

UNIFORM HOME FORECLOSURE PROCEDURES ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

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IN ALL THE STATES

at its

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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HOME FORECLOSURE PROCEDURES ACT

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UNIFORM HOME FORECLOSURE PROCEDURES ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Home Foreclosure Procedures Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Abandoned property” means mortgaged property with respect to which the homeowner and all persons claiming through the homeowner, including tenants, have relinquished possession. The term does not include unoccupied mortgaged property that is:

(A) undergoing construction, renovation, or rehabilitation that is proceeding with reasonable diligence to completion;

(B) physically secured and used or held for use by the homeowner as a vacation or seasonal home; or

(C) physically secured and the subject of a probate action, action to quiet title, or other litigation in which ownership is contested.

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

(3) “Creditor” means a person that is entitled to foreclose a mortgage under Section 104.

(4) “Expenses of foreclosure” means the lesser of:

(A) the reasonable expenses incurred by a foreclosing creditor to the extent provided in the mortgage; or

(B) the maximum amount permitted by law of this state other than this [act] as expenses in connection with a foreclosure.

(5) “Foreclosure” means a process, proceeding, or action to enforce a mortgage by terminating a homeowner’s interest in mortgaged property or obtaining possession of mortgaged property. The term does not include a voluntary transfer by the homeowner or a process, proceeding, or action to recover possession of property after a completed foreclosure sale. “Foreclose” has a corresponding meaning.

(6) “Foreclosure resolution” means a process in which a neutral individual assists a creditor and obligor to exchange information and prepare for and attend an in-person meeting or other communication at which the creditor, obligor, and neutral individual simultaneously can communicate with each other with the objective of reaching an agreement between the parties as an alternative to foreclosure.

(7) “Foreclosure-resolution agency” means [the administrative or judicial agency designated by the state to supervise foreclosure resolution].

(8) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(9) “Holder” means a person in possession of a negotiable instrument that is payable either to bearer or to an identified person in possession of the instrument.

(10) “Homeowner” means a person that owns an interest in mortgaged property, other than a mortgage, lien, security interest, easement, servitude, or leasehold with a term of less than [20] years, including renewal options.

(11) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

(12) "Loss mitigation" means an alternative to foreclosure offered by a creditor to a homeowner in default or facing imminent default.

(13) "Mortgage" means a consensual interest in real property which secures an obligation. The term does not include a lien that secures an obligation owed to a homeowners' association in a common-interest community.

(14) "Mortgage agreement" means a record that creates a mortgage.

(15) "Mortgaged property" means real property improved with not more than four dwelling units which is subject to a mortgage. The term includes:

(i) an attached single-family unit;

(ii) a single-family manufactured-housing unit or a time share in a dwelling unit if either is treated as real property under law of this state other than this [act];

(iii) real property on which construction of not more than four dwelling units has commenced; and

(iv) a single-family unit in a common-interest community.

The term does not include real property that, when the mortgage being foreclosed was created, was used or intended to be used primarily for nonresidential purposes.

(16) "Negotiable instrument" means a negotiable instrument as defined in [U.C.C. Section 3-104].

(17) "Negotiated transfer" means a transfer of title to mortgaged property pursuant to Section 501.

(18) "Neutral individual" means an individual not selected by either party who can reasonably be expected to be impartial in assisting the parties with the objective of reaching an

agreement as an alternative to foreclosure.

[(19) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial process under [insert statutory reference].]

(20) “Obligation” means a debt or other duty or liability of an obligor secured by a mortgage.

(21) “Obligor” means a person that:

(A) owes payment or performance of an obligation;

(B) has signed a mortgage agreement with respect to mortgaged property; or

(C) is otherwise accountable in whole or in part for payment or performance of the obligation.

(22) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

(23) “Public sale” means a sale by auction authorized by law of this state other than this [act].

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

(25) “Servicer” means a person responsible for servicing an obligation, including a person that holds or owns an obligation or originates a mortgage loan if the person also services the obligation.

(26) “Servicing” means:

(A) receiving a scheduled periodic payment from an obligor under the terms of an obligation, including an amount received for an escrow account;

(B) making or advancing a payment to the owner of an obligation on account of an amount due from the obligor under a mortgage-servicing loan document or servicing contract;

(C) making a payment to the obligor under a home-equity-conversion mortgage or reverse mortgage; or

(D) evaluating the obligor for loss mitigation or communicating with the obligor with respect to loss mitigation.

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

Legislative Note: *In a state that allows one or more types of nonjudicial foreclosure of a residential mortgage, a reference to the relevant statute should be added to the definition of “nonjudicial foreclosure.” In a state that does not allow nonjudicial foreclosure, this definition should be deleted, along with references to “nonjudicial foreclosure” elsewhere in this act. In some states, a land sale installment contract does not constitute a mortgage, with all the attendant consequences for a homeowner and a creditor, until a specified percentage of the original principal amount has been paid to the creditor. In Illinois, for example, that percentage is 50 percent of the original principal amount. In a state in which the issue arises, a statutory drafter should make appropriate revisions to this act to track existing practice in that state.*

Comment

1. The definition of “abandoned property” works in tandem with the factors listed in Section 603(a). Whether mortgaged property is “abandoned property” is determined by the facts of each case. The Section 603(a) factors are not exclusive; they serve an evidentiary purpose. The core question is whether the homeowner is presently in possession of the property. The question must be answered by evaluating the facts related to the homeowner’s use of the property.

2. The definition of “foreclosure resolution” requires at least one “in-person” meeting or other communication between the parties and a third-party neutral individual. The alternative requirements of either an “in-person” meeting or other form of electronic communication 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, video conference or other electronic means so long as all the parties and the neutral individual are able to simultaneously hear or communicate with one another.

3. The definition of “expenses of foreclosure” limits the expenses that a foreclosing party may impose on a borrower in connection with the foreclosure process to ‘reasonable’ expenses, even if other law of the state would allow expenses which would otherwise not satisfy that standard. The definition contemplates that these allowable expenses would include the reasonable costs of all typical foreclosure expenses, including such costs as sending notices, advertising, title searches, inspections and examinations of the mortgaged property, management and securing of the mortgaged property, insurance, filing and recording fees, attorney’s fees and litigation expenses incurred to the extent provided in the mortgage or authorized by other law, appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction, the fee of a court-appointed receiver, and other expenses reasonably necessary to the foreclosure.

4. The definition of “holder” is taken from revised Article 1: U.C.C. § 1-201(b)(21)(A) and the terms “bearer” and “identified person” have the same meanings in this act as in the U.C.C. The definition of “holder” in unrevised Article 1 has slightly different language, but is the same in substance.

5. The terms "homeowner" and "obligor" are separately defined because some provisions of this [act] apply to one rather than to both individuals. For most home mortgage transactions, the same individual (or individuals) will be both a homeowner and an obligor. However, occasionally, an individual will be a homeowner but not an obligor; examples might include a spouse or heir who acquires an ownership interest, but has not assumed the mortgage obligation. Similarly, from time to time an individual will be an obligor but not a homeowner; examples might include a guarantor or a person who conveys an ownership interest to another person after signing a mortgage agreement.

6. “loss mitigation” includes such actions as a repayment plan, forbearance agreement, loan modification, short sale, partial mortgage insurance claim, negotiated transfer and deed in lieu of foreclosure.

7. The term “mortgage” refers to the lien held by the creditor, which secures payment of the obligation, whereas the term “mortgage agreement” refers to the writing or other record that memorializes the parties’ agreement and creates the mortgage. Depending upon local usage and custom, the mortgage agreement may be denominated as a mortgage, deed of trust, trustee deed, security deed, deed to secure debt, or the like.

8. The definition of ‘Obligor’ includes, among other standards, a statement that the person has ‘signed’ a mortgage agreement. The term ‘sign’ in this sense has the same meaning as the same term has in UCC Section 1-201(b)(37).

9. The definition of an obligation includes a non-recourse debt, whether the debt is non-recourse due to the application of anti-deficiency judgment legislation, agreement of the parties or for other reasons.

10. In Section 102 (15), real property is “mortgaged property” if its primary use is residential. It includes but is not limited to owner-occupied principal residences and second or vacation homes.

The definition includes a broad range of structures commonly used for residential purposes, so long as the property does not consist of more than four dwelling units. The enumerated examples include such common structures as

- ‘**attached single-family units**’, which are commonly described as ‘townhouses’ or ‘row houses’;
- ‘**single-family manufactured housing units**’ – a broad category of structures ranging from factory-built single family homes to mobile homes or trailers which are permanently located on a foundation and connected to utility lines, so long as they are treated as real estate under state law; and
- ‘**time shares**’ – often known as ‘interval ownership’ – in single family dwelling units, so long as those interests are treated as real estate under state law.

The definition excludes parcels of real property that are used primarily for non-residential business purposes but which also contain one-to-four dwelling units, such as a farm with a farmhouse or a manufacturing facility that includes a residence for the company’s chief executive officer. Accordingly, this act does not apply to the foreclosure of mortgages on such a property; such mortgages are generally made as commercial mortgage loans with markedly different terms and underwriting standards than those used for home mortgage lending.

Likewise, the term “mortgage” does not include a blanket mortgage that covers multiple parcels containing more than four dwelling units in the aggregate.

11. The definitions of ‘servicer’ and ‘servicing’ are based in part on the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R. § 3500.2 (b).

SECTION 103. SCOPE; CONFLICTING LAW.

- (a) This [act] applies to foreclosure of mortgaged property in this state.
- (b) If there is a conflict between this [act] and other law of this state, this [act] prevails.

SECTION 104. PERSON ENTITLED TO COMMENCE FORECLOSURE.

(a) In this section, “transferable record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means that:

- (1) would be a negotiable instrument if the record were in writing;
- (2) the issuer of the record expressly has agreed is a transferable record; and
- (3) relates to an obligation.

(b) The only person that may commence a foreclosure is:

(1) if the obligation is evidenced by a negotiable instrument, the person entitled to enforce the instrument under [U.C.C. Section 3-301], but if the person is not in possession of the instrument due to its loss, theft, or destruction, the person must satisfy the requirements of Section 403;

(2) if the obligation is evidenced by a transferable record, the person with control of the record; or

(3) if the obligation is not evidenced by a negotiable instrument or transferable record, the person entitled to enforce the obligation as determined by law other than this [act].

Comment

1. The person who is authorized to foreclose a mortgage by this section is a “creditor” as defined in Section 102(3). To foreclose, the creditor must also satisfy the requirements set forth in Section 401 or 402.

2. This section resolves the problem of who has standing to foreclose by designating the person who is entitled to enforce the obligation, to be determined under other law. When the obligation is evidenced by a negotiable instrument, Article 3 of the Uniform Commercial Code provides the governing rules. When the obligation is evidenced by a “transferable record” as provided for by the Uniform Electronic Transactions Act (UETA) or the federal E-sign Act, the person in control of the transferable record has the right to foreclose; both Acts grant to a person having control of a “transferable record” the right to enforce a promissory note evidenced by an “electronic record,” as those terms are defined in those Acts.

3. When the obligation is not a transferable record and is not evidenced by a negotiable instrument, law other than this act and other than UCC Article 3 – which does not apply to non-negotiable instruments - will determine who is entitled to enforce the obligation. This includes situations in which the obligation is evidenced by an instrument that is not negotiable and situations in which the obligation is not evidenced by any type of instrument authenticated by the obligor.

As an example of the former, an obligor may sign a promissory note that has terms that makes the note nonnegotiable. As an example of the latter, under the law of some states an installment land contract creates a mortgage relationship between the parties, in which the vendee’s obligation to pay the price usually is not reflected in an instrument. In such cases, law other than this act determines who has the right to foreclose.

4. At the present time there is substantial interest in the prospect of creation of a mortgage note registry, consisting of an electronic registry of owners, mortgagees, and holders of

obligations. Such a registry could be created under either federal or state law or, at least in theory, both. It would maintain the records of mortgages and obligations under standards designed to ensure that each record is unique, identifiable, and unalterable. Such a system may allow the registration of all types of mortgage obligations, including those evidenced by negotiable instruments and transferable records. A mortgage registry of this type, if and when created, would indicate the person who has the right to enforce mortgage obligations and to foreclose on the mortgaged property. For registered obligations, the mortgage registry would supplant the rules provided in parts (1) and (2) of this Section.

5. This section does not state a separate rule for determining when a creditor who holds a security interest in a note to secure an obligation owed to the creditor has the right to foreclose. UCC Article 9 covers both sales of instruments and assignments of instruments that secure an obligation of the assignor. A creditor who takes possession of a negotiable instrument will acquire the right to foreclose. Other law determines when a creditor who takes possession of an instrument that is not negotiable to secure an obligation owed to the creditor acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide rules indicating when a secured party has the right to collect on collateral and to enforce the debtor's rights with respect to property that secures obligation owed to the debtor (i.e., the obligation to pay the mortgage loan to the debtor).

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

7. The definition of "transferable record" is taken directly from the definitions of 'electronic record' and 'transferable record' as they appear, respectively, in the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Sections 7006(4) and 7021(a)(1). Subsection (a) (3) of this section substitutes the words 'relates to an obligation' for the words "relates to a loan secured by real property" in 15 U.S.C. Section 7021(a)(1)(C) because the term 'obligation' is defined in this [act] and has the same meaning as 'a loan secured by real property'. Interpretation of the term 'transferable record' in this [act] should be consistent with interpretation of that term under federal law and under Section 16 of the Uniform Electronic Transactions Act.

SECTION 105. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.

(a) A person whose conduct is governed by this [act] shall comply in good faith with the requirements of this [act] and act in good faith throughout the foreclosure process.

(b) A creditor shall proceed in a commercially reasonable manner in complying with this [act].

Comment

1. For statutory duties that include explicit and precise rules for their performance, such as the time period for sending notices under §§201 and 302, a creditor's failure to implement a different rule cannot violate the "commercially reasonable" standard when the precise rule has been followed. On the other hand, the good faith standard would bar dishonest conduct that is literally in compliance, for example, seeking an abandoned property determination under §602 for a home the creditor knows is not abandoned, although it may meet the statutory criteria that give rise to a presumption of abandonment.

2. The obligation to act in good faith set forth in subsection (a) relates to the performance of specific duties and obligations imposed on persons by this act and to other actions taken throughout the foreclosure process.

3. The term "creditor" in subsection (b) and elsewhere in the Act includes servicers who have the right to foreclose the mortgage under Section 104.

4. The duty of good faith governs the conduct of persons who take any actions in connection with the foreclosure process governed by this act, from the sending of the Section 201 notice through sale and sale confirmation, if applicable. However, the duty does not extend to other aspects of the mortgage and obligation creation, performance and enforcement processes, which are not covered by this act.

SECTION 106. PROHIBITED ACTS. A creditor may not:

(1) make a misleading statement orally or in a record to a homeowner or obligor which would discourage a reasonable person from participating in loss mitigation or foreclosure resolution; or

(2) misrepresent any aspect of a foreclosure, including informing the homeowner or obligor that:

(A) a sale date is set when the procedure for setting a sale date has not been completed;

(B) a foreclosure sale has been postponed, canceled, or stayed due to loss mitigation or foreclosure resolution when the sale has not been postponed, canceled, or stayed; or

(C) the obligor is not eligible for a loss-mitigation option when the option is

available and the creditor has not evaluated the option.

SECTION 107. APPLICATION OF LOCAL REGULATION.

(a) [Notwithstanding [insert reference to any applicable “home rule” provision under the law of this state, a][A] municipality, [county], or other political subdivision in this state may not impose a regulation, restriction, or limitation on foreclosure or add to or diminish the rights and obligations under this [act] of a creditor, servicer, homeowner, or obligor.

(b) Except as otherwise provided in subsection (a), this [act] does not invalidate or modify a zoning, subdivision, building, or safety code or other ordinance or regulation generally applicable to the use of real property.

Comment

1. This section addresses local laws that regulate residential properties that are in foreclosure or have been sold at foreclosure. During recent years, local governments in a number of states have enacted ordinances that establish mediation or “dispute resolution” programs or that regulate abandoned properties. Lenders have expressed concern that such local programs are often burdensome, especially due to their limited geographical scope. Article 3 of this Act establishes a uniform statewide foreclosure resolution program, and Article 6 regulates abandoned properties in foreclosure on a uniform statewide basis, supplanting the need for local regulation of these matters.

2. Subsection (b) makes it clear that municipal ordinances generally applicable to real property in a municipality would not be affected by this act, regardless of who owns the property, and therefore will apply with equal force to property owned by homeowners or lenders. Accordingly, for example, a local ordinance mandating the maintenance of yards and blighted property would apply with equal force to a blighted property whether or not owned by a homeowner or creditor, and an ordinance enabling a municipality to repair blighted property and lien the property for the costs of the work, if it were otherwise lawful under applicable state law, would not be barred by this section.

SECTION 108. SERVICER.

(a) A creditor may delegate a duty under this [act] to a servicer.

(b) A servicer to which a creditor delegates a duty or a person authorized to foreclose under Section 401(c) or 402(b):

(1) has all rights conferred on a creditor by this [act] with respect to the authorized action, unless limited by contract; and

(2) is subject to the duties imposed by this [act] on the creditor.

(c) This section does not prevent a creditor from delegating its duties under this [act] to a person that is not a servicer.

(d) A creditor's liability for noncompliance with this [act] by a servicer or other person is determined by law of this state other than this [act].

SECTION 109. NO WAIVER. The rights of a homeowner or obligor under this [act] may not be waived, and the duties of a creditor under this [act] may not be diminished, by contract.

[ARTICLE] 2

NOTICES; RIGHT TO CURE

SECTION 201. NOTICE OF DEFAULT; RIGHT TO CURE.

(a) A person may not initiate foreclosure under [insert reference to state foreclosure law other than this [act]] until 30 days after the person sends separately to each obligor a written notice of default and right to cure.

(b) The notice under this section must state:

(1) the nature of the default, including a statement, as of the date of the notice, of all past-due payments, fees, and other charges owed to the creditor;

(2) the specific action the obligor must take to cure any curable default, including the exact amount that must be paid, all payment methods permitted by Section 203, and any other payment method acceptable to the creditor;

(3) the date by which the default must be cured, which may not be fewer than 30

days after the date the notice is sent;

(4) that if the obligor does not cure the default, the creditor may accelerate the obligation and demand payment of the full amount of the obligation, not just past-due payments, and may foreclose the mortgaged property;

(5) the effect of curing the default, including the right to have the obligation and mortgage remain in effect;

(6) that the obligor may dispute the default and raise any other defense to foreclosure or payment of the obligation or the manner of exercising those rights;

(7) the name of:

(A) the creditor and the facts that establish the creditor's right to foreclose under Section 104;

(B) the servicer, if different from the creditor; and

(C) the legal owner of the obligation, if the creditor is not the legal owner;

(8) that the obligor may request a copy of the negotiable instrument or other evidence of the obligation and a copy of any record that demonstrates the right to foreclose; and

(9) if the creditor is relying on a lost, destroyed, or stolen negotiable instrument, the information required by Section 403(b).

(c) The notice under this section may contain additional information, including a statement that additional amounts will come due after the date of the notice.

(d) The notice under this section may be combined with other notices required by the mortgage agreement or law, but may not be combined with the notice required by Section 302.

Comment

1. The itemization of the amount due as of the notice date is a critical piece of information for the homeowner or obligor and should be stated as exactly as possible. The

amount included for attorneys' fees should be limited to those accrued prior to the date of the notice, and thus should not include retainers or advances to attorneys that would be refunded in the event of a prompt cure.

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

3. This Act refers in several sections to the ‘foreclosure process’; see, for example, Sections 105(a) and this section 201. The notice of default under this Section is the beginning of the foreclosure process prescribed by this Act. However, the “first notice or filing” under federal regulations mandating a 120-day waiting period, 24 C.F.R. § 1024.41(f)(1), is the [Complaint or other first court filing in judicial state][Notice of Sale in non-judicial state]. Therefore the notice of default may be sent during the 120-day waiting period under the federal rule.

4. Items (1) through (6) are adapted from the elements of notice in the standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific deadline to cure the default. Items (7) and (8) are the ownership statement required by the national servicing settlement, and call for the servicer to identify its basis for standing at the outset of foreclosure proceedings, so that any disputes can be resolved promptly. This notice does not displace all state-specific aid programs and counseling notices which necessarily will depend on state funding – for example, Pennsylvania requires a separate 30-day notice of how to apply for its Homeowner’s Emergency Mortgage Assistance Program.

Subsection (b)(7)(A) requires the creditor to state the facts establishing its right to foreclose. For example, the holder of a negotiable instrument could comply by stating that the original instrument is in its possession, or in the possession of a specified agent, and the instrument is endorsed to the creditor or in blank.

5. In subsection (b)(2), the actions the homeowner needs to take in order to cure the default are governed by § 203. If the default by its nature cannot be cured, for example if the property has been forfeited or foreclosed by a senior lienholder, the notice may simply state that the default may not be cured.

6. If a homeowner or obligor has cured a default, any subsequent foreclosure based on a later default must be preceded by a new notice, subject to the limitations on repeated defaults contained in Section 203. This is because a cure restores the homeowner to the same legal position as if no default had occurred, §203(d). If, on the other hand, as a result of foreclosure resolution or otherwise, the homeowner has tendered payments under a forbearance plan or other workout but has not fully cured the default that was the subject of the notice, no new notice is required in the event the workout fails and the creditor chooses to proceed with foreclosure.

7. The servicer's duty to respond to an obligor's request under subsection (b)(8) is defined by other federal and state law governing information requests to servicers.

SECTION 202. METHOD OF NOTICE. A notice required by Section 201 or 302 must be sent by first-class mail addressed to each obligor at the obligor's last-known address. At least one mailed notice also must be addressed to "homeowner" at the address of the mortgaged property. If the obligor or the obligor's representative has requested in a record notice by electronic mail and has provided the creditor an electronic-mail address, the notice also must be sent to the electronic-mail address.

Comment

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

2. Notice must be sent by ordinary first class mail. First class mail has the characteristic that it will be delivered to the last known address whether or not the recipient accepts delivery in person. The creditor may supplement first class mail with certified mail or overnight delivery but may not rely solely on methods that require the recipient to accept delivery in person.

SECTION 203. RIGHT TO CURE DEFAULT.

(a) A person may cure a monetary default on an obligation by tendering payment. The payment must be in cash or by cashier's check, certified check, teller's check, or equivalent obligation of a bank, or by electronic-funds transfer, or money order in the amount specified in subsection (c) at any time after a notice under Section 201 and not later than two days before a scheduled or postponed foreclosure sale.

(b) A person may cure a default on an obligation other than a monetary default at any time not later than two days before a scheduled or postponed foreclosure sale.

(c) To cure a default under this section, a person must:

(1) tender all amounts that would have been due at the time of tender in the

absence of acceleration;

(2) perform any other duty under the obligation or mortgage agreement which would have been due in the absence of default or acceleration;

(3) tender all expenses of foreclosure specified in a record provided by the creditor which accrued before the time of tender; and

(4) tender any late fees, if provided for in the mortgage agreement or obligation and permitted by law other than this [act].

(d) Cure of a default under this section restores the obligor to the same position under the mortgage and the obligation the mortgage secures as if the default had not occurred.

(e) This section does not impair a greater right to cure a default which an obligor has under the mortgage agreement or the obligation.

(f) This section does not limit a right of an obligor to redeem mortgaged property by paying the full amount of the accelerated obligation at any time before a foreclosure sale is completed.

Comment

1. The cure of a default on an obligation secured by a mortgage has the effect of de-accelerating the payments due after acceleration, but before a completed foreclosure sale. The homeowner and obligor receive notice detailing the amounts needed to cure the default pursuant to Section 202, and identifying any nonpayment defaults, such as failure to maintain insurance.

2. Subsection (a) lists the forms of payment that a creditor must accept; the creditor may choose to accept other forms of payment and, in that case, would also include those other forms in its Section 201 notice. In the unlikely event that one of these forms of payment is not honored, for example if a cashier's check proves to be forged, the default is not cured and subsection (d) would not apply. Tender of the required payment amount results in a cure even if the creditor wrongfully refuses to accept the payment. In that event, the homeowner or obligor must continue to tender the required payment until the creditor accepts it.

3. The right to cure as used in this Act includes the right to reinstate the mortgage after acceleration. "Cure" is used in a broad sense here, similar to the use of the term in the Bankruptcy Code, §1322(b)(5).

4. The statutory right to cure provided by this section may not be waived by contract. In the event of a dispute between the creditor and a homeowner or obligor concerning the amounts needed to cure, or any nonmonetary performance that may be claimed as due, either party may seek declaratory relief from an appropriate court, and if appropriate, a temporary stay of any foreclosure sale to resolve the cure dispute.

5. If a default is cured, restoring the homeowner and obligor to the same position as if no default occurred means that if there is a later default, new notices must be sent prior to foreclosure. Conversely, if as a result of foreclosure resolution under Article 3 or otherwise, a settlement is reached but the homeowner or obligor does not fully cure the default, new notices are not required. However, nothing in this [act] requires a lender who properly assessed late fees or default interest following a default to disgorge those fees if the default is subsequently cured.

SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.

(a) A creditor does not have a duty under Section 201, 302, 404(e), or 405 to notify a person unless the creditor knows:

- (1) the person is a homeowner or obligor; and
- (2) the identity of the person.

(b) If a creditor knows the identity of a homeowner or obligor but does not know the homeowner's or obligor's mailing address, notice to the homeowner or obligor under Sections 201, 302, 404(e), and 405 must be sent to the address of the mortgaged property.

Comment

Section 204 is based on UCC § 9-605. Its purpose is to relieve the creditor from duties owed to a homeowner or obligor if the creditor or servicer does not know about that person. This may be the case, for example, when an original homeowner has sold the property to a purchaser, or when the original homeowner has died and his or her interest has passed to an heir or devisee.

[ARTICLE] 3

FORECLOSURE RESOLUTION

SECTION 301. FORECLOSURE-RESOLUTION PROGRAM. The [court or agency serving as the foreclosure-resolution agency] is the foreclosure-resolution agency. The agency shall adopt rules under [insert reference to state administrative procedures act or, if the

agency is the judicial system, to the rules of court] establishing procedures and standards for foreclosure resolution.

Comment

1. Foreclosure resolution is defined in Section 102 as a process in which a third-party neutral assists the parties at a meeting between them with the objective of achieving a commercially reasonable alternative to foreclosure, hopefully resulting in an agreement between the creditor and homeowner.

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

2. The Act does not prescribe standards or procedures for a state's foreclosure resolution program. However, the Appendix to the [act] sets forth model rules and best practices that state agencies may adopt.

3. Foreclosure resolution is not mediation as defined in the Uniform Mediation Act. The agency or court determination under §304 whether to permit foreclosure to proceed requires reporting of information concerning the foreclosure resolution process. The Uniform Mediation Act generally bars mediators from making reports. Article 3 and the model rules in the Appendix to Article 3 do, however, include some key principles from the Uniform Mediation Act, including the protection of personal financial information exchanged in foreclosure resolution and the avoidance of conflicts of interest on the part of the neutral individual.

SECTION 302. NOTICE OF FORECLOSURE RESOLUTION.

(a) Except as otherwise provided in subsection (c), before or at the time of commencing a judicial foreclosure, the creditor shall:

(1) request under subsection (d) that the foreclosure-resolution agency send the homeowner and obligor, not later than service of the foreclosure [complaint] on the homeowner, notice of the right to participate in foreclosure resolution; or

(2) send the notice under subsection (e).

[(b) Except as otherwise provided in subsection (c), in a nonjudicial foreclosure, the creditor shall:

(1) not later than 30 days after sending the notice of default and right to cure required by Section 201, request under subsection (d) that the foreclosure-resolution agency send the homeowner and obligor a notice of the right to participate in foreclosure resolution; or

(2) send the notice under subsection (e).]

(c) A creditor is not required to send or request sending of a notice under this section if a court or governmental agency has determined under Section 601 or 602 that the property is abandoned. If a court or governmental agency later determines that the property is not abandoned and a foreclosure sale has not been completed, the creditor shall request the notice under subsection (d) or send the notice under subsection (e) no later than 30 days after the determination that the property is not abandoned.

(d) If the foreclosure-resolution agency establishes a procedure for the agency to send the notice required by subsection (a) or (b), the creditor shall request the agency to send the notice to the creditor and to each homeowner and obligor and the agency promptly shall send the notice. The notice may be sent before or after commencement of a foreclosure action, as provided by the agency's rules, but must be sent before the creditor may request entry of a default or foreclosure judgment or give notice of a judicial or nonjudicial-foreclosure sale.

(e) If the foreclosure-resolution agency does not establish a procedure for the agency to send notice required by subsection (a) or (b), the creditor shall send notice to each homeowner and obligor in the manner required for the notice under Section 201.

(f) A notice under this section of the right to participate in foreclosure resolution must

include the following:

(1) the name, address, and telephone number of each housing-counseling agency, lawyer-referral service, and legal-aid agency serving the geographic area of the mortgaged property, designated by the foreclosure-resolution agency;

(2) the name, address, telephone number, and electronic-mail address of the appropriate contact person assigned by the creditor or servicer to the homeowner or obligor under rules of the federal Consumer Financial Protection Bureau;

(3) a statement that the homeowner or obligor may request a foreclosure-resolution meeting and that the request must be made not later than 30 days after notice is sent;

(4) the instructions for requesting foreclosure resolution and all eligibility requirements under the agency's rules;

(5) a description of all documents the agency's rules require the homeowner or obligor to bring to the foreclosure-resolution meeting; and

(6) a form prescribed by the agency for the homeowner or obligor to request foreclosure resolution and to affirm that the homeowner or obligor meets the eligibility requirements of Section 303.

Comment

1. The timing of the notice of foreclosure resolution will depend on whether the foreclosure-resolution agency is a court or other agency. Foreclosure resolution should begin at the earliest possible time after a notice of default. However, in states whose foreclosure resolution programs are operated by the courts, it may not be possible to begin foreclosure resolution until a foreclosure lawsuit has begun, in which case the second bracketed alternative language in subsection (a) should be used.

2. If the property is not abandoned, but the agency or court determines that the homeowner has rented the dwelling unit to someone other than another homeowner or an obligor, the obligor and homeowner are not eligible for foreclosure resolution, under §303. However, the creditor or agency must still send the notice of foreclosure resolution. If the agency determines, based on the obligor's request for foreclosure resolution or other information, that

the property is rental property, it must then permit foreclosure to proceed, under Section 304.

SECTION 303. ELIGIBILITY FOR AND PARTICIPATION IN FORECLOSURE RESOLUTION.

(a) If a homeowner or obligor, not later than 30 days after the sending of a notice under Section 302(d) or (e), makes a request for foreclosure resolution, the foreclosure-resolution agency shall schedule a meeting in accordance with its rules and appoint a neutral individual to conduct the meeting. For good cause, the agency may schedule the meeting and initiate foreclosure resolution later than 30 days after the sending of the notice.

(b) If the foreclosure-resolution agency schedules a meeting under subsection (a), the creditor and homeowner or obligor shall attend and participate in compliance with agency rules and any scheduling or other order made by the neutral individual or the agency. Failure to comply with this subsection includes failure:

(1) without good cause to timely attend a meeting;

(2) without good cause to provide, before a scheduled meeting, documents and information required by agency rules or reasonably requested by the neutral individual;

(3) to designate a person with authority to reach a settlement agreement, if the authority exists;

(4) without good cause to pay any required foreclosure resolution fee;

and

(5) to advise the homeowner, obligor, and neutral individual of any loss-mitigation option that is available to the homeowner or obligor or to consider the homeowner or obligor for the loss-mitigation option before or during foreclosure resolution.

(c) A homeowner or obligor is eligible for foreclosure resolution only if the mortgaged

property is occupied by the homeowner or obligor. If the mortgaged property contains more than one dwelling unit, foreclosure resolution is available only if at least one dwelling unit is occupied by the homeowner or obligor. With a request for foreclosure resolution, the homeowner or obligor shall submit to the foreclosure-resolution agency an affirmation that the mortgaged property is occupied either by a homeowner or obligor. If the agency determines that the property is not occupied by a homeowner or obligor, the agency may not schedule a meeting under subsection (a) and shall permit the creditor to proceed with foreclosure under Section 305.

(d) The agency may not initiate a second foreclosure resolution or schedule a second meeting in a foreclosure resolution if an earlier resolution was concluded, unless the parties to the foreclosure resolution consent.

SECTION 304. FORECLOSURE-RESOLUTION PROCEDURE.

(a) A creditor shall inform the homeowner, obligor, and foreclosure-resolution agency of:

(1) the loss-mitigation options available to the homeowner and obligor; and

(2) its willingness or refusal to offer a loss-mitigation option requested by the homeowner or obligor, the reason for any refusal, and the information on which any refusal is based.

(b) A creditor may not charge a homeowner or obligor a fee or costs for foreclosure resolution. The foreclosure-resolution agency may charge a fee or assess costs for the foreclosure resolution process to either or both parties.

(c) A homeowner or obligor that participates in foreclosure resolution shall provide reasonably available financial and other information to enable the creditor to evaluate any loss-mitigation option.

(d) This [act] does not impose a duty on a creditor to provide a specific loss-mitigation

option. The foreclosure-resolution agency rules may not impose a duty on a creditor to provide any specific loss-mitigation option.

(e) A homeowner or obligor may be accompanied at a foreclosure-resolution meeting by an attorney, housing counselor, or other individual, who may participate in the meeting.

(f) Personal financial information exchanged during foreclosure resolution is confidential and not subject to disclosure under [state freedom-of-information act or sunshine law]. Neither the foreclosure-resolution agency nor the neutral individual is required to respond to a discovery request in a court proceeding to the extent the request seeks personal financial information or privileged information exchanged during foreclosure resolution.

***Legislative Note:** Most states have adopted statutes or court rules addressing freedom of information, and open-government or ‘sunshine’ matters, and discovery during litigation. In adopting this act, the states should consider whether the requirements of this section regarding those matters are compatible with existing state statutes or rules, and make changes if appropriate.*

Comment

1. Abandoned properties are not eligible for foreclosure resolution and no notice of foreclosure resolution to an abandoned property is required. Investors who are renting a property otherwise covered by this Act are also ineligible for foreclosure resolution, but notice must be sent to the property prior to foreclosure. A homeowner must certify under §303(c) that the property is not a rental property (or, if it is, that the homeowner or obligor occupies at least one unit) in order to be eligible for foreclosure resolution. If the homeowner does not make the certification, foreclosure may proceed 30 days after the notice, under §305(a)(1). Existing foreclosure mediation programs generally limit eligibility to owner-occupants. *E.g.* N.Y. C.P.L.R. §3408 (“foreclosure . . . in which the defendant is a resident of the property”); Conn. Public Act No. 11-201 (applies to residential real property defined as “a one-to-four family dwelling occupied as a residence by a mortgagor”); *see also* 12 C.F.R. §1024.30(c)(2) (loss mitigation notice and appeal rules only apply to a mortgage loan that is secured by a property that is a borrower’s principal residence).

2. As provided in Section 301, the foreclosure agency rules and orders may impose additional requirements on the parties, for example requiring the creditor, servicer or its agent to appear in person or to have a person with authority to approve loss mitigation alternatives available by telephone at the time of the foreclosure resolution session, to perform a net present value analysis, to disclose the assumptions on which the analysis is based, or requiring homeowners to meet with a housing counselor to qualify for foreclosure resolution. The agency

will also regulate procedural matters, such as time limits for exchanging documents, scheduling and concluding foreclosure resolution meetings, reports by neutrals, and the like. States should continue to have flexibility in the design and implementation of foreclosure resolution programs, but should establish and publish the standards as required by section 301. The model rules and best practices principles of foreclosure resolution set forth in the Appendix to this Act were developed by the Uniform Laws Commission after extensive collaboration with a number of state agency heads and outside consultants, and should aid new state foreclosure resolution agencies in designing their programs.

3. In existing state foreclosure mediation programs, a creditor will commonly delegate to its servicer whatever duties the statute imposes on the creditor, and this [act] contemplates that procedure will continue to prevail under the procedures set forth in this Article 3. Section 108 provides ample authority for that delegation and articulates both the rights and responsibilities of the servicer in the mediation process. For that reason, in this Article and throughout the [act], the only reference is to the ‘creditor’, rather than to the ‘creditor and servicer’.

SECTION 305. RESTRICTIONS ON FORECLOSURE DURING FORECLOSURE RESOLUTION.

(a) Subject to law of this state other than this [act], a creditor may commence a foreclosure at the time provided in Section 302(a). Subject to subsection (c), a creditor may not file a default or dispositive motion in a foreclosure or schedule or cause to be scheduled a foreclosure sale, unless:

(1) the notice under Section 302, if required, has been sent;

(2) neither the homeowner nor obligor, not later than 30 days after the notice is sent, requests foreclosure resolution;

(3) the agency notifies the creditor that:

(A) the parties that participated in the meeting required by Section 303(a) have reached an impasse; or

(B) the homeowner or obligor has failed to participate in foreclosure resolution, provide required information after a reasonable opportunity to do so, or materially comply with an agency rule or order; or

(4) the court or agency renders an order permitting the creditor to proceed with foreclosure.

(b) If the court or foreclosure-resolution agency determines that the mortgaged property is not occupied by a homeowner or obligor, the court or agency shall render an order permitting the creditor to proceed with foreclosure.

(c) A creditor may file a default or dispositive motion in a foreclosure action, or schedule or cause to be scheduled a foreclosure sale, [90] days after the notice required by Section 302 is sent, unless the parties to the foreclosure resolution agree in a record to continue foreclosure resolution or the court or foreclosure-resolution agency directs the parties to the action to begin or continue foreclosure resolution.

(d) The court or foreclosure-resolution agency may render an order imposing appropriate conditions on the parties to foreclosure resolution, including the payment to the agency of fees and costs of foreclosure resolution authorized by Section 304(b) or the tender of periodic payments by the homeowner or obligor to the creditor.

Comment

1. Numerous states have enacted mandatory foreclosure resolution or loss mitigation laws. Under various names and structures, the consistent object of these programs is to delay or prevent foreclosure until the homeowner has had the opportunity to request some form of loss mitigation: See, e.g., Arkansas Act 885 (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to selling attorney or trustee that it has notified homeowner of ineligibility for loss mitigation options before nonjudicial sale); California Assembly Bill 278 (enacted July 11, 2012, prohibits foreclosure when loan modification request is pending); Idaho Code 45-1506, HB 331 Idaho now requires notice of right to apply for loan modification and bars nonjudicial sale until creditor responds to homeowner's request); Indiana Act 170 of 2011 (same; also prohibits servicer or attorney fees for mediation or loss mitigation); Massachusetts Chapter 194 of Acts of 2012 (creditor must offer mortgage modification prior to foreclosing, if modification would maximize value for mortgagee); Michigan Compiled Laws §3205a (amended Act 302 of 2011); Nevada Rev. Stat. §107.086; Washington Chapter 58 Laws of 2011, amending RCW 61.24 (delays foreclosure 90 days if homeowner requests meeting with creditor to request loss mitigation, and for cases referred by housing counselor to foreclosure resolution, until the parties comply with duty to mediate in good faith). Requiring a process that includes an

exchange of information between borrower and creditor, an explanation of various loss mitigation options and some form of meeting with a neutral individual before a foreclosure is begun allows necessary foreclosures to go forward promptly and efficiently after cases suitable for other resolutions are identified and resolved.

2. Subsection (a)(3) contemplates a variety of situations where, notwithstanding the 90-day waiting period before foreclosure may be commenced under subsection (b), either the court or foreclosure resolution agency may enter an order permitting foreclosure to proceed in less than 90 days. Situations that might warrant such an order include cases where the homeowner has already agreed to vacate the property, or has failed to participate in foreclosure resolution, or where emergency conditions short of abandonment would justify an accelerated foreclosure.

3. Subsection (c) contemplates a variety of situations where the 90 day foreclosure resolution period should be extended. Situations that might warrant such an order include cases where the servicer has failed to evaluate a homeowner's completed request for loss mitigation in a timely manner, has failed to comply with material aspects of federal servicing regulations, *see* 12 C.F.R. §1024.41, or has requested additional documents from the homeowner late in the foreclosure resolution process. In furtherance of the efficiency goals of the Act, extensions should not be routinely granted due to agency or court delays or backlogs.

4. Subsection (d) authorizes the agency to charge the parties fees sufficient to fund the costs of the foreclosure resolution program, a funding mechanism used in several states. States may wish to include more specific provisions about the fees the agency may impose. Subsection (d) also authorizes the agency to direct the homeowner to tender periodic payments during the foreclosure resolution process. A payment tender requirement may filter out borrowers who simply want to buy time, with no realistic expectation of retaining the property or achieving another alternative to foreclosure.

5. The consequence of an obligor failing to comply with the duty to participate under Section 304 or agency orders authorized by Section 305(d) is that the agency will permit the foreclosure to proceed immediately, under Section 305(a)(2)(B). The consequence of a creditor failing to comply with the duty to participate under Section 304 or agency orders authorized by Section 305(d) is that the agency may make an order under Section 305(c) delaying foreclosure until the resolution process is complete, and that a court may award any remedy under Article 7.

SECTION 306. LIMITED APPLICABILITY OF ARTICLE. This [article] does not apply to a foreclosure by a creditor that owns, holds, or services five or fewer mortgages at the time the notice required by Section 201 is sent. The creditor may elect to participate in foreclosure resolution in accordance with this [article] and foreclosure-resolution agency rules.

[ARTICLE] 4

FORECLOSURE REQUIREMENTS; PUBLIC SALE PROCEDURE

SECTION 401. JUDICIAL FORECLOSURE.

(a) A creditor may commence judicial foreclosure only after default in the obligation and satisfaction of all conditions required by the mortgage agreement and by law.

(b) In a judicial foreclosure, the following rules apply:

(1) The creditor shall plead that it has the right under Section 104 to foreclose.

(2) If the obligation is evidenced by a negotiable instrument, the [complaint] must include:

(A) a copy of the instrument in its present condition, including any indorsement or allonge and a statement identifying the person in possession of the instrument; or

(B) a copy of the instrument in its last-known condition and a statement that the instrument has been lost, destroyed, or stolen, in which case the [complaint] must include an affidavit that complies with Section 403.

(3) If the obligation is not evidenced by a negotiable instrument, the [complaint] must include a copy of the record evidencing the obligation and the creditor's right to enforce the obligation.

(c) A creditor, in a record, may authorize another person to foreclose. The [complaint] described in subsection (b) must disclose the name of the creditor and the person authorized by the creditor to foreclose.

(d) If an obligation is evidenced by a negotiable instrument and the creditor knows that it does not own the obligation, the [complaint] described in subsection (b) must disclose the name of the legal owner of the obligation.

Comment

1. This act does not define events of default. Instead, like UCC Article 9, this act leaves the definition of default to contract law. The obligation may be stated in a promissory note (i.e., an obligation to make monthly installment payments) or in another instrument such as the mortgage agreement.

2. The conditions referred to in subsection (a) are those indicated in the mortgage agreement or under this act and other law as necessary to accomplish before the commencement of foreclosure.

3. When the obligation is evidenced by a negotiable instrument, subsection (b) requires that the complaint identify the possessor of the instrument. The creditor may possess the instrument through an agent. If the agent is not an employee of the creditor and has a place of business in a location other than an office of the creditor, the complaint should identify the agent as the possessor.

4. Under subsection (b) the creditor's production of the original negotiable instrument is not necessary at the time of the filing of a complaint in a judicial foreclosure. Production of the original would later become appropriate if, during the course of the proceedings, the homeowner or obligor seeks further demonstration of the copy's authenticity or the whereabouts of the original.

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

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

6. Existing state law conflicts as to (1) whether the foreclosing party must have an express assignment of the mortgage, or a chain of assignments running back to the original mortgagee, and (2) whether that assignment or the chain of assignments must be recorded in the county land records. This section does not resolve the conflict.

[SECTION 402. NONJUDICIAL FORECLOSURE.

(a) A creditor may commence nonjudicial foreclosure only after default in the obligation and satisfaction of all conditions required by the mortgage agreement and by law.

(b) A creditor, in a record, may authorize another person to commence nonjudicial foreclosure.

(c) The notice of nonjudicial foreclosure required by [insert statutory reference] must disclose the name of the creditor and, if applicable, the person authorized by the creditor to foreclose.]

Comment

1. Law other than this act determines whether the obligor is in default. See Section 401, Comment 1.

2. This act does not generally replace the procedural requirements for nonjudicial foreclosure set forth in the enacting state's statutes governing nonjudicial foreclosure. The conditions referred to in subsection (a) include requirements set forth in the nonjudicial foreclosure statute, except as provided in Section 805.

3. This section states fewer requirements for the information to be provided to the homeowner in nonjudicial foreclosure than those contained in Section 401 for judicial foreclosure. This is consistent with the practice in most states that authorize nonjudicial foreclosure.

4. The information required in a judicial foreclosure complaint by Section 401 must also be provided, at an earlier point in time, when the notice of default and right to cure is sent to the obligor. See Section 201(b). Section 201 requires the same content for both judicial and nonjudicial foreclosures. This section does not require that this information be repeated in the notice given to the homeowner that initiates nonjudicial foreclosure.

5. Subsection (b) authorizes the creditor to foreclose through an agent, subject to the requirement that the notice initiating the nonjudicial foreclosure disclose the agency. See Section 401, Comment 5.

SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE

INSTRUMENT; AFFIDAVIT.

(a) If an obligation is or was evidenced by a negotiable instrument and the creditor is not

in possession of the instrument, the creditor may foreclose the mortgage only if:

(1) the creditor:

(A) was entitled to enforce the instrument when loss of possession occurred; or

(B) has directly or indirectly acquired ownership of the instrument from a person that was entitled to enforce the instrument when loss of possession occurred;

(2) the loss of possession was not the result of a transfer by the creditor or a lawful seizure; and

(3) the creditor cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) If a creditor seeks to foreclose under this section, the notice of default and right to cure sent under Section 201 must state that the instrument is unavailable and provide information establishing that the creditor may foreclose under this section. The notice must state that there is a risk that a person other than the creditor will seek to enforce the instrument and the homeowner or obligor has the right to adequate protection against a claim by another person.

[(c) In a nonjudicial foreclosure, the notice also must:

(1) state that the homeowner or obligor may petition the [name of appropriate court] where the mortgaged property is located for an order requiring the creditor to provide adequate protection; and

(2) include the indemnity required by subsection (d).]

(d) If a creditor seeks to foreclose under this section, the homeowner or obligor is entitled

to adequate protection against loss that might occur because of a claim by another person to enforce the negotiable instrument. The creditor must provide in a record an indemnity against loss by the homeowner or obligor. In a judicial foreclosure, the court may require additional protection against a claim by another person. [In a nonjudicial foreclosure, the homeowner or obligor may petition the [name of appropriate court] where the mortgaged property is located for an order requiring the creditor to provide additional protection against a claim by another person.]

(e) In a judicial foreclosure, the creditor shall file a [verified complaint] [complaint with affidavit] attesting to facts under subsection (a). The creditor shall provide the indemnity required by subsection (d) not later than the date established by the court.

Legislative Note: Subsection (a) incorporates the language of Section 3-309 of Revised U.C.C. Article 3 (2002). This language is recommended for a state that has adopted Revised Article 3. For a state that adopted an earlier version of U.C.C. Article 3, there is a split of authority as to whether an assignee of a lost, destroyed, or stolen negotiable instrument may enforce the instrument when the assignee never obtained possession of the instrument. A state with an earlier version of Article 3 should consider whether subsection (a) will change the law in the state.

Comment

1. This section requires a lost-note affidavit in a judicial foreclosure, thus following the procedure adopted by most states in their judicial foreclosure laws. The substance of this requirement follows the 2002 amendments to Article 3. In specifying when a creditor is entitled to enforce a negotiable instrument secured by a mortgage notwithstanding its inability to confirm possession of the instrument, subsection (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted the 2002 amendments to Article 3, Section 3-309 makes it clear that the person who lost possession may be a predecessor of the creditor who seeks to enforce the instrument. UCC § 9-109, Comment 5 provides a result similar to the 2002 Article 3 amendment (“Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section.”).

2. In some states, the circumstances in which a creditor is allowed to enforce an unavailable negotiable instrument are broader than under either the 2002 version or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B) (“[i]f a note or other evidence of indebtedness secured by a deed of trust is lost or for any reason cannot be produced”). In some

states, the circumstances are more restricted because the creditor's affidavit must attest to additional facts. E.g., Md. Code, Real Prop. § 7-105.1(f) (affidavit not sufficient unless it "(1) Identifies the owner of the debt instrument and states from whom and the date on which the owner acquired ownership; (2) States why a copy of the debt instrument cannot be produced; and (3) Describes the good faith efforts made to produce a copy of the debt instrument.").

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

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

5. This section does not require the preparation of a lost-note affidavit in a non-judicial foreclosure. If an action is filed to contest or to confirm a non-judicial foreclosure, the court should have the discretion to decide what proof of a lost, destroyed, or stolen negotiable instrument is sufficient.

6. Subsection (b) requires the creditor to disclose that the negotiable instrument is lost, destroyed, or stolen when it sends notice of default and right to cure under Section 201. In a non-judicial foreclosure, the additional content for the notice is required because the homeowner or obligor is unlikely to appreciate the risk associated with lost instruments, and it is unlikely that a court will consider the issue unless the homeowner or obligor initiates consideration.

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

8. Subsection (d) requires a verified complaint or a complaint with affidavit in a judicial-foreclosure when the negotiable instrument is lost, destroyed, or stolen. The affidavit must be

based upon the affiant's personal knowledge and must describe the efforts made to locate the negotiable instrument. A bare assertion that the instrument is lost or cannot be found is not sufficient. The court should apply its normal standards for determining the sufficiency of the affidavit. At trial the normal rules of evidence govern use of the affidavit. Below is a form for an affidavit that ordinarily would provide sufficient information:

LOST-NOTE AFFIDAVIT

_____ [*Name of affiant*] (Affiant) being sworn deposes and says:

1. Affiant is _____ [*Title or position*] of _____
_____ [*Name of creditor*] (Lender) and is authorized to make this affidavit on Lender's behalf.

2. Lender is the legal owner of a promissory note (Note) executed by _____
_____ [*Name(s) of obligor(s)*] in the original principal amount of
\$ _____ [*dollar amount*], dated _____ [*insert date*]
and secured by _____ [*Name of instrument*] recorded in _____
_____ [*recording reference*]. Lender has not sold, assigned,
pledged, or otherwise transferred the Note to any person. The Note is free and clear of all claims
and encumbrances.

3. The Note is lost, destroyed, or stolen and for this reason cannot be produced.

4. On _____ [*insert date*] Affiant made a diligent search for the Note by
personal examination of the books and records of Lender, as follows: _____

[*describe search efforts including the books and records examined by Affiant*]

_____ [*Name of affiant*]

ACKNOWLEDGEMENT

On _____ [*insert date*], before me, personally appeared [*insert name of affiant*], [*insert
affiant's title and name of creditor*] who acknowledged the same to be affiant's free act and deed
and the free act and deed of [*insert name of creditor*].

NOTARY PUBLIC or other title [*Name of Notary or other person authorized to administer
oaths under the law of this state*]

SECTION 404. ADVERTISEMENT OF PUBLIC SALE.

(a) Mortgaged property may be sold at a public sale not earlier than 30 days after the

creditor has published an advertisement of the sale which complies with this section. An advertisement complies with this section if:

(1) published once per week for three consecutive weeks before the sale in a newspaper having general circulation in the [county] where the mortgaged property is located; or

(2) published on an Internet website that is reasonably expected to be viewed by persons having an interest in purchasing the mortgaged property and the Internet publication remains regularly available between the time of posting and the time of sale.

(b) An advertisement under subsection (a) must indicate:

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

(2) the name of the person that will conduct the sale;

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

(4) the street address or, if there is no street address, other information identifying the location of the mortgaged property;

(5) any improvements and personal property included in the sale, if that information is readily available to the creditor;

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

(7) the material terms of the sale, including payment terms required of the successful bidder at the completion of the auction;

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

(9) a telephone number and electronic-mail address from which a person may obtain additional information concerning the mortgaged property and the sale.

(c) The advertisement required by this section need not contain a legal description of the mortgaged property or recording information for the mortgage or other instrument of record.

(d) A creditor may post the advertisement required by this section or other information pertaining to the sale at the location of the mortgaged property.

(e) A creditor shall send a copy of the advertisement required by this section to the homeowner and each obligor not later than the first date of newspaper publication or Internet posting. The creditor may send the copy with the notice of public sale required by Section 405 or send it separately.

Legislative Note: *A state that already has adopted a statute or court rule authorizing Internet advertising of public sales in lieu of newspaper advertising should consider whether the requirements of this section are compatible with the statute or rule, and make changes if appropriate.*

Comment

1. This section allows a public sale of the mortgaged property only if the creditor first publishes an advertisement that satisfies the requirements of this section. The purpose is to ensure that the public has a meaningful opportunity to learn of the proposed sale in order to appear and engage in competitive bidding. This section supersedes existing state laws covering advertisements for public sales for all foreclosures that are within the scope of this act.

2. In many states, a person other than the creditor, such as a trustee or sheriff, performs some or all of the steps related to advertisement of the public sale. This act does not mandate a change in who is responsible for advertising the sale.

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

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

5. Subsection (a) states the basic requirement of an advertisement of a public sale. Traditionally the law required the advertisement of foreclosure sales in local newspapers. Subsection (a) allows the creditor to continue that practice, but no longer specifies newspaper advertisement as required. In many communities, newspaper advertisements are no longer an

effective means of informing the public about upcoming foreclosure sales. Under these circumstances, a creditor's decision not to publish in a newspaper benefits both the creditor and the homeowner and any obligors by saving the expense.

Subsection (a) also allows the creditor to publish the advertisement either in a local newspaper or on an appropriate Internet website. The Internet site may be one operated by the newspaper or by any other person, whether or not located in the jurisdiction where the mortgaged property is located. The Internet site, however, must be one that has characteristics suggesting that interested members of the public are likely to find and to read the posting.

6. Subsection (c) adopts a bright-line rule with respect to legal descriptions of the real property and recording information. The failure to include such information does not make the public advertisement insufficient. This information is seldom of importance to a person who reads a foreclosure advertisement for the purpose of deciding whether the person has potential interest. Anyone who develops a potential interest is highly likely to investigate further before appearing at the sale to bid. That investigation may include title information, which will disclose the legal description and recording references for the mortgage and other recorded instruments in the chain of title, and typically will include other information as well bearing on the property.

7. Subsection (d) authorizes the creditor to post the public advertisement or a sign on the mortgaged property, regardless of whether that right is reserved in the mortgage. Posting at the property is not required. This changes the law in some states, in which posting foreclosure sale signs at the property is mandatory.

SECTION 405. NOTICE OF PUBLIC SALE. A creditor shall send each homeowner and obligor notice of the date, time, and place of a scheduled public sale. The creditor shall send the notice by first-class mail to the last-known address of each homeowner and obligor and send a separate copy by first-class mail, addressed to the occupant at the property address. Notice of sale must be mailed at least 30 days before the sale date.

Comment

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

2. This section does not displace any requirement under other law of this state for sending notices to persons other than homeowners and obligors, such as holders of junior interests in the mortgaged property.

SECTION 406. POSTPONEMENT OR CANCELLATION OF PUBLIC SALE.

(a) A creditor may postpone or cancel a scheduled public sale for any reason. If the sale is postponed, the announcement of postponement must include the date, time, and place of the rescheduled sale. If the postponement is announced at the date, time, and place advertised for the sale, a new public advertisement under Section 404 is not required, unless the sale is postponed for longer than [180] days after the date originally advertised. If the postponement is not announced at the date, time, and place advertised for the sale, a new public advertisement under Section 404 is required.

(b) If a creditor postpones an advertised public sale, the creditor promptly shall give each homeowner and obligor commercially reasonable notice of the postponement. The notice must include the date, time, and place of the rescheduled sale.

(c) If an advertised public sale is canceled, the creditor promptly shall notify each homeowner and obligor in the manner provided in Section 405. The notice must include a telephone number and electronic-mail address from which a person may obtain additional information concerning the creditor's plan for the mortgaged property, including any new sale date.

Comment

1. In this section the terms "postponement" and "cancellation" are mutually exclusive. A postponement means a decision not to hold a scheduled public sale coupled with the designation of a specific later date for the sale. A decision not to hold a scheduled sale, with no new date then designated, is a cancellation, even if the creditor intends to go forward with foreclosure and select or obtain a new date.

2. Once a public sale is scheduled, the creditor may elect to postpone or cancel the sale for any reason the person considers appropriate. A postponement might also take place for other reasons, such as a judicial order or an automatic stay in bankruptcy. Homeowners and obligors should receive prompt notice of any postponement or cancellation. The rules of Section 405 do

not apply to notices of postponement or cancellation. Subsection (b) covers notices of postponement and cancellation, requiring that the notice be commercially reasonable under the facts and circumstances. A postponement may be as short as one day. An oral announcement of the postponement, made at the time and place of the originally scheduled sale, would suffice if the homeowner and any obligor were present, in which event no written or additional notice would be necessary.

[SECTION 407. CONFIRMATION OF PUBLIC SALE.

(a) Not later than 30 days after a public sale of mortgaged property pursuant to an order or judgment of a court, the person conducting the sale shall file a report of sale with the court. The report must name the purchaser and describe the property, the amount bid, the amount paid to date, the expenses of the sale, and any other material terms.

(b) A creditor may file a motion for confirmation of a public sale of mortgaged property not later than one year after the sale. The motion must be served on all parties and the person that conducted the sale.

(c) The court that holds a hearing on a motion filed under subsection (b) shall confirm the sale unless:

- (1) there was a material procedural irregularity;
- (2) the terms of sale were unconscionable; or
- (3) the sale was conducted fraudulently.

(d) If the court does not confirm a public sale under subsection (c), the court may order a resale of the property.

(e) A final order, for which time for appeal has expired, confirming a public sale pursuant to subsection (c) conclusively establishes compliance with this [act] in favor of a good-faith purchaser for value of the mortgaged property. For purposes of this subsection, a foreclosing creditor is not a good-faith purchaser for value.

(f) A creditor is not required to seek judicial confirmation of a public sale of mortgaged

property. Unless the creditor files a motion for confirmation of the sale, entry of the judgment of foreclosure concludes the judicial foreclosure, subject to law of this state other than this [act].]

Comment

1. In some states, the law of judicial foreclosure requires that the court confirm the foreclosure sale. Although confirmation is mandatory in those states, in the vast majority of cases no objection to confirming the sale is made. This section provides an optional confirmation procedure that allows the creditor the choice to seek confirmation or treat the sale as ending the proceeding, assuming that no other party makes a post-sale challenge to the judgment or the sale.

2. A creditor may wish to seek confirmation of the sale pursuant to this optional provision – regardless of whether the foreclosure took place under a judicial or nonjudicial foreclosure process - if the creditor desires the additional conclusive effect that a judicial confirmation of the sale would have for title passing to a bona fide purchaser or if the creditor anticipates that another party is likely to challenge the sale based upon alleged defects in post-judgment procedures.

3. Subsection (e) provides that confirmation of the sale has conclusive effect on the transfer of title to the mortgaged property to a bona fide purchaser. However, the foreclosing creditor is not entitled to benefit from the conclusive effect of the sale. If a defect results in avoidance of the sale, the creditor is protected by reinstatement of the obligation and the mortgage. A creditor may not obtain conclusive effect by purchasing the mortgaged property through an agent, nominee, or affiliate, such as a subsidiary corporation.

[ARTICLE] 5

NEGOTIATED TRANSFER

SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN SATISFACTION OF OBLIGATION.

(a) A homeowner and creditor may negotiate a transfer of mortgaged property to the creditor in full satisfaction of the obligation to the creditor secured by the mortgage if:

- (1) all homeowners and the creditor agree to the transfer in a record after default by the homeowner or obligor;
- (2) the agreement states it is made pursuant to this section;
- (3) the creditor or court sends notice of the proposed negotiated transfer to the

persons entitled to notice under Section 502; and

(4) the creditor does not receive an objection in a record to the proposed transfer from a person entitled to notice under Section 502 not later than 20 days after notice was sent to the person.

(b) If a homeowner or person claiming under the homeowner is in possession of the mortgaged property, an agreement under subsection (a) must specify the date and time when the homeowner must surrender possession to the creditor. If a person is entitled to notice under Section 502, the homeowner is not obligated to surrender possession before the 20-day period provided in subsection (a)(4) expires, regardless of the terms of the proposed transfer.

(c) This section does not authorize a transfer of mortgaged property to a creditor in partial satisfaction of the obligation it secures.

(d) A negotiated transfer does not affect the rights of a person holding an interest in mortgaged property, if the interest has priority over the interest of a creditor to whom title to the property is transferred under this section.

Comment

1. This section authorizes a transfer from the homeowner to the creditor in satisfaction of the debt or other obligation. In so doing, it provides a framework for existing workout arrangements such as cash-for-keys agreements and deed-in-lieu of foreclosure transactions. This section and the following two sections provide for a safe harbor by specifying the effect of a transfer that meets the requirements of this section. This section is based in part on UCC § 9-620, which provides for the acceptance of personal property mortgaged property by a secured party in full or partial satisfaction of a secured obligation. The important innovations here are, first, to provide an expedited procedure to discharge junior liens on the property without the need for a foreclosure sale; and second, to resolve a number of collateral issues that flow from the expedited procedure, as detailed in Section 504.

2. This section does not specify a minimum consideration to be received by the homeowner in exchange for the homeowner's agreement to transfer the mortgaged property in satisfaction of the obligation. The sole exception is that if the homeowner is in possession and there are third parties entitled to notification of the proposed transfer, the agreement may not require the homeowner to vacate possession prior to the expiration of the period for notified

persons to submit an objection.

As a consequence, this section as now drafted confers a substantial benefit on mortgage creditors in the form of a new mechanism for converting every ‘deed in lieu’ transaction into an accelerated means of clearing title of junior encumbrancers without the need for a more traditional judicial foreclosure. In doing so, the section does not require any minimum benefit on homeowners, other than the general statement of effects of such an agreement contained in Section 504 and the rights of possession noted in the preceding paragraph.

3. The second sentence of Section 501(b) contemplates a circumstance where, for example, in a typical ‘cash for keys’ agreement, the lender and homeowner had agreed that the homeowner would move within a short period in return for a sum of money. If there are junior lienholders, however, the possibility exists that there may be an objection to the proposed transfer, that the agreement would not be approved, and that the benefits contemplated by a homeowner under Section 504 from an early move-out would not be realized. This sentence makes certain that the homeowner need not be displaced, even voluntarily, until the parties knew whether there would be objection from a junior lienholder.

In those cases where there are no junior lienholders or other holders of subordinate interests, it is likely that the parties would often choose to use a traditional deed in lieu of foreclosure to accomplish their agreement, instead of following this statutory negotiated transfer procedure; *see* section 504(f).

4. When there are multiple owners of the mortgaged property, all the owners need to consent to a negotiated transfer. The act does not authorize a forced transfer outside of foreclosure for a non-consenting co-owner.

5. Subsection (c) prohibits the creditor from accepting the mortgaged property in partial satisfaction of the obligation it secures in a negotiated transfer under this [act]. Because the effect of a negotiated transfer under section 504(a)(1) is to completely discharge the obligation, this section does not require any consent from an obligor who is not also a homeowner. Whether the parties may enter into another type of agreement for the transfer of the mortgaged property in partial satisfaction of the obligation is determined by other law of this state.

SECTION 502. NOTICE OF NEGOTIATED TRANSFER.

(a) If a homeowner and creditor propose a negotiated transfer when a judicial foreclosure is pending, the homeowner and creditor shall request the court to send notice of the proposed transfer to the parties to the action other than the homeowner and creditor. The court promptly shall send the notice.

(b) If a homeowner and creditor propose a negotiated transfer when a judicial foreclosure

is not pending, the creditor shall send notice of the proposed transfer to:

(1) a person from which the creditor received, before the homeowner and creditor agreed to the proposed transfer, notice of a claimed interest in the mortgaged property; and

(2) a person that, [10] days before the homeowner and creditor agreed to the proposed transfer, held a recorded interest in the property subordinate to the mortgage that is the subject of the proposed transfer.

Comment

1. This section is based in part on U.C.C. § 9-621, which provides for a notification procedure for an acceptance of personal property by a secured party in satisfaction of a secured obligation.

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

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

4. The notification procedure under subsection (b) is allowed in both judicial foreclosure and nonjudicial foreclosure states, provided the creditor has not filed a foreclosure complaint when it sends notice. Under Section 501(a)(1), there must be a default before the creditor and the homeowner agree to a negotiated transfer. Other steps that the creditor must take before foreclosing under this act, including the sending of notices under Section 201 and 302, do not have to precede a negotiated transfer.

SECTION 503. OBJECTION TO NEGOTIATED TRANSFER.

(a) Except as otherwise provided in this section, if a judicial foreclosure is pending and the court receives an objection from a person holding an interest in the mortgaged property which would be affected by a proposed negotiated transfer, the court shall set a date not later than [30] days after the date of the objection by which the person objecting may tender to the

creditor that is a party to the transfer an amount equal to the obligation to be satisfied under Section 501. If the person tenders the amount to the creditor on or before the date set by the court, the person is entitled to the benefit of the proposed transfer, and all interests subordinate in priority to the interest of the creditor that is a party to the proposed transfer are extinguished effective on the date of tender. If the person does not tender the amount to the creditor on or before the date set by the court, the interest of the person objecting and all other interests subordinate to the interest of the creditor that is a party to the proposed negotiated transfer are extinguished, effective on the date set by the court by which the tender could have been made.

(b) If a judicial foreclosure is pending and the court receives an objection from more than one person holding an interest in the mortgaged property which would be affected by a negotiated transfer, the court promptly shall determine the relative priorities of the interests held by each person that filed an objection. The court shall set separate days by which each objecting person holding an interest in the mortgaged property may tender the amounts described in subsection (a) to the creditor proposing the negotiated transfer and the amounts due to other persons holding interests in the mortgaged property which are junior in priority to the interest of the creditor proposing the negotiated transfer. The court shall assign the days to the objecting parties in the reverse order of their priorities, with the objecting party holding the most junior interest receiving the first tender date.

(c) If a judicial proceeding is not pending and a creditor that sends a notice under Section 502(b) receives an objection from a person holding an interest in the mortgaged property which would be affected by the negotiated transfer, the negotiated transfer may not proceed unless the creditor initiates a judicial proceeding to allow the objecting person to tender the amount due to the creditor. The judicial proceeding must be conducted as provided in this section.

(d) If an objecting person holding the most junior interest in the mortgaged property

tenders the amounts described in subsection (b) on or before the date set by the court, the person is entitled to the benefit of the proposed negotiated transfer, and all interests junior in priority to the interest of the creditor that first proposed the negotiated transfer are extinguished effective on the date of tender.

(e) If an objecting person holding the most junior interest in the mortgaged property does not tender the amounts described in subsection (b) on or before the date set by the court, the interests of the person that failed to tender are extinguished, and the objecting party with the next tender date is entitled to tender to all creditors that are senior in priority to the objecting party in the same manner described in subsection (b). This process continues until each objecting person has been paid in full or has its interest extinguished.

Comment

1. Section 503 provides a process to addresses those situations that may arise when there are either: (i) multiple objections to a negotiated transfer by junior lien holders; or (ii) non-objecting lien holders whose interests are subordinate to the creditor who proposed the negotiated transfer, but senior to the interests of an objecting lien holder.

2. This section and Section 504 make clear that a negotiated transfer extinguishes all property rights and interests in the mortgaged property that are subordinate in priority to the interest- whether a mortgage or other lien - of the creditor who enters into the negotiated transfer with the homeowners. Persons who own those subordinate interests are the holders of ‘junior interests’, as that term is used in this section. Junior interest holders are not limited to mortgagees and other lienholders. They include the holders of other property rights, such as leases and options to buy the property.

3. In contrast, of course, persons that hold interests that have priority over the interest of the creditor who enters into the negotiated transfer with the homeowners – so-called ‘senior interests’ – would not be affected by the negotiated transfer, and the creditor taking title by negotiated transfer would take only what the transferee had. This is precisely the same result as would occur if the creditor entering into the negotiated transfer instead chose to foreclose its interest, rather than entering into a negotiated transfer.

Thus, for example, if that creditor held only a second mortgage, and there was a first mortgage and an outstanding lien for unpaid real estate taxes, that creditor would own the mortgaged property after the negotiated transfer become final, subject to both the first mortgage and the lien for unpaid real estate taxes, since both those interests are senior in priority to the

second mortgage that is being foreclosed.

SECTION 504. EFFECT OF NEGOTIATED TRANSFER.

(a) A homeowner's transfer of mortgaged property pursuant to Section 501 to a creditor in satisfaction of an obligation to the creditor:

(1) discharges the obligation in full;

(2) transfers to the creditor all of the homeowner's rights in the property, except for a right of the homeowner to continue to occupy the property pursuant to an agreement between the homeowner and creditor which is incorporated in the negotiated-transfer agreement;

(3) discharges the mortgage held by the creditor and any mortgage or other lien subordinate in priority to the mortgage held by the creditor; and

(4) terminates any other subordinate interest except an interest protected from termination by law other than this [act].

(b) A subordinate interest is discharged or terminated under subsection (a) despite the creditor's or court's noncompliance with this [article]. A creditor that fails to comply with this [article] is liable to a person damaged by that failure for damages in the amount of any loss caused by the creditor's failure.

(c) If a homeowner and creditor agree that the homeowner may continue to occupy mortgaged property for a fixed time after a negotiated transfer, the agreement creates a license unless the parties agree in a record to enter into a landlord and tenant relationship.

(d) Transfer of mortgaged property under Section 501 terminates any right of the creditor to obtain a personal judgment against the homeowner and any other person liable for the obligation secured by the property, including attorney's fees, costs, and other expenses.

(e) Transfer of mortgaged property under Section 501 terminates any right of the

homeowner and other persons to redeem the property.

(f) This [article] does not prevent a homeowner and creditor from entering into an agreement other than a negotiated transfer, but the consequences of a negotiated transfer described in this section do not apply to an agreement that does not state it is made pursuant to Section 501.

Comment

Under Section 504, a negotiated transfer of title is final and conclusive, as is the discharge of all junior liens, despite any errors in the negotiated transfer process. The policy issue posed by this issue is whether to impose costs and damages on the bona fide good faith homeowner who surrendered title to the mortgaged property in reliance on a finalized negotiated transfer— and, simultaneously on those who purchase the mortgaged property from the creditor who participated in the negotiated transfer, or whether the better outcome is to simply impose on that same creditor an obligation to make whole those who may have been damaged by a defective transfer. If the creditor did not cause the noncompliance with the rules of this Section, law other than this act governs the liability of other parties.

[ARTICLE] 6

ABANDONED PROPERTY

SECTION 601. DETERMINATION OF ABANDONMENT IN JUDICIAL FORECLOSURE.

(a) In a judicial foreclosure, a creditor or governmental subdivision in which the mortgaged property is located or, if the property is located in a common-interest community, the community association also may move for a determination that the property is abandoned property.

(b) The moving party under subsection (a) shall deliver by first-class mail and serve in the manner described in subsection (d), separately to each homeowner and obligor, a notice that contains:

- (1) a copy of the motion;

(2) a copy of any affidavit attesting to abandonment or a governmental agency's determination that the property is abandoned which the party will submit as evidence;

(3) a description of the consequences that will follow from a determination of abandonment; and

(4) if the notice contains an agency determination of abandonment, a statement that the recipient may contact the [applicable government official] to obtain further information or object to the determination of abandonment.

(c) The notice required by subsection (b) may be combined with the notice required by Section 201.

(d) The moving party under subsection (a) shall serve personally, or make two attempts to serve personally, the notice described in subsection (b) on a homeowner at the mortgaged property. The attempts must be at least 72 hours apart at reasonable times. Posting the notice on the property is not required.

(e) The court shall schedule a hearing on a motion under subsection (a) to be held not fewer than [15] nor more than [30] days after filing of the motion.

(f) At the hearing under subsection (e), if no appearance is made to oppose the relief sought and credible evidence is presented supporting the allegations in the motion, the court shall render an order that the mortgaged property is abandoned property.

Comment

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

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

2. Subsections (e) and (f) are based in substantial part on Minn. Stat. § 582.032, which provides for expedited foreclosure for abandoned homes. Minnesota generally provides a statutory right of redemption (post-foreclosure-sale) of six months or one year, which is reduced to five weeks when the lender uses the statutory procedure for abandoned property; this section does not include a comparable right of redemption.

3. If no appearance is made at the hearing to oppose the motion to determine that the mortgaged property is abandoned, under subsection (f) the court may rely on affidavits to render an order that the property is abandoned without taking testimony.

4. Section 102(2) defines ‘common interest community’ in substantially the same language as contained in the Uniform Common Interest Ownership Act (‘UCIOA’). As the comments to UCIOA make clear, the term ‘common interest community’ is a short hand term to refer to every condominium, cooperative or homes association in an enacting state, and that is the same intention in this Act.

The distinguishing characteristic of any of those forms of shared ownership is that the unit owners in each such community hold exclusive title to their ‘unit’ – as defined in the documents creating the community – and share the ownership of common property.

In every state today, whether or not that state has adopted UCIOA, there is at least one statute (and often several statutes) that regulate at least some aspect of the condominium form of ownership. Invariably, those statutes refer to a ‘unit owners association’ or a ‘community association’. Section 3-101 of UCIOA uses this language to describe how the association must be organized, and provides in pertinent part as follows:

A unit owners association must be organized no later than the date the first unit in the common interest community is conveyed. The membership of the association at all times consists exclusively of all unit owners....

Most statutes providing for unit owners or community associations contain considerable detail regarding the powers and obligations of those association; *see, eg.*, Section 3-102 of UCIOA.

The provisions of Section 601 of this Act, enabling the community association to act with regard to the negative effects of abandoned property on the remaining units in that common interest community, are consistent with the general duties imposed under existing state law on these associations.

[SECTION 602. DETERMINATION OF ABANDONMENT IN NONJUDICIAL FORECLOSURE.

(a) In a nonjudicial foreclosure, a creditor or governmental subdivision in which the mortgaged property is located or, if the property is located in a common-interest community, the community association also may submit a request to the [building-code appeals board] for a determination that the property is abandoned property. The request must be accompanied by an affidavit attesting to facts indicating abandonment.

(b) A person that submits a request under subsection (a) shall send by first-class mail in the manner described in subsection (d) separately to each homeowner and obligor a notice that contains:

- (1) a copy of the request;
- (2) a copy of the affidavit attesting to abandonment;
- (3) a description of the consequences that will follow from a determination of abandonment;
- (4) a statement that the recipient may contact the [building-code appeals board] to obtain further information;
- (5) a statement that the recipient has the right to object to the proposed determination of abandonment by making an objection to the [building-code appeals board]; and
- (6) a statement that the objection must be received not later than 30 days after the notice was sent, and that if the objection is timely received, the [building-code appeals board] will not issue a determination of abandonment.

(c) The notice required by subsection (b) may be combined with the notice required by Section 201.

(d) A person that submits a request under subsection (a) shall deliver personally, or make two attempts to deliver personally, the notice described in subsection (b) on a homeowner at the mortgaged property. The attempts must be at least 72 hours apart at reasonable times. Posting the notice on the mortgaged property is not required.

(e) Not earlier than 30 days after sending the notice required by subsection (b), the [building-code appeals board] may determine in a record that the property is abandoned property if:

(1) the [building-code appeals board] receives evidence that notice under subsection (b) was sent to each homeowner and obligor;

(2) During the 30-day period after notice was sent to a person entitled to notice under subsection (b), the [building code-appeals board] did not receive an objection to the proposed determination from the person;

(3) the [building-code appeals board] has received an affidavit attesting to facts indicating abandonment; and

(4) a representative of the [building-code appeals board] has personally inspected the property.

(f) In a proceeding under subsection (e), if no objection is made to the proposed determination and credible evidence is presented supporting the allegations of abandonment, the [building-code appeals board] shall determine in a record that the mortgaged property is abandoned property.

(g) The [building-code appeals board] shall send a determination of abandonment under subsection (e) or (f) to the creditor and each homeowner and obligor.

(h) A determination of abandonment or the refusal of the [building-code appeals board]

to issue a determination under subsection (e) or (f) is subject to de novo judicial review.]

Legislative Note: *Because subsection (h) provides for de novo judicial review, a state should consider whether the requirements of this section are compatible with existing statutes or rules governing appeals from administrative bodies such as the body designated in this section, and make changes if appropriate.*

Comment

1. In a nonjudicial foreclosure, the creditor may treat the mortgaged property as abandoned only by submitting evidence of abandonment to a governmental board, department, or other entity for its review and consideration.

2. Subsection (e) (4) requires that a person acting on behalf on the governmental board personally visit the property as part of the decision making process. That person may be an employee of local government, such as a building inspector, who is responsible for evaluating the physical condition of dwelling units.

3. Judicial review of the decision is available to any interested person. Subsection (g) does not specify the nature of that action, which in many jurisdictions will be a mandamus action. De novo judicial review is appropriate to protect the homeowner from the significant limitations on the homeowner's rights under this act that follow from a determination of abandonment.

SECTION 603. PRESUMPTION OF ABANDONMENT.

(a) In a proceeding under Section 601 or 602, mortgaged property is presumed to be abandoned property if:

(1) a [building inspector] determines that the property is abandoned; or

(2) three or more of the following subparagraphs apply to the property:

(A) There are:

(i) one or more doors on the property that are boarded up, broken off, or continuously unlocked;

(ii) multiple windows that are boarded up or closed off; or

(iii) multiple window panes that are broken.

(B) Gas, electric, or water service to the property has been terminated or

utility consumption is so low that it indicates the property is not regularly occupied.

(C) Rubbish, trash, or debris has accumulated on the property.

(D) A governmental agency has determined that the property is unfit for occupancy or poses a threat to public health or safety.

(E) A creditor has changed the locks or otherwise secured the property and, for at least 30 days thereafter, the homeowner has not contacted the creditor to request entrance to the property or re-entered the property.

(F) One or more written statements signed by the homeowner indicate a clear intent to abandon the property.

(G) A law-enforcement agency has received reports of at least two separate incidents of trespass, vandalism, or other illegal acts being committed on the property in the 180 days before determination of abandonment is sought.

(H) The homeowner is dead and there is no evidence that a household member or heir of the homeowner is in actual possession of the property.

(b) An affidavit attesting to the conditions described in subsection (a) and any other facts evidencing abandonment must be signed by and based on personal knowledge of the affiant and state the basis for that personal knowledge. A person may submit one or more affidavits as evidence of abandonment.

Comment

1. The conditions giving rise to a presumption of abandonment set forth in subsection (a) closely track the criteria set forth in Ind. Code § 32-30-10.6-5(a). A government agency's issuance of a determination that the mortgaged property is abandoned by itself constitutes prima facie evidence of abandonment. In some localities, after such a determination the government will mark the property as abandoned. The government's determination, finding, or order might not use the word "abandoned"; it might, for example, refer to the property as vacant. Of course, the homeowner or another person has the right to challenge the correctness of the governmental determination.

With respect to the statutory conditions listed in the subparagraphs to subsection (a)(2), the presence of three or more of such conditions constitutes prima facie evidence, giving rise to a presumption of abandonment. Such conditions are not conclusive on the issue of abandonment. Many residential properties will exhibit at least one such condition, when the homeowner is still in possession of the property. If the homeowner or another person holding under the homeowner is in actual possession of the mortgage property, the property is not abandoned notwithstanding the existence of such conditions. Likewise, mortgaged property may be abandoned under this Section notwithstanding the absence of any of the statutory conditions.

2. A governmental agency's determination of abandonment under subsection (a)(1) is distinct from the procedure established by Section 602 for a creditor or another person to request a determination of abandonment in nonjudicial foreclosure. In many states other law authorizes a government agency or employee to issue an order, citation, or determination that residential property is abandoned, often without a prior hearing. Such an order or determination creates a presumption of abandonment under this Section. Likewise, a governmental determination that the property is unfit for occupancy or constitutes a serious threat to public health or safety under subsection (a)(2)(D) is not subject to the procedures established by Section 602.

3. Mortgaged property often becomes vacant, both under standard mortgage and reverse mortgage transactions, when the homeowner dies. Under subparagraph (a)(2)(H) proof of death of the homeowner is one of the conditions that may give rise to a presumption that the mortgaged property is abandoned, provided that there is no evidence that an heir or other beneficiary of the homeowner's estate is in actual possession. Of course if there are multiple homeowners, this condition is met only if all the homeowners have died.

4. An affidavit under subsection (b) may be given by any individual having personal knowledge, including a contractor, government employee, or neighbor of the mortgaged property.

SECTION 604. WITHDRAWAL OF ABANDONED-PROPERTY PROCEEDING.

[(a)] In a judicial foreclosure, after a party has moved for a determination that the property is abandoned property, the motion may be withdrawn only by leave of court.

[(b)] In a nonjudicial foreclosure, after a person has requested a determination that the property is abandoned property, the request may be withdrawn only with consent of the person submitting the request and each homeowner and obligor.]

Comment

Once a party has filed a motion in a judicial foreclosure for a determination that the mortgaged property is abandoned, withdrawal of the motion is allowed only by leave of court.

This allows for judicial control over the imposition of maintenance responsibilities under Section 606.

SECTION 605. FORECLOSURE OF ABANDONED PROPERTY.

(a) In a judicial foreclosure, if the court determines that the mortgaged property is abandoned property and the court previously rendered or at the same time renders a judgment of foreclosure, the court shall:

(1) order public sale of the abandoned property not earlier than [30] days but not later than [45] days after entry of the order; or

(2) on motion of the foreclosing creditor, if the court determines there is no equity in the mortgaged property available to satisfy the interests of subordinate creditors, order transfer of the abandoned property directly to the foreclosing creditor without public sale. The transfer of the property extinguishes the rights of all interests subordinate to the interest of the foreclosing creditor.

(b) [In a nonjudicial foreclosure, if a governmental agency determines that the mortgaged property is abandoned property, the creditor may conduct an expedited public sale of the property. Unless an action for judicial review of the determination is pending, the sale may take place not earlier than [30] days but not later than [60] days after issuance of the determination. The creditor shall comply with the notice requirement in Section 405, except that [15]-days' notice of the sale is sufficient.

(c) After a judicial order or determination by a governmental agency that mortgaged property is abandoned property, the creditor shall cause the public sale or transfer of the mortgaged property to the creditor to be completed not later than 120 days after the order is rendered or determination is made, unless the creditor releases its mortgage and the release is filed in the [real-property records]. Unless the creditor releases its mortgage, the creditor may not

seek to end its obligation under Section 606 to maintain the property by dismissing, terminating, or suspending the foreclosure.

(d) On a public sale or transfer of the mortgaged property to the creditor under subsection (a) [or (b)], any personal property remaining on the abandoned property is deemed to have been abandoned by the owner of the personal property and may be disposed of by the purchaser or transferee of the property [60] days after the sale or transfer. Neither the creditor, purchaser nor transferee is liable to the homeowner or obligor for disposal of personal property pursuant to this subsection.

(e) Completion of a public sale or transfer of mortgaged property to the creditor under subsection (a) [or (b)] terminates the right of the homeowner and any other person to redeem the property under law of this state other than this [act].

Comment

1. This Section provides for an expedited public sale of the mortgaged property after a determination that the mortgaged property is abandoned. In a judicial foreclosure, the court must order the sale to take place no longer than [___] days after the court enters its order finding the property to be abandoned, unless the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor may select the date, provided it is no sooner than [___] days after the written determination of abandonment.

2. This Section does not authorize a disposition of abandoned property other than public sale, but other dispositions are available under other sections of this Act. For example, the homeowner and creditor may agree to a negotiated transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504.

3. Once a creditor decides to take advantage of the expedited foreclosure procedure allowed by this Section, there is a public interest in ensuring that the property becomes occupied as soon as reasonably possible. For this reason subsection (c) does not allow the creditor to suspend indefinitely its efforts to consummate the foreclosure. There may be exceptional circumstances in which it is not feasible to hold the foreclosure sale within 60 days of the judicial order or written determination finding the property to be abandoned, as required by subsection (a) and (b).

Subsection (c) poses the substantial question of what consequences should flow from the failure of the creditor to comply with its requirements. On the one hand, it would clearly be

inappropriate to impose an obligation on a creditor to repair the property subject to the mortgage before the creditor has taken possession or an official determination is made that the property is abandoned. Certainly, the lending community would object to a statutory duty to maintain property on which it holds a mortgage in those instances where the lender would prefer to release its mortgage and forego any interest in that property.

On the other hand, the consequences of a creditor's failure either to commence and complete a foreclosure action or to release its mortgage on other stakeholders in the abandoned property – including the fee owner, the municipality and neighbors in which the abandoned property is located, and where appropriate, a homeowners association - are very real. The act as drafted resolves these conflicting policies by offering the lender a choice of how it wishes to proceed.

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

5. In some states, homeowners have a statutory right of redemption for a period of time after the completion of a public sale. Some of those states also extend redemption rights to third parties, such as subordinate lien holders. In states with statutory redemption, subsection (e) eliminates those rights after a public sale or transfer to the creditor of the mortgaged property. After a homeowner abandons the property, it serves no useful purpose to allow the homeowner an option to reacquire the property after the completion of foreclosure.

SECTION 606. MAINTENANCE OF ABANDONED PROPERTY.

(a) In this section, “maintain” means to:

- (1) care for the yard and exterior of a building on abandoned property, including removing excessive foliage growth that diminishes the value of surrounding properties;
- (2) prevent trespassers from remaining on the property;
- (3) prevent mosquito larvae from growing in standing water on the property; and
- (4) take any other action needed to prevent conditions on the property which create a public or private nuisance or hazard.

(b) If a creditor commences a judicial foreclosure, the creditor shall maintain the mortgaged property beginning when the court renders an order under Section 601 determining that the property is abandoned property.

(c) [If a creditor commences a nonjudicial foreclosure, the creditor shall maintain the

mortgaged property beginning when the [building-code appeals board] determines under Section 602 that the property is abandoned property.

(d) Absent a judicial order under Section 601 [or a determination under Section 602], a creditor that has commenced a foreclosure shall maintain the mortgaged property beginning when the creditor receives notice that the [building-code appeals board] determines that the property is abandoned property and is in a condition that poses a threat to public health or safety.

(e) A creditor's duty under this section to maintain abandoned property continues until the property is conveyed to a purchaser or the creditor records a release of its mortgage.

(f) A creditor that has a duty under this section to maintain abandoned property may enter and permit others to enter the property peacefully for the limited purpose of maintenance required by this section and inspection and repair. All reasonable expenses incurred by a creditor in complying with this section are obligations of the homeowner and secured by the mortgage.

(g) A person that enters abandoned property for a purpose described in subsection (f) is not liable to the homeowner for trespass or for damage to the property resulting from a cause other than the person's negligence or willful misconduct.

(h) The obligations created by this section may be enforced by:

(1) a governmental subdivision in which the mortgaged property is located; or

(2) if the property is located in a common-interest community, the community association.

(i) The duty of a creditor to maintain abandoned property is limited to the duty created by this section. If the creditor becomes the owner of the property, the creditor's duty with respect to the property is determined by law of this state other than this [act]. The creditor does not become a mortgagee in possession of the property solely by virtue of the creditor's performance of the

duty created by this section.

Comment

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.

However, it is clear under this [act] that the creditor has no obligation to maintain the property before the creditor commences a foreclosure. Moreover, the creditor does not become obligated to maintain merely by commencing foreclosure 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 605 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 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 has jurisdiction over the abandoned property. When the property is located in a common-interest community, it also provides standing for the association as a means to protect neighboring property owners whose interests are likely to be harmed by the creditor's failure to maintain the property. In conferring standing both to the local government and to owners' associations, this subsection follows the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This subsection does not grant a direct enforcement right to neighbors. If negatively impacted, such persons may have a remedy under other laws, such as public or private nuisance.

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

[ARTICLE] 7

REMEDIES

SECTION 701. EFFECT OF VIOLATION; DEFENSES; DAMAGES.

(a) In a judicial foreclosure, if the court determines that the creditor, servicer, or other person that commenced foreclosure has committed a material violation of this [act], the court may dismiss the action, stay the action on appropriate terms and conditions, or impose a sanction the court finds appropriate. Dismissal is without prejudice unless the court determines that a new foreclosure action should be barred because of substantial misconduct of the creditor or servicer or other good cause.

(b) [In a nonjudicial foreclosure, the homeowner or obligor may initiate an action against the creditor, servicer, or other person that commenced foreclosure, asserting a defense to foreclosure or that the creditor, servicer, or other person committed a material violation of this [act]. If the court determines that a defense exists or a material violation of this [act] occurred, the court may enjoin the foreclosure, stay the foreclosure on appropriate terms and conditions, or impose a sanction the court finds appropriate. An injunction may not be permanent unless the court determines that foreclosure is barred because of substantial misconduct of the creditor or servicer or other good cause.

(c) If a court determines under subsection (a) [or (b)] that a material violation of this [act] occurred, the creditor, servicer, or other person that commenced foreclosure may not add to the amount of the obligation any attorney's fees or costs incurred as a result of the violation, or any other attorney's fees and costs incurred before the creditor, servicer, or other person cures the violation.

(d) A homeowner or obligor injured by a violation of this [act] may bring an action

against the person that caused the injury for actual damages.

(e) In addition to damages recoverable under subsection (d), the court may award a homeowner or obligor statutory damages not exceeding \$[15,000] for a pattern or practice of violating this [act]. In determining whether to award statutory damages and the amount of statutory damages, the court shall consider all relevant factors, including:

(1) the frequency and persistence of violations by the person in its business practices;

(2) the nature of the violations; and

(3) the extent to which the violations were intentional.

(f) In opposing an award of statutory damages in subsection (e) for violations of this [act] established by the obligor or homeowner, the creditor or servicer may show that:

(1) the violation was due to a mistake, other than a mistake of law, that occurred notwithstanding reasonable procedures established to preclude the mistake; or

(2) before the action was brought, the creditor or servicer discovered and cured the violation.

(g) An action for damages under this section must be commenced not later than [one] year after the violation on which it is based occurred.

Comment

1. The statutory damages for individuals under subsection (e) require a pattern or practice of noncompliance, similar to the federal RESPA statute's provision for statutory damages, 12 U.S.C. §2605(f)

2. Dismissal with prejudice under (a) or a permanent injunction under (b) would be a sanction of last resort, and should be reserved for cases of very serious noncompliance by the creditor or servicer. Dismissal with prejudice may be warranted, for example, when there have been repeated and serious violations by the creditor. e.g., *Bank of New York v. Richardson*, 2011 Me. 38, 15 A.3d 756 (2011) (creditor failed to appear at three successive mediation conferences in a case where the homeowner asserted significant consumer law counterclaims); *U.S. Bank*

N.A. v. Solorin 934 N.Y.S.2d 655 (2012) (dismissal after 16-month delay in filing required certification of accuracy of supporting documents).

3. Actual damages incurred by a homeowner or obligor under this section may include damages for emotional distress. Whether or not the homeowner may claim that damages caused by a servicer are chargeable to the creditor who retained the servicer under theories of agency or employer/employee law is not determined by this act but by other law.

4. Under subsection (a), before confirmation of the foreclosure sale, the homeowner may raise a material violation of the statute, for example, a materially inaccurate notice of the amounts needed to cure a default, as a basis for asking the court to prevent the foreclosure sale (or confirmation), until the violation has been corrected and remedied. If the creditor can cure the violation in a timely way so that full compliance is achieved, it would then be appropriate under this section for the foreclosure to proceed.

However, after a foreclosure sale, under established principles of real estate law, unless the homeowner under state law has an independent right of redemption, a bona fide sale purchaser is entitled to rely on the conclusive effect of the sale, and the homeowner's only remedy for violations of the statute would be to seek damages from the foreclosing creditor or any other remedy allowed under state or federal law.

SECTION 702. DEFENSE OR REMEDY OF HOMEOWNER OR OBLIGOR

UNDER OTHER LAW. This [act] does not displace any defense or remedy of a homeowner or obligor under federal law or law of this state other than this [act].

Comment

This act preserves rights and defenses available to homeowners and obligors under other state statutes, regulations, common law, and federal law. In many states, such rights and defenses include payment or tender of payment; discharge; contract law defenses, including forgery, lack of capacity, duress, absence or failure of consideration, fraud, misrepresentation, unconscionability, failure of a condition precedent; equitable defenses such as estoppel, laches, or unclean hands; release by cancellation of debt; a violation by a creditor, servicer, their predecessors in interest, or their agents of unfair and deceptive trade practices statutes and other consumer protection statutes; a defect in a mortgage resulting from a failure to comply with statutory requirements for the execution of mortgages; a determination that the creditor or its predecessor in interest was not licensed under state mortgagee licensing statutes or was not legally authorized to make the loan under federal law; and breach of the duty of good faith and fair dealing.

SECTION 703. ATTORNEY'S FEES AND COSTS. In an action in which a party seeks a remedy under Section 701 or asserts a defense or remedy under Section 702, the court

may award the prevailing party reasonable attorney's fees and the costs of the action.

SECTION 704. ENFORCEMENT BY [ATTORNEY GENERAL]. In addition to enforcing any remedies available under law of this state other than this [act], the [Attorney General] may bring an action to enjoin a pattern or practice of violating this [act]. The court may:

(1) issue an injunction or order against a creditor, servicer, or agent of the creditor or servicer, or any other person violating this [act], which may include requiring action to remedy the violation or the payment of damages to an aggrieved obligor or homeowner; and

(2) assess a civil penalty for each violation of not less than \$[] nor more than \$ [].

SECTION 705. EFFECT OF HOLDER-IN-DUE-COURSE RULE.

(a) Notwithstanding [U.C.C. Section 3-305] and any agreement by a homeowner or obligor waiving a claim or defense, a creditor that is a holder in due course or seeks to enforce a waiver of a claim or defense is subject to the following claims and defenses that the homeowner or obligor could assert against the initial holder of the obligation:

(1) a specific allegation of fraud in connection with the original loan transaction;

(2) a specific allegation of material misrepresentation in connection with the original loan transaction; or

(3) a breach of promise in connection with the original loan transaction which substantially deprives the obligor of the benefit of the expected bargain.

(b) If a creditor is a holder in due course under [U.C.C. Section 3-305] or seeks to enforce a waiver of a claim or defense, a homeowner or obligor may:

(1) assert, in addition to the defenses otherwise available under [U.C.C. Section 3-305], any defense against the holder in due course described in subsection (a); or

(2) bring a declaratory-judgment action to establish any claim against the holder in due course described in subsection (a) or (b).

(c) A claim or defense under subsection (a) may not be made or asserted more than six years after the obligation being enforced was created.

(d) If a homeowner or obligor establishes a claim or defense under this section, relief is limited to modification of the remaining obligation and recoupment. Recoupment must be in the amount of the economic loss caused by the fraud, misrepresentation, or material breach of promise and may not exceed the amount owed on the obligation at the time of judgment. The court may determine whether the effect of recoupment is to cure the default or reinstate the obligation pursuant to Section 203. Recoupment reduces both what the creditor is entitled to recover in foreclosure and what the creditor is entitled to recover by other processes, including a separate action to recover the obligation.

(e) This section applies to an obligation incurred on or after [the effective date of this [act]].

Comment

1. This section represents a middle-ground position between preservation of the status quo and complete abrogation of the HDC doctrine.

In doing so, the draft limits the insulation that UCC Section 3-305 otherwise provides to holders of notes – typically viewed by the marketplace as negotiable instruments under UCC Section 3-104 – when secured by mortgages on “mortgaged property” as that term is defined in Section 102 (15) of this [act].

The section contains these major limitations compared to simply abrogating the holder in due course doctrine:

(a) it caps the liability of the holder to the outstanding loan balance,

(b) it applies only prospectively, and

(c) it preserves only claims and defenses based on fraud, material misrepresentation, or material breach of promise in connection with the original loan transaction.

2. The primary limitations on the claims or defenses which a borrower may assert are the following:

First, under subsection (a) the borrower's claims or defenses may be asserted despite any waiver the borrower or other owner of the mortgaged property may have signed;

Second, under subsection (b), any claim or defense must not be barred by a statute of limitation or other preclusion;

Third, also under subsection (b), any claim or defense must be 'based on fraud, material misrepresentation, or material breach of promise in connection with the original loan transaction;

Fourth, under subsection (c), the subsection (b) claims or defenses are in addition to the defenses already available under U.C.C. 3-305.

Fifth, under subsection (d), no such claim or defense may be made or asserted more than six years after the note was signed. However, nothing in this section would alter the existing common law doctrine of recoupment that, in some states, may permit assertion of a time-barred claim as a recoupment defense only.

Sixth, under subsection (e), if a borrower establishes a claim, the recovery is limited to the amount of borrower's economic loss, and in no event more than the outstanding balance on the note.

Seventh, under subsection (f), the new remedies provided to borrowers under this section would apply only to notes signed after the effective date of the [act] in the state where the mortgaged property is located.

3. The section also authorizes the borrower to bring a declaratory judgment to affirmatively assert one of these permitted claims, without the need to raise them only in a foreclosure action. This balances the limitation of the borrower's right to assert either a claim or a defense to a six year statute of limitation, with another year allowed in the case of an interest rate adjustment. There is no policy reason to force the borrower to default on her loan as a condition of asserting claims she may have arising out of fraud, misrepresentation or breach of promise.

4. Under subsection (e), the relief granted to the borrower is framed in terms of recoupment or reduction in the balance of the outstanding loan, rather than requiring the holder to pay funds to the borrower. For example, if the obligor is personally liable to pay the obligation, recoupment under this section reduces what the creditor may collect outside of foreclosure, including by way of a deficiency judgment if foreclosure proceeds to a sale. In this respect, this section follows the broad approach taken by the FTC regulation. By making the creditor "subject to" claims and defenses, those claims and defenses, when proven, offset the amount due on the obligation.

5. Finally, while the section refers only to 'creditors', a servicer would be subject to the same liabilities imposed on the creditor whose contract with a servicer authorized or required the creditor to undertake a duty that the [act] imposes on the creditor; see Section 107 of the [act].

[ARTICLE] 8

MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 802. GENERAL PRINCIPLES OF LAW APPLICABLE. The principles of law and equity, including the law of principal and agent, supplement this [act] unless displaced by its particular provisions.

Comment

The provisions of this act are to be supplemented by general principles of law and equity. In mortgage loan transactions, a creditor often acts through agents, and sometimes the creditor is an agent for a principal. The law of agency often will determine when a person has rights or duties under this act. The text is a shortened version of Revised UCC § 1-103(b), which provides:

Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

SECTION 803. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 804. TRANSITION. This [act] applies to foreclosure of a mortgage created before, on, or after [the effective date of this [act]], unless the creditor commenced a foreclosure before [the effective date of this [act]].

SECTION 805. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

Comment

1. Subsection (a) of this section should be separately prepared for each state. In each state it is necessary to pay careful attention to how this Act is to be blended with existing state law. The statutes to be specifically repealed will include statutes relating to notices of default, intent to accelerate, and the right to cure to be sent to homeowners; notices and standards for mediation and other types of facilitation; determination of who has the right to commence foreclosure; and advertisement and notices of foreclosure sales; confirmation of sales. Given the scope of this Act, which is limited to residential foreclosures, care should be taken not to repeal statutes to the extent they should continue to apply to non-residential foreclosures. In some instances, instead of repeal it may be useful to amend other state statutes to limit their scope to foreclosures that are not within the scope of this Act.

2. At the same time, this Act was drafted with the expectation that existing state foreclosure procedures would remain in place. This Act is not intended to displace all existing foreclosure laws in each state, but rather to be an overlay on existing law. For example, and most fundamentally, the Act does not anticipate or provide that a state employ a judicial foreclosure process when the customary practice is to foreclose under a power of sale procedure, nor does the Act contemplate that a state should enact a non-judicial foreclosure process in the absence of existing state laws. It is for that reason that the legislative drafters in each state should carefully consider how best to integrate the provisions of the Act with existing state laws governing the foreclosure process.

3. In addition to the listed specific sections repealed by this Act, subsection (b) provides for the repeal of all other legislation in this state which is inconsistent with this Act. This provision is necessary to resolve those matters that may ultimately be presented to a court in construing the Act in cases where the specific repealer in subsection (a) fails to note an existing state statute which the court concludes is inconsistent with a provision of this Act.

SECTION 806. EFFECTIVE DATE. This [act] takes effect

[APPENDIX]

Legislative Note: Model rules are not part of the Act, they are for use of the agency designated under Article 3].

MODEL FORECLOSURE RESOLUTION PROGRAM RULES

1. These rules apply to the foreclosure resolution program under [Article 3 of the Home Foreclosure Procedures Act.] “Agency” means the foreclosure-resolution agency. The agency is [name of court or agency]. All provisions referring to “creditor” include “servicer” as defined in [the HFPA].
2. The purpose of the foreclosure resolution program is to assist a creditor and a homeowner to reach a voluntary agreement that avoids foreclosure and achieves a sustainable foreclosure resolution or mitigates damages in cases where foreclosure is unavoidable.
3. The foreclosure resolution notice required by §302 of the HFPA may be sent [at any time no later than 30 days after the creditor sends the notice required by §201][no later than 30 days after the creditor files a complaint in foreclosure.] The notice shall instruct the homeowner to contact the agency to request foreclosure resolution at the telephone number [or electronic mail address] designated from time to time on the [agency web site][official journal].
4. If a homeowner requests foreclosure resolution, the agency shall open a foreclosure resolution case. Within five days of the request the agency shall send notice to the homeowner and creditor [by mail, by electronic mail] to provide the agency with required documents and information for the foreclosure resolution process. The document exchange notice to the homeowner shall also include a list of available housing counseling agencies that can assist the homeowner.
5. The agency shall schedule a meeting within 60 days after the homeowner’s request for foreclosure resolution.
6. The document exchange notice to the homeowner shall instruct the homeowner to submit to the agency and the creditor necessary and relevant documents including:
 - (a) documents showing income qualification for a loan modification, including copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or other income that the homeowner believes is relevant to the homeowner’s ability to repay the mortgage,
 - (b) documents supporting any dispute regarding the existence or amount of any mortgage loan default,
 - (c) documents relating to any prior loan modification or other prior agreement regarding the mortgage loan, and
 - (d) documents relating to any pending request to modify the loan or negotiate a settlement of the delinquency.
7. Homeowners who do not occupy the property being foreclosed are not eligible for foreclosure

resolution. The notice to the homeowner shall state that if the homeowner or obligor is not occupying the property, the homeowner is not eligible for foreclosure resolution, and that the homeowner must return a signed non-investor certification form provided by the agency, together with any required fee, in order to participate in foreclosure resolution.

8. The document exchange notice to the creditor shall instruct the creditor to submit to the agency and the homeowner necessary and relevant documents including:

- (a) any 45-day notice and 5-day notices required by CFPB rule 12 CFR §1024.39(b) and §1024.41(b)(2)(i)(B) previously sent to the homeowner in connection with the current default,
- (b) any prior offers of loss mitigation, forbearance, modification or other agreements made with the homeowner in connection with the current default,
- (c) a list of documents required by the creditor to evaluate the homeowner's request for loss mitigation,
- (d) the homeowner's payment history from the date of default,
- (e) itemization of all amounts due on the loan, including all fees,
- (f) copies of the promissory note, signed by the mortgagor, including any endorsements, allonges, amendments, or riders that show the mortgage debt, and
- (g) any lost note affidavit the creditor will rely on to foreclose the mortgage.

9. The agency or neutral individual may request additional documents from either party as appropriate. Either originals or copies of documents may be exchanged for the foreclosure resolution. The neutral individual and the agency will not resolve disputes regarding authenticity of documents.

10. The homeowner and creditor shall provide the documents requested by the agency no later than 10 days after the document exchange notice is sent.

11. The creditor shall communicate to the agency and the homeowner the identity of the individual who will represent the creditor at the foreclosure resolution session at the time it provides the required documents.

12. Within fourteen days after receiving the homeowner's request, the agency shall send [mail, electronic] notice to the creditor and homeowner that shall include:

- (1) The name and contact information of the assigned neutral individual,
- (2) The date, time, and location of the foreclosure resolution session,
- (3) Information about the conduct of the foreclosure resolution session, and
- (4) Consequences and penalties for noncompliance with program rules.

13. A neutral individual shall disclose potential conflicts of interest in the time and manner provided by these rules. Before accepting appointment as a neutral individual, the neutral individual shall (a) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the neutral individual, including a financial or personal interest in the outcome of

the foreclosure resolution and an existing or past relationship with a party to the foreclosure resolution or foreseeable participant in the foreclosure resolution, and (b) disclose such known fact to the parties as soon as is practical before the first foreclosure resolution meeting. If, after accepting a foreclosure resolution assignment, a neutral individual learns any fact that a reasonable individual would consider likely to affect the impartiality of the neutral individual, the neutral individual shall disclose it as soon as is practical.

14. The neutral individual's role is to assist the parties with information exchange, communication and negotiation to insure that every reasonable effort has been made to reach a voluntary agreement to resolve the alleged mortgage default in some manner other than a foreclosure sale.

[15. The agency may charge either or both parties a fee of [\$___] in connection with the foreclosure resolution].

16. At least [10] days prior to the foreclosure resolution session, the creditor must notify the neutral individual and homeowner of any decision to offer or not offer any loss mitigation options to the homeowner. The creditor shall provide the neutral individual with documentation supporting its decision not to offer a loss mitigation alternative to the homeowner. The creditor shall also provide the neutral individual with inputs and the results of the net present value calculations relied upon in reaching its decision. The neutral individual may request the creditor to provide additional documentation to support its decision.

17. The homeowner is entitled to have an attorney, housing counselor or other person of the homeowner's choosing accompany the homeowner to and participate in the pre-foreclosure resolution meeting.

Note – The term 'housing counselor' is included only as an example and without a definition because the term 'other person' would include any representative the homeowner chooses

18. If the homeowner fails without good cause to substantially and timely provide the documents specified by the neutral individual or the agency, or to attend the foreclosure resolution meeting, or if the agency determines that the homeowner requesting foreclosure resolution is not occupying the property, the agency shall [enter an order][request the court to enter an order] terminating the foreclosure resolution process and permitting foreclosure to proceed pursuant to the HFPA §304.

19. If the creditor fails without good cause to substantially and timely provide the documents specified by the neutral individual or the agency, or to appear at the foreclosure resolution meeting with authority to act on any available loss mitigation alternatives, the agency shall [enter an order][request the court to enter an order] extending the foreclosure resolution period and the stay of foreclosure pursuant to the HFPA §304.

20. The parties are required to appear in person at the foreclosure resolution session and the creditor's representative shall have the authority to enter into a settlement to resolve the dispute,

consistent with HFPA Section 304(d). The creditor's representative must have the ability to evaluate loss mitigation and to have the authority to make a decision as required by the RESPA regulations of the Consumer Financial Protection Bureau. However, upon written request provided to the neutral individual at least 30 days prior to the foreclosure resolution session, the neutral individual may waive the requirement of having the parties physically present at the session and allow them to appear by telephone or teleconference.

21. The parties shall create a signed record of any agreements reached during foreclosure resolution. The neutral individual shall ensure that any agreement reached by the parties at the foreclosure resolution session or during foreclosure resolution is promptly confirmed in a record and signed by all parties.

22. Within ten days from the conclusion of the foreclosure resolution session, the neutral individual shall file a record with the agency, reporting whether the parties were present at the session, complied with Section 303 of the Act and all program rules, and whether the parties reached any agreement. The neutral individual shall also send the record to the parties.

23. Upon receipt of the neutral individual's report, the agency shall close the case.

24. Only a court of competent jurisdiction may impose sanctions for violations of these rules, pursuant to Article 6 of the HFPA, upon motion of either party and after notice and an opportunity to be heard.

25. All personal financial information disclosed by the parties in the course of the foreclosure resolution is confidential and not subject to public disclosure.

26. The agency shall provide ongoing training for neutral individuals. This includes participation by all neutral individuals in a mandatory training session on an annual basis.

27. The agency shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing an evaluation of the operation and effects of the program. The report shall include a summary of the cases handled by the program, including the type and frequency of different outcomes, recommendations for changes, modifications, or repeal of the program or parts thereof with accompanying reasons and data.

28. The agency or neutral individual may recommend or require in appropriate cases that the homeowner tender monthly payments equal to at least [50%] of the contractual mortgage payment to the lender or to the agency as a condition of the foreclosure resolution.

29. The lender or creditor may at any time request, pursuant to HFPA §302(a)(2), an order permitting the foreclosure to proceed on the basis that the homeowner has materially failed to comply with rules and requirements of foreclosure resolution. The agency shall act on the request no later than 30 days after receiving the request.

[30.Court foreclosure resolution programs in judicial foreclosures. The appearance of the

homeowner or obligor at a foreclosure resolution session constitutes an entry of appearance in the foreclosure action.]