

APRIL 5, 2013 FINAL DRAFT CLEAN 3/25/2013

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FOR DISCUSSION ONLY

# RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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For April 5-6, 2013 Drafting Committee Meeting

*Without Prefatory Note and With Reporter's Drafting Comments*

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FORECLOSURE PROCESS AND PROTECTIONS**

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**RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS**

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1 **RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND**  
2 **PROTECTIONS ACT**

3 **ARTICLE 1**

4 **TITLE AND DEFINITIONS**

5 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Uniform Residential  
6 Real Estate Mortgage Foreclosure Process and Protections Act.

7 **Chair’s Note-** We have asked the Executive Committee for authority to change  
8 the title of the Act to the ‘Uniform Home Foreclosure Procedures Act.’ I also  
9 have a note from someone who has suggested the title “Uniform Residential  
10 Property Foreclosure Practices Act.”

11 **SECTION 102. DEFINITIONS.** In this [act]:

12 (1) “Abandoned property” means mortgaged property with respect to which the  
13 homeowner and persons claiming through the homeowner, including tenants, have relinquished  
14 possession. Abandoned property does not include unoccupied residential property that is (i)  
15 undergoing construction, renovation, or rehabilitation that is proceeding diligently to completion;  
16 or (ii) used or held for use by the homeowner as a vacation home or seasonal home and is secure  
17 and in substantial compliance with all applicable ordinances, codes, regulations, and laws.

18 (2) “Common interest community” means real property with respect to which a person,  
19 by virtue of ownership of a unit, is obligated to pay for real property taxes, insurance premiums,  
20 maintenance, or improvement of other real property or services described in a declaration or  
21 other governing documents, however denominated. A common interest community includes  
22 properties held by a cooperative housing corporation. In this paragraph, “ownership” includes a  
23 leasehold interest if the period of the lease is at least [20] years, including renewal options.

24 (3) “Creditor” means a person who owns or has the right to enforce an obligation. The  
25 term does not include a person who owns no more than five mortgage loans in the same calendar  
26

1 year as the mortgage at issue.

## 2 **Drafter's Notes**

3  
4 1. The last sentence of the definition of 'creditor' is an attempt to address  
5 Dale Whitman's and other comments to exclude 'mom & pop' lenders or one-off  
6 seller financing.

7  
8 2. The alternative (i.e., the "or has the right to enforce" clause) is useful  
9 for the time being due to the alternatives for section 401. We could define creditor  
10 as a person who has commenced foreclosure, but that doesn't work because we  
11 are imposing some duties on lenders before commencing foreclosure. We dropped  
12 the language referring to agents, services, and assigns: It is now "buried" in "other  
13 person"; to the extent we need to address issues involving services, agents, and  
14 assigns, we think it belongs elsewhere.

15  
16 3. We should consider the status of mortgage insurers, and other cases;  
17 perhaps we can define guarantors separately and then include them in substantive  
18 provisions only when appropriate.

19  
20 4. The Reporters, Chair and ABA Advisor believe- subject to contrary  
21 thoughts from the Committee – that we do not need to define the term 'servicer'.  
22 That word is not used in any statutory text or comments; it appears only in the  
23 discussion of facilitation standards and objectives.

24  
25 (4) "Expenses of foreclosure" means the lesser of the reasonable expenses incurred by a  
26 foreclosing creditor or the maximum amounts permitted by other law of this State for expenses  
27 in connection with a foreclosure. These expenses include costs of sending notices, advertising,  
28 title searches, inspections and examinations of the mortgaged property, management and  
29 securing of the mortgaged property, insurance, filing and recording fees, attorney's fees and  
30 litigation expenses incurred to the extent provided in the mortgage or authorized by other law,  
31 appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction,  
32 fees of court-appointed receivers, and other expenses reasonably necessary to the foreclosure.

33 (5) "Facilitation" means the assistance of a third-party neutral at an in-person meeting or  
34 meetings between the parties with the objective of achieving a commercially reasonable  
35 alternative to foreclosure, resulting in sustainable outcomes for the creditor and homeowner.

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### Reporter's Drafting Note

The definition of 'Facilitation' requires at least one 'in-person' meeting between the parties and a third-party neutral. The requirement of an 'in-person' meeting contemplates the continuation of the practice in many jurisdictions that, as an alternative to a 'face-to-face' meeting, the parties may meet by telephone or other electronic means so long as all the parties and the neutral are able to simultaneously hear or communicate with one another.

(6) "Facilitation agency" means [the administrative or judicial agency designated by the state to supervise foreclosure facilitation.]

(7) "Foreclosure" means any process, proceeding or other action by a creditor to terminate the homeowner's interest in the mortgaged property or to obtain possession of the mortgaged property for the creditor. [Foreclosure does not include a voluntary transfer by the homeowner and does not include an action to recover possession of the property after a completed foreclosure sale.]

(8) "Holder" means the person in possession of an instrument that is payable either to bearer or to an identified person that is the person in possession.

### Drafter's Note

This definition is taken from revised Article 1: UCC § 1-201(b). The definition in unrevised Article 1 has slightly different language, but is the same in substance.

(9) "Homeowner" means a person owning an interest in the mortgaged property, other than a mortgage, lien, servitude, or leasehold, whether or not the person is also an obligor.

### Drafter's Notes

1. The Committee should compare the new definition of 'Obligor'.
2. We need to consider to whom the Act requires 'notice' to be provided to a 'homeowner' v. an 'obligor' and how the creditor is able to identify each; *see* the proposed amendments to Sec. 401.
3. At the November meeting, there were suggestions from several persons



1 for more expansive comments; to the extent these notes are inadequate, please let  
2 the Reporters know of any desired additional comments.  
3

4 (10) "Individual" means a natural person.

5 **Drafter's Note**  
6

7 This definition was used only in section 503; that section has been amended and  
8 we may be able to delete this definition.  
9

10 (11) "Instrument" means a negotiable instrument as defined in [U.C.C. § 3-104].

11 (12) "Loss mitigation" means any program that the creditor offers to homeowners in  
12 default or facing imminent default, as an alternative to foreclosure.

13 **Drafter's Note**  
14

15 The comments will be expanded to make clear that 'loss mitigation' includes such  
16 actions as a repayment plan, forbearance agreement, loan modification, short sale,  
17 partial mortgage insurance claim, negotiated transfer and deed in lieu of  
18 foreclosure.  
19

20 (14) "Mortgage" means a consensual interest in residential property that secures an  
21 obligation, created by a mortgage agreement.

22 **Drafter's Note**  
23

24 The Committee should determine whether it wishes to address the status of land  
25 installment contracts within the act and if so, how.  
26

27 (15) "Mortgage agreement" means a record that creates or provides for a mortgage.

28 **Drafter's Note**  
29

30 In this Act the term "mortgage" refers to the lien or other property held by the  
31 creditor, which secures payment of the obligation, whereas the term "mortgage  
32 agreement" refers to the writing or other record that memorializes the parties'  
33 agreement and creates the mortgage. Depending upon local usage and custom, the  
34 mortgage agreement may be denominated as a mortgage, deed of trust, trustee  
35 deed, security deed, deed to secure debt, or the like.  
36

37 (16) "Mortgaged property" means residential property, together with any personal

1 property held or used in connection with the residential property, which is subject to a mortgage.

2 (17) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial process  
3 pursuant to [insert statutory reference here].

4 **Drafter’s Note**

5  
6 In states that allow one or more types of nonjudicial foreclosure of residential  
7 mortgages, the drafter should insert a reference to the relevant statute or statutes  
8 here. In states that do not allow nonjudicial foreclosure, this definition should be  
9 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.

10  
11 (18) “Obligor” means a person that, with respect to an obligation, (i) owes payment of the  
12 obligation, (ii) has provided property other than the mortgaged property to secure payment of the  
13 obligation, or (iii) is otherwise accountable in whole or in part for payment of the obligation.

14 (19) “Obligation” means a debt or other duty or liability that is secured by a mortgage.

15 (20) "Person" means an individual, corporation, business trust, estate, trust, partnership,  
16 limited liability company, association, joint venture, government; governmental subdivision,  
17 agency, or instrumentality; public corporation, or any other legal or commercial entity.

18 **Drafter’s Note**

19  
20 The Reporters, Chair and ABA Advisor believe that the definition of ‘real  
21 property’ is unnecessary and, by deleting it, we avoid several issues which were  
22 debated in November.

23  
24 (21) “Record”, used as a noun, means information that is inscribed on a tangible medium  
25 or is stored in an electronic or other medium and is retrievable in perceivable form.

26 (22) "Residential property" means real property improved with, one- to four-dwelling  
27 units, including structures ancillary to such dwelling units and including attached single-family  
28 dwelling units and single-family manufactured housing units placed upon permanent  
29 foundations. Residential property includes single-family units in a common interest community.

1 (23) “Servicer” means the person responsible for the servicing of a mortgage loan  
2 (including the person who makes or holds a mortgage loan if such person also services the  
3 mortgage loan). “Servicing” means receiving any scheduled periodic payments from a borrower  
4 pursuant to the terms of any mortgage loan, including amounts for escrow accounts and making  
5 the payments to the owner of the loan or other third parties of principal and interest and such  
6 other payments with respect to the amounts received from the borrower as may be required  
7 pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case  
8 of a home equity conversion mortgage or reverse mortgage as referenced in this section,  
9 servicing includes making payments to the borrower.

10 **Reporters’ Drafting Notes**

11 The definitions of ‘Servicer’ and ‘Servicing’ are taken from the Real Estate  
12 Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R.  
13 § 3500.2 (b).  
14

15 (24) “State” means a State of the United States, the District of Columbia, Puerto Rico, the  
16 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of  
17 the United States.

18 **Reporters’ Drafting Notes**

19  
20 1. In some states, a land sale installment contract does not constitute a  
21 ‘mortgage’, with all the attendant consequences for homeowners and creditors,  
22 until a specified percentage of the original principal amount has been paid to the  
23 creditor. In Illinois, for example, that percentage is 50% of the original principal  
24 amount. In those States where the issue arises, statutory drafters should make  
25 appropriate amendments to this act to track existing practice in that state.  
26

27 2. Whether mortgaged property is “abandoned property” is determined by  
28 the facts of each case. The factors listed in Section 505(a) are not exclusive. The  
29 core question is whether the homeowner is presently in possession of the  
30 property. The question must be answered by evaluating the facts related to the  
31 homeowner’s use of the property.  
32



1 fair dealing in the mortgage industry.

2 **ARTICLE 2**

3 **NOTICES, RIGHT TO CURE**

4  
5 **SECTION 201. NOTICE OF INTENT TO FORECLOSE AND RIGHT TO CURE.**

6 A creditor may not commence foreclosure until 30 days after it has sent to each homeowner and  
7 obligor a notice of default, intent to accelerate and right to cure. The notice shall state:

8 (a) The nature of the default including an itemization of all past due payments, fees and  
9 other charges as of the date of the notice. The itemization of amounts owed must be as of the  
10 date of the notice, and may not include amounts that have not yet come due. The notice may  
11 refer to the fact that additional sums will come due after the date of the notice. Fees and charges  
12 imposed by the creditor or the creditor's attorney must be ascertained and included; other  
13 amounts already accrued but unknown in amount may be estimated.

14 (b) The specific actions the homeowner must take to cure the default, as described in  
15 Section 204 (b), including the exact amounts that must be paid.

16 (c) The date by which the default must be cured in accordance with Section 204.

17 (d) The fact that if the homeowner does not cure, the creditor may demand payment of  
18 the full amount due, not just past due payments, and may foreclose and sell the property.

19 (e) The effect of curing the default, including the right to have the terms of the obligation  
20 and mortgage remain in effect.

21 (f) A statement of the homeowner's right to dispute the default or raise any other  
22 defenses to foreclosure and how that right may be exercised.

23 (g) The specific basis for asserting that the foreclosing creditor or servicer has the right to  
24 foreclose and, if the creditor or servicer is acting on behalf of the owner of the obligation, the

1 identity of the owner.

2 (h) The homeowner’s right to request a copy of the homeowner’s mortgage note or other  
3 evidence of the obligation and copies of any assignments of mortgage or deed of trust required to  
4 demonstrate the right to foreclose on the mortgage.

5 (i) A reference to the fact that the homeowner will receive separate notices of available  
6 foreclosure alternatives and facilitation.

7 (j) A notification to any obligors receiving the notice explaining that the notice is being  
8 sent to the homeowner as well as all other obligors whether they have an interest in the property  
9 or not.

### 10 **Reporters’ Drafting Notes**

11  
12 1. At the February 2013 meeting a motion was made to require notice of  
13 intent to foreclose to go to all homeowners and obligors. The motion was tabled,  
14 and some participants felt that non-obligor owners should not get the detailed debt  
15 information in the notice. This issue remains open for further discussion. This  
16 draft adopts the simple approach of requiring a single notice for all homeowners  
17 and obligors.

18  
19 2. The mortgage obligation may be accelerated by filing a complaint,  
20 scheduling a sale, or by separate notice of acceleration – the notice of intent to  
21 accelerate does not by itself accelerate the debt. The notice need not refer to  
22 acceleration if the creditor does not intend to accelerate the obligation, for  
23 example if it is fully matured. The definition of “foreclosure” in section 102  
24 includes other legal methods that may be used to terminate the homeowner’s  
25 interest in the mortgaged property, such as a quiet title or ejectment action in the  
26 case of an installment land sale contract..

27  
28 3. Items (a) through (f) are the elements of notice in the standard  
29 Fannie/Freddie mortgage instrument. Item (c) adds a specific deadline to cure the  
30 default. Items (g) and (h) are the ownership statement required by the national  
31 servicing settlement, and call for the servicer to identify its basis for standing at  
32 the outset of foreclosure proceedings, so that any disputes can be resolved  
33 promptly. Including this information complements Section 4-107, providing  
34 conclusive effect to a completed foreclosure sale. This notice would not displace  
35 all state-specific aid program and counseling notices which necessarily will  
36 depend on state funding – for example, Pennsylvania requires a separate 30-day  
37 notice of how to apply for its Homeowner’s Emergency Mortgage Assistance

1 Program.

2  
3 4. In subsection (b), the actions the homeowner needs to take in order to  
4 cure the default are governed by § 204.

5  
6 5. In subsection (g), the basis on which a particular creditor may assert the  
7 right to foreclose is specified in §401. The notice may, but is not required to,  
8 explain that the agent has full authority on behalf of the owner to negotiate with  
9 the homeowner.

10  
11 6. If a homeowner or obligor has cured a default, any subsequent  
12 foreclosure based on a later default must be preceded by a new notice. This is  
13 because a cure restores the homeowner to the same legal position as if no default  
14 had occurred. If, on the other hand, as a result of facilitation or otherwise, the  
15 homeowner has tendered payments under a forbearance plan or other workout but  
16 has not fully cured the default that was the subject of the notice, no new notice is  
17 required in the event the workout fails and the creditor chooses to proceed with  
18 foreclosure.

19  
20 **SECTION 202. PARTIES TO SEND AND RECEIVE NOTICE** The notice

21 required by Section 201 may be sent by any creditor or servicer, but must be separately sent to  
22 each homeowner and obligor.

23 **SECTION 203. MANNER OF NOTICE DELIVERY.** The notice required by Section

24 201 and Section 301 must be sent by first class mail to each homeowner's and obligor's last  
25 known address, and to the mortgaged property address. At least one mailed notice shall be  
26 addressed to the homeowner "or occupant." If a homeowner or obligor or a homeowner's or  
27 obligor's representative has requested to receive notice by electronic mail and has provided an  
28 electronic mail address to the creditor, the notice must also be sent by electronic mail to the  
29 homeowner's or obligor's electronic mail address.]

30 **Reporters' Drafting Notes**

31  
32 1. The complaint in a judicial foreclosure state, or notice of sale in a  
33 nonjudicial foreclosure state, must be delivered according to existing law, usually  
34 by personal service. The requirement for additional electronic mail notice does  
35 not displace the paper notices required by this act or other law. The creditor may,

1 but is not required to, send the notice by certified mail as well as by ordinary first  
2 class mail.

3  
4 2. For comparison purposes, consider the notice provisions contained in §  
5 3-121 of the Common Interest Ownership Act:

6  
7 “UCIOA SECTION 3-121. NOTICE TO UNIT OWNERS.

8 (a) An association shall deliver any notice required to be given by the  
9 association under this [act] to any mailing or electronic mail address a unit owner  
10 designates. Otherwise, the association may deliver notices by:

11 (1) hand delivery to each unit owner;

12 (2) hand delivery, United States mail postage paid, or commercially  
13 reasonable delivery service to the mailing address of each unit;

14 (3) electronic means, if the unit owner has given the association an  
15 electronic address; or

16 (4) any other method reasonably calculated to provide notice to the unit  
17 owner.

18 (b) The ineffectiveness of a good faith effort to deliver notice by an  
19 authorized means does not invalidate action taken at or without a meeting.”

20 **SECTION 204. RIGHT TO CURE DEFAULT.**

21 (a) A homeowner or obligor may cure a default by tendering the amount or performance  
22 specified in subsection (b) at any time until 24 hours before any scheduled or postponed  
23 foreclosure sale. The right to cure may not be exercised more than three times in a calendar year.

24 (b) To cure a default under this section, a homeowner must:

25 (1) Tender in cash or immediately available funds all sums that would have been  
26 due at the time of tender in the absence of acceleration;

27 (2) Perform or tender performance of any other duty under the obligation and  
28 mortgage that would have been due in the absence of default or acceleration;

29 (3) Tender in cash or immediately available funds all reasonable costs and



1 attorney fees of proceeding to foreclosure that are (A) specified in writing by the creditor and (B)  
2 actually incurred prior to the date of tender; and

3 (4) Tender any late fees, if provided for in the mortgage and permitted by [state  
4 law].

5 (c) Cure of a default pursuant to this section restores the homeowner to the same position  
6 under the mortgage and the obligation it secures as if the default had not occurred.

7 (d) A homeowner’s right to cure may not be waived.

8 **Reporters’ Drafting Notes**  
9

10 1. The right of a homeowner to cure a default has the effect of de-  
11 accelerating the payments due after acceleration, but before a completed  
12 foreclosure sale. Once a sale is completed, the interests of potential purchasers  
13 militate against further extending the possibility of a homeowner cure. The  
14 homeowner receives notice detailing the amounts needed to cure the default  
15 pursuant to Section 202, and identifying any nonpayment defaults, such as failure  
16 to maintain insurance. The right to cure is independent of any right to redeem.  
17

18 2. This section does not alter contractual rights to cure that are stronger,  
19 but the statutory right to cure may not be waived by contract. In the event of a  
20 dispute between the creditor and a homeowner concerning the amounts needed to  
21 cure, or any nonmonetary performance that may be claimed as due, either party  
22 may seek declaratory relief from an appropriate court, and if appropriate, a  
23 temporary stay of any foreclosure sale to resolve the cure dispute.  
24

25 3. If a default is cured, restoring the homeowner to the same position as if  
26 no default occurred means that if there is a later default, new notices must be sent  
27 prior to foreclosure. Conversely, if as a result of facilitation under Article 3 or  
28 otherwise, a settlement is reached but the homeowner does not fully cure the  
29 default, new notices are not required..  
30

31 **SECTION 205. UNKNOWN HOMEOWNER OR OBLIGOR.**

32 A creditor, based on its status as a creditor, does not owe a duty under Sections 201 or 301 to  
33 notify a person that is a homeowner or obligor unless the creditor knows all of the following:

34 (1) That the person is a homeowner or obligor;

35 (2) The identity of the person; and

1 (3) How to communicate with the person.

2 **Reporters' Drafting Notes**

3 1. Section 205 is based on UCC § 9-605. Its purpose is to relieve the  
4 creditor from duties owed to a borrower or debtor if the creditor does not know  
5 about that person. This may be the case, for example, when an original borrower  
6 has sold the property to a purchaser, or when the original borrower has died and  
7 that borrower's interest has passed to an heir or devisee.

8  
9 2. In defining what it is that a creditor 'knows', this Section intends that  
10 the creditor must have actual knowledge of the facts described, as opposed to  
11 constructive knowledge. In that sense, the word 'knows' in this Section has the  
12 same meaning as it does under UCC Section 1-202 of revised UCC Article 1,  
13 which, in turn, derived from former UCC Section 1-201 (25-27).

14  
15 **ARTICLE 3**

16 **FACILITATION**

17  
18 **PREAMBLE TO ARTICLE 3 - FACILITATION - FOR THE FEBRUARY 15-16, 2013**  
19 **DRAFTING COMMITTEE MEETING**

20  
21 **With Additional Comments for the April 2013 meeting**

22  
23 The Drafting Committee has spent considerable time discussing the subject of mediation  
24 – now called facilitation; a number of members on the Committee believe that a successful  
25 process that screens potential workout alternatives to foreclosure offers the single best hope for  
26 homeowners in the continuing foreclosure crisis. Commissioner Walters stated this view  
27 succinctly in a November email to the Committee Chair when she wrote: "Mediation is key to  
28 the success of this act. It is the main thing if not the only thing that we can give borrowers...."

29  
30 The Committee will recall our June meeting when a panel consisting of Attorney Heather  
31 Scheiwe Kulp, then of Chicago, and four judges and mediators from the states of Connecticut,  
32 Pennsylvania, the District of Columbia and Nevada described their programs and what they  
33 believed were the essential elements of a successful mediation program.

34  
35 In an effort to provide a concrete example of an existing state statute that had allegedly  
36 been adopted by consensus among lender and borrower representatives, and which hopefully  
37 held promise of considerable success, the first draft of this Act included - the now deleted  
38 Section 303, which was based largely on legislation adopted in 2011 and 2012 in the State of  
39 Washington.

40  
41 The text of Section 301 and all of Article 3 was discussed in some detail in November;  
42 much of that discussion focused on the challenges posed by any single mediation program.  
43 Among other issues, we discussed the differences that rural and urban communities posed in

1 terms of appropriate facilitation procedures, the relative costs and resources required by an ‘opt-  
2 in’ versus an ‘opt-out’ system, the cost-benefit analysis of programs with state-funded full time  
3 mediators, and the concerns expressed by the lending community generally that, in their view,  
4 mediation or facilitation often led to nothing other than extended delay in foreclosure and  
5 resultant greater economic losses to creditors whose loans were already underwater.  
6

7 In the Chair’s view, the discussion demonstrated that widespread enactment of a ‘one size fits  
8 all’ mediation statute might prove elusive.  
9

10 The following deleted provisions were our first attempt to provide a statement of ‘best practices’  
11 that might be incorporated into the statute.  
12

13 Reporter White has restated those original best practices for the April meeting as follows:  
14

### 15 **PRINCIPLES OF FACILITATION**

16

17 The following principles are recognized by lender and consumer advocates as well as  
18 mediation and facilitation program participants as necessary elements of a successful facilitation  
19 program.  
20

21 1. The goal of facilitation is to create commercially reasonable alternatives to foreclosure,  
22 which achieve sustainable outcomes, including "graceful exits."  
23

24 2. The borrower should have access to a housing counselor (or a lawyer) to assist in the  
25 facilitation process.  
26

27 3. The process of bringing the parties together to achieve an alternative to foreclosure is  
28 better understood as facilitation, not mediation, because some of the standards typically followed  
29 by mediators are not appropriate.  
30

31 4. Facilitation is not merely a requirement that parties "meet and confer, " i.e. a mandate  
32 merely for two-party settlement negotiations. The involvement of a neutral third party is critical  
33 to success.  
34

35 5. The neutral facilitator should disclose any conflicts of interest. A lawyer serving as a  
36 facilitator must inform unrepresented borrowers that the lawyer is not representing them.  
37

38 6. Facilitation should not unnecessarily delay the foreclosure process, but should provide  
39 adequate time for full consideration of alternatives to foreclosure.  
40

41 7. If the borrower makes a timely request for facilitation, or in an opt-out system, when  
42 the lender initiates foreclosure, the relevant agency must initiate the facilitation process within 14  
43 days.  
44

45 9. Documentation information exchange.

46 a. The servicer must specify whatever documents it requires from the borrower

1 within [5] days after initiation of the facilitation process.  
2

3 b. The borrower must provide the income and other documents required by the  
4 servicer listed in (a) above to the servicer and the facilitator not less than [30] days before the  
5 scheduled first facilitation session. If the borrower fails to substantially provide the documents  
6 specified by the servicer within the time frame required by this paragraph, the facilitation process  
7 terminates.

8 c. The servicer must provide to the borrower and the facilitation agency: (i) the  
9 borrower's payment history from the date of default; (ii) itemized amounts due on the loan,  
10 including all fees.

11 d. The servicer should provide the facilitator its decision, including the inputs and  
12 results of any net present value calculations it relies on in deciding not to offer any  
13 particular loss mitigation alternative.  
14

15 10. The first facilitation session must take place within [XX] days after initiation of the  
16 facilitation process.  
17

18 11. Participation – the servicer must have a lawyer and servicer representative present in  
19 person or by telephone or teleconference; the servicer must evaluate loss mitigation and make  
20 decision as required by the RESPA regulations of the Consumer Financial Protection Bureau.  
21

22 12. The facilitation agency should clearly identify any eligibility restrictions for its  
23 program, such as property occupancy.  
24

25 13. Standards of practice for facilitators: There is consensus that facilitator conflicts of  
26 interest should be avoided or disclosed. Traditional mediator standards are problematic in some  
27 cases. For example, mediators traditionally do not disclose anything that takes place during  
28 facilitation or report to a court on the parties' conduct, whereas a facilitator may need to report  
29 on either party's conduct so that a court can decide whether to permit foreclosure to proceed, or  
30 to impose sanctions.  
31

32 14. Proceedings should be confidential, with appropriate exceptions to permit reporting  
33 outcomes and/or noncompliance with rules to the court or supervising agency.  
34

35 15. States should establish programs to provide appropriate training and continuing  
36 education of facilitators.  
37

38 16. All agreements for foreclosure alternatives should be memorialized in writing and  
39 signed by both parties to minimize later disputes.  
40

41 17. Facilitation agencies should collect enough data to determine the outcomes of  
42 facilitation and whether it is achieving its objectives.  
43

44 18. States should provide adequate funding to train and provide facilitators and for the  
45 associated agency or court supervision.  
46

1 19. Original copies of documents (as opposed to true copies) should not be needed during  
2 facilitation. Issues about authenticity and possession should be resolved separately in litigation if  
3 need be.  
4

### 5 **Reporters' Drafting Notes**

6

7 **The Drafting Committee, Advisors and Observers may recall that earlier**  
8 **drafts of the Act included a considerable commentary, including footnotes,**  
9 **that sought to describe the policy choices embedded in a 'best practices'**  
10 **approach to mediation versus adoption of a single statutory mediation**  
11 **solution. It seems to us that these excerpts from our earlier commentary**  
12 **remain valid:**  
13

14 1. A persistent issue raised by several commentators, including the ABA advisor, is the  
15 absence in the current draft of any remedy for a servicer's failure to comply with the document  
16 exchange requirements or other failure to participate in the facilitation process.  
17

18 2. The current text of these principles \*\*\* addresses the issue of dual tracking, but in  
19 different ways.  
20

21 3. What policy choices are embedded in this particular version of the 'mediation'  
22 process? What are some of the implications of this set of choices? Our basic set of choices here  
23 involves these discrete elements:  
24

25 First, by mandating 'mediation' before foreclosure may commence, we eliminate the so-  
26 called 'dual tracking' problem, where homeowners find themselves simultaneously in a  
27 mortgage modification discussion and a defendant in a foreclosure action.  
28

29 Second, by creating an 'opt-out' rather than an 'opt-in' system, we are creating a system  
30 that will surely serve more homeowners' interests, but will create potentially serious financial  
31 cost issues in the states, for which we have no ready answer. Given our time constraints, we did  
32 not draft alternatives.  
33

34 Third, we were torn between the June discussion suggesting that the Act incorporate 'best  
35 practices' for 'mediation' and the more substantive provisions for mediation found in the laws of  
36 some states. For purposes of this draft, we chose to incorporate some of the new mandated  
37 documentation of 'net present value' in the State of Washington, as detailed in the current text of  
38 Section 303 (b).  
39

40 \*\*\*\*\*

41 The drafters acknowledge that most states' current statutes differ dramatically from the  
42 approach taken by the State of Washington and broadly reflected in [the now deleted] Section  
43 303 of this Act. For that reason, in the absence of a mandate imposed at the federal level, we  
44 acknowledge that it would be difficult conceptually to mandate that each state engage the  
45 services of a third party 'mediator' intended to independently review the servicers' determination  
46 of net present value, as they are now required to do under FHFA regulations, the law of states

1 such as Washington and the Attorney Generals' Servicer settlement.  
2

3 At the same time, in the absence of some means of ensuring that the homeowners'  
4 interests are being properly calculated by servicers who, by many accounts, have an economic  
5 interest in preferring foreclosure to loan modification, it is not realistic to assume that  
6 homeowners will have the independent capacity to consider the accuracy of that calculation.  
7

8 **What follows is an amended version of the former sections, based on the February**  
9 **committee discussion.**  
10

### 11 **SECTION 301. NOTICE OF FACILITATION.**

12 (a) Before any creditor or servicer [may commence foreclosure][may request entry of a  
13 foreclosure judgment] the creditor or servicer must give each homeowner and obligor notice of  
14 facilitation.

15 (b) [If the facilitation agency, by rule, establishes a procedure for the facilitation agency  
16 to send notice of facilitation to homeowners,] the creditor must request that a notice of  
17 facilitation be sent by the facilitation agency to the creditor and to each homeowner and obligor.  
18 [If there is no procedure for the facilitation agency to send the notice] the creditor or service shall  
19 send the notice to each homeowner and obligor, in the same manner as required for the notice  
20 required by Section 201.

21 (c) The notice of facilitation must include the following:

22 (1) The names, addresses and telephone numbers of the housing counseling  
23 agencies, lawyer referral services and legal aid agencies serving the homeowner's geographic  
24 area that are designated from time to time by the facilitation agency.

25 (2) The name, address, telephone number and e-mail address of the person  
26 designated by the creditor as the homeowner's single point of contact, if a person has been so  
27 designated.

28 (3) [*Opt-out alternative*: The location, date and time at which the homeowner

1 may appear for an in-person facilitation session with the creditor, under the supervision of the  
2 facilitation agency, together with instructions on how to reschedule the in-person facilitation.]  
3 *[Opt-in alternative:* The fact that the homeowner or obligor may request facilitation and the  
4 identity and contact information for the person or agency to contact to request facilitation.]  
5 (4) A description of all documents the borrower should bring to the facilitation  
6 session, in accordance with rules promulgated by the facilitation agency.

### 7 **Reporters' Drafting Notes**

8  
9 1. Between 2007 and 2012 eighteen states adopted statewide foreclosure  
10 diversion or mediation programs, and local jurisdictions in at least eight additional  
11 states have established similar programs. The programs vary greatly in their  
12 timing and design, and exist in both judicial and nonjudicial foreclosure states.  
13 Most programs in judicial foreclosure states call for intervention after a  
14 foreclosure complaint is filed. While most stakeholders recognize that starting  
15 mediation or facilitation earlier in the process would increase the chances of  
16 success and reduce costs, most existing state laws do not provide a means to  
17 initiate facilitation before the judicial process begins. Pre-foreclosure facilitation  
18 permits early sorting of foreclosure cases, into those where the homeowner wants  
19 to find a solution other than foreclosure, and those cases that are uncontested or  
20 where there is no realistic alternative to foreclosure.

21  
22 2. Automatic scheduling of facilitation meetings is the opt-out approach  
23 now used in Connecticut, Philadelphia County and a number of counties in  
24 Indiana, among others. The opt-in alternative used in other jurisdictions calls for  
25 the notice to inform the homeowners that they have a right to request a facilitation  
26 conference within a designated period, and the specific means for requesting the  
27 conference, by telephone, internet or other suitable means established by the  
28 facilitation agency. Experience has shown that the opt-out approach, with  
29 automatic scheduling of foreclosure facilitation, results in much higher rates of  
30 homeowner response, and ultimately higher success rates in preventing  
31 foreclosure sales and maximizing creditor recoveries.

32  
33 3. The April 2013 amendments to this Section allow for continued variations to  
34 exist among state facilitation, mediation and loss mitigation programs, including  
35 whether the process is opt-in or opt-out for homeowners, whether notice is sent to  
36 homeowners by the state agency or the creditor/servicer, and whether the process  
37 takes place before or after judicial involvement in the foreclosure.

1           **SECTION 302. DUTY TO PARTICIPATE IN FACILITATION AND**  
2 **NEGOTIATE IN GOOD FAITH.**

3  
4           (a) Both parties must negotiate in good faith to seek a resolution other than a  
5 foreclosure sale. The creditor or servicer shall inform the homeowner of the loss mitigation  
6 options that are available to the homeowner. The homeowner shall provide reasonably  
7 available financial and other information to permit the creditor to evaluate any loss mitigation  
8 option. The creditor or servicer shall notify the homeowner and the mediator, facilitator or  
9 facilitation agency of its willingness or refusal to offer any loss mitigation option requested by  
10 the homeowner, and of the reasons for any refusal and the information on which the refusal is  
11 based. The creditor or servicer may not charge the homeowner any fees for the facilitation  
12 process. The parties shall comply with any scheduling order established by the facilitation  
13 agency.

14           (b) For purposes of this section, failure to negotiate in good faith includes:

- 15           1) failing to timely participate in meetings without good cause;
- 16           2) failing without good cause to provide documents and information required by  
17           facilitation agency rules or reasonably requested by the facilitator to the  
18           facilitator and other party prior to a scheduled meeting or conference;
- 19           3) failing to designate a representative with adequate authority to reach a  
20           settlement agreement;
- 21           4) failure without good cause to pay any required facilitation fee;
- 22           5) failure to implement or comply with a settlement agreement in connection  
23           with foreclosure or facilitation; or
- 24           6) failure on the part of a creditor or servicer to advise the homeowner and  
25           facilitator of any loss mitigation options that are in fact available to the



1 homeowner and to fully consider the homeowner for the loss mitigation  
2 options before or during facilitation.

### 3 **Reporters' Drafting Notes**

4  
5 As provided in Section 303, the facilitation agency may impose additional  
6 requirements on the parties, for example requiring the creditor or its agent to  
7 appear in person or to have a person with authority to approve loss mitigation  
8 alternatives available by telephone at the time of the facilitation session, to  
9 perform a net present value analysis, to disclose the assumptions on which the  
10 analysis is based, or requiring borrowers to meet with a housing counselor to  
11 qualify for facilitation. The agency will also regulate procedural matters, such as  
12 time limits for exchanging documents, scheduling and concluding facilitation  
13 meetings, reports by mediators or facilitators, and the like. States should continue  
14 to have flexibility in the design and implementation of facilitation programs, but  
15 should establish and publish the standards as required by section 303. The  
16 principles of facilitation set forth following Section 304 should aid state  
17 facilitation agencies in designing their programs.

#### 18 19 **SECTION 303. STANDARDS FOR CONDUCT OF FACILITATION.**

20 The facilitation agency shall adopt regulations pursuant to [insert reference to State  
21 Administrative Procedures Act or, if the facilitation agency is the judicial system, to the rules of  
22 court] describing the facilitation process.]

#### 23 24 **SECTION 304. NO FORECLOSURE DURING FACILITATION.**

25 (a) After the facilitation process has begun, the creditor or servicer may not commence  
26 or continue foreclosure unless:

27 (1) the homeowner does not respond to the facilitation notice, by either appearing  
28 at the scheduled facilitation session or by sending a written request for loss mitigation to the  
29 creditor within 60 days of the facilitation notice; or

30 (2) The facilitation agency provides the creditor or servicer with a notice that the  
31 parties have negotiated in good faith and reached an impasse, or that the homeowner has failed to  
32 participate or provide required information after a reasonable opportunity to do so.

1 (b) Notwithstanding the limitations in subsection (a), the creditor or servicer may  
2 proceed to enforce the mortgage [90 days] after the notice required by Section 301 is sent, unless  
3 the parties agree to continue the facilitation process or the [facilitation agency][Court] directs the  
4 parties to continue the facilitation process for good cause shown.

### 5 **Reporters' Drafting Notes**

6  
7 1. Numerous states have recently enacted mandatory facilitation or loss  
8 mitigation laws whose object is to delay or prevent foreclosure until the  
9 homeowner has had the opportunity to request loss mitigation or facilitation:  
10 Arkansas Act 885 (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to  
11 selling attorney or trustee that it has notified homeowner of ineligibility for loss  
12 mitigation options before nonjudicial sale); California Assembly Bill 278 (enacted  
13 July 11, 2012, prohibits foreclosure when loan modification request is pending);  
14 Idaho Code 45-1506, HB 331 Idaho now requires notice of right to apply for loan  
15 modification and bars nonjudicial sale until creditor responds to homeowner's  
16 request); Indiana Act 170 of 2011 (same; also prohibits servicer or attorney fees  
17 for facilitation or loss mitigation); Massachusetts Chapter 194 of Acts of 2012 (  
18 creditor must offer mortgage modification prior to foreclosing, if modification  
19 would maximize value for mortgagee); Michigan Compiled Laws §3205a  
20 (amended Act 302 of 2011); Nevada Rev. Stat. §107.086; Washington Chapter 58  
21 Laws of 2011, amending RCW 61.24 (delays foreclosure 90 days if homeowner  
22 requests meeting with creditor to request loss mitigation, and for cases referred by  
23 housing counselor to facilitation, until the parties comply with duty to mediate in  
24 good faith). Requiring a complete facilitation process prior to initiation of  
25 foreclosure allows necessary foreclosures to go forward promptly and efficiently  
26 after cases suitable for other resolutions are identified and resolved.

27  
28 2. The Committee should consider the bracketed text in subsection (a)  
29 concerning the ability of the lender to take 'other action' during the facilitation  
30 process.

## 31 **ARTICLE 4**

### 32 **RIGHT TO FORECLOSE, EFFECTS OF FORECLOSURE**

33  
34  
35 **SECTION 401. [RIGHT TO FORECLOSE.]** (a) Only a person who has the right  
36 to foreclose under subsection (b) or subsection (g) may commence a foreclosure.

37 (b) A person has a right to foreclose its mortgage after default in the obligation if all  
38 conditions required by the mortgage agreement as prerequisites to foreclosure are satisfied and

1 one of the following conditions is met:

2 (1) If the obligation is evidenced by an instrument, the person is

3 (A) the holder,

4 (B) a nonholder in possession of the instrument who has the rights of a  
5 holder, or

6 (C) a person not in possession of the instrument who establishes the right  
7 to enforce that instrument due to its loss or destruction by meeting the requirements of Section  
8 403 or subsection (g) of this section .

9 (2) If the obligation is not evidenced by an instrument, the person is the owner of  
10 the obligation.

11 (c) In a judicial foreclosure proceeding, the plaintiff must prove that it has the right to  
12 foreclose under subsection (b) or subsection (g). If the plaintiff relies upon an instrument, the  
13 complaint must include:

14 (1) a copy or image of the instrument, in its present condition including any  
15 endorsements or allonges, and

16 (2) an allegation that the original is either: (i) in the possession of the plaintiff; (ii)  
17 in the possession of the plaintiff's principal; or (iii) lost [or destroyed], in which case the  
18 complaint must also include a lost instrument affidavit that complies with [insert UCC reference]  
19 .

20 (d) In a nonjudicial foreclosure proceeding, the creditor must prepare an affidavit  
21 attesting to facts demonstrating that it has the right to foreclose under subsection (b) or  
22 subsection (g), which affidavit shall be included with the notice of foreclosure required by  
23 section 202.

1 (e) In a judicial or nonjudicial foreclosure proceeding, a person who has the right to  
2 foreclose may exercise that right by authorizing an agent to foreclose in an authenticated record.  
3 In that event, the complaint or affidavit described in subsection (c) or (d) shall name the principal  
4 and the agent.

5 (f) If the obligation is evidenced by an instrument and the person with the right to  
6 foreclose under subsection (b) does not own the obligation, the complaint described in subsection  
7 (c) or the affidavit described in subsection (d) shall disclose the name of the owner of the  
8 obligation.

9 (g) If the obligation is registered with an organization that is authorized by a statute or  
10 regulation of the United States to maintain electronic records of obligations pursuant to standards  
11 designed to ensure that the record of each obligation is unique, identifiable, and unalterable, then  
12 a certificate or record issued by the organization that names a person as the owner of an  
13 obligation or the holder or an instrument is sufficient to allow that person to foreclose in a  
14 judicial or nonjudicial foreclosure proceeding.

15 **Drafter's Notes**

16 The General Counsel's office of the Federal Reserve Bank of New York  
17 has recommended in its letter dated March 6, 2013 that the Act contemplate the  
18 possibility of an electronic recording system where all notes are electronically  
19 generated and where, as a consequence, there is no paper note which might be  
20 'possessed' in order to satisfy the holder in due course requirements of UCC  
21 Article 3. This approach has been endorsed by the Federal Housing Finance  
22 Agency, by Prof. Dale Whitman and by others.

23 To accommodate this possibility, the Reporters, Chair, and ABA Advisor  
24 have added new subsection (g); it serves as a starting point for Committee  
25 discussion of the feasibility of including in the Act such a provision for the  
26 registration of documents for residential mortgage loans. Under this draft, a  
27 certificate or record issued by the sponsoring organization is conclusive evidence

1 that the person named in the certificate as owning the obligation, holding the  
2 instrument (if the obligation is evidenced by an instrument), or acting on behalf of  
3 the owner or holder, has the right to foreclose under Section 401.

4 We have also made conforming changes in subsections 401(a), 401 (b), 401(c) and  
5 401(d) by making, in each case, appropriate references to subsection (g).  
6

### 7 **Reporters' Drafting Notes**

8  
9 1. This section designates the "person entitled to enforce" an instrument  
10 under revised UCC Article 3 as the person with the right to foreclose the  
11 mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which defines  
12 who is "person entitled to enforce" an instrument. When the payee of the  
13 negotiable instrument has retained possession of the instrument, that person has  
14 the right to foreclose. When the payee has transferred possession of the  
15 negotiable instrument to another person, the facts must be examined to determine  
16 who has the right to enforce the note. The subsequent possessor may become a  
17 holder under UCC Article 3 by obtaining a special endorsement or blank  
18 endorsement, but this section does not require that a subsequent possessor become  
19 a holder in order to acquire the right to foreclose. Such a subsequent possessor  
20 may be entitled to enforce the note, but will have to allege and prove facts that are  
21 sufficient to establish the right to enforce.  
22

23 2. Subsection (b)(2) includes situations in which the secured obligation is  
24 evidenced by an instrument that is not negotiable and situations in which the  
25 obligation is not evidenced by any type of instrument authenticated by the debtor.  
26 As an example of the former, an owner may sign a promissory note that has terms  
27 that makes the note nonnegotiable. As an example of the latter, under the law of  
28 some states an installment land contract creates a mortgage relationship between  
29 the parties, in which the vendee's obligation to pay the price usually is not  
30 reflected in an instrument. In all such cases, the owner of the obligation who has  
31 the right to foreclose will be either the original obligee or an assignee.  
32

33 3. In judicial foreclosure, under existing law the creditor generally must  
34 confirm possession or account for possession of the original note at the time of  
35 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the  
36 law appears not to require confirmation of possession of the original note prior to  
37 commencement of foreclosure proceedings or the sale. This section requires that  
38 the foreclosing person have possession of the instrument prior to the  
39 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,  
40 unless that person prepares a lost note affidavit meeting the requirements of  
41 Section 4-103.  
42

43 4. This section does not state a separate rule for determining when a  
44 creditor who holds a security interest in a note has the right to foreclose. UCC  
45 Article 9 covers both sales of instruments and assignments of instruments that

1 secure an obligation of the assignor. A creditor who takes possession of a  
2 negotiable instrument will acquire the right to foreclose. A creditor who takes  
3 possession of an instrument that is not negotiable ordinarily will not acquire the  
4 right to foreclose; the issue turns on whether the rights granted to the creditor are  
5 sufficient to make the creditor the “owner” of the obligation (in other words, a  
6 “buyer” of the payment rights).  
7

8 5. Multiple persons may hold the right to foreclose a mortgage. Other law,  
9 including UCC Article 3 and the law of agency, determines whether the right to  
10 foreclose may be exercised by fewer than all such persons.  
11

12 6. If it is unclear whether the secured obligation is evidenced by a  
13 negotiable instrument or by an instrument that is not negotiable, the creditor may  
14 choose to proceed by complying with both subsections (b)(1) and (b)(2). The  
15 creditor should state whether it is relying on subsection (b)(1), (b)(2), or both in  
16 the alternative.  
17

18 7. Under subsection (c) the creditor’s production of the original negotiable  
19 instrument is not necessary at the time of the filing of a complaint in a judicial  
20 foreclosure. Production of the original would later become appropriate if, during  
21 the course of the proceedings, the homeowner or obligor seeks further  
22 demonstration of the copy’s authenticity or the whereabouts of the original.  
23 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial  
24 proceedings, a court may decide to order production of the original instrument if  
25 necessary to resolve a particular issue.  
26

27 8. Subsection (e) authorizes the person who has the right to foreclose to  
28 exercise that right through an agent. By requiring a description of the agency it  
29 does not permit the principal to remain undisclosed. An agent authorized to  
30 foreclose may be a loan servicer who has a pre-existing contractual relationship  
31 with the creditor, or any other person appointed at any time. If the secured  
32 obligation is evidenced by a negotiable instrument, the agent or the principal (the  
33 person entitled to enforce the note) may hold and retain possession of the note.  
34 Subsection (e) is not intended to change existing laws that authorize a third  
35 person, such as a trustee under a deed of trust, to foreclose in nonjudicial  
36 proceedings. In such circumstances, subsection (e) allows the beneficiary to  
37 appoint an agent, but does not speak to the procedure for appointing a substitute  
38 trustee.  
39

40 9. Section 401 as drafted, allowing an agent to foreclose, is consistent  
41 with the standing decision in *Sprint Communications Co. v. APCC Services, Inc.*,  
42 554 U.S. 269 (2008). There, payphone operators had assigned claims for  
43 compensation from long-distance carriers to collection firms. In *Sprint* the Court  
44 permitted an assignee of a legal claim for money to pursue that claim in federal  
45 court, even when the assignee had promised to remit the proceeds of the litigation  
46 to the assignor.

1  
2           **SECTION 402. TRANSFER OF MORTGAGE.**

3           (a) A transfer of an obligation secured by a mortgage also operates to transfer the  
4 mortgage.

5                           **Reporters' Drafting notes**

6           Sections 401 and 402 must both be consulted to determine whether a particular  
7 transferee is a person who is entitled to foreclose. After the Drafting Committee  
8 makes choices as to the alternatives stated in both sections, as a matter of style it  
9 may be expeditious to consolidate the two sections.

10  
11           (b) [**Alternative #1**] If the transfer is accomplished by assignment of the mortgage, the  
12 assignment may be recorded in the office in which mortgages are recorded, but recordation is not  
13 required for the new creditor to foreclose the mortgage pursuant to Section 401.

14           (b) [**Alternative #2**] If the transfer is accomplished by assignment of the mortgage, the  
15 assignment may be recorded in the office in which mortgages are recorded. After the transfer of  
16 an obligation to a new owner, the new creditor may foreclose the mortgage only after recordation  
17 of the assignment or other appropriate document in the office in which mortgages are recorded.

18                           **Reporters' Drafting Notes**

19  
20           1. Subsection (a) adopts the principle stated in UCC § 9-203(g), which  
21 provides that an Article 9 transfer of a instrument also transfers the mortgage  
22 (more formally, § 9-203(g) provides that attachment of a security interest in a  
23 right to payment or performance secured by personal or real property  
24 automatically transfers the security interest to the secured party). Section 9-  
25 203(g) covers sales of negotiable instruments, other instruments, and payment  
26 intangibles, as well as lending transactions in which those rights serve as  
27 collateral to secure an obligation of the transferor.

28  
29           Subsection (a) is broader than § 9-203(g); it applies regardless of whether  
30 the transferee obtains an attached Article 9 security interest. It also encompasses  
31 involuntary transfers such as inheritance and judicial sales. Restatement (Third)  
32 of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: "A transfer of an  
33 obligation secured by a mortgage also transfers the mortgage unless the parties to  
34 the transfer agree otherwise." Under the Restatement rule, parties to the transfer  
35 may agree otherwise, but this section does not permit severance of the obligation

1 from the mortgage, following UCC § 9-203(g) and common-law authorities in a  
2 number of states.

3  
4 2. When the foreclosing party is not the originating creditor there is  
5 conflicting state law, both in judicial foreclosure and nonjudicial foreclosure  
6 states, as to (1) whether the foreclosing party must have an express assignment of  
7 the mortgage, or a chain of assignments running back to the original mortgagee,  
8 and (2) whether that assignment or the chain of assignments must be recorded in  
9 the county land records.

10  
11 In some states, a statute explicitly requires a recorded assignment. E.g.,  
12 Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the  
13 secured creditor with title to the security instrument shall be filed prior to the time  
14 of sale in the [county land records].” In many states, judicial decisions going in  
15 both directions interpret statutes that do not on their face provide immediately  
16 obvious answers to these questions. E.g., *In re Vasquez*, 266 P.3d 1053 (Ariz.  
17 2011) (recording assignments of deeds of trust is not required, although trustee  
18 must record notice of trustee’s sale); *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d  
19 40 (Mass. 2011) (requiring written chain of assignments).

20  
21 3. The two alternatives in subsection (b) provide different answers to the  
22 fundamental question of whether a creditor may foreclose a mortgage in the  
23 absence of a recorded chain of title in the land records demonstrating that the  
24 creditor owns the mortgage.

25  
26 The first alternative in this subsection adopts the position that an express  
27 assignment is unnecessary; note that subsection (a) implies an assignment upon a  
28 transfer of the obligation. In addition, this alternative for subsection (b) adopts  
29 the position that recordation of an assignment (or notice of an implied  
30 assignment) is not a prerequisite for foreclosure.

31  
32 4. In contrast, Alternative # 2 in subsection (b) confirms the rule in many  
33 states – a rule which is intended to protect the interests of homeowners and  
34 subsequent purchasers – that a written assignment in favor of the foreclosing  
35 creditor is a necessary pre-condition to instituting a foreclosure. Because note  
36 transfers are not generally recorded, advocates for mandating this outcome  
37 believe that recording of mortgage assignments is necessary to provide a complete  
38 public record of land title transfers, to protect obligors from double liability, and  
39 to prevent post-sale title challenges.

40  
41 Under Alternative #2, a transfer of the note without an accompanying  
42 express assignment of the note does not deprive the assignee of the ability to  
43 foreclose. The principle that “the mortgage follows the note”, e.g., Restatement of  
44 Property §5.4(a), means that the current holder or owner of the mortgage  
45 obligation has an equitable right to obtain and record an assignment of the  
46 mortgage or deed of trust from any prior record mortgagee, mortgage assignee or



1           beneficial owner, unless the parties intended otherwise.  
2

3           Under the second alternative, the complaint or affidavit required by  
4 Section 401 must identify and describe all necessary assignments and  
5 substitutions. Recordation of a separate assignment, or endorsement on the  
6 mortgage itself, provides record notice of the chain of mortgage ownership, and  
7 insulates the foreclosure sale purchaser from attacks on title based on transfer  
8 defects. The mortgage transfer should be described in the complaint in a judicial  
9 proceeding or the affidavit in a nonjudicial proceeding and appear of record prior  
10 to the recording of the foreclosure sale deed. It is sufficient to record an  
11 assignment to the foreclosing person's agent, so long as the agency is described in  
12 the complaint or affidavit. When the mortgage is in the form of a deed of trust,  
13 transfer is generally effected by recording a substitution of trustee. The recorded  
14 substitution of trustee must describe any transfers of beneficial ownership.  
15

16           **SECTION 403. LOST INSTRUMENT;AFFIDAVIT.**

17           (a) [**Alternative #1**] If an instrument secured by a mortgage has been lost [or destroyed],  
18 the creditor may foreclose the mortgage only if the creditor makes an affidavit attesting to the  
19 facts stated in [UCC § 3-309(a)(1) through (a)(3)].

20           (a) [**Alternative #2**] If an instrument secured by a mortgage has been lost [or  
21 destroyed], the creditor may foreclose the mortgage only if the creditor was entitled to enforce  
22 the instrument when loss of possession occurred and makes an affidavit attesting to the facts  
23 stated in [UCC § 3-309(a)].

24           (b) If the creditor makes an affidavit pursuant to subsection (a), the obligor is entitled to  
25 adequate protection against loss that might occur by reason of a claim by another person to  
26 enforce the instrument, and the affidavit shall include a written indemnity from the creditor  
27 against loss by the obligor. Whether adequate protection requires more than the indemnity is  
28 determined by the facts of each case. Upon motion by the obligor, the court may also require that  
29 additional adequate protection be provided by any reasonable means.

30           (c) In a judicial foreclosure proceeding, the affidavit described in subsection (a) shall be  
31 filed with the complaint.

1 (d) In a nonjudicial foreclosing proceeding, the creditor shall include the affidavit  
2 described in subsection (a) with the notice of foreclosure required by Section 2-103 together with  
3 a statement that the obligor has the right to petition the [name of appropriate court] where the  
4 property is located for an order requiring the creditor to provide adequate protection against a  
5 claim by another person.

### 6 **Reporters' Drafting Notes**

7  
8 1. The policy choice facing the Drafting Committee, of course, is the  
9 extent to which this Act should give license to foreclosing creditors who sign  
10 "lost" or "destroyed" note affidavits without ever having possessed either the  
11 original or a certified copy of the note, and without any evidence of a written  
12 assignment of the underlying mortgage to that creditor. For comparison purposes,  
13 even under the "business records" exception to conventional hearsay rules, it is  
14 not clear that unsigned contracts would be admissible evidence that the parties  
15 named in the contract would be entitled to enforce it. Further, if one is to speak of  
16 "moral hazard," there is little doubt that a liberal "lost note" affidavit policy offers  
17 a powerful incentive to the first note holder intentionally to discard the original  
18 note and thereby avoid the cost and uncertainty of maintaining thousands of  
19 original paper notes. It would be useful for the Drafting Committee to discuss  
20 this subject, in light of the potential for fraud against an obligor.

21  
22 2. Subsection (a) offers two alternatives to deal with the problem of lost or  
23 destroyed promissory notes, both of which interface with the UCC Article 3  
24 treatment of lost or destroyed negotiable instruments. The first alternative is  
25 compatible with the 2002 amendments to Article 3. In specifying when a creditor  
26 is entitled to enforce a negotiable instrument secured by mortgage  
27 notwithstanding its inability to confirm possession of the instrument, subsection  
28 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted  
29 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person  
30 who lost possession may be a predecessor of the creditor who seeks to enforce the  
31 instrument.

32  
33 3. Alternative # 2 to subsection (a) is consistent with the text of UCC § 3-  
34 309 prior to the 2002 amendments. Most states have not yet adopted the 2002  
35 amendments. Most of these states follow the 1990 Official Text of Article 3. In  
36 these states there are a few cases holding that the affidavit must be signed by the  
37 person who lost the note. See, e.g., *Atlantic Nat. Trust, LLC v. McNamee*, 984  
38 So. 2d 375 (Ala. 2007) (examining prior cases; holding that assignee of  
39 promissory note that was not in possession when lost may enforce the note).  
40 Alternative #2 requires the creditor who forecloses be the person who lost or  
41 destroyed the note and who executes the affidavit.

1  
2 4. In some states, the circumstances in which a creditor is allowed to  
3 enforce an unavailable instrument are broader than under either the 2002 version  
4 or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B) (“[i]f a note or  
5 other evidence of indebtedness secured by a deed of trust is lost or for any reason  
6 cannot be produced”). In some states, the circumstances are more restricted  
7 because the creditor’s affidavit must attest to additional facts. E.g., Md. Code §  
8 7-105.1 (affidavit not sufficient unless it “(1) Identifies the owner of the debt  
9 instrument and states from whom and the date on which the owner acquired  
10 ownership; (2) States why a copy of the debt instrument cannot be produced; and  
11 (3) Describes the good faith efforts made to produce a copy of the debt  
12 instrument.”).

13  
14 5. When the loan documents executed by the parties did not include a  
15 negotiable instrument, the creditor seeking to foreclose may or may not possess  
16 an original writing or record (including a counterpart) that evidences the  
17 obligation. This section does not require an affidavit for a creditor who lacks  
18 possession of such an original record. Some states require “lost note affidavits”  
19 under these circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond,  
20 note, contract, open account agreement, or other written evidence of debt”); Va.  
21 Code § 55-59.1(B) (“note or other evidence of indebtedness”).  
22

23 6. This section does not discuss the evidentiary effect of the affidavit in  
24 judicial proceedings. Some states have statutory law on point. For example, an  
25 Alabama statute provides that a lost note affidavit “must be received as  
26 presumptive evidence both of the contents and loss or destruction of such  
27 instrument, unless the defendant by answer, verified by affidavit, denies the  
28 execution of such bond, note or bill or the endorsement, acceptance, or the  
29 contents thereof, in which case proof of such execution, endorsement, acceptance,  
30 or contents must be made by the plaintiff.” Ala. Code § 6-5-284.  
31

32 7. Some statutes dealing with lost note affidavits appear to require an  
33 affidavit only if the creditor is unable to produce the original *or a copy* of the  
34 instrument.  
35

36 8. Subsection (b) follows UCC § 3-309(b), which requires adequate  
37 protection for the obligor from the risk that at some point in the future the  
38 instrument will surface and its possessor will assert the right to be paid. (UCC §  
39 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)  
40 requires that the affidavit include a written indemnity, binding the creditor, to  
41 protect all obligors against the risk that a person other than the creditor will seek  
42 to enforce the instrument. This indemnity serves to reinforce the rights that the  
43 obligor already has under principles of restitution and unjust enrichment. See,  
44 e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011):  
45 “*Payment Of Money Not Due*. Payment by mistake gives the payor a claim in  
46 restitution against the recipient to the extent payment was not due.” In appropriate

1 cases, a court may require a bond in addition to a written indemnity.

2  
3 **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.**

4 (a) Mortgaged property may be sold at a public sale only after giving a commercially  
5 reasonable public advertisement of the sale.

6 (b) A public advertisement of the sale must indicate:

7 (1) the name of the homeowner and, if not the same, the name of the person who  
8 signed the mortgage agreement;

9 (2) the name of the creditor or other person who will conduct the sale;

10 (3) the date, time, and place of the sale;

11 (4) the street address or, if there is no street address, other information identifying  
12 where the mortgaged property is located;

13 (5) any improvements and personal property that are included in the sale, if that  
14 information is readily discernable by the creditor;

15 (6) the amount of the obligation, including expenses of foreclosure, to be satisfied  
16 by proceeds of the sale;

17 (7) whether the mortgaged property is to be sold subject to senior indebtedness;

18 (8) the material terms of the sale, including payment terms to be required for the  
19 successful bidder at the completion of the auction;

20 (9) whether access to the mortgaged property for the purpose of inspection is  
21 available to prospective bidders before the sale; and

22 (10) a telephone number and email address from which a person may obtain  
23 additional information concerning the mortgaged property and the sale.

24 (c) The public advertisement does not have to contain a legal description of the

1 mortgaged property or recording information for the mortgage or other instruments of record.

2 (d) The public advertisement, or other information pertaining to the sale, may be posted  
3 at the location of the mortgaged property.

4 (e) Except as otherwise provided in subsections (e)(1), (e)(2), (e)(3), and (e)(4), whether  
5 the method and timing of publication of the public advertisement is commercially reasonable is a  
6 question of fact.

7 (1) The method of publication is commercially reasonable if published both in a  
8 newspaper having general circulation in the [county] where the mortgaged property is located  
9 and in an Internet website that is reasonably expected to be viewed by persons having an interest  
10 in purchasing the mortgaged property.

11 (2) For a newspaper advertisement, the timing of publication is commercially  
12 reasonable if published once per week for three consecutive weeks before the sale, with the first  
13 publication not more than 30 days before the sale.

14 (3) For an Internet website, the timing of publication is commercially reasonable  
15 if published at least 21 days before the sale and the Internet posting remains regularly available  
16 between the time of posting and the time of sale.

17 (4) Notice of postponement is commercially reasonable if published in the same  
18 outlets as the original notice for at least 7 days before the postponed sale.

19 (f) A copy of the public advertisement shall be sent to the homeowner and to any  
20 obligor. The notice of public advertisement may be sent with the notice of commencement of  
21 foreclosure or may be sent separately.

22 (g) The person conducting the sale may postpone or cancel the sale for any cause the  
23 person considers appropriate. Announcement of a postponement must include the time and

1 location of the rescheduled sale. If oral announcement of the postponement is made at the time  
2 and place advertised for the sale, a new public advertisement is not required unless the sale is  
3 postponed for longer than thirty (30) days beyond the date originally advertised.

#### 4 **Reporters' Drafting Notes**

5  
6 1. This section allows a public sale of the mortgaged property only if the  
7 creditor first gives a commercially reasonable public advertisement. The purpose  
8 is to ensure that the public has a meaningful opportunity to learn of the proposed  
9 sale in order to appear and engage in competitive bidding. This section supersedes  
10 existing state laws covering advertisements for public sales for all foreclosures  
11 that are within the scope of this [act].  
12

13 2. This section does not specify the person who is obligated to give the  
14 advertisement of sale. In many states, that person will be the creditor, but in other  
15 states, another person such as a trustee or sheriff performs that function. This [act]  
16 does not mandate a change in who is responsible for advertising the sale.  
17

18 3. This [act] does not require the accomplishment of foreclosure by a  
19 public auction sale. If other state law allows alternative methods of foreclosure,  
20 such methods remain permissible. For example, Connecticut law allows strict  
21 foreclosure without a sale of the property.  
22

23 4. Subsection (b) states minimum requirements for the public  
24 advertisement. An advertisement that lacks any of the information set forth in  
25 subsection (b) is insufficient as a matter of law. An advertisement may contain  
26 additional information about the mortgaged property or the sale.  
27

28 5. Traditionally the law required the advertisement of foreclosure sales in  
29 local newspapers. This section allows the creditor to continue that practice, but no  
30 longer specifies newspaper advertisement as required or sufficient in all cases.  
31 Whether a newspaper advertisement alone is sufficient depends upon whether it is  
32 commercially reasonable under the facts, which must be determined based upon  
33 the nature of the property, the newspaper, and other local circumstances.  
34 Similarly, whether it is commercially reasonable for a creditor *not* to publish a  
35 newspaper advertisement, relying instead on other outlets, depends upon the facts.  
36 In many communities, newspaper advertisements are no longer an effective  
37 means of informing the public about upcoming foreclosure sales. Under these  
38 circumstances, a creditor's decision not to publish in a newspaper benefits both  
39 the creditor and the homeowner and any obligors by saving the expense.

40 6. Subsection (c) adopts a bright-line rule with respect to legal descriptions  
41 of the real property and recording information. The failure to include such  
42 information does not make the public advertisement insufficient. This

1 information is seldom of importance to a person who reads a foreclosure  
2 advertisement for the purpose of deciding whether the person has potential  
3 interest. Anyone who develops a potential interest is highly likely to investigate  
4 further before appearing at the sale to bid. That investigation may include title  
5 information, which will disclose the legal description and recording references for  
6 the mortgage and other recorded instruments in the chain of title, and typically  
7 will include other information as well bearing on the property.  
8

9 7. Subsection (d) authorizes the creditor to post the public advertisement  
10 or a sign on the property, regardless of whether that right is reserved in the  
11 mortgage. [*Note: Is this appropriate? Do foreclosure signs including “bank sale”*  
12 *signs have negative consequences for the neighborhoods? What about zoning and*  
13 *HOA covenants that may restrict or limit signs?]*  
14

15 8. Subsection (e) creates four safe harbors. First, the method of  
16 publication is commercially reasonable if the creditor publishes the public  
17 advertisement both in a local newspaper and with an appropriate Internet website.  
18 The Internet site may be one operated by the newspaper or by any other person,  
19 whether or not located in the jurisdiction where the mortgaged property is located.  
20 The Internet site, however, must be one that has characteristics suggesting that  
21 interested members of the public are likely to find and to read the posting. There  
22 are two safe harbors with respect to timing for newspaper advertisements and  
23 Internet advertisements, which seek to ensure public access to the advertisement  
24 for approximately one month preceding the date of sale. Last, a safe harbor for  
25 postponed sales allows a shorter length of time than required for the safe harbor  
26 for the original notice because members of the public with potential interest in the  
27 property had the opportunity to read the original notice.  
28

29 **SECTION 405. NOTICE OF SALE, POSTPONEMENT OF SALE AND**  
30 **CANCELLATION OF SALE.**  
31

32 (a) The creditor shall give the homeowner and any obligor written notice of the  
33 date, time, and place of the scheduled foreclosure sale. Notice of sale shall be delivered  
34 by first class mail to the last known addresses of the homeowner and any obligor, and by  
35 personal delivery to the property address. Notice of sale shall be delivered at least 30  
36 days prior to the sale date.

37 (b) If the sale is postponed pursuant to Section 404(g), the creditor shall promptly  
38 give the homeowner and any obligor a commercially reasonable notice of the  
39 postponement. If the sale is cancelled pursuant to Section 404(g), the creditor shall

1 promptly notify the homeowner and any obligor by first class mail as provided in  
2 subsection (a).

### 3 **Reporters' Drafting Notes**

4 1. This section requires that the creditor notify the homeowner and any  
5 obligors of the date, time, and place of the foreclosure sale. Subsection (a)  
6 requires a 30-day notice of the originally scheduled sale. One notice must be  
7 mailed, and a second copy of the notice must be personally delivered to the  
8 residence.

9  
10 2. Once a foreclosure sale is scheduled, the creditor may elect to postpone  
11 or cancel the sale pursuant to Section 404(g). A postponement might also take  
12 place for other reasons, such as a judicial order or an automatic stay in  
13 bankruptcy. Homeowners and obligors should receive prompt notice of any  
14 postponement or cancellation. The rules of subsection (a) do not apply to notices  
15 of postponement or cancellation. Subsection (b) covers notices of postponement  
16 and cancellation, requiring that the notice be commercially reasonable under the  
17 facts and circumstances. A postponement may be as short as one day. An oral  
18 announcement of the postponement, made at the time and place of the originally  
19 scheduled sale, would suffice if the homeowner and any obligor were present, in  
20 which event no written or additional notice would be necessary.

### 21 **SECTION 406. OPTIONAL CONFIRMATION OF SALE AFTER** 22 **NONJUDICIAL FORECLOSURE; DEFICIENCY JUDGMENT.**

23 (a) If the price at which the mortgaged property is sold at an auction sale pursuant to  
24 nonjudicial foreclosure is less than the obligation, resulting in a deficiency, any action to recover  
25 the deficiency must be brought within [60 days] after the sale.

26 (b) No deficiency judgment shall be granted unless the court, after notice and a hearing,  
27 grants an order confirming the sale. The court shall grant a confirmation order unless it finds:

28 (1) there was a material procedural irregularity such as the failure to give required  
29 notices to parties,

30 (2) the sale was conducted fraudulently, or

31 (3) the property sold at a price less than its fair market value as of the date of the  
32 foreclosure sale.  
33  
34



1 (c) The fair market value referred to in subsection (b)(3) shall be determined by the  
2 finder of fact based upon competent evidence of value, which may include, but is not limited to,  
3 the following:

- 4 (1) expert opinion testimony;
- 5 (2) comparable sales;
- 6 (3) anticipated marketing time and holding costs; and
- 7 (4) cost of sale.

### 8 **Reporters' Drafting Notes**

9  
10 1. This Section conforms to existing law by not requiring that a court  
11 confirm the sale conducted in a nonjudicial foreclosure as a general matter.  
12 However, confirmation is required if the creditor wishes to obtain a deficiency  
13 judgment. A number of states follow this approach by requiring confirmation of  
14 the foreclosure sale if the creditor wishes to obtain a deficiency judgment. Two  
15 examples are Georgia and Texas. See Ga. Code § 44-14-161; Tex. Property Code  
16 § 51.003. Georgia requires a report of the sale to the superior court within 30 days  
17 of the sale, followed by a confirmation hearing and the issuance of a confirmation  
18 order if the court finds the property sold for "its true market value." Under a  
19 Texas statute adopted in 1991, an action to recover a deficiency must be brought  
20 within two years of the sale. If requested by the borrower, the court determines  
21 the fair market value. If the fair market value exceeds the foreclosure sale price,  
22 that value is used instead of the sale price to calculate the deficiency.  
23  
24

### 25 **SECTION 407. OPTIONAL CONFIRMATION OF SALE IN JUDICIAL** 26 **FORECLOSURE.**

27 (a) The foreclosing creditor may file a motion in the [specify court] for confirmation of a  
28 foreclosure sale within 60 days of the auction sale of the mortgaged property. The motion shall  
29 be served on the person conducting the sale, who shall file a report of the sale with the court.  
30 The report must name the purchaser and describe the property, the amount bid, the amount paid  
31 to date, and any other material terms.

32 (b) The court shall grant an order confirming the sale unless it finds:

1 (1) there was a material procedural irregularity such as the failure to give required  
2 notices to parties;

3 (2) the terms of sale were unconscionable;

4 (3) the sale was conducted fraudulently; or

5 (4) justice was otherwise not done.

6 (c) If the court fails to confirm the sale, it may order a resale of the property on such  
7 terms as are just.

8 (d) If the court confirms the sale, the purchaser may record the confirmation order.

### 9 **Reporters' Drafting Notes**

10  
11 1. Comments at the November 2012 meeting highlighted the conflict  
12 between mandating judicial confirmation of sales in nonjudicial foreclosure states  
13 where it is not presently required, on one hand, and the need for a mechanism to  
14 establish the conclusive effect of a sale on the other. This draft attempts to  
15 resolve the conflict by providing for an optional, rather than mandatory, sale  
16 confirmation process. Confirmation is a prerequisite for the conclusive effect of  
17 the sale for the benefit of bona fide purchasers. In a nonjudicial foreclosure state,  
18 the creditor (or title insurer) seeking to prevent possible claims of a defective  
19 foreclosure process can opt for judicial confirmation, or can choose not to obtain  
20 confirmation if it is confident that there were no defects in the foreclosure  
21 process. The addition of an optional confirmation process in states without one  
22 should prove less controversial than mandating judicial confirmation. For judicial  
23 foreclosure states, while the foreclosure judgment is conclusive as to the basic  
24 prerequisites to foreclosure, such as the existence of a default, an optional sale  
25 confirmation can add some protection against challenges to defects in post-  
26 judgment procedures, such as the notice of sale.

27  
28 **SECTION 408. CONCLUSIVE EFFECT OF FORECLOSURE SALE.** A final and

29 non-appealable court order confirming the sale pursuant to Section 406 or 407 conclusively  
30 establishes compliance with this Act in favor of purchasers of the mortgaged property in good  
31 faith for value. [For purposes of this section, the foreclosing creditor is not a good faith  
32 purchaser for value.]

### 33 **Reporters' Drafting Notes**

1  
2 1. At the November 2012 meeting there was disagreement regarding  
3 whether the foreclosing creditor should benefit from the conclusive effect of the  
4 confirmation of a foreclosure sale. The language remains bracketed for further  
5 discussion.

6 **ARTICLE 5**

7 **OTHER PROVISIONS**

8 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN**  
9 **SATISFACTION OF OBLIGATION.**

10  
11 (a) A homeowner may transfer mortgaged property to a creditor in full satisfaction of the  
12 homeowner's obligation to that creditor secured by that property if:

13 (1) The homeowner and the creditor agree to the transfer in a record authenticated  
14 by both parties after the homeowner's default; and

15 (2) An authenticated notification of objection to the proposed transfer is not  
16 received from any person entitled to notice under section 502 within 20 days after notification  
17 was sent to that person.

18 (b) If the homeowner or a person claiming under the homeowner is in possession of the  
19 mortgaged property, the agreement must specify the date and time when the homeowner is to  
20 surrender possession to the creditor. If there is any person entitled to notice under section 502,  
21 the homeowner is not obligated to surrender possession before the 20-day period described in  
22 subsection (a)(2) has elapsed.

23 **Reporters' Drafting Notes**

24  
25 1. The Section authorizes a transfer from the homeowner to the creditor in  
26 full satisfaction of the debt or other obligation. In so doing, it provides a  
27 framework for existing workout arrangements such as cash-for-keys agreements  
28 and deed-in-lieu of foreclosure transactions. This Section and the following two  
29 sections provide for a safe harbor by specifying the effect of a transfer that meets  
30 the requirements of this Section. This Section is based in part on UCC § 9-620,  
31 which provides for the acceptance of personal property mortgaged property by a

1 secured party in full or partial satisfaction of a secured obligation. The important  
2 innovation here is to discharge junior liens on the property without the need for a  
3 foreclosure sale.

4  
5 2. This Section does not specify a minimum consideration to be received  
6 by the homeowner in exchange for the homeowner's agreement to transfer the  
7 mortgaged property in satisfaction of the obligation. The sole exception is that if  
8 the homeowner is in possession and there are third parties entitled to notification  
9 of the proposed transfer, the agreement may not require the homeowner to vacate  
10 possession prior to the expiration of the period for notified persons to submit an  
11 objection.

12  
13 3. As suggested in the prior paragraph, the Reporters, Chair and ABA  
14 advisor note that the consensus of the discussion at the November meeting  
15 appeared to be that there was no apparent justification for mandating that a  
16 'negotiated transfer' under this section include any statutory minimum  
17 consideration to be paid to the homeowner; this draft accordingly deletes  
18 reference to that original requirement in this section.

19  
20 As a consequence, this section as it is now drafted confers a substantial  
21 benefit on mortgage creditors - in the form of a new mechanism for converting  
22 every 'deed in lieu' transaction into an accelerated means of clearing title of  
23 junior encumbrancers without the need for a more traditional judicial foreclosure  
24 - but does not confer any minimum benefit on homeowners (other than the  
25 general statement of effects of such an agreement contained in Section 504 and  
26 the rights of possession noted in paragraph 2 above.)

27  
28 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

29 (a) If a negotiated transfer pursuant to Section 501 is proposed at a time when a judicial  
30 foreclosure proceeding is pending with respect to the mortgaged property, the court must send  
31 notice of the proposed negotiated transfer to all parties, except for the homeowner and the  
32 creditor that is foreclosing.

33 (b) If a negotiated transfer pursuant to Section 501 is proposed at a time when a judicial  
34 foreclosure proceeding is not pending with respect to the mortgaged property, the creditor must  
35 send notice of the proposed negotiated transfer to:

36 (1) any person from which the creditor has received, before the homeowner and  
37 the creditor agreed to the proposed transfer, an authenticated notification of a claim of an interest

1 in the mortgaged property; and  
2 (2) any person that, 10 days before the homeowner and the creditor agreed to the  
3 proposed transfer, held an interest in the mortgaged property, perfected by a filing in the public  
4 records, that is subordinate to the mortgage that is the subject of the proposed transfer.

### 5 **Reporters' Drafting Notes**

6  
7 1. This section is based on UCC § 9-621, which provides for a notification  
8 procedure for an acceptance of personal property by a secured party in full or  
9 partial satisfaction of a secured obligation.

10  
11 2. Subsection (a) provides for the court to notify parties to the foreclosure  
12 proceeding of an agreement proposed by the homeowner and creditor for a  
13 transfer in full satisfaction of the debt or other obligation. If there are no parties  
14 to the action, other than the homeowner and the creditor, then there is no one to  
15 notify. Holders of subordinate interests in the mortgaged property should have  
16 been joined as necessary parties to the foreclosure action.

17  
18 3. Subsection (b) provides for the creditor to notify persons who have  
19 subordinate interests in the mortgaged property of an agreement proposed by the  
20 homeowner and creditor for a transfer in full satisfaction of the obligation. Such  
21 subordinate interest holders may have their rights terminated by the negotiated  
22 transfer, and therefore they have the right to request protection pursuant to  
23 Section 503.

### 24 **SECTION 503. HEARING ON OBJECTIONS TO NEGOTIATED TRANSFER.**

25  
26 (a) If the court receives an effective notification of objection from any person holding an  
27 interest in the mortgaged property that would be affected by the negotiated transfer, the court  
28 shall promptly schedule a hearing regarding that objection.

29  
30 (b) If, at the hearing, the creditor who is a party to the proposed transfer demonstrates by  
31 appraisal or otherwise that that there is no equity in the mortgaged property available to satisfy  
32 the interests of the objecting interest holder, the court shall overrule the objection and approve  
33 the negotiated transfer.

34 (c) If, at the hearing, the objecting party demonstrates by appraisal or otherwise that

1 there is equity in the mortgaged property available to satisfy the interests of the objecting interest  
2 holder, the court shall set a date not later than [30] days after the date of the hearing by which the  
3 objecting party shall be entitled to tender to the creditor who is a party to the proposed transfer a  
4 sum equal to the obligation owed to the proposing creditor, including interest and court costs. If  
5 the objecting party tenders that sum to the creditor within the time set by the court, the objecting  
6 party shall be entitled to the benefit of the proposed negotiated transfer. Otherwise, the rights of  
7 the objecting party under this section shall be extinguished.

8 (d) If a creditor who has sent a notice under Section 502(b) receives an effective  
9 notification of objection from any person holding an interest in the mortgaged property that  
10 would be affected by the negotiated transfer, the negotiated transfer shall not proceed unless the  
11 creditor initiates a judicial proceeding for the purpose of holding a hearing pursuant to the rules  
12 set forth in subsections (b) and (c).

13 **SECTION 504. EFFECT OF NEGOTIATED TRANSFER.**

14 (a) A homeowner's transfer of the mortgaged property pursuant to Section 501 to a  
15 creditor in full satisfaction of the obligation to that creditor it secures:

16 (1) discharges the obligation in full;

17 (2) transfers to the creditor all of the homeowner's rights in the mortgaged  
18 property , except for any right of the homeowner to continue to occupy the mortgaged property  
19 pursuant to an agreement between the homeowner and the creditor which is incorporated into the  
20 negotiated transfer agreement;

21 (3) discharges the mortgage held by the creditor and any subordinate mortgage or  
22 other subordinate lien; and

23 (4) terminates any other subordinate interest.

1 (b) A subordinate interest is discharged or terminated under subsection (a), even in the  
2 event of noncompliance with the requirements of this Act; provided, that a creditor who fails to  
3 comply with the requirements of this Act is liable for damages in the amount of any loss caused  
4 by its failure to comply.

5 (c) If the homeowner and creditor have agreed that the homeowner has the right to  
6 continue to occupy the mortgaged property for a fixed period of time, that agreement creates a  
7 license unless the parties have expressly agreed to enter into a landlord-tenant relationship.

8 (d) A transfer of the mortgaged property waives all rights of the creditor to obtain a  
9 personal judgment for the obligation, including costs and expenses, against the homeowner or  
10 any other person liable for the obligation secured by the mortgaged property.

11 (e) A transfer of the mortgaged property waives all rights of the homeowner to redeem  
12 the mortgaged property.

13 (f) [Nothing in Sections 501 through 504 prevents a homeowner and creditor from  
14 entering into any other form of agreement on mutually agreeable terms, but the effects of a  
15 negotiated transfer described in these sections do not apply to an agreement that fails to state that  
16 the agreement is made pursuant to section 501.] (g) Nothing in this article affects the rights of  
17 any creditor holding an interest in the mortgaged property which is senior to the interests of the  
18 creditor that takes title to the mortgaged property pursuant to this section.

19 **Reporters' Drafting Notes**  
20

21 1. This section is based upon UCC § 9-622, which specifies the effect of  
22 acceptance of personal property mortgaged property by a secured party in full or  
23 partial satisfaction of a secured obligation. Subsection (a) specifies the effect of a  
24 transfer of the mortgaged property in full satisfaction of the secured obligation.  
25 The transfer to which it refers is one that results from performance of the  
26 agreement made by the homeowner and the creditor. If a timely objection is  
27 received by the court or by the creditor from a person entitled to notification, then  
28 neither this subsection nor subsection (b) applies. Paragraph (1) expresses the

1 fundamental consequence of accepting the mortgaged property in full satisfaction  
2 of the secured obligation—the obligation is discharged.

3  
4 2. Paragraphs (2) through (4) indicate the effects of a transfer on various  
5 property rights and interests. Under paragraph (2), the creditor acquires “all of the  
6 homeowner’s rights in the mortgaged property.” Under paragraph (3), all junior  
7 encumbrances are discharged. Paragraph (4) provides for the termination of other  
8 subordinate interests. Under existing law, a deed-in-lieu of foreclosure accepted  
9 by a creditor does not terminate subordinate mortgages, subordinate liens, or other  
10 subordinate property rights. This Act changes by result by authorizing a transfer  
11 in full satisfaction of the obligation, which terminates junior interests.

12  
13 3. Subsection (c) specifies that the status of the homeowner who continues  
14 to occupy the property after entering into an agreement to transfer the property to  
15 the creditor in full satisfaction of the obligation is that of a licensee. The parties’  
16 agreement and other state law determine the rights and obligations of the parties  
17 as licensor and licensee.

18  
19 4. The last sentence of subsection (f) is bracketed to reflect at least one  
20 policy choice that the Reporters, Chair and the ABA Advisor believe should be  
21 made by the Committee.

22  
23 As drafted, the sentence authorizes homeowners and creditors to enter into  
24 any other type of agreement that they might desire, but no such agreement –  
25 presumably including a traditional ‘deed in lieu’ arrangement – would confer the  
26 benefits of Section 504 unless the agreement expressly provided that it was made  
27 pursuant to Section 501.

28  
29 The converse of the policy is reflected in this observation from Reporter  
30 Smith:

31  
32 “I believe the better policy is to displace existing state laws on “deed in  
33 lieu” transactions within the scope of this act. Among other problems, if  
34 we keep both, there will be transactions in which the lender has not clearly  
35 documented whether the intent to proceed under this act or under other  
36 law.”

37  
38 **SECTION 505. ABANDONED PROPERTY.**

39 (a) A government agency’s determination, finding, or order that mortgaged property is  
40 abandoned, or the presence of not less than [three] of the following conditions, constitutes prima  
41 facie evidence that the mortgaged property is abandoned property:

42 (1) One or more doors to the mortgaged property are boarded up, closed off,



1 smashed through, broken off, unhinged, or continuously unlocked; or multiple windows are  
2 boarded up or closed off; or multiple window panes are broken.

3 (2) Gas service, electric service, water service, or other utility service to the  
4 mortgaged property has been terminated; or utility consumption is extremely low so as to  
5 indicate that the property is not regularly occupied.

6 (3) Rubbish, trash, or debris has accumulated on the mortgaged property.

7 (4) The mortgaged property is deteriorating so as to constitute a serious threat to  
8 public health or safety.

9 (5) The creditor has changed the locks on the mortgaged property and for at least  
10 30 days after the changing of the locks the homeowner has not requested entrance to the  
11 mortgaged property.

12 (6) There exist one or more written statements, including documents of  
13 conveyance, signed by the homeowner that indicate a clear intent to abandon the mortgaged  
14 property.

15 (7) The police or sheriff's office has received at least two reports of trespassers on  
16 the mortgaged property or of vandalism or other illegal acts being committed on the mortgaged  
17 property.

18 (8) The homeowner has died and there is no evidence that a survivor of the  
19 homeowner is in actual possession of the mortgaged property.

20 (b) In a judicial foreclosure proceeding, the plaintiff or the city or [county] in which the  
21 mortgaged property is located may petition the court for a determination that the mortgaged  
22 property is abandoned property. If the mortgaged property is located in a common interest  
23 community, the association that governs that community shall have the right to intervene in the

1 proceeding.

2 (c) In a judicial foreclosure proceeding, after notice and a hearing, the court may issue an  
3 order finding that the mortgaged property is abandoned property. In a nonjudicial foreclosure  
4 proceeding, the creditor or the city or [county] in which the mortgaged property is located may  
5 seek a determination that the mortgaged property is abandoned property by submitting a request  
6 accompanied by an affidavit to [name of official]. The person seeking the determination must  
7 send a notification to the homeowner and other persons entitled to notice under Section 201. The  
8 notification must include a copy of the request and the affidavit, must describe the consequences  
9 that will follow from a determination of abandonment, and must inform the recipient has the  
10 right to contact the [name of official] to obtain further information or to object to the proposed  
11 determination of abandonment. After personal inspection of the mortgaged property, which shall  
12 include entry into the dwelling unit, the [name of official] may issue a written determination  
13 finding that the mortgaged property is abandoned property. The [name of official] shall send the  
14 written determination to the creditor, the homeowner, and other persons entitled to notice under  
15 Section 201. The written determination, or the refusal of the [name of official] to issue a written  
16 determination, shall be subject to judicial review de novo in an appropriate court.

### 17 **Reporters' Drafting Notes**

18  
19 1. This Act authorizes an expedited foreclosure procedure for abandoned  
20 properties for both judicial foreclosure and for nonjudicial foreclosures.<sup>1</sup> An  
21 expedited procedure is appropriate for two reasons. First, the homeowner is no  
22 longer making a valuable economic use of the property to provide shelter for the  
23 homeowner or the homeowner's family or someone claiming under the  
24 homeowner, such as a tenant. A foreclosure sale will not result in a possessor  
25 being forced to relocate to other housing. Second, properties that are facing  
26 foreclosure and that are vacant have significant negative impacts on  
27 neighborhoods and the surrounding communities. Vacancies reduce the market  
28 values of neighboring properties. Neighborhood crime increases. The vacant

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<sup>1</sup> Defer for later discussion by the Committee maintenance and repair obligations of homeowners and creditors with respect to abandoned property.

1 properties tend to suffer from lack of repair and maintenance, creating public  
2 health risks, including infestations by vermin, mosquitoes, and other insects.  
3 There are fiscal impacts on local governments, who find property taxes on vacant  
4 properties often become delinquent; yet the governments are faced with added  
5 expenses to provide essential services to blighted neighborhoods, such as police  
6 and fire protection. By providing for an expedited foreclosure procedure, this Act  
7 seeks to return abandoned properties to the stock of occupied, well-maintained  
8 housing as soon as reasonably possible.  
9

10 2. The conditions giving rise to prima facie evidence of abandonment set  
11 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code  
12 § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance  
13 of a determination that the mortgaged property is abandoned by itself constitutes  
14 prima facie evidence of abandonment. The government's determination, finding,  
15 or order might not use the word "abandoned"; it might, for example, refer to the  
16 property as vacant. Of course, the homeowner or another person has the right to  
17 challenge the correctness of the governmental determination.  
18

19 With respect to the statutory conditions listed in Subsection (a)(1) through  
20 (a)(8), the presence of [three] or more of such conditions constitutes prima facie  
21 evidence, giving rise to a presumption of abandonment. Such conditions are not  
22 conclusive on the issue of abandonment. Many residential properties will exhibit  
23 at least one such condition, when the homeowner is still in possession of the  
24 property. If the homeowner or another person holding under the homeowner is in  
25 actual possession of the mortgage property, the property is not abandoned  
26 notwithstanding the existence of such conditions. Likewise, mortgaged property  
27 may be abandoned under this Section notwithstanding the absence of any of the  
28 statutory conditions.  
29

30 3. Mortgaged property often becomes vacant, both under standard  
31 mortgage and reverse mortgage transactions, when the homeowner dies. Under  
32 Subsection (a)(8) proof of death of the homeowner constitutes prima facie  
33 evidence that the mortgaged property is abandoned, provided that there is no  
34 evidence that an heir or other beneficiary of the homeowner's estate is in actual  
35 possession. Of course if there are multiple homeowners, this condition is met  
36 only if all the homeowners have died.  
37

38 4. In a nonjudicial foreclosure proceeding, the creditor may treat the  
39 mortgaged property as abandoned only by submitting evidence of abandonment to  
40 an independent third party. Subsection (c) provides for the submission of evidence  
41 to a person, who as part of the decision making process must personally visit the  
42 property and enter the dwelling unit. Normally jurisdictions enacting this Act will  
43 designate an employee of local government, such as a building inspector, who is  
44 responsible for evaluating the physical condition of dwelling units.  
45

46 Judicial review of the decision is available to any interested person.

1 Subsection (c) does not specify the nature of that action, which in many  
2 jurisdictions will be a mandamus action.

3  
4 **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

5 (a) If the court issues an order finding that the mortgaged property is abandoned property  
6 pursuant to Section 505(b) and it has previously issued, or at the same time issues, a judgment of  
7 foreclosure, then the court shall order an expedited sale of the property. The order shall call for  
8 public sale of the property no sooner than [30] days and no later than [60] days after entry of the  
9 order.

10 (b) In a nonjudicial foreclosure proceeding, upon the issuance of a written determination  
11 that the mortgaged property is abandoned property pursuant to Section 505(c), the creditor may  
12 conduct an expedited sale of the property. A public sale of the property may take place no sooner  
13 than [30] days and no later than 60 days after the issuance of the written determination, unless  
14 judicial review of the determination is commenced. The creditor shall comply with the notice  
15 requirements of Section 405, except that [15] days advance notice of the sale is sufficient.

16 (c) After a judicial order or a written determination finding that the mortgaged property  
17 is abandoned property, the creditor shall take necessary and appropriate action to cause the  
18 foreclosure sale to be completed within a reasonable time unless the creditor releases its  
19 mortgage and files that release on the land records. The creditor shall not have the right to  
20 dismiss, terminate, or suspend foreclosure proceedings, and thereby end its obligations to  
21 maintain the abandoned property under Section 507.

22 [(d) The completion of a foreclosure sale pursuant to subsection (a) or (b) shall have the  
23 effect of terminating the rights of the homeowner or any other person to redeem the property  
24 after the sale under Code Section \_\_\_\_.]

1  
2           1. This Section provides for an expedited public sale of the mortgaged  
3 property after a determination that the mortgaged property is abandoned. In a  
4 judicial foreclosure, the court must order the sale to take place no longer than \_\_\_  
5 days after the court enters its order finding the property to be abandoned, unless  
6 the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor  
7 may select the date, provided it is no sooner than \_\_\_ days after the written  
8 determination of abandonment.  
9

10           2. This Section does not authorize a disposition of abandoned property  
11 other than public sale, but other dispositions are available under other sections of  
12 this Act. For example, the homeowner and creditor may agree to a negotiated  
13 transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash  
14 for keys agreement].  
15

16           3. Once a creditor decides to take advantage of the expedited foreclosure  
17 procedure allowed by this Section, there is a public interest in ensuring that the  
18 property becomes occupied as soon as reasonably possible. For this reason  
19 subsection (c) does not allow the creditor to suspend indefinitely its efforts to  
20 consummate the foreclosure. There may be exceptional circumstances in which it  
21 is not feasible to hold the foreclosure sale within 60 days of the judicial order or  
22 written determination finding the property to be abandoned, as required by  
23 subsection (a) and (b). In that event, subsection (c) provides an outside limit of  
24 [four months] to complete the sale.  
25

26           Subsection (c) poses the substantial question of what consequences should  
27 flow from the failure of the creditor to comply with its requirements. On the one  
28 hand, in the view of the Reporters, the Chair and the ABA Advisor, it would  
29 clearly be inappropriate to impose an obligation on a creditor to repair the  
30 property subject to the mortgage before the creditor has taken possession or an  
31 official determination is made that the property is abandoned. Indeed, we  
32 anticipate that the lending community will resist a statutory duty to maintain  
33 property on which it holds a mortgage in those instances where the lender would  
34 prefer to release its mortgage and forego any interest in that property.

35           On the other hand, the consequences of a creditor's failure to either  
36 commence and complete a foreclosure action or to release its mortgage, on other  
37 stakeholders in the abandoned property – including the fee owner, the  
38 municipality and neighbors in which the abandoned property is located, and  
39 where appropriate, a homeowners association - are very real. We believe this is a  
40 subject deserving of substantial discussion during the April meeting.  
41

42           4. In states that afford the homeowner and other persons a statutory right  
43 of redemption after completion of a foreclosure sale, subsection (d) serves to  
44 terminate those redemption rights.  
45

1           5. On February 8, 2013, Illinois enacted detailed provisions providing for  
2 expedited foreclosure for abandoned properties. 2012 Ill. Legis. Serv. P.A. 97-  
3 1164 (S.B. 16). The core provision is set forth below:  
4

5           § 15–1505.8. Expedited judgment and sale procedure for abandoned residential  
6 property.

7           (a) Upon motion and notice, the mortgagee may elect to utilize the  
8 expedited judgment and sale procedure for abandoned residential property stated  
9 in this Section to obtain a judgment of foreclosure pursuant to Section 15–1506.  
10 The motion to expedite the judgment and sale may be combined with or made part  
11 of the motion requesting a judgment of foreclosure. The notice of the motion to  
12 expedite the judgment and sale shall be sent by first-class mail to the last known  
13 address of the mortgagor, and the notice required by paragraph (1) of subsection  
14 (1) of this Section shall be posted at the property address.

15           (b) The motion requesting an expedited judgment of foreclosure and sale  
16 may be filed by the mortgagee at the time the foreclosure complaint is filed or any  
17 time thereafter, and shall set forth the facts demonstrating that the mortgaged real  
18 estate is abandoned residential real estate under Section 15–1200.5 and shall be  
19 supported by affidavit.

20           (c) If a motion for an expedited judgment and sale is filed at the time the  
21 foreclosure complaint is filed or before the period to answer the foreclosure  
22 complaint has expired, the motion shall be heard by the court no earlier than  
23 before the period to answer the foreclosure complaint has expired and no later  
24 than 15 days after the period to answer the foreclosure complaint has expired.

25           (d) If a motion for an expedited judgment and sale is filed after the period  
26 to answer the foreclosure complaint has expired, the motion shall be heard no  
27 later than 15 days after the motion is filed.

28           (e) The hearing shall be given priority by the court and shall be scheduled  
29 to be heard within the applicable time period set forth in subsection (c) or (d) of  
30 this Section.

31           (f) Subject to subsection (g), at the hearing on the motion requesting an  
32 expedited judgment and sale, if the court finds that the mortgaged real estate is  
33 abandoned residential property, the court shall grant the motion and immediately  
34 proceed to a trial of the foreclosure. A judgment of foreclosure under this Section  
35 shall include the matters identified in Section 15–1506.

36           (g) The court may not grant the motion requesting an expedited judgment  
37 and sale if the mortgagor, an unknown owner, or a lawful occupant appears in the  
38 action in any manner before or at the hearing and objects to a finding of  
39 abandonment.

40           (h) The court shall vacate an order issued pursuant to subsection (f) of this  
41 Section if the mortgagor or a lawful occupant appears in the action at any time  
42 prior to the court issuing an order confirming the sale pursuant to subsection (b–3)  
43 of Section 15–1508 and presents evidence establishing to the satisfaction of the  
44 court that the mortgagor or lawful occupant has not abandoned the mortgaged real  
45 estate.

46           (i) The reinstatement period and redemption period for the abandoned

1 residential property shall end in accordance with paragraph (4) of subsection (b)  
2 of Section 15–1603, and the abandoned residential property shall be sold at the  
3 earliest practicable time at a sale as provided in this Article.

4 (j) The mortgagee or its agent may enter, secure, and maintain abandoned  
5 residential property subject to subsection (e–5) of Section 21–3 of the Criminal  
6 Code of 2012.

7 (k) Personal property.

8 (1) Upon confirmation of the sale held pursuant to Section 15–1507, any  
9 personal property remaining in or upon the abandoned residential property shall  
10 be deemed to have been abandoned by the owner of such personal property and  
11 may be disposed of or donated by the holder of the certificate of sale (or, if none,  
12 by the purchaser at the sale). In the event of donation of any such personal  
13 property, the holder of the certificate of sale (or, if none, the purchaser at the sale)  
14 may transfer such donated property with a bill of sale. No mortgagee or its  
15 successors or assigns, holder of a certificate of sale, or purchaser at the sale shall  
16 be liable for any such disposal or donation of personal property.

17 (2) Notwithstanding paragraph (1) of this subsection (k), in the event a  
18 lawful occupant is in possession of the mortgaged real estate who has not been  
19 made a party to the foreclosure and had his or her interests terminated therein, any  
20 personal property of the lawful occupant shall not be deemed to have been  
21 abandoned, nor shall the rights of the lawful occupant to any personal property be  
22 affected.

23 (l) Notices to be posted at property address.

24 (1) The notice set out in this paragraph (1) of this subsection (l) shall be  
25 conspicuously posted at the property address at least 14 days before the hearing  
26 on the motion requesting an expedited judgment and sale and shall be in boldface,  
27 in at least 12 point type, and in substantially the following form:

28  
29 **“NOTICE TO ANY TENANT OR OTHER LAWFUL**  
30 **OCCUPANT OF THIS PROPERTY**

31  
32 **A lawsuit has been filed to foreclose on this property, and the party asking to**  
33 **foreclose on this property has asked a judge to find that THIS PROPERTY**  
34 **IS ABANDONED. The judge will be holding a hearing to decide whether this**  
35 **property is ABANDONED. IF YOU LAWFULLY OCCUPY ANY PART OF**  
36 **THIS PROPERTY, YOU MAY CHOOSE TO GO TO THIS HEARING and**  
37 **explain to the judge how you are a lawful occupant of this property. If the**  
38 **judge is satisfied that you are a LAWFUL OCCUPANT of this property, the**  
39 **court will find that this property is NOT ABANDONED. This hearing will be**  
40 **held in the courthouse at the following address, date, and time: . . .**

41  
42 **IMPORTANT**

43  
44 **This is NOT a notice to vacate the premises. You may wish to contact a**  
45 **lawyer or your local legal aid or housing counseling agency to discuss any**  
46 **rights that you may have. . . .**

1  
2 **[Other required provisions of the notice criminalize intentional removal of**  
3 **the notice and trespass on the property.]**  
4

5 (2) The notice set out in this paragraph (2) of this subsection (1) shall be  
6 conspicuously posted at the property address at least 14 days before the hearing to  
7 confirm the sale of the abandoned residential property and shall be in boldface, in  
8 at least 12 point type, and in substantially the following form:  
9

10 **“NOTICE TO ANY TENANT OR OTHER LAWFUL OCCUPANT OF**  
11 **THIS PROPERTY**  
12

13 **A lawsuit has been filed to foreclose on this property, and the judge has**  
14 **found that THIS PROPERTY IS ABANDONED. As a result, THIS**  
15 **PROPERTY HAS BEEN OR WILL BE SOLD.**

16 **HOWEVER, there still must be a hearing for the judge to approve the sale.**  
17 **The judge will NOT APPROVE this sale if the judge finds that any person**  
18 **lawfully occupies any part of this property.**

19 **IF YOU LAWFULLY OCCUPY ANY PART OF THIS PROPERTY, YOU**  
20 **MAY CHOOSE TO GO TO THIS HEARING and explain to the judge how**  
21 **you are a lawful occupant of this property. You also may appear BEFORE**  
22 **this hearing and explain to the judge how you are a lawful occupant of this**  
23 **property.**

24 **If the judge is satisfied that you are a LAWFUL OCCUPANT of this**  
25 **property, the court will find that this property is NOT ABANDONED, and**  
26 **there will be no sale of the property at this time.**

27 **This hearing will be held in the courthouse at the following address, date,**  
28 **and time: . . . .**  
29

30 **[Other required provisions of the notice criminalize intentional removal of**  
31 **the notice and trespass on the property.]**  
32

33 **SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.**

34 (a) In a judicial foreclosure proceeding, a creditor shall maintain abandoned property  
35 from the time the court issues an order finding that the mortgaged property is abandoned  
36 property pursuant to Section 505(b).

37 (b) In a nonjudicial foreclosure proceeding, a creditor shall maintain abandoned property  
38 from the time of issuance of a written determination that the mortgaged property is abandoned  
39 property pursuant to Section 505(c).



1 (c) In the absence of a judicial order under subsection (a) or a written determination  
2 under subsection (b), a creditor who has commenced foreclosure proceedings shall maintain the  
3 mortgaged property if a governmental entity issues a citation finding that the mortgaged property  
4 is abandoned property in a condition that poses a threat to public safety or health.

5 (d) The creditor's obligation to maintain abandoned property shall continue until the  
6 conveyance of the property through foreclosure to a purchaser other than the creditor or until the  
7 creditor records a release of its mortgage.

8 (e) For purposes of this section, "failure to maintain" means (i) failure to care for the  
9 exterior of the property, including, but not limited to, permitting excessive foliage growth that  
10 diminishes the value of surrounding properties; (ii) failing to take action to prevent trespassers or  
11 squatters from remaining on the property; (iii) failing to take action to prevent mosquito larvae  
12 from growing in standing water; or (iv) other conditions that create a public or private nuisance.

13 (f) A creditor who has the obligation to maintain abandoned property shall have the right  
14 peaceably to enter the property, or to cause others peaceably to enter the property, for the limited  
15 purposes of inspection, repair, and maintenance as required by this section. All reasonable  
16 expenses incurred by the creditor pursuant to this section shall be an obligation of the  
17 homeowner and shall be secured by the mortgage.

18 (g) No person who enters the abandoned property for the purposes described in  
19 subsection (f) shall have any liability to the homeowner for trespass or for damage to the  
20 property.

21 (h) The following persons shall have the right to enforce the obligations created by this  
22 section in any appropriate action or proceeding:

23 (1) The city or other governmental entity in which the mortgaged property is

1 located.

2 (2) A homeowners association, condominium association, or cooperative  
3 association if the mortgaged property is subject to the rules of that association.

4 (i) The obligations of the creditor to maintain abandoned property are limited to those  
5 stated in the Section; provided, that if the creditor becomes the owner of the abandoned property,  
6 its obligations with respect to the property shall be determined by other law. The creditor shall  
7 not become a mortgagee in possession of the property by virtue of its performance of the  
8 obligations stated in this Section.

### 9 **Reporters' Drafting Notes**

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1. This Section requires creditors to maintain abandoned properties under certain circumstances. The obligation may arise based upon action of the creditor or action of the municipality or other governmental entity where the property is located. The creditor does not become obligated to maintain merely by commencing foreclosure proceedings at a time when the dwelling unit is vacant. Rather, the obligation arises when the creditor seeks to use the expedited foreclosure procedure authorized by Section 505 and obtains either a judicial order or official determination that the property is abandoned. Under subsection (c) the obligation may also arise any time after the creditor has commenced foreclosure proceedings if the municipality or other local governmental entity cites the property as both abandoned and presenting a threat to public safety or health.

2. Subsection (e) defines the scope of the creditor's obligation to maintain abandoned property. The focus is on the outward appearance of the property, including yards and other exterior spaces, and other conditions that are likely to have significant impacts on the neighborhood, such as interior spaces frequented by squatters or persons engaged in criminal activities. This subsection is modeled closely on Cal. Civ. § 2929.3(b), enacted in 2008.

3. Subsection (f) grants a license to the creditor and to its agents or contractors to enter abandoned property for the purpose of inspection, repair, and maintenance, regardless of whether that right is reserved in the mortgage. Similarly, this subsection authorizes the addition of the creditor's reasonable maintenance expenses under this section to the debt secured by the mortgage, regardless of whether the mortgage contains a provision to that effect.

4. Subsection (h) provides for enforcement by the local government that

1 has jurisdiction over the abandoned property. When the property is located in a  
2 common-interest community, it also provides standing for the association as a  
3 means to protect neighboring property owners whose interests are likely to be  
4 harmed by the creditor’s failure to maintain the property. In conferring standing  
5 both to the local government and to owners’ associations, this subsection follows  
6 the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This  
7 subsection does not grant a direct enforcement right to neighbors. If negatively  
8 impacted, such persons may have a remedy under other laws, such as public or  
9 private nuisance.

10  
11 5. At common law a creditor who takes possession of mortgaged property  
12 prior to the completion of foreclosure becomes a “mortgagee in possession,” who  
13 by virtue thereof undertakes a number of obligations to the homeowner with  
14 respect to maintenance and care of the property. Subsection (i) expressly provides  
15 that a creditor who enters the property for the purpose of complying with its  
16 obligations under this Section does not assume the liabilities of a mortgagee in  
17 possession.

18  
19 **SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.**

20  
21 **PREAMBLE TO REVISED SECTION 508.**

22  
23 The Committee will recall that Section 3-116 of the Uniform Common Interest  
24 Ownership Act provides the unit owners association a super priority – that is, priority over first  
25 mortgages - for six months of regular common expense assessments, plus court costs and legal  
26 fees, when those common charges are unpaid.

27 The November draft presented 4 alternatives to address the issues that home owner  
28 associations for condominiums, cooperatives and planned communities face in collecting those  
29 common charges. The problem is made considerably more complex by the extended delays in  
30 finalizing foreclosures now being experienced in some states. The arguments favoring enhanced  
31 priority for CIC assessment liens were presented at the November meeting by representatives of  
32 the Community Association Institute.

33  
34 Of those four original alternatives, the first provided super priority for all regular periodic  
35 common charges plus interest – compared to the existing six months - , but did not give super  
36 priority for any association’s legal fees, for special assessments or for other charges.

37  
38 The second alternative proposed a limitation on the priority claim of the association’s  
39 legal fees, but was otherwise identical to alternative 1.

40  
41 Alternative # 3 proposed an automatic increase in the super priority lien for all delayed  
42 foreclosures, while Alternative 4 provided the association a right to accelerate its own  
43 foreclosure actions for non-payment of common charges, as well as to seek acceleration of a  
44 foreclosure of the first mortgage, in order to minimize the association’s own lost common  
45 charges which would be wiped out by the foreclosure.

1  
2 Upon consideration, it may simplify consideration of this issue by the Drafting  
3 Committee to consider only a single proposed section. In drafting that section, we sought  
4 to take into account much of the discussion at the November meeting, as well as the  
5 thoughts of association advocates and other views expressed by lenders.  
6

7 Finally, and separate from consideration of this section, it may be appropriate for  
8 the Drafting Committee to consider the utility of authorizing creditors who provide  
9 mortgage financing to purchasers of dwelling units in common interest communities to,  
10 first, require those purchasers to escrow funds for common charges as well as real estate  
11 taxes and casualty insurance; and, second, to require that home owner associations accept  
12 periodic payments of common charges from lenders –say, quarterly instead of monthly –  
13 rather than directly from the unit owner, in order to minimize the lenders’ risk of failed  
14 common charge payments.  
15

16 **SECTION 508. [NEW] LIEN FOR SUMS DUE ASSOCIATION;**  
17 **ENFORCEMENT.**

18 **Drafter’s Note**

19  
20 Other than necessary style matters, this section incorporates all the  
21 relevant language of Sec. 3-116 of the Uniform Common Interest Ownership Act,  
22 with two exceptions:  
23

24 First, the highlighted text in subsection (c) limits the association’s legal  
25 fees in an uncontested matter to a sum equal to 3 months of the association’s  
26 common charges;  
27

28 Second, the highlighted text in subsection (d) provides that if a mortgage  
29 foreclosure is not completed in 12 months, then, in addition to the existing 6  
30 month priority granted to associations, the association would thereafter begin to  
31 add a month’s priority for every additional month, beginning in month 13.  
32

33 (a) The association has a statutory lien on a dwelling unit for any assessment attributable  
34 to that unit based on the periodic budget adopted by the association pursuant to the declaration  
35 and the statutes of this state authorizing creation of the common interest community in which the  
36 dwelling unit is located; and fines imposed against its unit owner. Unless the declaration  
37 otherwise provides, reasonable attorneys' fees and costs, other fees, charges, late charges, fines  
38 and interest charged pursuant to other law and any other sums due to the association under the

1 declaration or as a result of an administrative, arbitration, mediation or judicial decision, are  
2 enforceable in the same manner as unpaid assessments under this section. If an assessment  
3 described in this section is payable in installments, the lien is for the full amount of the  
4 assessment from the time the first installment thereof becomes due.

5 (b) A lien under this section is prior to all other liens and encumbrances on a dwelling  
6 unit in a common interest community except (1) liens and encumbrances recorded before the  
7 recordation of the declaration, (2) a first mortgage on the dwelling unit recorded before the date  
8 on which the assessment or other charge sought to be enforced became delinquent, and (3) liens  
9 for real estate taxes and other governmental assessments or charges against the dwelling unit.

10 (c) A lien under this section is also prior to first mortgages described in subdivision (2)  
11 of subsection (b) to the extent of (1) the “priority amount,” that is, an amount equal to the  
12 common expense assessments based on the periodic budget adopted by the association pursuant  
13 the declaration and the statutes of this state authorizing creation of the common interest  
14 community in which the unit is located which would have become due in the absence of  
15 acceleration during the six months immediately preceding institution of an action to enforce  
16 either the association's lien or a mortgage described in subdivision (2) of subsection (b); and (2)  
17 the association's costs and attorney's fees in enforcing its lien. **However, if (i) an action to**

18 **enforce the association’s lien is uncontested or (ii) no defense to the association’s priority is**  
19 **raised in a creditor’s action to foreclose a first mortgage on a dwelling unit, the amount of**  
20 **the association’s attorney’s fee for which this subsection grants a priority over a first**  
21 **mortgage may not exceed a sum equal to [three] months of the common expense assessment**  
22 **due from that dwelling unit based on the periodic budget adopted by the association.**

23 **(d) In addition to the priority amount over a first mortgage as described in**

1 **subsection (c), if a creditor commences a civil action to foreclose a first mortgage described**  
2 **in subsection (b)(2) against a dwelling unit in a common interest community and if [twelve]**  
3 **months passes after the date the action is commenced without judgment having entered in**  
4 **that action and title to the dwelling unit having passed pursuant to that judgment, the**  
5 **amount of the association's lien which has priority over the first mortgage shall thereafter**  
6 **automatically increase by an additional month of common expense assessment based on the**  
7 **periodic budget adopted by the association on that dwelling unit for each additional month**  
8 **or part thereof that subsequently passes until judgment enters and title passes to the**  
9 **creditor or the purchaser of that dwelling unit.**

10 (e) This section does not affect the priority of mechanics' or materialmen's liens or the  
11 priority of liens for other assessments made by the association. A lien under this section is not  
12 subject to [insert appropriate reference to state homestead, dower and curtesy, or other  
13 exceptions].

14 (f) Unless the declaration otherwise provides, if two or more associations have liens for  
15 assessments created at any time on the same property under this section, those liens have equal  
16 priority.

17 (g) Recording of the declaration constitutes record notice and perfection of the lien. No  
18 further recordation of any claim of lien for assessment under this section is required.

19 (h) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien  
20 are instituted within three years after the full amount of the assessments becomes due.

21 (i) This section does not prohibit actions against unit owners to recover sums for which  
22 subsection (a) of this section creates a lien or prohibit an association from taking a deed in lieu of  
23 foreclosure.

1 (j) Unless the declaration provides for a lesser interest rate, a statutory lien under this  
2 section shall accrue interest at the rate of one percent per month.

3 **ARTICLE 6**

4 **REMEDIES**

5 **SECTION 601. HOMEOWNER REMEDIES.**

6 (a) A homeowner may assert any material violation of this statute as a defense in a  
7 judicial foreclosure, or seek injunctive relief against any nonjudicial foreclosure sale based on  
8 any material violation of this statute, prior to confirmation of the sale pursuant to Section 406.

9 (b) A homeowner injured by any violation of this statute may bring an action in [specify  
10 court] for damages against the foreclosing creditor before or after confirmation of the foreclosure  
11 sale. The court [shall][may] award reasonable attorney's fees and costs to a homeowner who  
12 prevails in an action under this Section.

13 [(b)(ALT) A violation of this statute that causes injury to a homeowner is also a violation  
14 of [state consumer protection or unfair and deceptive practices statute] and entitles the  
15 homeowner to all remedies provided for under [relevant section of CP or UDAP statute]].

16 **Reporters' Drafting Notes**

17  
18 Prior to confirmation of the foreclosure sale, the homeowner may raise a  
19 material violation of the statute, for example a materially inaccurate notice of the  
20 amounts needed to cure a default, to prevent the foreclosure sale (or  
21 confirmation), until the violation has been corrected and remedied. After a  
22 foreclosure sale the homeowner's remedy for violations of the statute is to seek  
23 damages from the foreclosing creditor, and a bona fide sale purchaser is entitled  
24 to rely on the conclusive effect under Section 407. If a violation by the creditor  
25 can be cured timely so that full compliance is achieved, the foreclosure may  
26 proceed.

27  
28 **CHAIR'S NOTE** – the substance of the following sections 602 through 607  
29 (excluding the alternative provisions regarding abrogation of the holder in due  
30 course doctrine) were prepared, at my request, by observer George Holler. The  
31 Reporters and I have edited Attorney Holler's text to conform to Conference

1 style, with the result that considerable portions of his original text have been  
2 moved to the Reporter’s Comments. I also deleted certain other provisions of the  
3 original text which I felt were inherent in the authority of a court and need not be  
4 restated.

5  
6 **SECTION 602 –ADDITIONAL DEFENSES TO FORECLOSURE**  
7

8 (a) In addition to the rights granted a homeowner under Section 601, and without  
9 limiting any rights existing under common law or by statute, the following are defenses to  
10 foreclosure:

- 11 1. Payment or tender of payment;
- 12 2. Discharge;
- 13 3. Cure, in accordance with Section 204 of this Act.
- 14 4. Any defense that the homeowner or obligor could assert under applicable contract  
15 law, including forgery, lack of capacity, duress, absence or failure of  
16 consideration, fraud, misrepresentation, unconscionability, failure of a condition  
17 precedent, or other generally applicable contract defenses.
- 18 5. Any equitable defenses such as estoppel, laches or unclean hands.
- 19 6. Release by cancellation of debt.
- 20 7. A violation by a creditor, servicer, their predecessors in interest, or their agents of  
21 [insert state UDAP and other relevant consumer protection statutes applicable to  
22 residential mortgage obligors], or Chapter 41 of Title 15 of the United States  
23 Code.
- 24 8. A defect in a mortgage resulting from a failure to comply with [insert state  
25 mortgage execution requirement statute] that has not been cured under [insert  
26 state curative statute];



1           9. A determination that the creditor or its predecessor in interest was not licensed  
2           under [insert state mortgagee licensing statute] or was not legally authorized to  
3           make the loan under federal law;

4           10. Breach of the duty of good faith and fair dealing.

5           **SECTION 603 – PROCEDURE FOR ASSERTING DEFENSES IN A NONJUDICIAL**  
6           **FORECLOSURE**

7  
8           (a) In a non-judicial foreclosure proceeding, a homeowner or obligor may bring a separate  
9           action against a creditor or its agents asserting a defense to foreclosure. The filing of an action  
10          under this Section by a homeowner or obligor shall operate as an automatic stay, applicable to all  
11          entities, of any foreclosure, pending a court hearing or order lifting the stay.

12          (b) If the obligor or homeowner establishes a defense to foreclosure or a violation of this act,  
13          the court [shall] [may] award the obligor or homeowner attorney’s fees and costs pursuant to  
14          Section 606(a)(3).

15          (c) In an action under this section, if the court determines that a valid defense to the  
16          foreclosure action exists, the court may enter whatever order is just and equitable under the  
17          circumstances.

18          **SECTION 604– ENFORCEMENT BY ATTORNEY GENERAL**

19          The attorney general may bring an action to enjoin a pattern of violating this statute. In  
20          such an action the court may issue an injunction or order, which may include requiring steps to  
21          be taken to remedy violations or the payment of damages to aggrieved homeowners, the  
22          reasonable costs of the attorney general’s investigation, or additional funds for consumer  
23          education programs, training, and other activities designed to protect against violations of this  
24          act. The injunction or order may bind the creditor, servicer, their predecessors in interest, or their  
25          agents.

1        **SECTION 605 – CERTAIN ACTS PROHIBITED**

2        A creditor, servicer, or its agent shall not:

3        (a) Discourage, either overtly or by implication, the homeowner or obligor from  
4 participating in any loss mitigation or facilitation;

5        (b) Communicate directly with any homeowner or obligor represented by counsel without  
6 express permission from that counsel; or

7        (c) Misrepresent any aspect of the foreclosure process,

8        **SECTION 606 – CIVIL LIABILITY**

9        (a) When a homeowner or obligor establishes a defense to foreclosure or when any creditor,  
10 servicer, or its agent fails to comply with any provision of this act with respect to any obligor or  
11 homeowner, such creditor, servicer, or agent is liable to such obligor or homeowner for:

12        (i) Any actual damage sustained by such obligor or homeowner;

13        (ii) Such additional damages as the court may allow, but not exceeding [\$15,000.00] per  
14 obligor and homeowner.

15        (iii) In the case of any successful action to enforce the foregoing liability or establish a  
16 defense to foreclosure, the costs of the action or defense, together with a reasonable attorney's  
17 fee as determined by the court.

18        (b) In determining the amount of liability under subsection (a)(2), the court shall consider,  
19 among other relevant factors:

20        (i) The frequency and persistence of noncompliance by the creditor, servicer, or agent;

21        (ii) The nature of such noncompliance, and

22        (iii) The extent to which such noncompliance was intentional.

1           **SECTION 607 – ABROGATION OF THE HOLDER IN DUE COURSE RULE IN**  
2           **FORECLOSURES**

3  
4           **[Alternative # 1]** (a) Nothing in this act abrogates the rights of a holder in due course to  
5 pursue its rights against an obligor on an instrument. Notwithstanding the foregoing, [and  
6 subject to the limitations contained in Alternatives 3 and 4 below] a creditor who forecloses  
7 under this act is subject to all claims and defenses that the homeowner or obligor could assert  
8 against the creditor who first owned the obligation.

9           **[Alternative # 2]** (a) Notwithstanding [insert reference to State UCC 3-305], when a  
10 party with the right to foreclose under Section 401 initiates foreclosure, the homeowner or  
11 obligor may assert any available defense, including those set forth in Section 602 **[Alternative #**  
12 **3:** provided, that:

13           (a) a homeowner may not assert a defense against a party entitled to foreclose which  
14 could not, because of any applicable statute of limitations, be asserted against the original holder  
15 of the note for which the mortgage serves as collateral; and

16           (b) a party entitled to foreclose who is not the original holder of the note for which the  
17 mortgage serves as collateral shall not be liable for more than the outstanding principal amount  
18 of the note for which the mortgage serves as collateral unless that person is the original holder of  
19 that note. ]

20           **[Alternative # 4:** (c) A [creditor] [party entitled to foreclose] who is not the original  
21 holder of the note for which the mortgage serves as collateral is not subject to any claims and  
22 defenses (other than the defenses to which a holder in due course is liable under [insert reference  
23 to UCC Section 3-\_\_\_\_]) unless that note was executed after the date this [act] became effective in  
24 this state. ]

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## Reporters' Drafting Notes

1. Section 602 lists a broad range of potential defenses available to a homeowner; they include:

- a. Payment as provided in UCC Sections 3-602 and § 3-603 and other applicable law;
- b. Discharge as provided in UCC Section 3-604 and other applicable law.
- c. Cancellation of debt might include, for example, a case where a creditor, servicer, their predecessors in interest, or their agents file a Form 1099-C, "Cancellation of Debt" with the Internal Revenue Service; such a filing would be a defense to foreclosure.
- d. Breach of the duty of good faith and fair dealing encompasses a broad range of potential 'bad' behavior which, if sufficiently egregious, would warrant the court's determination that the mortgage should not be enforced against the homeowner. The failure by a creditor, servicer, their predecessors in interest, or their agents to fairly and honestly perform their obligations under the note, mortgage, or any federal or state mortgage lending or mortgage servicing law, regulation or rule, or any mortgage-related settlement to which the Attorney General, Department of Banking or Department of Consumer Protection is a party, may constitute a defense to foreclosure.

Without limiting the general application of the foregoing, the following conduct by any of the named entities might, in appropriate circumstances, constitute a breach of the implied covenant of good faith and fair dealing:

1. Conjuring up a pretended default;
  2. Asserting an interpretation of law or contract contrary to the creditor, servicer, or agent's own understanding;
  3. Falsification of facts;
  4. Taking advantage of the necessitous circumstances of the obligor or homeowner to extort a Modification of the note or mortgage without a legitimate commercial reason;
  5. Harassing demands for assurances of performance;
  6. Rejection of performance for unstated reasons;
  7. Willful failure to mitigate damages;
  8. Abuse of a power to determine compliance or to terminate a modification or forbearance agreement;
  9. Failure to inform the obligor and homeowner of all loss mitigation options available;
  10. If demanded by the obligor or homeowner, failure to provide to the obligor or homeowner written proof of any investor restrictions to any form of loss mitigation; and
  11. Failure to honor any loss mitigation process that had already commenced before the creditor, servicer or their agent became the creditor, servicer or agent with respect to the mortgage.
2. The potential judicial remedies available under Section 603(c) might include, for example:

- 1 a. A permanent or temporary injunction barring the foreclosure of the mortgage for a
- 2 period of time to be determined by the court;
- 3 b. Reduction of the amount of principal, interest or penalties assessed by the creditor;
- 4 c. An order by the court releasing the mortgage; or
- 5 d. An award of actual or statutory damages and attorney’s fees and costs to the obligor
- 6 or homeowner pursuant to SECTION 606 of this act;
- 7

8 3. Examples under Section 605 (c) of how a creditor might be found to have violated this  
9 provision might include such actions as: (i) informing the homeowner or obligor that a sale date  
10 is set when the procedures for setting a sale have not been completed; (ii) stating that a  
11 foreclosure has been stayed due to loss mitigation and at the same time continuing with the  
12 foreclosure process; or (iii) Stating that a homeowner is not eligible for loss mitigation options  
13 when those options have not yet been evaluated.

14  
15 **ARTICLE 7**

16 **EFFECTIVE DATE AND REPEALER**

17 **SECTION 701. EFFECTIVE DATE** This Act takes effect on [insert date].

18 **SECTION 702. PRE-EFFECTIVE DATE TRANSACTIONS.**

19 (a) Except as otherwise provided in this Section, this Act applies to the foreclosure of a  
20 mortgage within its scope, even if the mortgage was created before this Act takes effect.

21 (b) This Act does not affect a foreclosure commenced before this Act takes effect.

22 **Reporters’ Drafting Note**

23  
24 This Act applies to the foreclosure of mortgages created before the  
25 effective date of this Act, unless the creditor has taken action to foreclose before  
26 the effective date.

27  
28 **SECTION 703. SPECIFIC REPEALER.** The following acts and parts of acts are hereby  
29 repealed:

30 [List statutes and parts of statutes to be repealed.]

31 **Legislative Drafting Note**

32  
33 This section should be separately prepared for each state. In each state it is  
34 necessary to pay careful attention to how this Act is to be blended with existing  
35 state law. The statutes to be specifically repealed will include statutes relating to  
36 notices of default, intent to accelerate, and the right to cure to be sent to

1 homeowners; notices and standards for mediation and other types of facilitation;  
2 determination of who has the right to commence foreclosure; and advertisement  
3 and notices of foreclosure sales; confirmation of sales. Given the scope of this  
4 Act, which is limited to residential foreclosures, care should be taken not to repeal  
5 statutes to the extent they should continue to apply to non-residential foreclosures.  
6 In some instances, instead of repeal it may be useful to amend other state statutes  
7 to limit their scope to foreclosures that are not within the scope of this Act.  
8

9 **SECTION 704. GENERAL REPEALER.** All acts and parts of acts inconsistent with  
10 this Act are hereby repealed.

11 **Reporters' Drafting Note**

12  
13 This section provides for the repeal of all other legislation inconsistent with this  
14 Act.  
15