

DRAFT
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

November 14-15, 2014 Drafting Committee Meeting

CLEAN DRAFT

Without Prefatory Note and with Reporters' Drafting Notes

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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November 6, 2014

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HOME FORECLOSURE PROCEDURES

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1 **HOME FORECLOSURE PROCEDURES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

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

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

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

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

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

(3) “Creditor” means a person that commences a foreclosure or has the right to foreclose a mortgage under Section 401(b). [The term does not include a person that owns, holds, or services five or fewer mortgages at the time the notice required by Section 201 is sent.]

Drafters’ Notes

1. An alternative to making a broad exception from the entire act for lenders owning 5 or less mortgages would be to exempt these lenders from the obligation to participate in the ‘early resolution’ process of Article 3. If the bracketed language remains, add a Legislative Note that explains to the States why the small lender exemption is made.

2. The Chair (and perhaps he alone) has struggled with the definition of ‘creditor’. However elegant the current definition may be, it is ultimately circular – in that it includes the very servicers to whom the creditor may delegate duties under Section 107. Further, the definition does not describe the creditor’s relationship to the borrower or the debt, but simply characterizes the ‘creditor’ as any PETE under 401(b); this is, again, a reference that clearly includes entities that are not traditional creditors but are, indeed, persons who may owe a duty to the traditional creditor once the foreclosure process is complete and the proceeds of sale are in hand.

Finally, Section 401(b)(2) provides that ‘only the person designated as the owner or holder of the obligation by the registry may commence a foreclosure’. While the [act] does not define what ‘owner of the obligation’ means, it surely does not mean a servicer who is under contract with that owner to commence the foreclosure.

Reporter White suggests that an alternative approach might to define the creditor as “a person entitled to receive payment or performance under an obligation”. Section 107 – describing the relationship between servicer and holder – would then completely address the situation where the servicer is the PETE. This alternative definition would also be entirely consistent with the current definition of ‘mortgage registry’ which refers to ‘the owner of an obligation’.

(4) “Early resolution” means the assistance of a third-party neutral at an in-person meeting or other communication in which a creditor, obligor, and third-party-neutral simultaneously can communicate with one another with the objective of reaching an

1 agreement between the parties for a commercially reasonable alternative to foreclosure.

2 **Chairman’s Note:** The Committee must at least attempt to finally determine
3 the name of this process. It seems to the Chair there are three clusters of
4 potential names, each based on a dominant word or combination of two of the
5 dominant words: (i) foreclosure; (ii) mediation; and (iii) resolution. The
6 clusters seem to include:

7		
8	Foreclosure Mediation	Foreclosure Conciliation
9	Foreclosure Resolution	Foreclosure Diversion
10	Pre-Foreclosure [etc.]	
11	Dispute Resolution	Early Resolution
12	Mediation [alone]	
13		

14 The co-Reporters, Committee Chair and ABA Advisor recommend use of the term
15 ‘Foreclosure Mediation’, together with a note distinguishing practice under this [act] from
16 the rules mandated by the Uniform Mediation Act and similar state statutes.

17
18 (5) “Early-resolution agency” means [the administrative or judicial agency
19 designated by the state to supervise early resolution of foreclosure].

20 (6) “Expenses of foreclosure” means the lesser of:

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

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

25 (7) “Foreclosure” means a process, proceeding, or action by a creditor to
26 terminate a homeowner’s interest in mortgaged property or obtain possession of
27 mortgaged property for the creditor. The term does not include a voluntary transfer by a
28 homeowner or an action to recover possession of property after a completed foreclosure
29 sale. “Foreclose” has a corresponding meaning.

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

1 instrument.

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

5 (10) “Knowledge” means actual knowledge. “Knows” has a corresponding
6 meaning.

7 (11) “Loss mitigation” means an alternative to foreclosure offered by a creditor to
8 a homeowner in default or facing imminent default.

9 (12) “Mortgage” means a consensual interest in real property which secures an
10 obligation. The term does not include a lien that secures an obligation owed to a
11 homeowners’ association in a common-interest community.

12 (13) “Mortgage agreement” means a record that creates a mortgage.

13 (14) “Mortgage registry” means an electronic registry of owners, mortgagees and
14 holders of obligations, which is created under federal or state law and maintains the
15 records of those mortgages and obligations under standards designed to ensure that each
16 record is unique, identifiable, and unalterable.

17 **Chair’s note** – this Draft combines the definitions of ‘Mortgaged property’
18 and “Residential property”; while the preserved term will be ‘mortgaged
19 property’, this draft temporarily leaves the text where ‘Residential property’
20 had been in order to best display the style changes. In making this change,
21 the revised definition abandons the suggestion in the former definition of
22 ‘mortgaged property’ that the mortgage might cover personal property that
23 was not also a fixture.

24
25 (16) “Negotiable instrument” means a negotiable instrument as defined in [UCC
26 Section 3-104].

27 (17) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial

1 process under [insert statutory reference].

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

4 (19) “Obligor” means a person that:

5 (A) owes payment or performance of an obligation;

6 (B) has provided property other than the mortgaged property to secure
7 payment of the obligation;

8 (C) has signed a mortgage agreement with respect to the mortgaged
9 property; or

10 (D) is otherwise accountable in whole or in part for payment of the
11 obligation.

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

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

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

19 (23) “Mortgaged property” means real property improved with not more than four
20 dwelling units which is subject to a mortgage. The term includes an attached single-
21 family unit, a single-family manufactured-housing unit treated as real property under law
22 of this state other than this [act], a time share in a dwelling unit if that time share is
23 treated as real property under law of this state other than this [act], real property on which

1 construction of not more than four dwelling units has commenced, and a single-family
2 unit in a common-interest community. The term does not include real property that,
3 when the mortgage being foreclosed was created, was used or intended to be used
4 primarily for nonresidential purposes such as farming, commercial, or industrial use.

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

8 (25) “Servicing” means:

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

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

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

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

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

21 **Legislative Note:** In states that allow one or more types of nonjudicial foreclosure of
22 residential mortgages, a reference to the relevant statute should be added to the definition
23 of “nonjudicial foreclosure.” In states that do not allow nonjudicial foreclosure, this
24 definition should be deleted, along with references to “nonjudicial foreclosure” elsewhere
25 in this [act].
26

Drafters' Notes

1. The definition of “abandoned property” works in tandem with the factors listed in Section 505(a). Whether mortgaged property is “abandoned property” is determined by the facts of each case. The Section 505(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 “early resolution” requires at least one “in-person” meeting or other communication between the parties and a third-party neutral. 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 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: UCC § 1-201(b)(21)(A) and the terms “bearer” and “identified person” have the same meanings in this act as in the UCC. The definition of “holder” in unrevised Article 1 has slightly different language, but is the same in substance.

4a. 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

1 to time an individual will be an obligor but not a homeowner; examples
2 might include a guarantor or a person who conveys an ownership interest to
3 another person after signing a mortgage agreement.
4

5 5. “loss mitigation” includes such actions as a repayment plan,
6 forbearance agreement, loan modification, short sale, partial mortgage
7 insurance claim, negotiated transfer and deed in lieu of foreclosure.
8

9 6. The term “mortgage” refers to the lien held by the creditor, which
10 secures payment of the obligation, whereas the term “mortgage agreement”
11 refers to the writing or other record that memorializes the parties’ agreement
12 and creates the mortgage. Depending upon local usage and custom, the
13 mortgage agreement may be denominated as a mortgage, deed of trust,
14 trustee deed, security deed, deed to secure debt, or the like.
15

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

24 7. The definition of ‘Obligor’ includes, among other standards, a
25 statement that the person has ‘signed’ a mortgage agreement. The term
26 ‘sign’ in this sense has the same meaning as the same term has in UCC
27 Section 1-201(b)(37).
28

29 8. The definition of an obligation includes a non-recourse debt,
30 whether the debt is non-recourse due to the application of anti-deficiency
31 judgment legislation, agreement of the parties or for other reasons.
32

33 9. Real property is “mortgaged property” if its primary use is
34 residential. It includes but is not limited to owner-occupied principal
35 residences and second or vacation homes. The definition excludes parcels
36 of real property that are used primarily for non-residential business purposes
37 but which also contain one-to-four dwelling units, such as a farm with a
38 farmhouse or a manufacturing facility that includes a residence for the
39 company’s chief executive officer. Likewise, the term “ mortgage” does not
40 include a blanket mortgage that covers multiple parcels containing more
41 than four dwelling units in the aggregate.
42

43 10. The definitions of ‘servicer’ and ‘servicing’ are based in part on
44 the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq*
45 (“RESPA”), 24 C.F.R. § 3500.2 (b).
46

SECTION 103. SCOPE. This [act] applies to foreclosure of mortgaged property in this state.

SECTION 104. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS.

(a) A creditor, obligor, and homeowner shall comply in good faith with the requirements of this [act] and shall act in good faith throughout the foreclosure process. “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing. [This subsection does not create an independent cause of action for the failure of a person to act in good faith.]

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

Drafters' Notes

1. For statutory duties that include explicit and precise rules for their performance, such as the time period for sending notices under §§201 and 402, 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 §505 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 by their agreement. It is not the source of independent obligations to take or refrain from taking certain actions.

SECTION 105. PROHIBITED ACTS. A creditor may not:

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

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

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

5 (B) the foreclosure has been postponed, canceled, or stayed due to loss
6 mitigation or early resolution while at the same time continuing with the foreclosure; or

7 (C) the obligor is not eligible for a loss-mitigation option when the option
8 is available and the creditor has not evaluated the option.

9 **SECTION 106. APPLICATION OF LOCAL REGULATIONS.**

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

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

18 **Drafters’ Notes**

19
20 1. This section addresses local laws that regulate residential properties that
21 are in foreclosure or have been sold at foreclosure. During recent years, local
22 governments in a number of states have enacted ordinances that establish mediation
23 or “dispute resolution” programs or that regulate abandoned properties. Lenders
24 have expressed concern that such local programs are often burdensome, especially
25 due to their limited geographical scope. A number of state legislatures have passed
26 statutes to preempt various types of local legislation that affect mortgage lending
27 and the enforcement of mortgages. This section seeks to address the issue. The
28 drafting committee discussed prior versions of this section at its January 2014 and
29 May 2014 meetings. One major decision is whether field preemption or conflict

1 preemption is more appropriate. Although the current language reflects the former
2 model, the committee has not yet made a decision. It will consider the matter at its
3 fall 2014 meeting.

4
5 2. Subsection (b) makes it clear that municipal ordinances generally
6 applicable to real property in a municipality would not be affected by this act,
7 regardless of who owns the property, and therefore will apply with equal force to
8 property owned by homeowners or lenders. Accordingly, for example, a local
9 ordinance mandating the maintenance of yards and blighted property would apply
10 with equal force to a blighted property whether or not owned by a homeowner or
11 creditor, and an ordinance enabling a municipality to repair blighted property and
12 lien the property for the costs of the work, if it were otherwise lawful under
13 applicable state law, would not be barred by this section.

14 15 **SECTION 107. SERVICERS.**

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

17 (b) A servicer who is authorized to act on behalf of a creditor:

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

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

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

23 **SECTION 108. NO WAIVER.** Except as otherwise provided in Section 501,
24 the rights of an obligor or homeowner and duties of a creditor under this [act] may not be
25 waived or varied by agreement.

26 **Drafters' Note**

27 At its fall 2014 meeting the drafting committee will consider whether there are other
28 provisions of the Act that an obligor or homeowner should be permitted to waive
29 or vary by agreement, either generally or after default.

30 31 **[SECTION 109. NOTICE AND KNOWLEDGE.**

32 (a) Subject to subsection (b), a person "receives" a notice or notification when

1 the notice or notification :

2 (1) comes to that person's attention; or

3 (2) is delivered in a manner reasonable under the circumstances at the
4 place of business through which the contract was made or at another location held out by
5 the person as the place for receipt of a similar communication.

6 (b) In this subsection, “organization” means a person other than an individual.
7 Notice, knowledge, or a notice or notification received by an organization is effective for
8 a foreclosure when it is brought to the attention of the individual conducting the
9 foreclosure and, in any event, from the time it would have been brought to the
10 individual's attention if the organization had exercised due diligence. An organization
11 exercises due diligence if it maintains reasonable routines for communicating significant
12 information to the individual conducting the foreclosure and there is reasonable
13 compliance with the routines. Due diligence does not require an individual acting for the
14 organization to communicate information unless the communication is part of the regular
15 duties of the individual or the individual has reason to know of the foreclosure and that
16 the foreclosure would be materially affected by the information.

17 **Drafter’s Note**

18 This Section incorporates without change those parts of Revised UCC § 1-
19 202 that are relevant for this act.

20
21 Chair’s Note- this Section is bracketed as a signal for Committee discussion.

22
23 **[ARTICLE] 2**

24 **NOTICES; RIGHT TO CURE**

25 **SECTION 201. NOTICE OF DEFAULT; RIGHT TO CURE.**

26 (a) A creditor may not initiate foreclosure under [insert reference to state

1 foreclosure law other than this [act]] until 30 days after the creditor sends separately to
2 each obligor a notice of default and right to cure.

3 (b) The notice under subsection (a) must state:

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

6 (2) the specific action the obligor must take to cure any curable default,
7 including the exact amount that must be paid;

8 (3) the date by which the default must be cured, which may not be fewer
9 than 30 days after the date the notice is sent;

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

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

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

17 (7) the name of

18 (A) the creditor and the particular facts that establish the creditor's
19 right to foreclose;

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

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

23 (8) that the obligor may request a copy of the negotiable instrument or

1 other evidence of the obligation and a copy of any record that demonstrates the right to
2 foreclose; and

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

5 (c) The notice under subsection (a) may state that additional amounts may come
6 due after the date of the notice.

7 **Drafters' Notes**

8
9 1. The itemization of the amount due as of the notice date is a critical
10 piece of information for the homeowner or obligor and should be stated as
11 exactly as possible. The amount included for attorneys' fees should be
12 limited to those accrued prior to the date of the notice, and thus should not
13 include retainers or advances to attorneys that would be refunded in the
14 event of a prompt cure.

15
16 2. The mortgage obligation may be accelerated by filing a
17 complaint, scheduling a sale, or by separate notice of acceleration – the
18 notice of default and right to cure does not by itself accelerate the debt. The
19 notice need not refer to acceleration if the creditor does not intend to
20 accelerate the obligation, for example if it is fully matured. The definition
21 of "foreclosure" in section 102 includes other legal methods that may be
22 used to terminate the homeowner's interest in the mortgaged property, such
23 as a quiet title or ejectment action in the case of an installment land sale
24 contract.

25
26 3. This Act refers in several sections to the 'foreclosure process';
27 see, for example, Sections 102(7), 104(a), 106 and this section 201. The
28 notice of default under this Section is the beginning of the foreclosure
29 process prescribed by this Act. However, the "first notice or filing" under
30 federal regulations mandating a 120-day waiting period, 24 C.F.R. §
31 1024.41(f)(1), is the [Complaint or other first court filing in judicial
32 state][Notice of Sale in non-judicial state]. Therefore the notice of default
33 may be sent during the 120-day waiting period under the federal rule.
34

35 4. Items (1) through (6) are adapted from the elements of notice in
36 the standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds
37 a specific deadline to cure the default. Items (7) and (8) are the ownership
38 statement required by the national servicing settlement, and call for the
39 servicer to identify its basis for standing at the outset of foreclosure
40 proceedings, so that any disputes can be resolved promptly. This notice

1 does not displace all state-specific aid programs and counseling notices
2 which necessarily will depend on state funding – for example, Pennsylvania
3 requires a separate 30-day notice of how to apply for its Homeowner’s
4 Emergency Mortgage Assistance Program.
5

6 5. In subsection (b)(2), the actions the homeowner needs to take in
7 order to cure the default are governed by § 203. If the default by its nature
8 cannot be cured, for example if the property has been forfeited or foreclosed
9 by a senior lienholder, the notice may simply state that the default may not
10 be cured.
11

12 6. If a homeowner or obligor has cured a default, any subsequent
13 foreclosure based on a later default must be preceded by a new notice,
14 subject to the limitations on repeated defaults contained in Section 203. This
15 is because a cure restores the homeowner to the same legal position as if no
16 default had occurred, §203(c). If, on the other hand, as a result of early
17 resolution or otherwise, the homeowner has tendered payments under a
18 forbearance plan or other workout but has not fully cured the default that
19 was the subject of the notice, no new notice is required in the event the
20 workout fails and the creditor chooses to proceed with foreclosure.
21

22 **SECTION 202. MANNER OF NOTICE DELIVERY.** A notice required by

23 Section 201 or 302 must be sent by first-class mail to the last known address of each
24 obligor. At least one mailed notice must also be addressed to “occupant” at the address of
25 the mortgaged property. If the obligor or the obligor’s representative has requested notice
26 by electronic mail and has provided the creditor an electronic-mail address, the notice
27 also must be sent to the electronic-mail address.

28 **Drafters’ Notes**
29

- 30 1. The complaint in a judicial foreclosure state, or notice of sale in a
31 nonjudicial foreclosure state, must be delivered according to existing
32 law, usually by personal service. The requirement for additional
33 electronic mail notice does not displace the paper notices required by
34 this act or other law.
35
- 36 2. Notice must be sent by ordinary first class mail. First class mail has the
37 characteristic that it will be delivered to the last known address whether
38 or not the recipient accepts delivery in person. The creditor may
39 supplement first class mail with certified mail or overnight delivery but
40 may not rely solely on methods that require the recipient to accept

1 delivery in person.

2
3 **SECTION 203. RIGHT TO CURE DEFAULT.**

4 (a) An obligor may cure a monetary default on an obligation by tendering in cash
5 or immediately-available funds the amount specified in subsection (c) at any time after a
6 notice under Section 201 and not later than two days before a scheduled or postponed
7 foreclosure sale.

8 (b) An obligor may cure a default other than a monetary default at any time not
9 later than two days before a scheduled or postponed foreclosure sale.

10 (c) To cure a default under this section, an obligor shall:

11 (1) tender all amounts that would have been due at the time of tender in
12 the absence of acceleration;

13 (2) perform or tender performance of any other duty under the obligation
14 or mortgage agreement that would have been due in the absence of default or
15 acceleration;

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

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

20 (d) Cure of a default under subsection (c) restores the obligor to the same position
21 under the mortgage and the obligation it secures as if the default had not occurred.

22 (e) This section does not impair a greater right to cure a default that the obligor
23 has under the mortgage agreement or the record that creates the obligation.

24 (f) This section does not limit a right of an obligor to redeem the mortgaged

1 property by paying the full amount of the accelerated obligation at any time before the
2 foreclosure sale is completed.

3 **Drafters' Notes**

4
5 1. The right of a homeowner or obligor to cure a default on an
6 obligation secured by a mortgage has the effect of de-accelerating the
7 payments due after acceleration, but before a completed foreclosure sale.
8 The homeowner and obligor receive notice detailing the amounts needed to
9 cure the default pursuant to Section 202, and identifying any nonpayment
10 defaults, such as failure to maintain insurance.

11
12 2. The right to cure as used in this Act includes the right to reinstate
13 the mortgage after acceleration. "Cure" is used in a broad sense here,
14 similar to the use of the term in the Bankruptcy Code, §1322(b)(5).

15
16 3. The statutory right to cure provided by this section may not be
17 waived by contract. In the event of a dispute between the creditor and a
18 homeowner or obligor concerning the amounts needed to cure, or any
19 nonmonetary performance that may be claimed as due, either party may
20 seek declaratory relief from an appropriate court, and if appropriate, a
21 temporary stay of any foreclosure sale to resolve the cure dispute.

22
23 4. If a default is cured, restoring the homeowner and obligor to the
24 same position as if no default occurred means that if there is a later default,
25 new notices must be sent prior to foreclosure. Conversely, if as a result of
26 early resolution under Article 3 or otherwise, a settlement is reached but the
27 homeowner or obligor does not fully cure the default, new notices are not
28 required. However, nothing in this [act] requires a lender who properly
29 assessed late fees or default interest following a default to disgorge those
30 fees if the default is subsequently cured.

31
32 5. 'Immediately available funds' include certified checks, cashier's
33 checks, money orders, electronic transfers, and other payments that provide
34 reasonable certainty of prompt payment.

35 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

36
37 (a) A creditor does not have a duty under Section 201, 302, 404(e) or 405 to
38 notify a homeowner or obligor unless the creditor knows:

39 (1) that the person is a homeowner or obligor; and

40 (2) the identity of the person.

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

5 **Drafters' Notes**

6 1. Section 204 is based on UCC § 9-605. Its purpose is to relieve the
7 creditor from duties owed to a homeowner or obligor if the creditor or
8 servicer does not know about that person. This may be the case, for
9 example, when an original homeowner has sold the property to a purchaser,
10 or when the original homeowner has died and his or her interest has passed
11 to an heir or devisee.
12

13 **[ARTICLE] 3**

14 **EARLY RESOLUTION**

15 **SECTION 301. EARLY-RESOLUTION PROGRAM.** [The court or agency
16 serving as the early resolution agency] is the early resolution agency. The agency shall
17 adopt rules under [insert reference to state administrative procedures act or, if the agency
18 is the judicial system, to the rules of court] establishing procedures and standards for
19 early resolution.

20 **Drafters' Notes**

21 1. The Drafting Committee has spent considerable time discussing
22 the subject of foreclosure mediation – now called early resolution. A
23 number of members on the Committee believe that a successful process that
24 screens potential workout alternatives to foreclosure offers the single best
25 hope for homeowners in the continuing foreclosure crisis.
26

27 2. Early resolution is defined in Section 102 as the assistance of a
28 third-party neutral at an in-person meeting between the parties with the
29 objective of achieving a commercially reasonable alternative to foreclosure,
30 resulting in an agreement between the creditor and homeowner.
31

32 Between 2007 and 2012 eighteen states adopted statewide
33 foreclosure diversion or mediation programs, and local jurisdictions in at

1 least eight additional states have established similar programs. The
2 programs vary greatly in their timing and design, and exist in both judicial
3 and nonjudicial foreclosure states. Most programs in judicial foreclosure
4 states call for intervention after a foreclosure complaint is filed. While most
5 stakeholders recognize that starting mediation or early resolution earlier in
6 the process would increase the chances of success and reduce costs, most
7 existing state laws do not provide a means to initiate early resolution before
8 the judicial process begins. Pre-foreclosure early resolution permits early
9 sorting of foreclosure cases, into those where the homeowner wants to find
10 a solution other than foreclosure, and those cases that are uncontested or
11 where there is no realistic alternative to foreclosure.
12

13 3 The Act does not prescribe standards or procedures for a state's
14 early resolution program. However, the Appendix to the [act] sets forth
15 model rules and best practices that state agencies are urged to adopt.
16

17 4. Early resolution is not mediation as defined in the Uniform
18 Mediation Act. The agency or court determination under §304 whether to
19 permit foreclosure to proceed requires reporting of information concerning
20 the early resolution process. The Uniform Mediation Act generally bars
21 mediators from making reports. Article 3 and the model rules in the
22 Appendix to Article 3 do, however, include some key principles from the
23 Uniform Mediation Act, including the protection of confidential
24 information exchanged in early resolution and the avoidance of conflicts of
25 interest on the part of the neutral.
26

27 **SECTION 302. NOTICE OF EARLY RESOLUTION.**

28 (a) Not later than 30 days after a creditor sends a notice of default and right to
29 cure required by Section 201, or, in a judicial foreclosure, not later than service of a
30 mortgage foreclosure [complaint] on the homeowner, the creditor shall send to the
31 homeowner and obligor a notice under subsection (c) of the right to participate in early
32 resolution, or shall request that the early- resolution agency send the notice under
33 subsection (b), a creditor is not required to send or request a notice if a court or
34 governmental agency has determined under Section 505 that the property is abandoned.
35 If a court or governmental agency later determines that the property is not abandoned and
36 a foreclosure sale has not been completed, the creditor shall request the notice under

1 subsection (b) or send the notice under subsection (c).

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

8 (c) If the early resolution agency does not establish a procedure for the agency to
9 send notice required by subsection (a), the creditor shall send notice to each homeowner
10 and obligor, in the same manner as required for the notice under Section 201. (d) A
11 notice of the right to participate in early resolution must include the following:

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

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

18 (3) that the homeowner or obligor may request an early resolution
19 meeting, that the request must be made not later than 30 days after notice is sent, the
20 instructions for requesting early resolution, and all eligibility requirements under the
21 early-resolution agency rules;

22 (4) a description of all documents the homeowner or obligor must bring to
23 the early resolution meeting under the early-resolution agency rules; and

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

Drafter's Notes

1. The timing of the notice of early resolution will depend on whether the early resolution agency is a court or other agency. Early resolution should begin at the earliest possible time after a notice of default. However, in states whose early resolution programs are operated by the courts, it may not be possible to begin early 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 a person other than a family member, the obligor and homeowner are not eligible for early resolution, under §303. However, the creditor or agency must still send the notice of early resolution. If the agency determines, based on the obligor's request for early resolution or other information, that the property is rental property, it must then permit foreclosure to proceed, under Section 304.

SECTION 303. ELIGIBILITY FOR PARTICIPATION IN EARLY RESOLUTION.

(a) If a homeowner or obligor makes a request for early resolution not later than 30 days after the sending of a notice under Section 302(b) or (c), the agency shall schedule a meeting in accordance with its rules and appoint a neutral to conduct the meeting.

(b) If the early-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 rendered by the neutral or the agency. Failure to comply with this subsection includes failure:

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

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

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

6 (4) without good cause to pay any required early resolution fee;
7 and

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

11 (c) A homeowner or obligor is eligible for early resolution only if the mortgaged
12 property is not abandoned property or rented to a person other than the homeowner or
13 obligor [or an immediate family member of either]. If the mortgaged property contains
14 more than one dwelling unit, early resolution is available only if at least one dwelling unit
15 is occupied by the homeowner or obligor [or an immediate family member of either].
16 With a request for early resolution, the homeowner or obligor shall submit to the early-
17 resolution agency an affirmation that the mortgaged property is not abandoned and that it
18 is occupied either by an obligor or homeowner [or an immediate family member of
19 either]. If the agency determines that the property is abandoned or is not occupied by a
20 homeowner or obligor [or an immediate family member of either], the agency may not
21 schedule a meeting under subsection (a), but instead shall permit the creditor to proceed
22 with foreclosure under Section 305.

1 **SECTION 304. PARTICIPATION IN EARLY RESOLUTION.**

2 (a) The creditor shall inform the homeowner, obligor, and the early-resolution
3 agency of the loss-mitigation options available to the homeowner and obligor. The
4 creditor shall notify the homeowner, obligor, and the neutral or agency of its willingness
5 or refusal to offer a loss-mitigation option requested by the homeowner or obligor, the
6 reasons for any refusal, and the information on which any refusal is based.

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

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

13 (d) This [act] does not impose a duty on a creditor to provide any specific loss
14 mitigation option. The early-resolution agency rules may not impose a duty on a creditor
15 to provide any specific loss-mitigation option.

16 (e) A homeowner or obligor may be accompanied at an early-resolution meeting
17 by an attorney, housing counselor, or other individual.

18 (f) Personal financial information exchanged during early resolution is
19 confidential and not subject to disclosure under [state FOIA or sunshine laws]. Neither
20 the early resolution agency nor the neutral is required to respond to a discovery request in
21 a court proceeding other than the foreclosure action, if the discovery seeks personal
22 financial information of a homeowner or obligor exchanged during early resolution.

23 (g) A neutral shall disclose potential conflicts of interest in the time and manner

provided by the early-resolution agency rules.

Drafters' Notes

1. Abandoned properties are not eligible for early resolution and no notice of early resolution to an abandoned property is required. Investors who are renting a property otherwise covered by this Act are also ineligible for early resolution, but notice must be sent to the property prior to foreclosure. A homeowner must certify that the property is not a rental property (or, if it is, that the homeowner or obligor [or an immediate family member of either] occupies at least one unit) in order to request early resolution. 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 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 early 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 early resolution. The agency will also regulate procedural matters, such as time limits for exchanging documents, scheduling and concluding early resolution meetings, reports by neutrals, and the like. States should continue to have flexibility in the design and implementation of early resolution programs, but should establish and publish the standards as required by section 301. The model rules and best practices principles of early resolution set forth following Section 304 were developed by the Uniform Laws Commission after extensive collaboration with a number of state agency heads and outside consultants, and should aid state new early 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 107 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’.

1 **SECTION 305. FORECLOSURE ACTION DURING EARLY**
2 **RESOLUTION.**

3 (a) After an early-resolution agency or a creditor has sent notice required by
4 Section 302 to a homeowner or obligor, the creditor, subject to law of this state other than
5 this [act], may commence a foreclosure. Subject to subsection (c), the creditor may not
6 file a default or dispositive motion in a foreclosure action, or schedule or cause to be
7 scheduled a foreclosure sale, unless:

8 (1) neither the homeowner nor obligor responds to the early resolution
9 notice by making a request for early resolution to the agency not later than 30 days after
10 the notice is sent;

11 (2) the agency notifies the creditor that

12 (A) the parties have participated in the meeting required by Section
13 303(a) and reached an impasse, or

14 (B) the homeowner or obligor has failed to participate in early
15 resolution, provide required information after a reasonable opportunity to do so, or
16 materially comply with agency rules; or

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

19 (b) If the court or agency determines that the mortgaged property is abandoned or
20 used as rental property, the court or agency shall render an order permitting the creditor
21 to proceed with foreclosure.

22 (c) A creditor may proceed to file a default or dispositive motion in a foreclosure
23 action, or schedule or cause to be scheduled a foreclosure sale, [90] days after sending the

1 notice required by Section 302, unless the parties agree in a record to continue early
2 resolution or the court or early-resolution agency directs the parties to continue early
3 resolution.

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

8 **Drafters' Notes**

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

36
37 2. Subsection (a)(3) contemplates a variety of situations where,
38 notwithstanding the 90-day waiting period before foreclosure may be
39 commenced under subsection (b), either the court or early resolution

1 agency may enter an order permitting foreclosure to proceed in less than 90
2 days. Examples of particular situations that might warrant such an order
3 may include a case where the homeowner has already agreed to vacate the
4 property, or has failed to participate in early resolution, or if emergency
5 conditions short of abandonment would justify an accelerated foreclosure.
6

7 3. Subsection (b) contemplates a variety of situations where the 90
8 day waiting period before foreclosure may be finalized should be extended.
9 Examples of particular situations that might warrant such an order include
10 cases where the servicer has failed to evaluate a homeowner's completed
11 request for loss mitigation in a timely manner, has failed to comply with
12 material aspects of federal servicing regulations, *see* 12 C.F.R. §1024.41, or
13 has requested additional documents from the homeowner late in the early
14 resolution process.
15

16 4. Subsection (c) authorizes the agency to charge the parties fees
17 sufficient to fund the costs of the early resolution program, a funding
18 mechanism used in several states. States may wish to include more specific
19 provisions about the fees the agency may impose. Subsection (c) also
20 authorizes the agency to direct the homeowner to tender periodic payments
21 during the early resolution process. Lenders should benefit because the
22 payment requirement may filter out borrowers who simply want to buy
23 time, with no realistic expectation that retaining the property is possible.
24

25 [TO BE MOVED TO END OF THE ACT]

26 MODEL EARLY RESOLUTION PROGRAM RULES

27 1. These rules apply to the foreclosure early resolution program under [Article 3 of the
28 Home Foreclosure Procedures Act.] "Agency" means the early resolution agency. The
29 agency is [name of court or agency]. All provisions referring to "creditor" include
30 "servicer" as defined in [the HFPA].
31

32 2. The purpose of the foreclosure early resolution program is to assist a creditor and a
33 homeowner to reach a voluntary agreement that avoids foreclosure and achieves a
34 sustainable early resolution or mitigates damages in cases where foreclosure is
35 unavoidable.
36

37 3. The early resolution notice required by §302 of the HFPA may be sent [at any time no
38 later than 30 days after the creditor sends the notice required by §201][no later than 30 days
39 after the creditor files a complaint in foreclosure.] The notice shall instruct the homeowner
40 to contact the agency to request early resolution at the telephone number [or electronic
41 mail address] designated from time to time on the [agency web site][official journal].
42

43 4. If a homeowner requests early resolution, the agency shall open a foreclosure early
44 resolution case. Within five days of the request the agency shall send notice to the

1 homeowner and creditor [by mail, by electronic mail] to provide the agency with required
2 documents and information for the early resolution process. The document exchange
3 notice to the homeowner shall also include a list of available housing counseling agencies
4 that can assist the homeowner.

5
6 5. The agency shall schedule a meeting within 60 days after the homeowner's request for
7 early resolution.

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

- 11
12 a) Documents showing income qualification for a loan modification, including copies
13 of pay stubs, W-2 forms, social security or disability income, retirement income, child
14 support income, or other income that the homeowner believes is relevant to the
15 homeowner's ability to repay the mortgage,
16 b) Documents supporting any dispute regarding the existence or amount of any
17 mortgage loan default,
18 c) Documents relating to any prior loan modification or other prior agreement
19 regarding the mortgage loan and
20 d) Documents relating to any pending request to modify the loan or negotiate a
21 settlement of the delinquency.

22
23 7. Homeowners who do not occupy the property being foreclosed are not eligible for early
24 resolution. The notice to the homeowner shall state that if the homeowner or obligor is
25 not occupying the property is not eligible for early resolution, and that the homeowner
26 must return a signed non-investor certification form provided by the agency, together with
27 any required fee, in order to participate in early resolution.

28
29 8. The document exchange notice to the creditor shall instruct the creditor to submit to the
30 agency and the homeowner necessary and relevant documents including

- 31
32 a) Any 45-day notice and 5-day notices required by CFPB rule 12 CFR §1024.39(b)
33 and §1024.41(b)(2)(i)(B) previously sent to the homeowner in connection with the
34 current default,
35 b) Any prior offers of loss mitigation, forbearance, modification or other agreements
36 made with the homeowner in connection with the current default,
37 c) a list of documents required by the creditor to evaluate the homeowner's request
38 for loss mitigation,
39 d) The homeowner's payment history from the date of default,
40 e) Itemization of all amounts due on the loan, including all fees,
41 f) copies of the promissory note, signed by the mortgagor, including any
42 endorsements, allonges, amendments, or riders that show the mortgage debt,
43 g) any lost note affidavit the creditor will rely on to foreclose the mortgage.

44
45 9. The agency or neutral may request additional documents from either party as
46 appropriate. Either originals or copies of documents may be exchanged for the early

1 resolution. The neutral and the agency will not resolve disputes regarding authenticity of
2 documents.

3 10. The homeowner and creditor shall provide the documents requested by the agency no
4 later than 10 days after the sending of the document exchange notice.

5
6 11. The creditor shall communicate to the agency and the homeowner the identity of the
7 individual who will represent the creditor at the early resolution session at the time it
8 provides the required documents.

9
10 12. Within fourteen days after receiving the homeowner's request, the agency shall send
11 [mail, electronic] notice to the creditor and homeowner that shall include:

- 12
13 (1) The name and contact information of the assigned neutral,
14 (2) The date, time, and location of the early resolution session,
15 (3) Information about the conduct of the early resolution session, and
16 (4) Consequences and penalties for noncompliance with program rules.

17
18 13. Before accepting appointment as neutral, the neutral shall (a) make an inquiry that is
19 reasonable under the circumstances to determine whether there are any known facts that a
20 reasonable individual would consider likely to affect the impartiality of the neutral,
21 including a financial or personal interest in the outcome of the early resolution and an
22 existing or past relationship with a party to the early resolution or foreseeable participant
23 in the early resolution, and (b) disclose such known fact to the parties as soon as is practical
24 before the first early resolution meeting. If, after accepting a early resolution, a neutral
25 learns any fact that a reasonable individual would consider likely to affect the impartiality
26 of the neutral, including a financial or personal interest in the outcome of the early
27 resolution and an existing or past relationship with a party to the early resolution or
28 foreseeable participant in the early resolution, the neutral shall disclose it as soon as is
29 practical.

30
31 14. The neutral's role is to assist the parties with information exchange, communication
32 and negotiation to insure that every reasonable effort has been made to reach a voluntary
33 agreement to resolve the alleged mortgage default in some manner other than a foreclosure
34 sale.

35
36 [15. The neutral may charge each party a fee of [\$200]].

37
38 16. At least [10] days prior to the early resolution session, the creditor must notify the
39 neutral and homeowner of any decision to offer or not offer any loss mitigation options to
40 the homeowner. The creditor shall provide the neutral with documentation supporting its
41 decision not to offer a loss mitigation alternative to the homeowner. The creditor shall also
42 provide the neutral with inputs and the results of the net present value calculations relied
43 upon in reaching its decision. The neutral may request the creditor to provide additional
44 documentation to support its decision.

45
46 17. The homeowner is entitled to have an attorney, housing counselor or other person of

1 the homeowner's choosing accompany the homeowner to and participate in the early
2 resolution meeting.

3 Note – The term 'housing counselor' is included only as an example and
4 without a definition because the term 'other person' would include any
5 representative the homeowner chooses
6

7 18. If the homeowner fails without good cause to substantially and timely provide the
8 documents specified by the neutral or the agency, or to attend the early resolution meeting,
9 or if the agency determines that the homeowner requesting early resolution is not
10 occupying the property, the agency shall [enter an order][request the court to enter an order]
11 terminating the early resolution process and permitting foreclosure to proceed pursuant to
12 the HFPFA §304.
13

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

20 20. The parties are required to appear in person at the early resolution session and shall
21 have the authority to enter into a settlement to resolve the dispute. The creditor's
22 representative must have the ability to evaluate loss mitigation and to have the authority to
23 make a decision as required by the RESPA regulations of the Consumer Financial
24 Protection Bureau. However, upon written request provided to the neutral at least 30 days
25 prior to the early resolution session, the neutral may waive the requirement of having the
26 parties physically present at the session and allow them to appear by telephone or
27 teleconference.
28

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

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

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

38 24. Sanctions for violations of these rules, pursuant to Article 6 of the HFPFA, may be
39 imposed only by a court of competent jurisdiction upon motion of either party and after
40 notice and an opportunity to be heard.

41 25. All personal financial information as defined by [section of Act] disclosed by the
42 parties in the course of the early resolution is confidential and not subject to public

disclosure under [state freedom of information or sunshine laws] or any other state law.

26. The agency shall provide ongoing training for neutrals. This includes participation by all neutrals 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 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 early 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 early resolution. The agency shall act on the request no later than 30 days after receiving the request.

[30. Court early resolution programs in judicial foreclosures. The appearance of the homeowner or obligor at an early resolution session will constitute an entry of appearance in the foreclosure action.]

[ARTICLE] 4

RIGHT TO FORECLOSE; PUBLIC SALE PROCEDURE

SECTION 401 [A]. RIGHT TO FORECLOSE - JUDICIAL

FORECLOSURE.

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

(b)

(1) Except as otherwise provided in paragraph (2) and subsection (d), only a person entitled to enforce the obligation secured by the mortgage, as determined by law of this state other than this [act], may commence a foreclosure.

1 (2) If the obligation is registered in a mortgage registry, only the person
2 designated as the owner or holder of the obligation by the registry may commence a
3 foreclosure.

4 (c) In a judicial-foreclosure, the following rules apply:

5 (1) The creditor must plead that it has the right under subsection (b) to
6 foreclose; and

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

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

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

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

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

21 (e) If an obligation is evidenced by a negotiable instrument and a creditor does not
22 own the obligation, the [complaint] described in subsection (c) must disclose the name of
23 the legal owner of the obligation.

1 **SECTION 401 [B]. RIGHT TO FORECLOSE- NONJUDICIAL**
2 **FORECLOSURE.**

3 (a) A person described in subsection (b) may commence nonjudicial foreclosure
4 only after default in the obligation and satisfaction of all conditions required by the
5 mortgage agreement and by law.

6 (b)
7 (1) Except as otherwise provided in paragraph (2) and subsection (d), only
8 a person entitled to enforce the obligation secured by the mortgage, as determined by law
9 of this state other than this [act], may commence a foreclosure.

10 (2) If the obligation is registered in a mortgage registry, only the person
11 designated as the owner or holder of the obligation by the registry may commence a
12 foreclosure.

13 (c) The creditor, in a record, may authorize another person to foreclose.

14 **Drafters' Notes**

15 1. This act does not define events of default. Instead, like UCC
16 Article 9, this act leaves the definition of default to contract law. The
17 obligation may be stated in a promissory note (i.e., an obligation to make
18 monthly installment payments) or in another instrument such as the
19 mortgage agreement.
20

21 2. The conditions referred to in subsection (a) are those indicated in
22 the mortgage agreement or under this act and other law as necessary to
23 accomplish before the commencement of foreclosure.
24

25 3. Subsection (b)(1) resolves the problem of who has standing to
26 foreclose by designating the person who is entitled to enforce the obligation,
27 to be determined under other law of this state. When the obligation is
28 evidenced by a negotiable instrument, Article 3 of the Uniform Commercial
29 Code provides the governing rules. When the obligation is not evidenced
30 by a negotiable instrument, law other than UCC Article 3 will determine
31 who is entitled to enforce the obligation. One example of other law is the
32 Uniform Electronic Transactions Act (UETA), which grants to a person

1 having control of a “transferable record” the rights to enforce a promissory
2 noted evidenced by an “electronic record,” as those terms are defined in that
3 act.
4

5 4. Subsection (b)(2) authorizes foreclosure by a person identified as
6 the owner or holder of the obligation in a mortgage registry, a term defined
7 in Article 1. A mortgage registry does not presently exist, but there is
8 substantial interest in its creation. Thus, the Act contemplates the possibility
9 of an electronic recording system where all notes are electronically
10 generated and where, as a consequence, there is no paper note which might
11 be “possessed” in order to satisfy the holder in due course requirements of
12 UCC Article 3.
13

14 Under this section, a certificate or record issued by the sponsoring
15 organization is conclusive evidence that the person named in the certificate
16 as owning the obligation, holding the negotiable instrument (if the
17 obligation is evidenced by an negotiable instrument), or acting on behalf of
18 the owner or holder, has the right to foreclose under Section 401.
19

20 5. When the obligation is evidenced by a negotiable instrument,
21 subsection (c) requires that the complaint identify the possessor of the
22 instrument. The creditor may possess the instrument through an agent. If the
23 agent is not an employee of the creditor and has a place of business in a
24 location other than an office of the creditor, the complaint should identify
25 the agent as the possessor.
26

27 6. This section does not state a separate rule for determining when a
28 creditor who holds a security interest in a note to secure an obligation owed
29 to the creditor has the right to foreclose. UCC Article 9 covers both sales
30 of instruments and assignments of instruments that secure an obligation of
31 the assignor. A creditor who takes possession of a negotiable instrument
32 will acquire the right to foreclose. Other law determines when a creditor
33 who takes possession of an instrument that is not negotiable to secure an
34 obligation owed to the creditor acquires the right to foreclose. For example,
35 UCC § 9-607(a) and (b) provide rules indicating when a secured party has
36 the right to collect on collateral and to enforce the debtor’s rights with
37 respect to property that secures obligation owed to the debtor (i.e., the
38 obligation to pay the mortgage loan to the debtor).
39

40 7. Multiple persons may hold the right to foreclose a mortgage.
41 Other law, including UCC Article 3 and the law of agency, determines
42 whether the right to foreclose may be exercised by fewer than all such
43 persons.
44

45 8. When the obligation is owned by a trust, the owner of the
46 obligation for purposes of this Section is the trustee, not the beneficial

owner or owners of the trust property.

9. Under subsection (c) 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. Similarly, in a nonjudicial foreclosure, if there are subsequent judicial proceedings, a court may decide to order production of the original instrument if necessary to resolve a particular issue.

10. Subsection (d) 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 (d) 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.

11. If the obligation is registered in a mortgage registry under subsection (b)(2), the person designated in the registry as owner or holder of the obligation may authorize an agent to foreclose under subsection (d) without filing an amendment with the mortgage registry to identify the agent.

12. The alternative drafts for judicial and non-judicial foreclosure highlight the differences between the [act's] current requirements regarding the information provided to the borrower in the two forms of foreclosure.

Specifically, in subsection (c), (d) and (e) of the judicial foreclosure version, the creditor is required to include the following information in the complaint - and thereby advise the borrower of those facts:

1 First, under (c), if the note is a negotiable instrument, either (i) a
2 copy of the instrument and a statement identifying the person in possession
3 of the note; or (ii) if the note has been lost, destroyed, or stolen, a copy of
4 the note and a 403 affidavit.

5
6 Second, if the note is not negotiable, a copy of the record evidencing
7 the obligation and the creditor's right to enforce it.

8
9 Third, under (d), if the creditor has authorized another person to
10 foreclose, the complaint must disclose the name of the creditor and the
11 person authorized by the creditor to foreclose.

12
13 Fourth and finally, under (e), if the note is negotiable and a creditor
14 does not own it, the complaint must disclose the name of the legal owner.

15
16 All of this information must be included in the Section 201 notice
17 provided to all borrowers following default. However, Section 401 [B] , in
18 the case of non-judicial foreclosure, does not require any of the above
19 information to be provided to the borrower as part of the non-judicial
20 foreclosure process, except for telling the borrower that the creditor has
21 authorized another person to foreclose.

22
23 These differences in the current draft reflect what the drafters
24 believe was the guidance given by Drafting Committee members in states
25 where non-judicial foreclosure is the dominant process, and where the lack
26 of the highlighted information is the norm.

27
28 The policy issue is whether the borrower should have that
29 information to give to her lawyer, if she is going to contest the foreclosure,
30 and whether it would impose on the creditor an obligation to inform the
31 borrower of those same facts.

32
33 **SECTION 402. ASSIGNMENT OF MORTGAGE UNNECESSARY. A**

34 person entitled to foreclose a mortgage under Section 401 is not required to obtain or
35 record an assignment of the mortgage from any prior holder of the obligation.

36 **Drafters' Notes**

37 1. Existing state law conflicts as to (1) whether the foreclosing party
38 must have an express assignment of the mortgage, or a chain of assignments
39 running back to the original mortgagee, and (2) whether that assignment or
40 the chain of assignments must be recorded in the county land records.

41
42 In some states, a statute explicitly requires a recorded assignment.

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

10
11 This section resolves the conflict by following the principle that a
12 transfer of an interest in an obligation secured by a mortgage also operates
13 to transfer a corresponding interest in the mortgage. UCC § 9-203(g). If a
14 transfer of the right to enforce an obligation is accompanied by a separate
15 assignment of the mortgage, the assignment may be recorded in the office
16 in which mortgages are recorded. However, the creditor is not required to
17 obtain a mortgage assignment, nor to record any assignment, in order to
18 establish a right to foreclose the mortgage. The requirements of section 401
19 are all that is needed to establish standing to foreclose.

20
21 2. By allowing foreclosure by an assignee or transferee who
22 qualifies as the person to foreclose under Section 401, without a
23 requirement of recording any documents in the real property records, this
24 Act makes it unnecessary to follow the procedure authorized by UCC § 9-
25 607(b), which grants a secured party the right to record a copy of the
26 security agreement and an affidavit in the real property records. Compliance
27 with the requirements of Section 401 is sufficient.

28 29 **SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE**

30 **INSTRUMENT; AFFIDAVIT.**

31 (a) If a negotiable instrument secured by a mortgage is lost, destroyed, or stolen,
32 the creditor may foreclose the mortgage only if:

33 (1) the creditor was entitled to enforce the instrument when loss of
34 possession occurred; or

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

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

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

7 (b) If a creditor seeks to foreclose under subsection (a), the notice of default and
8 right to cure sent under Section 201 must state that the instrument is unavailable and
9 provide information establishing that the creditor may foreclose under subsection (a). In
10 a nonjudicial foreclosure, the notice also must:

11 (1) state that there may be a risk that a person other than the creditor will
12 seek to enforce the instrument, that the homeowner or obligor has the right to adequate
13 protection against a claim by another person, and that the homeowner or obligor has the
14 right to petition the [name of appropriate court] where the mortgaged property is located
15 for an order requiring the creditor to provide adequate protection; and

16 (2) include the indemnity required by subsection (c).

17 (c) If a creditor seeks to foreclose subsection (a) the homeowner or obligor is
18 entitled to adequate protection against loss that might occur by reason of a claim by another
19 person to enforce the negotiable instrument. The creditor must provide in a record an
20 indemnity against loss by the homeowner or obligor. In a judicial-foreclosure, the court
21 may require additional protection against a claim by another person. In a nonjudicial-
22 foreclosure, the homeowner or obligor may petition the [name of appropriate court] where
23 the mortgaged property is located for an order requiring the creditor to provide additional

1 protection against a claim by another person.

2 (d) In a judicial-foreclosure, a creditor shall file with the [complaint] an affidavit
3 attesting to facts under subsection (a). The creditor shall provide the indemnity required
4 by subsection (c) not later than the public sale. An affidavit that substantially complies
5 with the following form provides sufficient information:

6 **LOST-NOTE AFFIDAVIT**

7
8 _____(Affiant) being sworn deposes and says:
9 *[Name of affiant]*

10
11 1. Affiant is _____ of _____
12 *[Title or position]* *[Name of creditor]*

13
14 (Lender) and is authorized to make this affidavit on Lender's behalf.

15
16 2. Lender is the legal owner of a promissory note (Note) executed by

17
18 _____
19 *[Name(s) of obligor(s)]*

20
21 in the original principal amount of \$ _____
22 *[dollar amount], [date]*

23
24 and secured by _____
25 *[name of instrument]*

26
27 recorded in _____
28 *[recording reference]*

29
30 Lender has not sold, assigned, pledged, or otherwise transferred the Note to any person.
31 The Note is free and clear of all claims and encumbrances.

32
33 3. The Note is lost, destroyed, or stolen and for this reason cannot be produced.

34
35 4. On _____ Affiant made a diligent search for
36 *[insert date]*

37
38 the Note by personal examination of the books and records of Lender.
39
40 _____

1 _____
2
3 _____
4 *[describe search efforts including the books and records examined by Affiant]*
5
6 _____

7 *[name of affiant]*
8

9 ACKNOWLEDGEMENT

10
11 On *[insert date]*, before me, personally appeared *[insert name of affiant]*, *[insert affiant's*
12 *title and name of creditor]* who acknowledged the same to be affiant's free act and deed
13 and the free act and deed of *[insert name of creditor]*.
14

15 _____ NOTARY PUBLIC or
16 *[Name of Notary or other person authorized* other title
17 *to administer oaths under the law of this state]*
18

19 (e) The destruction of a negotiable instrument in connection with its registration
20 in a mortgage registry is not destruction of the instrument for purposes of this section.

21 ***Legislative Note:*** *Subsection (a) incorporates the language of Section 3-309 of Revised*
22 *UCC Article 3 (2002). This language is recommended for States that have adopted Revised*
23 *Article 3. For States that have adopted a prior version of UCC Article 3, there is a split of*
24 *authority as to whether an assignee of a lost, destroyed, or stolen negotiable instrument*
25 *may enforce the instrument when the assignee never obtained possession of the instrument.*
26 *States with a prior version of Article 3 should consider whether subsection (a) will change*
27 *the law in their State, and if so, whether that change is desirable.*
28

29 Drafter's Notes

30
31 1. This section requires a lost-note affidavit in a judicial foreclosure,
32 thus following the procedure adopted by most states in their judicial
33 foreclosure laws. The substance of this requirement follows the 2002
34 amendments to Article 3. In specifying when a creditor is entitled to enforce
35 a negotiable instrument secured by a mortgage notwithstanding its inability
36 to confirm possession of the instrument, subsection (a) tracks the
37 requirements of UCC § 3-309 (2002). In states that have adopted the 2002
38 amendments to Article 3, Section 3-309 makes it clear that the person who
39 lost possession may be a predecessor of the creditor who seeks to enforce
40 the instrument. UCC § 9-109, Comment 5 provides a result similar to the
41 2002 Article 3 amendment ("Also, the right under Section 3-309 to enforce
42 a lost, destroyed, or stolen negotiable promissory note may be sold to a
43 purchaser who could enforce that right by causing the seller to provide the
44 proof required under that section.").

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

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

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

33
34 5. This section does not require the preparation of a lost-note
35 affidavit in a non-judicial foreclosure. If an action is filed to contest or to
36 confirm a non-judicial foreclosure, the court should have the discretion to
37 decide what proof of a lost, destroyed, or stolen negotiable instrument is
38 sufficient.

39
40 6. Subsection (b) requires the creditor to disclose that the negotiable
41 instrument is lost, destroyed, or stolen when it sends notice of default and
42 right to cure under Section 201. In a non-judicial foreclosure, the additional
43 content for the notice is required because the homeowner or obligor is
44 unlikely to appreciate the risk associated with lost instruments, and it is
45 unlikely that a court will consider the issue unless the homeowner or obligor
46 initiates consideration.

1 7. Subsection (c) follows UCC § 3-309(b), which requires adequate
2 protection for the obligor from the risk that at some point in the future the
3 instrument will surface and its possessor will assert the right to be paid.
4 (UCC § 3-309(b) was not affected by the 2002 amendments to Article 3.)
5 Subsection (b) requires that the affidavit include a written indemnity,
6 binding the creditor, to protect all obligors against the risk that a person
7 other than the creditor will seek to enforce the instrument. This indemnity
8 serves to reinforce the rights that the obligor already has under principles of
9 restitution and unjust enrichment. See, e.g., Restatement (Third) of
10 Restitution and Unjust Enrichment § 6 (2011): “*Payment of Money Not Due*.
11 Payment by mistake gives the payor a claim in restitution against the
12 recipient to the extent payment was not due.” In appropriate cases, a court
13 may require a bond in addition to a written indemnity.
14

15 8. Subsection (d) describes the affidavit required in a judicial-
16 foreclosure and includes a safe-harbor form. The affidavit must be based
17 upon the affiant’s personal knowledge and must describe the efforts made
18 to locate the negotiable instrument. A bare assertion that the instrument is
19 lost or cannot be found is not sufficient. The court should apply its normal
20 standards for determining the sufficiency of the affidavit.
21

22 **SECTION 404. PUBLIC ADVERTISEMENT OF PUBLIC SALE.**

23 (a) Mortgaged property may be sold at a public sale only after the creditor has
24 published a commercially-reasonable public advertisement of the sale. An advertisement
25 is commercially reasonable if:

26 (1) published in a newspaper having general circulation in the [county]
27 where the mortgaged property is located once per week for three consecutive weeks
28 before the sale, with the first publication not more than 30 days before the sale; or

29 (2) posted on an Internet website that is reasonably expected to be viewed
30 by persons having an interest in purchasing the mortgaged property at least 21 days
31 before the sale and the Internet posting remains regularly available between the time of
32 posting and the time of sale.

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

34 (1) the name of the homeowner and, if not the same, the name of the

1 person that signed the mortgage agreement;

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

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

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

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

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

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

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

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

16 (c) An advertisement under subsection (a) need not contain a legal description of
17 the mortgaged property or recording information for the mortgage or other instrument of
18 record.

19 (d) The creditor may post an advertisement under subsection (a) or other
20 information pertaining to the sale at the location of the mortgaged property.

21 (e) A creditor shall send a copy of the advertisement under subsection (a) to the
22 homeowner and to each obligor no later than the date of newspaper publication or
23 Internet posting. The creditor may send the copy with the notice of public sale required

by Section 405 or send it separately.

Drafters' Notes

1. This section allows a public sale of the mortgaged property only if the creditor first gives a commercially reasonable public advertisement. 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) requires a commercially reasonable advertisement of a public law. 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 creates a safe harbor regarding circumstances when an advertisement would be commercially reasonable. Specifically, the method of publication is commercially reasonable if the creditor publishes the public advertisement either in a local newspaper or with 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. The safe harbor exists, however, only

1 if period of time for newspaper and Internet advertisements, satisfies the
2 standards in the act, which seek to ensure public access to the advertisement
3 for approximately one month preceding the date of sale.
4

5 6. Subsection (c) adopts a bright-line rule with respect to legal
6 descriptions of the real property and recording information. The failure to
7 include such information does not make the public advertisement
8 insufficient. This information is seldom of importance to a person who
9 reads a foreclosure advertisement for the purpose of deciding whether the
10 person has potential interest. Anyone who develops a potential interest is
11 highly likely to investigate further before appearing at the sale to bid. That
12 investigation may include title information, which will disclose the legal
13 description and recording references for the mortgage and other recorded
14 instruments in the chain of title, and typically will include other information
15 as well bearing on the property.
16

17 7. Subsection (d) authorizes the creditor to post the public
18 advertisement or a sign on the mortgaged property, regardless of whether
19 that right is reserved in the mortgage. Posting at the property is not required.
20 This changes the law in some states, in which posting foreclosure sale signs
21 at the property is mandatory.
22

23 **SECTION 405. NOTICE OF PUBLIC SALE.** A creditor shall send

24 each homeowner and obligor notice of the date, time, and place of a scheduled
25 public sale. Notice of sale must be sent by first-class mail to the last-known
26 address of each homeowner and obligor and a separate copy must be hand
27 delivered to the property address. Notice of sale must be mailed or delivered at
28 least 30 days before the sale date.

29 **Drafters' Notes**

30 1. This section requires that the creditor notify the
31 homeowner and any obligors of the date, time, and place of the
32 foreclosure sale. The section requires a 30-day notice of the
33 originally scheduled sale. One notice must be mailed, and a second
34 copy of the notice must be personally delivered to the residence.
35

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

SECTION 406. POSTPONEMENT OR CANCELLATION OF PUBLIC SALE.

(a) A creditor may postpone or cancel an advertised 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 announcement of the postponement is made at the date, time, and place advertised for the sale, a new public advertisement is not required under Section 404, unless the sale is postponed for longer than 30 days after the date originally advertised. If the announcement is not made at the date, time, and place advertised for the sale, a new public advertisement under Section 404 is required.

(b) If a foreclosure sale is postponed, 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 a foreclosure sale is cancelled, 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.

Drafters' Notes

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

1 or cancel the sale for any reason the person considers appropriate. A
2 postponement might also take place for other reasons, such as a judicial
3 order or an automatic stay in bankruptcy. Homeowners and obligors should
4 receive prompt notice of any postponement or cancellation. The rules of
5 Section 405 do not apply to notices of postponement or cancellation.
6 Subsection (b) covers notices of postponement and cancellation, requiring
7 that the notice be commercially reasonable under the facts and
8 circumstances. A postponement may be as short as one day. An oral
9 announcement of the postponement, made at the time and place of the
10 originally scheduled sale, would suffice if the homeowner and any obligor
11 were present, in which event no written or additional notice would be
12 necessary.

13
14 **[SECTION 407. CONFIRMATION OF PUBLIC SALE.]**

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

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

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

24 (1) there was a material procedural irregularity;

25 (2) the terms of sale were unconscionable; or

26 (3) the sale was conducted fraudulently.

27 (d) If the court does not confirm a public sale under subsection (c) and a party
28 makes a motion to set aside the sale, the court may order a resale of the property.

29 (e) For purposes of this subsection, a foreclosing creditor is not a good faith
30 purchaser for value. 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 purchaser of the mortgaged property in good faith for value

(f) Confirmation of a public sale is not required. 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].]

Legislative Note: *In some states, the law of judicial foreclosure requires that the court confirm the foreclosure sale. Although confirmation is mandatory, in the vast majority of the cases, no objection to confirming the sale is made. This section provides for an optional confirmation procedure, which allows the creditor the choice to seek confirmation or to treat the sale as ending the proceeding, assuming that no other party makes a post-sale challenge to the judgment or the sale. The creditor generally will seek confirmation only if it desires the conclusive effect that a confirmed sale has for title passing to a bona fide purchaser or if it anticipates that another party is likely to challenge the sale based upon alleged defects in post-judgment procedures. This section is recommended only for states that presently require confirmation of foreclosure sale in judicial foreclosure.*

Drafters' Note

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. 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 mortgaged
property if:

1 (1) all the homeowners and the creditor agree to the transfer in a record
2 after default by the homeowner or obligor;

3 (2) the agreement states it is made pursuant to this section;

4
5 (3) the creditor sends notice of the proposed negotiated transfer to the
6 persons entitled to notice under Section 502; and

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

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

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

18 **Drafters' Notes**

19
20 1. This section authorizes a transfer from the homeowner to the
21 creditor in satisfaction of the debt or other obligation. In so doing, it
22 provides a framework for existing workout arrangements such as cash-for-
23 keys agreements and deed-in-lieu of foreclosure transactions. This section
24 and the following two sections provide for a safe harbor by specifying the
25 effect of a transfer that meets the requirements of this section. This section
26 is based in part on UCC § 9-620, which provides for the acceptance of
27 personal property mortgaged property by a secured party in full or partial
28 satisfaction of a secured obligation. The important innovations here are,
29 first, to provide an expedited procedure to discharge junior liens on the
30 property without the need for a foreclosure sale; and second, to resolve a
31 number of collateral issues that flow from the expedited procedure, as

1 detailed in Section 504.

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

10
11 As a consequence, this section as now drafted confers a substantial
12 benefit on mortgage creditors in the form of a new mechanism for
13 converting every 'deed in lieu' transaction into an accelerated means of
14 clearing title of junior encumbrancers without the need for a more
15 traditional judicial foreclosure. In doing so, the section does not require any
16 minimum benefit on homeowners, other than the general statement of
17 effects of such an agreement contained in Section 504 and the rights of
18 possession noted in the preceding paragraph.

19
20 3. The second sentence of Section 501(b) contemplates a
21 circumstance where, for example, the lender and homeowner had agreed, in
22 a common 'cash for keys' agreement, that the homeowner would move
23 within a short period in return for a sum of money. If there are junior
24 lienholders, however, the possibility exists that there may be an objection
25 to the proposed transfer, that the agreement would not be approved, and that
26 the benefits contemplated by a homeowner under Section 504 from an early
27 move-out would not be realized. This sentence makes certain that the
28 homeowner need not be displaced, even voluntarily, until the parties knew
29 whether there would be objection from a junior lienholder.

30
31 In those cases where there are no junior lienholders or other holders
32 of subordinate interests, it is likely that the parties would often choose to
33 use a traditional deed in lieu of foreclosure to accomplish their agreement,
34 instead of following this statutory negotiated transfer procedure; *see* section
35 504(f).

36
37 4. When there are multiple owners of the mortgaged property, all the
38 owners need to consent to a negotiated transfer. The act does not authorize
39 a forced transfer outside of foreclosure for a non-consenting co-owner.

40
41 5. Subsection (c) prohibits the creditor from accepting the
42 mortgaged property in partial satisfaction of the obligation it secures in a
43 negotiated transfer under this [act]. Because the effect of a negotiated
44 transfer under section 504(a)(1) is to completely discharge the obligation,
45 this section does not require any consent from an obligor who is not also a
46 homeowner. Whether the parties may enter into another type of agreement

1 for the transfer of the mortgaged property in partial satisfaction of the
2 obligation is determined by other law of this state.

3
4 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

5 (a) If a negotiated transfer under Section 501 is proposed when a judicial-
6 foreclosure is pending, the homeowner and creditor shall request the court to send notice
7 of the proposed negotiated transfer to all parties to the action other than the homeowner
8 and creditor. The court promptly shall send the notice.

9 (b) If a negotiated transfer under Section 501 is proposed when a judicial-
10 foreclosure is not pending, the creditor shall send notice of the proposed transfer to:

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

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

17 **Drafters' Notes**

18
19 1. This section is based in part on UCC § 9-621, which provides for
20 a notification procedure for an acceptance of personal property by a secured
21 party in satisfaction of a secured obligation.

22
23 2. Subsection (a) provides for the court to notify parties to the
24 foreclosure of an agreement proposed by the homeowner and creditor for a
25 transfer in full satisfaction of the debt or other obligation. If there are no
26 parties to the action, other than the homeowner and the creditor, then there
27 is no one to notify. Holders of subordinate interests in the mortgaged
28 property should have been joined as necessary parties to the foreclosure
29 action.

30
31 3. Subsection (b) provides for the creditor to notify persons who
32 have subordinate interests in the mortgaged property of an agreement
33 proposed by the homeowner and creditor for a transfer in full satisfaction of

1 the obligation. Such subordinate interest holders may have their rights
2 terminated by the negotiated transfer, and therefore they have the right to
3 request protection pursuant to Section 503.
4

5 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED**
6 **TRANSFER.**

7 (a) If a judicial foreclosure is pending and the court receives an objection from a
8 person holding an interest in the mortgaged property which would be affected by a
9 negotiated transfer under Section 501, the court shall schedule a hearing on the objection.
10 The hearing must be held not later than [20] days after the objection is received.

11 (b) If a creditor that sends a notice under Section 502(b) receives an objection
12 from a person holding an interest in the mortgaged property which would be affected by
13 the negotiated transfer, the negotiated transfer may not proceed unless the creditor
14 initiates a judicial proceeding seeking a hearing on the objection. The hearing must be
15 conducted as provided by subsections (c) and (d).

16 (c) If in a hearing held under subsection (a), the court concludes there is no equity
17 in the mortgaged property available to satisfy the interest of the person objecting to the
18 proposed negotiated transfer, the court shall overrule the objection to the negotiated
19 transfer. In that event, the rights of the person objecting and all other interests subordinate
20 to the interest of the creditor that is a party to the proposed transfer under this section are
21 extinguished effective on the date of the court's conclusion.

22 (d) If in a hearing held under subsection (a), the court concludes there is equity in
23 the mortgaged property available to satisfy the interest of the person objecting to the
24 proposed negotiated transfer, the court shall set a date not later than [30] days after the
25 date of the hearing by which the person objecting may tender to the creditor that is a

1 party to the proposed transfer an amount equal to the obligation owed to the creditor. If
2 the person objecting tenders the amount to the creditor within the time set by the court,
3 the person objecting is entitled to the benefit of the proposed transfer, and all interests
4 subordinate to the interest of the creditor that is a party to the proposed transfer are
5 extinguished effective on the date of tender. If the person objecting does not tender the
6 amount to the creditor within the time set by the court, the rights of the person objecting
7 and all other interests subordinate to the interest of the creditor that is a party to the
8 proposed transfer are extinguished, effective on the date set by the court by which the
9 tender could have been made.

10 **Drafters' Note**

11 In a hearing under this section, the court may consider any evidence
12 to determine whether there is equity in the mortgaged property,
13 including an appraisal. An appraisal is not required.
14

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

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

18 (1) discharges the obligation in full;

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

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

25 (4) terminates any other subordinate interest except an interest protected

1 from termination by law other than this [act].

2 (b) A subordinate interest is discharged or terminated under subsection (a)
3 even in the event of noncompliance with this [article]. A creditor that fails to
4 comply with this [article] is liable for damages in the amount of any loss caused by
5 its failure to comply.

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

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

13 (e) Transfer of mortgaged property under Section 501 terminates any right of the
14 homeowner and other persons to redeem the property.

15 (f) This [article] does not prevent a homeowner and creditor from entering into an
16 agreement other than a negotiated transfer, but a negotiated transfer described in this
17 section does not apply to an agreement that does not state it is made pursuant to Section
18 501.

19 (g) This [article] does not affect the rights of a person holding an interest in
20 mortgaged property which has priority over the interest of a creditor that takes title to the
21 property under this section.

22 **Drafters' Notes**

23
24 1. This section is based in part on UCC § 9-622, which specifies the
25 effect of acceptance of personal property by a secured party in full or partial

1 satisfaction of a secured obligation.

2
3 Subsection (a) specifies that the effect of a transfer of the mortgaged
4 property is full satisfaction of the secured obligation. The transfer to which
5 it refers is one that results from performance of the agreement made by the
6 homeowner and the creditor. If a timely objection is received by the court
7 or by the creditor from a person entitled to notification, then neither this
8 subsection nor subsection (b) applies. Paragraph (1) expresses the
9 fundamental consequence of accepting the mortgaged property in full
10 satisfaction of the secured obligation—the obligation is discharged.

11 2. Paragraphs (2) through (4) of subsection (a) indicate the effects
12 of a transfer on various property rights and interests. Under paragraph (2),
13 the creditor acquires “all of the homeowner’s rights in the mortgaged
14 property.” Under paragraph (3), all junior encumbrances are discharged.
15 Paragraph (4) provides for the termination of other subordinate interests.
16 Under existing law, a deed-in-lieu of foreclosure accepted by a creditor does
17 not terminate subordinate mortgages, subordinate liens, or other subordinate
18 property rights. This Act changes that result by authorizing a transfer in full
19 satisfaction of the obligation, which terminates junior interests.
20

21 3. Subsection (a)(4) terminates subordinate interests, but with a
22 savings clause for a subordinate “protected from termination by other law.”
23 The clearest examples are the common provisions in state statutes providing
24 that various kinds of residential leasehold interests are not automatically
25 terminated by a foreclosure, but may only be terminated by the creditor
26 when they would be terminable under the terms of the lease itself in the
27 absence of foreclosure. This act does not overturn the results under those
28 statutes.
29

30 4. Subsection (b) affords a remedy to any person aggrieved by a
31 creditor’s failure to comply with the requirements of this [article], including
32 the holder of a subordinate interest to whom a notice required by Section
33 502 was not sent. Damages for noncompliance are those reasonably
34 calculated to put the aggrieved person in the position it would have occupied
35 but for the noncompliance. They include attorneys’ fees and costs.
36

37 5. Subsection (c) specifies that the status of the homeowner who
38 continues to occupy the property after entering into an agreement to transfer
39 the property to the creditor in full satisfaction of the obligation is that of a
40 licensee. The parties’ agreement and other state law determine the rights
41 and obligations of the parties as licensor and licensee.
42

43 6. Subsection (f) authorizes homeowners and creditors to enter into
44 any other type of agreement that they might desire, but no such agreement
45 – presumably including a traditional ‘deed in lieu’ arrangement – would
46 confer the benefits of Section 504 unless the agreement expressly provided

1 that it was made pursuant to Section 501.

2
3 7. The act does not require notice of the proposed negotiated transfer
4 to a senior creditor because the interest of the senior creditor will not be
5 affected by that transfer. It may well be that a negotiated transfer would
6 result in a violation of a 'due on sale' clause in the senior mortgage, but
7 whether or not such a violation results would not be affected by notice to a
8 senior creditor, and the act should not suggest a contrary result.

9
10 Moreover, a practical concern for the junior creditor and borrower
11 may be that after receiving notice, the senior creditor may intervene in the
12 hearing and seek to impose a charging order on any consideration offered
13 by the junior creditor in connection with the negotiated transfer, a tactic that
14 might jeopardize the entire transfer. A junior creditor may well be willing
15 to satisfy the senior debt but more eager to quickly clear subordinate liens;
16 no valid purpose would be served by requiring more notice to senior lien
17 holders than would be required in a conventional foreclosure.

18
19 **[ARTICLE] 6**

20 **ABANDONED PROPERTY**

21 **SECTION 601. PRESUMPTION OF ABANDONMENT.**

22 (a) Mortgaged property is presumed to be abandoned property if (1) a
23 governmental agency determines that the property is abandoned; or (2) three or more of
24 the following subparagraphs apply to the property:

25 (A) One or more doors to the property are boarded up, closed off, smashed
26 through, broken off, unhinged, or continuously unlocked; multiple windows are boarded
27 up or closed off; or multiple window panes are broken.

28 (B) Gas, electric, or water service to the property has been terminated or
29 utility consumption is so low that it indicates that the property is not regularly occupied.

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

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

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

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

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

9 (H) The homeowner is dead and there is no evidence that a survivor or an
10 heir of the homeowner is in actual possession of the property.

11 (b) An affidavit attesting to the presence of conditions described in subsection (a)
12 and any other facts evidencing abandonment must be signed by and based on personal
13 knowledge of the affiant and must state the basis for that personal knowledge.
14 Photographic or other documentary evidence that demonstrates the supporting facts must
15 be attached to the affidavit. A person may submit multiple affidavits as evidence of
16 abandonment.

17 **Drafters' Notes**

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

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

9 2. The conditions giving rise to prima facie evidence of
10 abandonment set forth in Subsection (a) through (a) closely track the criteria
11 set forth in Ind. Code § 32-30-10.6-5(a) (effective March 16, 2012). A
12 government agency's issuance of a determination that the mortgaged
13 property is abandoned by itself constitutes prima facie evidence of
14 abandonment. In some localities, after such a determination the government
15 will mark the property as abandoned. The government's determination,
16 finding, or order might not use the word "abandoned"; it might, for example,
17 refer to the property as vacant. Of course, the homeowner or another person
18 has the right to challenge the correctness of the governmental
19 determination.
20

21 With respect to the statutory conditions listed in the subparagraphs
22 to subsection (a)(2), the presence of three or more of such conditions
23 constitutes prima facie evidence, giving rise to a presumption of
24 abandonment. Such conditions are not conclusive on the issue of
25 abandonment. Many residential properties will exhibit at least one such
26 condition, when the homeowner is still in possession of the property. If the
27 homeowner or another person holding under the homeowner is in actual
28 possession of the mortgage property, the property is not abandoned
29 notwithstanding the existence of such conditions. Likewise, mortgaged
30 property may be abandoned under this Section notwithstanding the absence
31 of any of the statutory conditions.
32

33 3. A governmental agency's determination of abandonment under
34 subsection (a)(1) is distinct from the procedure established by Section 603
35 for a creditor or another person to request a determination of abandonment
36 in nonjudicial foreclosure. In many states other law authorizes a
37 government agency or employee to issue an order, citation, or determination
38 that residential property is abandoned, often without a prior hearing. Such
39 an order or determination creates a presumption of abandonment under this
40 Section. Likewise, a governmental determination that the property is unfit
41 for occupancy or constitutes a serious threat to public health or safety under
42 subsection (a)(2)(D) is not subject to the procedures established by Section
43 603.
44

45 4. Mortgaged property often becomes vacant, both under standard
46 mortgage and reverse mortgage transactions, when the homeowner dies.
Under subparagraph (a)(2)(H) proof of death of the homeowner is one of

1 the conditions that may give rise to a presumption that the mortgaged
2 property is abandoned, provided that there is no evidence that an heir or
3 other beneficiary of the homeowner's estate is in actual possession. Of
4 course if there are multiple homeowners, this condition is met only if all the
5 homeowners have died.
6

7 5. An affidavit under subsection (b) may be given by any person
8 having personal knowledge, including a contractor, government employee,
9 or neighbor of the mortgaged property.
10

11 **SECTION 602. DETERMINATION OF ABANDONMENT IN JUDICIAL**
12 **FORECLOSURE.**

13 (a) In a judicial foreclosure, a party or governmental subdivision in which the
14 mortgaged property is located may move for a determination that the property is
15 abandoned property. If the property is located in a common-interest community, the
16 community association may intervene in the foreclosure.

17 (b) A moving party under subsection (a) shall send separately to each homeowner
18 and obligor a notice that contains the following:

19 (1) a copy of the motion;

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

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

25 (4) a statement that the recipient may contact the [applicable government
26 official] to obtain further information or object to the proposed determination of
27 abandonment.

28 (c) The notice required by subsection (b) may be combined with the notice

1 required by Section 201.

2 (d) The party filing a motion under subsection (a) shall serve personally, or make
3 two attempts to serve personally, the notice described in subsection (b) on a homeowner
4 at the mortgaged property. The attempts must be at least 72 hours apart. One attempt
5 must be before noon, and the other attempt must be between 6 P.M. and 10 P.M. Posting
6 the notice on the property is not required.

7 (e) When a motion is filed under subsection (a), the court shall schedule a hearing
8 on the motion to be held not less than [15] nor more than [30] days after the filing of the
9 motion.

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

13 **Drafters' Notes**

14 1. Subsections (e) and (f) are based in substantial part on Minn. Stat.
15 § 582.032, which provides for expedited foreclosure for abandoned homes.
16 Minnesota generally provides a statutory right of redemption (post-
17 foreclosure-sale) of six months or one year, which is reduced to five weeks
18 when the lender uses the statutory procedure for abandoned property; this
19 section does not include a comparable right of redemption.
20

21 2. If no appearance is made at the hearing to oppose the motion to
22 determine that the mortgaged property is abandoned, under subsection (f)
23 the court may rely on affidavits to render an order that the property is
24 abandoned without taking testimony.
25

26 **SECTION 603. DETERMINATION OF ABANDONMENT IN**

27 **NONJUDICIAL FORECLOSURE.**

28 (a) In a nonjudicial foreclosure, a creditor, or governmental subdivision in which
29 the mortgaged property is located may submit a request to [governmental agency] for a

1 determination that the property is abandoned property. The request must be accompanied
2 by an affidavit attesting to facts indicating abandonment or a governmental agency's
3 determination the property is abandoned.

4 (b) A person that submits a request under subsection (a) shall send separately to
5 each homeowner and obligor a notice that contains the following:

6 (1) a copy of the request;

7 (2) a copy of the affidavit attesting to abandonment or a governmental
8 agency's determination the property is abandoned;

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

11 (4) a statement that the recipient may contact the [governmental agency]
12 to obtain further information;

13 (5) a statement that the recipient has the right to object to the proposed
14 determination of abandonment by sending a notification of objection to the
15 [governmental agency]; and

16 (6) a statement that the notification of objection must be received within
17 30 days after the notice was sent to the recipient, in which event the [governmental
18 agency] will not issue a determination of abandonment.

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

21 (d) A person that submits a request under subsection (a) shall serve personally, or
22 make two attempts to serve personally, the notice described in subsection (b) on a
23 homeowner at the mortgaged property. The attempts must be at least 72 hours apart. One

1 attempt must be before noon, and the other attempt must be between 6 P.M. and 10 P.M.

2 Posting the notice on the mortgaged property is not required.

3 (e) The [governmental agency], no sooner than 30 days after sending notice
4 under subsection (b), may issue a determination in a record that the property is
5 abandoned property if:

6 (1) the [governmental agency] has received evidence that notice under
7 subsection (b) was sent to each homeowner and obligor;

8 (2) the [governmental agency] has not received a notification of objection
9 to the proposed determination from a person entitled to notice under subsection (b) not
10 later than 30 days after notice was sent to the person;

11 (3) the [governmental agency] has received an affidavit attesting to facts
12 indicating abandonment or a governmental agency's determination, finding, or order that
13 the mortgaged property is abandoned; and

14 (4) the [governmental agency] has personally inspected the property.

15 (f) The [governmental agency] shall send a determination of abandonment under
16 subsection (e) to the creditor and to each homeowner and obligor.

17 (g) A determination of abandonment under subsection (e) or the refusal of the
18 [governmental agency] to issue a determination is subject to de novo judicial review.

19 **Drafters' Notes**

20
21 1. In a nonjudicial foreclosure, the creditor may treat the mortgaged
22 property as abandoned only by submitting evidence of abandonment to an
23 independent third party. Subsection (a) provides for the submission of
24 evidence to a person, who as part of the decision making process must
25 personally visit the property. Normally jurisdictions enacting this Act will
26 designate an employee of local government, such as a building inspector,
27 who is responsible for evaluating the physical condition of dwelling units.
28

2. 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 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 by the consent of the person submitting the request and each homeowner and obligor.

Drafters' Note

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 a court determines that 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 a 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 a motion of the foreclosing creditor, if the court determines that there is no equity in the mortgaged property available to satisfy the interests of subordinate creditors, the court shall order a transfer of the abandoned property directly

1 to the foreclosing creditor without public sale. The transfer of the property extinguishes
2 the rights of all interests subordinate to the interest of the foreclosing creditor.

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

9 (c) After a judicial order or a determination by a governmental agency that the
10 mortgaged property is abandoned property, the creditor shall cause the public sale or
11 transfer of the mortgaged property to the creditor to be completed not later than 120 days
12 after the order is rendered or the determination is made unless the creditor releases its
13 mortgage and the release is filed in the [real-property records]. Unless the creditor
14 releases its mortgage, the creditor may not seek to end its obligation to maintain the
15 property under Section 606 by dismissing, terminating, or suspending the foreclosure.

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

22 (e) Completion of a public sale or a transfer of mortgaged property to the creditor
23 under subsection (a) or (b) terminates the right of the homeowner and any other person to

1 redeem the property under law of this state other than this [act].

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

10 **Drafters' Notes**

11
12 1. This Section provides for an expedited public sale of the
13 mortgaged property after a determination that the mortgaged property is
14 abandoned. In a judicial foreclosure, the court must order the sale to take
15 place no longer than __ days after the court enters its order finding the
16 property to be abandoned, unless the creditor agrees to a later sale date. In
17 a nonjudicial foreclosure, the creditor may select the date, provided it is no
18 sooner than [__] days after the written determination of abandonment.

19
20 2. This Section does not authorize a disposition of abandoned
21 property other than public sale, but other dispositions are available under
22 other sections of this Act. For example, the homeowner and creditor may
23 agree to a negotiated transfer to the creditor in lieu of foreclosure pursuant
24 to Sections 501 to 504.

25
26 3. Once a creditor decides to take advantage of the expedited
27 foreclosure procedure allowed by this Section, there is a public interest in
28 ensuring that the property becomes occupied as soon as reasonably possible.
29 For this reason subsection (c) does not allow the creditor to suspend
30 indefinitely its efforts to consummate the foreclosure. There may be
31 exceptional circumstances in which it is not feasible to hold the foreclosure
32 sale within 60 days of the judicial order or written determination finding the
33 property to be abandoned, as required by subsection (a) and (b).

34
35 Subsection (c) poses the substantial question of what consequences
36 should flow from the failure of the creditor to comply with its requirements.
37 On the one hand, it would clearly be inappropriate to impose an obligation
38 on a creditor to repair the property subject to the mortgage before the
39 creditor has taken possession or an official determination is made that the
40 property is abandoned. Certainly, the lending community would object to
41 a statutory duty to maintain property on which it holds a mortgage in those
42 instances where the lender would prefer to release its mortgage and forego
43 any interest in that property.

44
45 On the other hand, the consequences of a creditor's failure either to

1 commence and complete a foreclosure action or to release its mortgage on
2 other stakeholders in the abandoned property – including the fee owner, the
3 municipality and neighbors in which the abandoned property is located, and
4 where appropriate, a homeowners association - are very real. The act as
5 drafted resolves these conflicting policies by offering the lender a choice of
6 how it wishes to proceed.

7
8 4. In states that afford the homeowner and other persons a statutory
9 right of redemption after completion of a foreclosure sale, subsection (e)
10 serves to terminate those redemption rights.

11
12 **SECTION 606. MAINTENANCE OF ABANDONED PROPERTY.**

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

14 (1) care for the yard and exterior of any building on abandoned property,
15 including removing excessive foliage growth that diminishes the value of surrounding
16 properties;

17 (2) prevent trespassers from remaining on the property;

18 (3) prevent mosquito larvae from growing in standing water on the
19 property; and

20 (4) take any other actions needed to prevent conditions on the property
21 which create a public or private nuisance.

22 (b) If a creditor is a party to a judicial-foreclosure, the creditor shall maintain the
23 mortgaged property beginning when the court renders an order determining that the
24 property is abandoned property under Section 602.

25 (c) If a creditor commences a nonjudicial-foreclosure, the creditor shall maintain
26 the mortgaged property beginning when a [governmental agency] determines that the
27 property is abandoned property is issued under Section 603.

28 (d) Absent a judicial order under subsection (b) or a determination under
29 subsection (c), a creditor that has commenced a foreclosure shall maintain the mortgaged

1 property beginning when the creditor receives notice that a [governmental agency] has
2 issued a determination that the property is abandoned property and is in a condition that
3 poses a threat to public safety or health.

4 (e) A creditor's obligation to maintain abandoned property continues until the
5 property is conveyed through foreclosure to a purchaser other than the creditor or until
6 the creditor records a release of its mortgage.

7 (f) A creditor that is obligated to maintain abandoned property may enter the
8 property peacefully and cause others to enter the property peacefully for the limited
9 purpose of maintenance required by this section and inspection and repair. All reasonable
10 expenses incurred by a creditor in complying with this section are an obligation of the
11 homeowner and are secured by the mortgage.

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

15 (h) The following have the right to enforce the obligations created by this section:

16 (1) a governmental subdivision in which the mortgaged property is
17 located; [or]

18 (2) a homeowners association, condominium association, or cooperative
19 association, if the property is subject to the rules of the association [; or]

20 (3) a community development corporation serving the area where the
21 mortgaged property is located].

22 (i) The obligation of a creditor to maintain abandoned property is limited to the
23 obligations created by this section. If the creditor becomes the owner of the property, the

1 creditor's obligations with respect to the property are determined by law of this state
2 other than this [act]. The creditor does not become a mortgagee in possession of the
3 property solely by virtue of the creditor's performance of the obligations created by this
4 section.

5 **Drafters' Notes**

6
7 1. This Section requires creditors to maintain abandoned properties
8 under certain circumstances. The obligation may arise based upon action of
9 the creditor or action of the municipality or other governmental entity where
10 the property is located. The creditor does not become obligated to maintain
11 merely by commencing foreclosure at a time when the dwelling unit is
12 vacant. Rather, the obligation arises when the creditor seeks to use the
13 expedited foreclosure procedure authorized by Section 605 and obtains
14 either a judicial order or official determination that the property is
15 abandoned. Under subsection (c) the obligation may also arise any time
16 after the creditor has commenced foreclosure if the municipality or other
17 local governmental entity cites the property as both abandoned and
18 presenting a threat to public safety or health.

19
20 2. Subsection (e) defines the scope of the creditor's obligation to
21 maintain abandoned property. The focus is on the outward appearance of
22 the property, including yards and other exterior spaces, and other conditions
23 that are likely to have significant impacts on the neighborhood, such as
24 interior spaces frequented by squatters or persons engaged in criminal
25 activities. This subsection is modeled closely on Cal. Civ. § 2929.3(b),
26 enacted in 2008.

27
28 3. Subsection (f) grants a license to the creditor and to its agents or
29 contractors to enter abandoned property for the purpose of inspection,
30 repair, and maintenance, regardless of whether that right is reserved in the
31 mortgage. Similarly, this subsection authorizes the addition of the creditor's
32 reasonable maintenance expenses under this section to the debt secured by
33 the mortgage, regardless of whether the mortgage contains a provision to
34 that effect.

35
36 4. Subsection (h) provides for enforcement by the local government
37 that has jurisdiction over the abandoned property. When the property is
38 located in a common-interest community, it also provides standing for the
39 association as a means to protect neighboring property owners whose
40 interests are likely to be harmed by the creditor's failure to maintain the
41 property. In conferring standing both to the local government and to
42 owners' associations, this subsection follows the approach taken by N.Y.

1 Real Prop. Acts. § 1307(3), enacted in 2009. This subsection does not grant
2 a direct enforcement right to neighbors. If negatively impacted, such
3 persons may have a remedy under other laws, such as public or private
4 nuisance.
5

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

14 **[ARTICLE] 7**

15 **REMEDIES**

16 **SECTION 701. EFFECT OF VIOLATION.**

17 (a) In a judicial-foreclosure proceeding, if the creditor or servicer is shown to
18 have committed a material violation of this [act], the court may dismiss the action, stay
19 the action on appropriate terms and conditions, or impose other appropriate sanctions
20 until the violation is cured. Dismissal must be without prejudice unless the court
21 determines that a new foreclosure action should be barred because of misconduct by the
22 creditor or servicer or other good cause.

23 (b) In a nonjudicial-foreclosure proceeding, the homeowner or obligor may
24 initiate an action to enjoin or restrain the foreclosure on the grounds that a creditor or
25 servicer committed a material violation of this [act]. If the court finds that a material
26 violation of this [act] occurred, the court shall allow foreclosure to continue after the
27 violation is cured, unless the court determines that continuation of the foreclosure would
28 unfairly burden the homeowner.

29 (c) If a court determines there is a material violation of this [act] under subsection
30 (a) or (b), the creditor may not add to the amount of the obligation any attorney’s fees or

1 costs incurred as a result of the violation, or any other attorney's fees and costs incurred
2 before the creditor cures the violation.

3 (d) A homeowner or obligor injured by a violation of this [act] may bring an
4 action for actual damages sustained by the homeowner or obligor against the person that
5 caused the violation.

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

10 (1) the frequency and persistence of violations [in dealing with the
11 homeowner][in its business practices] by the creditor or servicer;

12 (2) the nature of the violations, and

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

14 (f) In opposing the imposition or amount of statutory damages for violations of
15 this [act] established by the obligor or homeowner, the creditor or servicer may show
16 that:

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

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

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

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Comments

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 is 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 may 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; *see* Section 602.

SECTION 702. DEFENSE OR REMEDY OF HOMEOWNER OR

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

1 **Drafter's Note**

2 This act preserves rights and defenses available to homeowners and obligors
3 under other state statutes, regulations, common law, and federal law. In
4 many states, such rights and defenses include payment or tender of
5 payment; discharge; contract law defenses, including forgery, lack of
6 capacity, duress, absence or failure of consideration, fraud,
7 misrepresentation, unconscionability, failure of a condition precedent;
8 equitable defenses such as estoppel, laches, or unclean hands; release by
9 cancellation of debt; a violation by a creditor, servicer, their predecessors in
10 interest, or their agents of unfair and deceptive trade practices statutes and
11 other consumer protection statutes; a defect in a mortgage resulting from a
12 failure to comply with statutory requirements for the execution of
13 mortgages; a determination that the creditor or its predecessor in interest
14 was not licensed under state mortgagee licensing statutes or was not legally
15 authorized to make the loan under federal law; and breach of the duty of
16 good faith and fair dealing.
17

18 **SECTION 703. PROCEDURE FOR ASSERTING DEFENSE IN**

19 **NONJUDICIAL FORECLOSURE.**

20 (a) A homeowner or obligor may bring an action against a creditor or servicer
21 asserting a defense to a nonjudicial foreclosure. [An action to enjoin a foreclosure sale
22 must be brought before the sale.]

23 (b) In an action under this section, if the court determines that a defense to a
24 nonjudicial foreclosure exists, the court may order any appropriate relief, including an
25 award of any remedy provided in Section 601.

26 **Drafter's Note**

27 The bracketed language in subsection (a) complements the 1-year
28 limitations period in section 701(f) for damage actions.
29

30 **SECTION 704. ATTORNEY'S FEES AND COSTS.** In an action in which a

31 party seeks a remedy under Section 701 based on a violation of this [act], or asserts a
32 defense or remedy under Section 702 or a defense under Section 703, the court shall
33 award the costs of the action and reasonable attorney's fees to the prevailing party.

1 **SECTION 705. ENFORCEMENT BY [ATTORNEY GENERAL].** In
2 addition to enforcing any remedies available under law of this state other than this [act],
3 the [attorney general or other state official or agency] may bring an action to enjoin a
4 pattern or practice of violating this [act]. In such an action the court may (1) issue an
5 injunction or order against a creditor, servicer, their agents, or any other person violating
6 this [act], which may include requiring steps to be taken to remedy a violation or the
7 payment of damages to aggrieved homeowners; and (2) assess a civil penalty of not less
8 than \$[____] nor more than \$[____].

9 **SECTION 706. EFFECT OF THE HOLDER IN DUE COURSE RULE.**

10 (a) Notwithstanding [insert reference to UCC Section 3-305] and any agreement
11 waiving claims or defenses by an obligor or homeowner, a creditor that is a holder in due
12 course or who seeks to enforce a waiver of claims or defenses is subject to the claims and
13 defenses described in subsection (b) that the obligor or homeowner could assert against
14 the initial holder of the obligation.

15 (b) An obligor or homeowner may assert against a holder in due course a claim or
16 defense, not otherwise subject to a statute of limitations or other preclusion, based on
17 fraud, material misrepresentation, or fundamental breach of promise in connection with
18 the original loan transaction.

19 (c) If the creditor is a holder in due course under [insert reference to UCC Section
20 3-305] or seeks to enforce a waiver of claims and defenses, an obligor or homeowner
21 may:

22 (1) assert, in addition to the defenses otherwise available under [insert
23 reference to UCC Section 3-305], any defense against the holder in due course

1 described in subsection (b); or

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

4 (d) A claim or defense under subsection (c) may not be made or asserted after the
5 later of six years after execution of the record creating the obligation being enforced or, if
6 the claim or defense relates to an adjustment of the interest rate on the obligation or a
7 prepayment fee, one year after the creditor or servicer sends notice of an adjustment or
8 fee.

9 (e) If an obligor or homeowner establishes a claim or defense under this section,
10 relief is limited to reformation of the obligation and recoupment. Recoupment must be in
11 the amount of the economic loss caused by the fraud, misrepresentation, or fundamental
12 breach of promise and may not exceed the amount owed on the obligation at the time of
13 judgment. The court may determine whether the effect of recoupment is to cure the
14 default or reinstate the obligation pursuant to Section 201. Recoupment reduces both
15 what the creditor is entitled to collect in foreclosure and what the creditor is entitled to
16 collect by other processes, including a separate action to collect the obligation.

17 (f) This section applies to obligations incurred after [the effective date of this
18 [act]].

19 **Drafters' Notes**

20
21 1. This section represents a middle-ground position between preservation of
22 the status quo and complete abrogation of the HDC doctrine, along the lines
23 of the Federal Trade Commission Regulation (16 CFR Part 433) that
24 protects consumers who finance the purchase of goods or services.

25
26 In doing so, the draft limits the insulation that UCC Section 3-305 otherwise
27 provides to holders of notes – typically viewed by the marketplace as
28 negotiable instruments under UCC Section 3-104 – when secured by
29 mortgages on “mortgaged property” as that term is defined in Section 102

1 (15) of this [act].
2

3 The section contains these major limitations compared to simply abrogating
4 the holder in due course doctrine:
5

6 (a) it caps the liability of the holder to the outstanding loan balance,
7

8 (b) it applies only prospectively, and
9

10 (c) it preserves only claims and defenses based on fraud, material
11 misrepresentation, or fundamental breach of promise in connection with the
12 original loan transaction.
13

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

16 First, under subsection (a) the borrower's claims or defenses may be
17 asserted despite any waiver the borrower or other owner of the mortgaged
18 property may have signed;
19

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

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

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

27 Fifth, under subsection (d), no such claim or defense may be made
28 or asserted more than six years after the note was signed or, in the case of
29 an interest rate adjustment, more than one year after the creditor sends
30 notice of the adjustment to the borrower. However, nothing in this section
31 would alter the existing common law doctrine of recoupment that, in some
32 states, may permit assertion of a time-barred claim as a recoupment defense
33 only.

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

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

41 3. The section also authorizes the borrower to bring a declaratory judgment

1 to affirmatively assert one of these permitted claims, without the need to
2 raise them only in a foreclosure action. This balances the limitation of the
3 borrower's right to assert either a claim or a defense to a six year statute of
4 limitation, with another year allowed in the case of an interest rate
5 adjustment. There is no policy reason to force the borrower to default on
6 her loan as a condition of asserting claims she may have arising out of fraud,
7 misrepresentation or breach of promise.
8

9 4. Under subsection (e), the relief granted to the borrower is framed in terms
10 of recoupment or reduction in the balance of the outstanding loan, rather
11 than requiring the holder to pay funds to the borrower. For example, if the
12 obligor is personally liable to pay the obligation, recoupment under this
13 section reduces what the creditor may collect outside of foreclosure,
14 including by way of a deficiency judgment if foreclosure proceeds to a
15 sale. In this respect, this section follows the broad approach taken by the
16 FTC regulation. By making the creditor "subject to" claims and defenses,
17 those claims and defenses, when proven, offset the amount due on the
18 obligation.
19

20 5. Finally, while the section refers only to 'creditors', a servicer would be
21 subject to the same liabilities imposed on the creditor whose contract with
22 a servicer authorized or required the creditor to undertake a duty that the
23 [act] imposes on the creditor; see Section 107 of the [act].
24

25 **[ARTICLE] 8**

26 **MISCELLANEOUS PROVISIONS**

27 **SECTION 801. UNIFORMITY OF APPLICATION AND**

28 **CONSTRUCTION.** In applying and construing this uniform act, consideration must be
29 given to the need to promote uniformity of the law with respect to its subject matter
30 among states that enact it.

31 **SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN**

32 **GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or
33 supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.
34 Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act,
35 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 803. PRE-EFFECTIVE DATE TRANSACTIONS. This [act] applies to foreclosure of a mortgage created before, on or after the effective date of this [act], unless the creditor has commenced a foreclosure before the effective date of this [act]. **[WRB- At the suggestion of the Style Committee, the Drafter’s note, with revisions, became the substantive provision.]**

SECTION 804. REPEALER; CONFORMING AMENDMENTS. The following acts and parts of acts are repealed:

(a)

(b)

(c)

If there is a conflict between this [act] and other law of this state, this [act] prevails.

Legislative Notes

At a later time, and with further guidance from Style, the Reporters will add legislative notes on FOIA, various kinds of records, and Redemption.

Style asks “How does this affect the Overlay concept? Repealer might be inconsistent with that concept.

Drafters’ Notes

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

1 other state statutes to limit their scope to foreclosures that are not within the
2 scope of this Act.
3

4 2. At the same time, this Act was drafted with the expectation that
5 existing state foreclosure procedures would remain in place. This Act is not
6 intended to displace all existing foreclosure laws in each state, but rather to
7 be an overlay on existing law. For example, and most fundamentally, the
8 Act does not anticipate or provide that a state employ a judicial foreclosure
9 process when the customary practice is to foreclose under a power of sale
10 procedure, nor does the Act contemplate that a state should enact a non-
11 judicial foreclosure process in the absence of existing state laws. It is for
12 that reason that the legislative drafters in each state should carefully
13 consider how best to integrate the provisions of the Act with existing state
14 laws governing the foreclosure process.
15

16 3. In addition to the listed specific sections repealed by this Act,
17 subsection (b) provides for the repeal of all other legislation in this state
18 which is inconsistent with this Act. This provision is necessary to resolve
19 those matters that may ultimately be presented to a court in construing the
20 Act in cases where the specific repealer in subsection (a) fails to note an
21 existing state statute which the court concludes is inconsistent with a
22 provision of this Act.
23

24 **SECTION 805. EFFECTIVE DATE.** This [act] takes effect