D R A F T

FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAW

February 26 – 28, 2015 Drafting Committee Meeting

REDLINED DRAFT

Without Prefatory Note and with Reporters' Drafting Notes

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporters' notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

February 16, 2015

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HOME FORECLOSURE PROCEDURES ACT

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [act]:

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

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

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

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

(2) "Common-interest community" means real property with respect to which a person, by virtue of ownership of a unit, is obligated to pay real-property taxes or insurance premiums or for maintenance, improvement of other real property, or services described in a declaration or other governing document, however denominated. The term includes properties held by a cooperative-housing corporation. In this paragraph, "ownership" includes a leasehold interest if the period of the lease is at least [20] years, including 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~~Pre-foreclosure resolution" means a process in which ~~the assistance of~~ a third-party neutral person assists the parties 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 agreement between the parties for a commercially reasonable alternative to foreclosure.

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

~~**Foreclosure** Mediation~~	~~**Foreclosure** Conciliation~~
~~**Foreclosure Resolution**~~	~~**Foreclosure** Diversion~~
~~Pre-**Foreclosure [etc.]**~~	
~~Dispute **Resolution**~~	~~Early **Resolution**~~
~~**Mediation** [alone]~~	

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

(5) "Pre-foreclosure ~~Early~~ resolution agency" means [the administrative or judicial agency designated by the state to supervise ~~early resolution~~pre-foreclosure resolution ~~of foreclosure~~].

(6) "Expenses of foreclosure" means the lesser of:

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

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

(7) "Foreclosure" means a process, proceeding, or action ~~by a creditor~~ to ~~terminate~~ enforce an obligation by terminating a homeowner's interest in mortgaged property or obtaining possession of mortgaged property ~~for the creditor~~. The term does not include a voluntary transfer by a homeowner or an action to recover possession of property after a completed foreclosure sale. "Foreclose" has a corresponding meaning.

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

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

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

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

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

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

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

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

(15) "Mortgaged property" means real property improved with not more than four dwelling units which is subject to a mortgage. The term includes an attached single-family unit, a single-family manufactured-housing unit treated as real property under law of this state other than this [act], a time share in a dwelling unit if that time share is treated as real property under law of this state other than this [act], real property on which construction of not more than four dwelling units has commenced, and a single-family unit in a common-interest community. The term does not include real property that, when the mortgage being foreclosed was created, was used or intended to be used primarily for nonresidential purposes such as farming, commercial, or industrial use.

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

(17) "Nonjudicial foreclosure" means a foreclosure that proceeds without judicial process under [insert statutory reference].

(18) "Obligation" means a debt or other duty or liability of an obligor secured by a mortgage.

(19) "Obligor" means a person that:

(A) owes payment or performance of an obligation;

(B) ~~has provided property other than the mortgaged property to secure payment of the obligation;~~ has signed a mortgage agreement with respect to the mortgaged property; or

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

(20) "Person" means an individual, estate, business or nonprofit entity, public

corporation, government or governmental subdivision, agency, instrumentality, or other legal entity.

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

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

~~(23) “Mortgaged property” means real property improved with not more than four dwelling units which is subject to a mortgage. The term includes an attached single-family unit, a single-family manufactured-housing unit treated as real property under law of this state other than this [act], a time share in a dwelling unit if that time share is treated as real property under law of this state other than this [act], real property on which construction of not more than four dwelling units has commenced, and a single-family unit in a common-interest community. The term does not include real property that, when the mortgage being foreclosed was created, was used or intended to be used primarily for nonresidential purposes such as farming, commercial, or industrial use.~~

(23~~4~~) “Servicer” means a person responsible for servicing an obligation, including a person that holds or owns an obligation or originates a mortgage loan if the person also services the obligation.

(24~~5~~) “Servicing” means:

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

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

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

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

(25~~6~~) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

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

Comments

1. The definition of "abandoned property" works in tandem with the factors listed in Section ~~505~~601(a). Whether mortgaged property is "abandoned property" is determined by the facts of each case. The Section ~~505~~601(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~~pre-foreclosure 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.

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

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

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

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

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

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

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

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

SECTION 103. SCOPE. 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~~person whose conduct is governed by this Act 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].

Comments

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~~ 602 for a home the creditor knows is not abandoned, although it may meet the statutory criteria that give rise to a presumption of abandonment.

2. The obligation to act in good faith set forth in subsection (a) relates to the performance of specific duties and obligations imposed on persons by this act and by their agreement. It is not the source of independent obligations to take or refrain from taking certain actions.

3. The term "creditor" in subsection (b) and elsewhere in the Act includes servicers who have the right to foreclose the mortgage under Section 401.

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~~pre-foreclosure resolution; or

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

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

(B) the foreclosure sale has been postponed, canceled, or stayed due to loss mitigation or ~~early resolution~~pre-foreclosure resolution ~~while at the same time continuing with the foreclosure~~when the sale has not been postponed, canceled or stayed; or

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

SECTION 106. APPLICATION OF LOCAL REGULATIONS.

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

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

Comments

1. This section addresses local laws that regulate residential properties that are in foreclosure or have been sold at foreclosure. During recent years, local governments in a number of states have enacted ordinances that establish mediation or "dispute resolution" programs or that regulate abandoned properties. Lenders have expressed concern that such local programs are often burdensome, especially due to their limited geographical scope. A number of state legislatures have passed statutes to preempt various types of local legislation that affect mortgage lending and the enforcement of mortgages. This section seeks to address the issue. The drafting committee discussed prior versions of this section at its January 2014 and May 2014 meetings. One major decision is whether field preemption or conflict preemption is more appropriate. Although the current language reflects the former model, the committee has not yet made a decision. It will consider the matter at its fall 2014 meeting.

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

law, would not be barred by this section.

SECTION 107. SERVICERS.

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

(b) A servicer ~~who is authorized to act~~ ~~on behalf of~~to whom a creditor delegates a duty:

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

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

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

Comment

This section does not prevent a creditor from delegating duties to persons other than servicers.

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

~~**Drafters' Note**~~

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

~~[SECTION 109. NOTICE AND KNOWLEDGE.~~

~~(a) Subject to subsection (b), a person "receives" a notice or notification when the notice or notification :~~

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

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

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

~~Drafter's Note~~

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

~~**Chair's Note** this Section is bracketed as a signal for Committee discussion.~~

[ARTICLE] 2

NOTICES; RIGHT TO CURE

SECTION 201. NOTICE OF DEFAULT; RIGHT TO CURE.

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

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

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

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

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

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

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

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

(7) the name of

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

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

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

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

foreclose; and

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

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

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

Comments

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

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

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

4. Items (1) through (6) are adapted from the elements of notice in the standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a

specific deadline to cure the default. Items (7) and (8) are the ownership statement required by the national servicing settlement, and call for the servicer to identify its basis for standing at the outset of foreclosure proceedings, so that any disputes can be resolved promptly. This notice does not displace all state-specific aid programs and counseling notices which necessarily will depend on state funding – for example, Pennsylvania requires a separate 30-day notice of how to apply for its Homeowner's Emergency Mortgage Assistance Program.

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

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

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

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

Comments

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

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

3. At the Chicago meeting, the Committee voted 5-5 on a motion to delete the bracketed second sentence of Section 202. The Committee should make a final decision regarding whether a Section 202 notice should be sent to "occupants".

SECTION 203. RIGHT TO CURE DEFAULT.

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

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

(c) To cure a default under this section, a~~n obligo~~ person~~r~~ shall:

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

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

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

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

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

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

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

Comments

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

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

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

4. If a default is cured, restoring the homeowner and obligor to the same position as if no default occurred means that if there is a later default, new notices must be sent prior to foreclosure. Conversely, if as a result of ~~early resolution~~pre-foreclosure resolution under Article 3 or otherwise, a

settlement is reached but the homeowner or obligor does not fully cure the default, new notices are not required. However, nothing in this [act] requires a lender who properly assessed late fees or default interest following a default to disgorge those fees if the default is subsequently cured.

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

SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.

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

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

(2) the identity of the person.

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

Comment

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

[ARTICLE] 3

~~EARLY~~ PRE-FORECLOSURE RESOLUTION

SECTION 301. ~~EARLY~~PRE-FORECLOSURE -RESOLUTION PROGRAM. [The court or agency serving as the ~~early resolution~~pre-foreclosure resolution agency] is the ~~early resolution~~pre-foreclosure resolution agency**.** The agency shall adopt rules under [insert reference to state administrative procedures act or, if the agency is the judicial system, to the rules of court] establishing procedures and standards for ~~early resolution~~pre-foreclosure resolution. The agency will appoint a neutral person to assist parties making a request under Section 303 to achieve alternatives to foreclosure.

Comments

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

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

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

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

3. ~~Early resolution~~Pre-foreclosure resolution is not mediation as defined in the Uniform Mediation Act. The agency or court determination under §304 whether to permit foreclosure to proceed requires reporting of information concerning the ~~early resolution~~pre-foreclosure resolution

process. The Uniform Mediation Act generally bars mediators from making reports. Article 3 and the model rules in the Appendix to Article 3 do, however, include some key principles form the Uniform Mediation Act, including the protection of confidential information exchanged in ~~early resolution~~pre-foreclosure resolution and the avoidance of conflicts of interest on the part of the neutral.

SECTION 302. NOTICE OF ~~EARLY RESOLUTION~~PRE-FORECLOSURE RESOLUTION.

(a) ~~Not later than 30 days after a creditor sends a notice of default and right to cure required by Section 201, or, in~~In a judicial foreclosure, ~~not later than service of a mortgage foreclosure [complaint] on the homeowner,~~ the creditor shall send to the homeowner and obligor a notice under subsection (c) of the right to participate in ~~early resolution~~pre-foreclosure resolution, or shall request that the ~~early~~ pre-foreclosure resolution agency send the notice under subsection (b), not later than service of a foreclosure [complaint] on the homeowner. In a nonjudicial foreclosure, the creditor shall send to the homeowner and obligor a notice under subsection (c) of the right to participate in pre-foreclosure resolution, or shall request that the pre-foreclosure resolution agency send the notice under subsection (b), nor later than 30 days after sending a notice of default and right cure required by Section 201.

(b) A creditor is not required to send or request a notice if a court or governmental agency has determined under Section ~~505~~ 602 that the property is abandoned. If a court or governmental agency later determines that the property is not abandoned and a foreclosure sale has not been completed, the creditor shall request the notice under subsection (b) or send the notice under subsection (c).

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

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

(e~~d~~) A notice of the right to participate in ~~early resolution~~pre-foreclosure resolution must include the following:

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

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

(3) that the homeowner or obligor may request a~~n~~ ~~early resolution~~pre-foreclosure resolution meeting, that the request must be made not later than 30 days after notice is sent, the instructions for requesting ~~early resolution~~pre-foreclosure resolution, and all eligibility requirements under the ~~early resolution~~ agency's rules;

(4) a description of all documents the homeowner or obligor must bring to the ~~early resolution~~pre-foreclosure resolution meeting under the ~~early resolution~~ agency's

rules; and

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

Comments

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

2. If the property is not abandoned, but the agency or court determines that the homeowner has rented the dwelling unit to ~~a person~~ someone other than ~~a family member~~ another homeowner or an obligor, the obligor and homeowner are not eligible for ~~early resolution~~pre-foreclosure resolution, under §303. However, the creditor or agency must still send the notice of ~~early resolution~~pre-foreclosure resolution. If the agency determines, based on the obligor's request for ~~early resolution~~pre-foreclosure resolution or other information, that the property is rental property, it must then permit foreclosure to proceed, under Section 304.

SECTION 303. ELIGIBILITY FOR PARTICIPATION IN ~~EARLY RESOLUTION~~PRE-FORECLOSURE RESOLUTION.

(a) If a homeowner or obligor makes a request for ~~early resolution~~pre-foreclosure 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 person to conduct the meeting.

(b) If the pre-foreclosure ~~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 person or the agency. Failure to comply with this subsection includes failure:

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

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

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

(4) without good cause to pay any required ~~early resolution~~pre-foreclosure resolution fee;

and

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

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

SECTION 304. PARTICIPATION IN ~~EARLY RESOLUTION~~PRE-FORECLOSURE RESOLUTION.

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

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

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

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

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

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

(g) The~~A~~ neutral person shall disclose potential conflicts of interest in the time and manner provided by the ~~early resolution~~ agency rules.

Comments

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

2. As provided in Section 301, the pre-foreclosure agency rules and orders may impose additional requirements on the parties, for example requiring the creditor, servicer or its agent to appear in person or to have a person with authority to approve loss mitigation alternatives available by telephone at the time of the ~~early resolution~~pre-foreclosure resolution session, to perform a net present value analysis, to disclose the

assumptions on which the analysis is based, or requiring homeowners to meet with a housing counselor to qualify for ~~early resolution~~pre-foreclosure resolution. The agency will also regulate procedural matters, such as time limits for exchanging documents, scheduling and concluding ~~early resolution~~pre-foreclosure resolution meetings, reports by neutrals, and the like. States should continue to have flexibility in the design and implementation of ~~early resolution~~pre-foreclosure resolution programs, but should establish and publish the standards as required by section 301. The model rules and best practices principles of ~~early resolution~~pre-foreclosure 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~~pre-foreclosure resolution agencies in designing their programs.

3. In existing state foreclosure mediation programs, a creditor will commonly delegate to its servicer whatever duties the statute imposes on the creditor, and this [act] contemplates that procedure will continue to prevail under the procedures set forth in this Article 3. Section 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’.

SECTION 305. FORECLOSURE ACTION DURING ~~EARLY RESOLUTION~~PRE-FORECLOSURE RESOLUTION.

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

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

(2) the agency notifies the creditor that

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

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

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

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

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

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

Comments

1. Numerous states have ~~recently~~ enacted mandatory ~~early resolution~~pre-foreclosure resolution or loss mitigation laws. Under various names and structures, the consistent object of these programs is to delay or prevent foreclosure until the homeowner has had the opportunity to request some

form of loss mitigation: See, e.g., Arkansas Act 885 (2011) Sec 3, Ark Code 18-50-104 (beneficiary must certify to selling attorney or trustee that it has notified homeowner of ineligibility for loss mitigation options before nonjudicial sale); California Assembly Bill 278 (enacted July 11, 2012, prohibits foreclosure when loan modification request is pending); Idaho Code 45-1506, HB 331 Idaho now requires notice of right to apply for loan modification and bars nonjudicial sale until creditor responds to homeowner's request); Indiana Act 170 of 2011 (same; also prohibits servicer or attorney fees for mediation or loss mitigation); Massachusetts Chapter 194 of Acts of 2012 (creditor must offer mortgage modification prior to foreclosing, if modification would maximize value for mortgagee); Michigan Compiled Laws §3205a (amended Act 302 of 2011); Nevada Rev. Stat. §107.086; Washington Chapter 58 Laws of 2011, amending RCW 61.24 (delays foreclosure 90 days if homeowner requests meeting with creditor to request loss mitigation, and for cases referred by housing counselor to ~~early resolution~~pre-foreclosure resolution, until the parties comply with duty to mediate in good faith). Requiring a process that includes an exchange of information between borrower and creditor, an explanation of various loss mitigation options and some form of meeting with a third party neutral before a foreclosure is begun allows necessary foreclosures to go forward promptly and efficiently after cases suitable for other resolutions are identified and resolved.

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

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

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

SECTION 306: EXEMPTION FOR SMALL CREDITORS. The provisions of this Article do not apply to a foreclosure by a person that is the owner, holder, or servicer of five or fewer mortgages at the time the notice required by Section 201 is sent. An exempt small creditor may elect voluntarily to send the notice under §303 and participate in pre-foreclosure resolution under this Article.

[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)~~, the only person who may commence a foreclosure is 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~~or a person described in subsection (d).

(2) If the obligation is registered in a mortgage registry, only the person

designated as the owner or holder of the obligation by the registry may commence a foreclosure.

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

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

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

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

(B) a statement that the instrument has been lost, destroyed, or stolen and a copy of the instrument in its last-known condition, in which case the [complaint] must include an affidavit that complies with Section ~~403~~402.

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

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

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

SECTION 401 [B]. RIGHT TO FORECLOSE- NONJUDICIAL

FORECLOSURE.

(a) A person described in subsection (b) may commence nonjudicial 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)~~, the only person who may commence a foreclosure is a person entitled to enforce the obligation secured by the mortgage, as determined by law ~~of this state ~~other than this [act], or a person described in subsection (d)~~may commence a foreclosure~~.

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

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

Comments

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

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

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

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

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

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

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

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

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

8. When the obligation is owned by a trust, the owner of the 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 foreclosure 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:

First, under (c), if the note is a negotiable instrument, either (i) a copy of the instrument and a statement identifying the person in possession of the note; or (ii) if the note has been lost, destroyed, or stolen, a copy of the note and a ~~403~~ 402 affidavit.

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

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

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

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

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

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

13. Existing state law conflicts as to (1) whether the foreclosing party must have an express assignment of the mortgage, or a chain of assignments running back to the original mortgagee, and (2) whether that assignment or the chain of assignments must be recorded in the county land records. This section resolves the conflict by following the principle that a transfer of an interest in an obligation secured by a mortgage also operates to transfer a corresponding interest in the mortgage. UCC § 9-203(g). The requirements of section 401 are all that is needed to establish standing to foreclose.

CHAIR'S NOTE: Several members of the Drafting Committee, as well as observers and the ABA Advisor, ask that the Drafting Committee reconsider the deletion of Section 402.

~~**SECTION 402. ASSIGNMENT OF MORTGAGE UNNECESSARY.** A person entitled to foreclose a mortgage under Section 401 is not required to obtain or record an assignment of the mortgage from any prior holder of the obligation.~~

~~**Drafters' Notes**~~

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

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

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

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

SECTION 402. LOST, DESTROYED, OR STOLEN NEGOTIABLE INSTRUMENT; AFFIDAVIT.

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

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

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

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

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

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

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

for an order requiring the creditor to provide adequate protection; and

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

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

(d) In a judicial-foreclosure, a creditor shall file ~~with the [complaint] an affidavit~~ a [verified complaint] [complaint with affidavit] attesting to facts under subsection (a). The creditor shall provide the indemnity required by subsection (c) not later than the public sale. (e) The destruction of a negotiable instrument in connection with its registration in a mortgage registry is not destruction of the instrument for purposes of this section.

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

Comments

1. This section requires a lost-note affidavit in a judicial foreclosure, thus following the procedure adopted by most states in their judicial foreclosure laws. The substance of this requirement follows the 2002

amendments to Article 3. In specifying when a creditor is entitled to enforce a negotiable instrument secured by a mortgage notwithstanding its inability to confirm possession of the instrument, subsection (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted the 2002 amendments to Article 3, Section 3-309 makes it clear that the person who lost possession may be a predecessor of the creditor who seeks to enforce the instrument. UCC § 9-109, Comment 5 provides a result similar to the 2002 Article 3 amendment ("Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section.").

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

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

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

5. This section does not require the preparation of a lost-note affidavit in a

non-judicial foreclosure. If an action is filed to contest or to confirm a non-judicial foreclosure, the court should have the discretion to decide what proof of a lost, destroyed, or stolen negotiable instrument is sufficient.

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

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

8. Subsection (d) ~~describes the~~requires a verified complaint or a complaint with affidavit ~~required~~ in a judicial-foreclosure ~~and includes a safe-harbor form~~when the negotiable instrument is lost, destroyed, or stolen. The affidavit must be based upon the affiant's personal knowledge and must describe the efforts made to locate the negotiable instrument. A bare assertion that the instrument is lost or cannot be found is not sufficient. The court should apply its normal standards for determining the sufficiency of the affidavit. At trial the normal rules of evidence govern use of the affidavit. Below is a form for an affidavit that ordinarily would provide~~s~~ sufficient information:

LOST-NOTE AFFIDAVIT

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

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

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

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

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

____
[*name of affiant*]

ACKNOWLEDGEMENT

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

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

SECTION 403. ~~PUBLIC~~ ADVERTISEMENT OF PUBLIC SALE.

(a) Mortgaged property may be sold at a public sale only after the creditor has published ~~a commercially-reasonable public~~an advertisement of the sale that satisfies this section. An advertisement ~~is commercially reasonable~~satisfies this section if:

(1) published in a newspaper having general circulation in the [county]

where the mortgaged property is located once per week for three consecutive weeks before the sale, with the first publication not more than 30 days before the sale; or

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) A creditor shall send a copy of the advertisement under subsection (a) to the homeowner and to each obligor no later than the date of newspaper publication or Internet posting. The creditor may send the copy with the notice of public sale required by Section ~~405~~ 404 or send it separately.

Comments

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

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

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

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

5. Subsection (a) states the basic ~~requires~~ requirement of an ~~a commercially reasonable~~ advertisement of a public ~~law~~ sale. Traditionally

the law required the advertisement of foreclosure sales in local newspapers. Subsection (a) allows the creditor to continue that practice, but no longer specifies newspaper advertisement as required. In many communities, newspaper advertisements are no longer an effective means of informing the public about upcoming foreclosure sales. Under these circumstances, a creditor's decision not to publish in a newspaper benefits both the creditor and the homeowner and any obligors by saving the expense.

Subsection (a) also ~~creates a safe harbor regarding circumstances when an advertisement would be commercially reasonable. Specifically, the method of publication is commercially reasonable if~~ allows the creditor to publish~~es~~ the ~~public~~ advertisement either in a local newspaper or ~~with~~ on an appropriate Internet website. The Internet site may be one operated by the newspaper or by any other person, whether or not located in the jurisdiction where the mortgaged property is located. The Internet site, however, must be one that has characteristics suggesting that interested members of the public are likely to find and to read the posting. ~~The safe harbor exists, however, only if period of time for newspaper and Internet advertisements, satisfies the standards in the act, which seek to ensure public access to the advertisement for approximately one month preceding the date of sale.~~

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

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

SECTION 404. NOTICE OF PUBLIC SALE. A creditor shall send each homeowner and obligor notice of the date, time, and place of a scheduled public sale**.** The Creditor must send the n~~N~~otice of sale ~~must be sent~~ by first-class mail to the last-known address of each homeowner and obligor and send a separate copy ~~must be hand delivered to~~~~sent~~ by first-class mail, addressed to the occupant at the property address. Notice of sale must be mailed or delivered at least 30 days before the sale date.

Comments

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

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

SECTION 405. 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~~403, unless the sale is postponed for longer than ~~30~~ [180] 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~~ 403 is required.

(b) If a ~~foreclosure~~ public 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~~ public sale is cancelled, the creditor promptly shall notify each homeowner and obligor in the manner provided in Section ~~405~~404. 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.

Comments

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 a hold a scheduled sale, with no new date then designated, is a cancellation, even if the creditor intends to go forward with foreclosure and select or obtain a new date.

2. Once a public sale is scheduled, the creditor may elect to postpone or cancel the sale for any reason the person considers appropriate. A postponement might also take place for other reasons, such as a judicial order or an automatic stay in bankruptcy. Homeowners and obligors should receive prompt notice of any postponement or cancellation. The rules of Section ~~405~~ 404 do not apply to notices of postponement or cancellation. Subsection (b) covers notices of postponement and cancellation, requiring that the notice be commercially reasonable under the facts and circumstances. A postponement may be as short as one day. An oral announcement of the postponement, made at the time and place of the originally scheduled sale, would suffice if the homeowner and any obligor were present, in which event no written or additional notice would be necessary.

[SECTION 406. CONFIRMATION OF PUBLIC SALE.

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

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

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

(1) there was a material procedural irregularity;

(2) the terms of sale were unconscionable; or

(3) the sale was conducted fraudulently.

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

(e) For purposes of this subsection, a foreclosing creditor is not a good faith 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.*

Comment

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

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

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

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

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

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

Comments

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

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

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

3. The second sentence of Section 501(b) contemplates a circumstance where, for example, the lender and homeowner had agreed, in a common 'cash for keys' agreement, that the homeowner would move within a short

period in return for a sum of money. If there are junior lienholders, however, the possibility exists that there may be an objection to the proposed transfer, that the agreement would not be approved, and that the benefits contemplated by a homeowner under Section 504 from an early move-out would not be realized. This sentence makes certain that the homeowner need not be displaced, even voluntarily, until the parties knew whether there would be objection from a junior lienholder.

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

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

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

SECTION 502. NOTICE OF NEGOTIATED TRANSFER.

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

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

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

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

Comments

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

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

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

CHAIR'S NOTE: The Reporters, Chair and ABA advisor have revised the following Section 503 to address the consequences that may arise if (i) there are multiple objections by junior lien holders, or (ii) there are non-objecting lien holders who are subordinate to the creditor who proposed the negotiated transfer, but senior to the objecting lien holder. The section requires further discussion.

SECTION 503. ~~HEARING ON~~ OBJECTIONS TO NEGOTIATED TRANSFER.

(a) Except as provided in subsection (b), (c) and (d), ~~I~~if a judicial foreclosure is pending and the court receives an objection from a person holding an interest in the mortgaged property which would be affected by a negotiated transfer under Section 501, the court shall set a date not later than [30] days after the date of the objection by which the person objecting may tender to the creditor that is a party to the proposed negotiated transfer an amount equal to the sum due to the creditor from the homeowner under the negotiated transfer. If the person objecting tenders the amount to the creditor within the time set by the court, the person objecting is entitled to the benefit of the proposed negotiated transfer, and all interests subordinate to the interest of the creditor that is a party to the proposed negotiated transfer are extinguished effective on the date of tender. If the person objecting does not tender the amount to the creditor within the time set by the court, the rights of the person objecting and all other interests subordinate to the interest of the creditor that is a party to the proposed negotiated transfer are extinguished, effective on the date set by the court by which the tender could have been made.~~shall schedule a hearing on the objection. The hearing must be held not later than [20] days after the objection is received.~~

(b) If a judicial foreclosure is pending and the court receives objections from more than one person holding an interest in the mortgaged property which would be affected by a negotiated transfer under Section 501, the court shall promptly determine the relative priorities of the interests held by each of the persons who filed objections. The court shall then set consecutive days by which each of the objecting persons holding interests in the mortgaged property may tender (i) the sums described in subsection (a) to the creditor proposing the negotiated transfer; and (ii) all sums due to all other persons holding interests in the mortgaged property which are subordinate to the interest of the creditor proposing the negotiated transfer. The court shall assign those dates to the objecting parties in the reverse order of their priorities, with the most junior objecting party receiving the first tender date.

(c) If the objecting person holding the most junior interest in the mortgaged property tenders the amounts described in (b) within the time set by the court, that person is entitled to the benefit of the proposed negotiated transfer, and all interests subordinate to the interest of the creditor that first proposed the negotiated transfer are extinguished effective on the date of tender.

(d) If the objecting person holding the most junior interest in the mortgaged property does not tender the amounts described in (b) to the creditors within the time set by the court: (i) the rights of the person who failed to tender are forever extinguished; and (ii) the objecting party with the next tender date shall be entitled to tender to all creditors who are senior to the objecting party in the same manner as described in (b). This process shall continue until each objecting person shall either have been paid in full, or shall have its interest extinguished.~~If a creditor that sends a notice under Section 502(b) receives an objection from a person holding an interest in the mortgaged property which would be affected by the negotiated transfer, the negotiated transfer may not proceed unless the creditor initiates a judicial proceeding seeking a hearing on the objection. The hearing must be conducted as provided by subsections (c~~a~~) and (d).~~

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

~~(d) If in a hearing held under subsection (a), the court concludes there is equity in the mortgaged property available to satisfy the interest of the person objecting to the~~

~~proposed negotiated transfer, the court~~

~~**Drafters' Note**~~

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

SECTION 504. EFFECT OF NEGOTIATED TRANSFER.

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

(1) discharges the obligation in full;

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

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

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

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

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

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

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

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

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

Comments

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

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

2. Paragraphs (2) through (4) of subsection (a) indicate the effects of a transfer on various property rights and interests. Under paragraph (2), the creditor acquires "all of the homeowner's rights in the mortgaged property." Under paragraph (3), all junior encumbrances are discharged.

Paragraph (4) provides for the termination of other subordinate interests. Under existing law, a deed-in-lieu of foreclosure accepted by a creditor does not terminate subordinate mortgages, subordinate liens, or other subordinate property rights. This Act changes that result by authorizing a transfer in full satisfaction of the obligation, which terminates junior interests.

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

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

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

6. Subsection (f) authorizes homeowners and creditors to enter into any other type of agreement that they might desire, but no such agreement – presumably including a traditional 'deed in lieu' arrangement – would confer the benefits of Section 504 unless the agreement expressly provided that it was made pursuant to Section 501.

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

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

[ARTICLE] 6

ABANDONED PROPERTY

SECTION 601. PRESUMPTION OF ABANDONMENT.

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

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

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

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

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

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

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

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

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

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

Comments

1. This Act authorizes an expedited foreclosure procedure for abandoned properties for both judicial foreclosure and for nonjudicial foreclosures. An expedited procedure is appropriate for two reasons. First, the homeowner is no longer making a valuable economic use of the property to provide shelter for the homeowner or the homeowner's family or someone claiming under the homeowner, such as a tenant. A foreclosure sale will not result in a possessor being forced to relocate to other housing. Second, properties that are facing foreclosure and that are vacant have significant negative impacts on neighborhoods and the surrounding communities. Vacancies reduce the market values of neighboring properties. Neighborhood crime increases. The vacant properties tend to suffer from lack of repair and maintenance, creating public health risks, including infestations by vermin, mosquitoes, and other insects. There are fiscal impacts on local governments, who find property taxes on vacant properties often become delinquent; yet the governments are faced with added expenses to provide essential services to blighted neighborhoods, such as police and fire protection. By providing for an expedited foreclosure procedure, this Act seeks to return abandoned properties to the stock of occupied, well-maintained housing as soon as reasonably possible.

2. The conditions giving rise to prima facie evidence of abandonment set forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code § 32-30-10.6-5(a) (effective March 16, 2012). A government

agency's issuance of a determination that the mortgaged property is abandoned by itself constitutes prima facie evidence of abandonment. In some localities, after such a determination the government will mark the property as abandoned. The government's determination, finding, or order might not use the word "abandoned"; it might, for example, refer to the property as vacant. Of course, the homeowner or another person has the right to challenge the correctness of the governmental determination.

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

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

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

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

SECTION 602. DETERMINATION OF ABANDONMENT IN JUDICIAL FORECLOSURE.

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

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

(1) a copy of the motion;

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

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

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

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

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

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

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

Comments

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

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

SECTION 603. DETERMINATION OF ABANDONMENT IN NONJUDICIAL FORECLOSURE.

(a) In a nonjudicial foreclosure, ~~a~~ the creditor~~,~~ or governmental subdivision in which the mortgaged property is located may submit a request to [governmental agency] for a determination that the property is abandoned property. The request must be accompanied by an affidavit attesting to facts indicating abandonment ~~or a governmental agency's determination the property is abandoned~~.

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

(1) a copy of the request;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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.

Comment

Once a party has filed a motion in a judicial foreclosure for a determination that the mortgaged property is abandoned, withdrawal of the motion is allowed only by leave of court. This allows for judicial control over the imposition of maintenance responsibilities under Section 606.

SECTION 605. FORECLOSURE OF ABANDONED PROPERTY.

(a) In a judicial-foreclosure, if 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 to the foreclosing creditor without public sale. The transfer of the property extinguishes the rights of all interests subordinate to the interest of the foreclosing creditor.

(b) In a nonjudicial-foreclosure, if a governmental agency has determined that the mortgaged property is abandoned property, a creditor may conduct an expedited public sale of the property. Unless an action for judicial review of the determination is pending, the sale may take place not earlier than [30] days but not later than [60] days after issuance of the determination. The creditor shall comply with the notice requirements of Section ~~405~~404, except that [15]-days' notice of the sale is sufficient.

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

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

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

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

Comments

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

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

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

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

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

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

SECTION 606. MAINTENANCE OF ABANDONED PROPERTY.

(a) In this section, "maintain" means to:

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

(2) prevent trespassers from remaining on the property;

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

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

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

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

(d) Absent a judicial order under subsection (b) or a determination under subsection (c), a creditor that has commenced a foreclosure shall maintain the mortgaged property beginning when the creditor receives notice that a [governmental agency] has issued a determination that the property is abandoned property and is in a condition that poses a threat to public safety or health.

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

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

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

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

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

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

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

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

Comments

1. This Section requires creditors to maintain abandoned properties under certain circumstances. The obligation may arise based upon action of the creditor or action of the municipality or other governmental entity where the property is located.

However, it is clear under this [act] that the creditor has no obligation to maintain the property before the creditor commences a foreclosure. Moreover, the creditor does not become obligated to maintain merely by commencing foreclosure at a time when the dwelling unit is vacant. Rather, the obligation arises when the creditor seeks to use the expedited foreclosure procedure authorized by Section 605 and obtains either a judicial order or official determination that the property is abandoned. Under subsection (c) the obligation may also arise any time after the creditor has commenced foreclosure if the municipality or other local governmental entity cites the property as both abandoned and presenting a threat to public safety or health.

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

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

4. Subsection (h) provides for enforcement by the local government that has jurisdiction over the abandoned property. When the property is located in a common-interest community, it also provides standing for the association as a means to protect neighboring property owners whose interests are likely to be harmed by the creditor's failure to maintain the property. In conferring standing both to the local government and to owners' associations, this subsection follows the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This subsection does not grant a direct enforcement right to neighbors. If negatively impacted, such

persons may have a remedy under other laws, such as public or private nuisance.

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

[ARTICLE] 7

REMEDIES

SECTION 701. EFFECT OF VIOLATION; DEFENSES.

(a) In a judicial-foreclosure ~~proceeding~~, if the court finds that the creditor or servicer or a person that has commenced foreclosure has ~~is shown to have~~ committed a material violation of this [act], the court may dismiss the action, stay the action on appropriate terms and conditions, or impose ~~other appropriate~~any sanction~~s~~ ~~until the violation is cured~~the court deems appropriate. Dismissal must be without prejudice unless the court determines that a new foreclosure action should be barred because of misconduct by the creditor or servicer or other good cause.

(b) In a nonjudicial-foreclosure ~~proceeding~~, the homeowner or obligor may initiate an action against the creditor or servicer or a person that has commenced foreclosure asserting a defense to ~~enjoin or restrain the~~ foreclosure or that a creditor or servicer committed a material violation of this [act]. If the court finds that a defense exists or a material violation of this [act] occurred, the court may enjoin the foreclosure, stay the foreclosure on appropriate terms and conditions, or impose any sanction the court deems appropriate. ~~shall allow foreclosure to continue after the violation is cured, unless the court determines that continuation of the foreclosure would unfairly burden the~~

~~homeowner.~~ An injunction must not be permanent unless the court determines that foreclosure should be barred because of misconduct by the creditor or servicer or other good cause.

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

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

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

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

(2) the nature of the violations, and

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

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

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

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

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

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 to proceed.

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

SECTION 702. DEFENSE OR REMEDY OF HOMEOWNER OR OBLIGOR UNDER OTHER LAW. This [act] does not displace any defense or remedy a homeowner or obligor has under federal law or law of this state other than this [act].

Comment

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

~~**SECTION 703. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL FORECLOSURE.**~~

~~(a) A homeowner or obligor may bring an action against a creditor or servicer asserting a defense to a nonjudicial foreclosure, and the court may grant any appropriate relief in the action, including any of the remedies in Section 701.~~. ~~[An action to enjoin a foreclosure sale must be brought before the sale.]~~

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

~~**Drafter's Note**~~

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

SECTION 703. ATTORNEY'S FEES AND COSTS. In an action in which a party seeks a remedy under Section 701 based on a violation of this [act], or asserts a defense or remedy under Section 702 or a defense under Section 703, the court ~~shall~~ may award the costs of the action and reasonable attorney's fees to the prevailing party.

SECTION 704. ENFORCEMENT BY [ATTORNEY GENERAL]. In addition to enforcing any remedies available under law of this state other than this [act], the [attorney general or other state official or agency] may bring an action to enjoin a pattern or practice of violating this [act]. In such an action the court may (1) issue an injunction or order against a creditor, servicer, their agents, or any other person violating this [act], which may include requiring steps to be taken to remedy a violation or the payment of damages to aggrieved obligors or homeowners; and (2) assess a civil penalty of not less than $[____] nor more than $[____].

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

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

(b) An obligor or homeowner may assert against a holder in due course a claim or defense~~, not otherwise subject to a statute of limitations or other preclusion,~~ based on specific allegations of fraud, material misrepresentation, or ~~fundamental~~ material breach of promise in connection with the original loan transaction. A material breach of promise is a breach that substantially deprives the obligor of the benefit of the expected bargain.

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

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

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

(d) A claim or defense under subsections (b) and (c) may not be made or asserted ~~after the later of~~ more than six years after ~~execution~~ signing of the record creating the obligation being enforced~~ or, if the claim or defense relates to an adjustment of the interest rate on the obligation or a prepayment fee, one year after the creditor or servicer sends notice of an adjustment or fee~~.

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

(f) This section applies to obligations incurred after [the effective date of this

[act]].

Reporter's Note: We should consider whether subsection (e) should be parallel to Section 3-305.

Comments

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

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

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

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

(b) it applies only prospectively, and

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

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

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

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

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

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

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

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

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

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

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

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

A PROPOSED STATE-LEVEL ELECTRONIC NOTE REGISTRY

SUGGESTED BY

FRED MILLER AND CONNIE RING

I. Introduction

At the February meeting of the Drafting Committee, the Drafting Committee hopefully will be considering various alternatives for a registry provision including among them:

- **LEAVE IT TO OTHER LAW THAT MAY EMERGE LATER**
- **ANTICIPATE THAT A NATIONAL REGISTRY MODELED ON THE FRB DRAFT MAY EVOLVE IN TIME**
- **PROVIDE FOR A REGISTRY FOR REAL ESTATE IN EACH STATE WITH RECIPROCITY WITH OTHER STATES AND TRANSITION TO A STATE COMPACT OR FEDERAL REGISTRY IF AND WHEN DEVELOPED.**

We propose that the Uniform Home Foreclosure Procedures Act (Act) needs to require the establishment of a registry by each state enacting the Act and include a new Article 8 with a transition to a federal or state compact registry if and when a satisfactory one may be established.

The ULC conference has had some experience in including successful provisions for registries in its Acts, for example:

1. **UCC Article 8** –authorizes DTC by the provisions of Part 5 to operate the holding of electronic (non-certificated) securities pursuant to certain standards and rules.

2. **Uniform Anatomical Gift Act** – encourages the establishment of a registry for donors; the registries cover areas served by Organ Procurement Organizations that sometimes embrace parts of states but substantially all of the country is served collectively by a registry. The practice is to call the registry where the donor resides if the donor is fatally injured and dying in another state or country without his or her donative intent otherwise known on a driver's license or some other document.

3. **UCC Article 7** –authorizes electronic Bills of Lading under standards set forth in that Act.

4. **Uniform Electronic Transaction Act** – authorizes electronic mortgage notes. MERS has employed this authorization and has maintained a capacity for registering electronic notes with substantial success, but the MERS system dealing with MERS as the mortgagee for the owner of indebtedness secured by a mortgage has had much litigation due to its structure and thus is not well regarded in all quarters.

5. **Virginia Advance Medical Directives Act:** Virginia authorizes the establishment of a "secured online" registry by a state agency and authorizes reliance on the registry.

While these precedents are useful, they are not models that fit well the circumstances in the housing market. They do provide some guidance of the features for a registry from which a registry for mortgage notes might be formulated.

II. <u>A ULC Subcommittee has been created to study alternatives for a registry.</u>

The Subcommittee appointed by Harriet Lansing to review and make recommendations with respect to a registry for residential mortgage notes has concluded that:

- Capital available from a national market is necessary to provide for a vibrant and healthy housing industry
- Packaging and securitization of residential mortgages is necessary for adequate capital availability.
- Thus it is important that the Act include authorization for and establishment of a registry.

The subcommittee believes that the benefits, but taking into account the detriments, for stakeholders in the current draft of the proposed Act will not generate support from the stakeholders. The American Bankers already have confirmed that opinion. It is also unlikely that any state will enact a proposal that authorizes a registry that does not exist and the framework of which depends on the creation of a federal registry that may, in significant measure, preempt existing state law for property located in that state. The only feasible proposal for enactment thus must embrace a registry proposal with known and limited impact on existing state laws.

What are the benefits of a registry? There is a substantial cost in processing paper notes and mortgages, in warehousing them, in locating them if and when needed, and in providing them for the record in foreclosure actions. When mortgages were provided by local banks, payments were made to that bank, and upon foreclosure processed by the local bank, so paper notes were not a major concern or cost. Since the homeowner was likely the continuing customer of the bank, there was a built in effort to work things out if possible.

Today's national and international credit market has changed all of that forever. Today relatively few mortgages are held and served by the local community banker. The mortgages are packaged with the local bank selling their mortgages for investors who acquire the ownership of a small fraction of the package. Thus, it often is difficult to find someone with authority to explore whether things can be worked out for everyone's mutual benefit, the servicers and banks sometimes exploit the situation, and some defaulters delay foreclosures when not justified due to confusion in the law, adding to the costs of realizing the value of the collateral that in turn negatively impacts interest rates and availability of capital for affordable housing for consumers, and depressing resale value of neighboring properties that are not subject to foreclosure. Congestion in our courts may also delay resolution of cases. An electronic registry for notes can avoid or mitigate a number of these problems by clarifying who has the right to foreclose and what is proper procedure as well as reducing cost through the use of electronic records, and accordingly, through the use of electronic records, would be very attractive to both borrowers and lenders.

This draft sets forth a concept largely following the precedent from UCC Article 8 and the Virginia registry for Advance Medical Directives, but still will need much careful and thoughtful drafting.

III. <u>Proposal For Initially A State Registry In The Act, With Transition To A State Compact Or Federal Registry</u>

A. Add to or change provisions of the current HFP Act as follows:

1. Change § 102(14) to read:

> "Registry" means an entity in accordance with Article 8 of this Act created and operated for the following purposes: (1) to allow the deposit of mortgage notes and the accompanying mortgages, (2) to eliminate paper forms, (3) to identify the person entitled to enforce the note and thus foreclose the mortgage, (4) to track transfers, modifications, and satisfactions of the note and mortgage, (5) to provide certain protections for secured parties, and (6) to address selected other issues, such as appropriate safeguards for and transparency of relevant information, remedies for violations of certain rules other than specified in Article 8 of the Act, and the application of relevant rules from other state law, particularly the Uniform Commercial Code.

2. Change § 401 to read:

SECTION 401[A]. RIGHT TO FORECLOSE – JUDICIAL FORECLOSURE; OTHER RIGHTS

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

(b) (1) Except as otherwise provided in 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, including the Uniform Commercial Code as enacted in this state, may commence a foreclosure.

(2) For an obligation registered in the registry provided for in Article 8 of this Act, subject to subsection (d), only the person designated as the person entitled to enforce the obligation as specified in subsection (b)(1) may be recognized by the registry, and exercise the exclusive right to foreclose or exercise other rights with respect to the obligation and the mortgage securing it.

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

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

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

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

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

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

(d) (1) The creditor in a record may authorize another person to foreclose. The [complaint] described in subsection (c) must disclose the name of the creditor and of the person authorized by the creditor to foreclose.

(2) A person with a security interest perfected by filing under the Uniform Commercial Code as enacted in this state in an obligation registered in the registry, and who is not the person described in this section as entitled to enforce the obligation, may be recognized by the registry if the person has its interest noted in the registry when the obligation is registered, or upon the taking of the security interest if it does not exist when the obligation is registered, and thereafter shall be deemed, as applicable, to also be perfected by possession and shall have the right to notify the registry to prohibit transfer of the obligation and the mortgage that secures it without prior consent by the secured party in a record, and upon receipt of the notification and after a reasonable opportunity for the registry to act on it, the registry must recognize and implement the notification and thereafter the secured party is recognized as having the sole right to enforce the obligation and to foreclose the mortgage that secures it.

COMMENT

It seems unnecessary to specifically mention "transferable records." Either they are subject to the rules for negotiable instruments as provided in UETA § 16 or § 16 separately accomplishes what the deposit of a negotiable instrument into the registry would accomplish. Nonetheless, this conclusion needs discussion. Also, it is awkward, given the definition of "creditor," to describe that person differently in subsections (a) and (b) than in subsection (c), but it seems necessary given subsection (d).

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

SECTION 401[B]. RIGHT TO FORECLOSE – NONJUDICIAL FORECLOSURE; OTHER RIGHTS

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

(b) (1) Except as otherwise provided in 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, including the Uniform Commercial Code as enacted in this state, may commence a foreclosure.

(2) For an obligation registered in the registry provided for in Article 8 of this Act, subject to subsection (d), only the person designated as the person entitled to enforce the obligation as specified in subsection (b)(1) may be recognized by the registry, and exercise the exclusive right to foreclose or exercise other rights with respect to the obligation and the mortgage securing it.

(c) In a nonjudicial foreclosure, the following rules apply:

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

(2) If the obligation is evidenced by a negotiable instrument, the creditor also must supply upon request by the homeowner or obligor:

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

(B) a statement that the instrument has been lost, destroyed, or stolen and, if possible, a true and complete copy of the instrument in its last-known condition, in which case an affidavit that complies with Section 403 must also be supplied.

(3) If the obligation is not evidenced by a negotiable instrument, a true and complete copy of the record evidencing the obligation and any record or records evidencing the creditor's right to enforce the obligation must be supplied upon request by the homeowner or obligor.

(d) (1) The creditor in a record may authorize another person to foreclose. The name of the creditor and of the person authorized by the creditor to foreclose must be disclosed in the record, which must be available to the homeowner or obligor upon their request.

(2) A person with a security interest perfected by filing under the Uniform Commercial Code as enacted in this state in an obligation registered in the registry, and who is not the person described in this section as entitled to enforce the obligation, may be recognized by the registry if the person has its interest noted in the registry when the obligation is registered, or upon the taking of the security interest if it does not exist when the obligation is registered, and thereafter shall be deemed, as applicable, to also be perfected by possession and shall have the right to notify the registry to prohibit transfer of the obligation and the mortgage that secures it without prior consent by the secured party in a record, and upon receipt of the notification and after a reasonable opportunity for the registry to act on it, the registry must recognize and implement the notification and thereafter the secured party is recognized as having the sole right to enforce the obligation and to foreclose the mortgage that secures it.

(e) If an obligation is evidenced by a negotiable instrument and a creditor does not own the obligation, the name of the legal owner or owners of the obligation must be disclosed to the homeowner or obligor upon their request.

3. Change § 402 to read:

If an obligation is registered in the registry, the person entitled to foreclose under Section 401 is not required to obtain or record any assignment of the mortgage from any transferor of the obligation in the relevant real estate records of this state.

COMMENT

No reason exists to mandate recording of an assignment of a mortgage due to the registry, which essentially serves that purpose if transparent. For non-registry mortgages, this leaves recording to current applicable state law. This approach might reduce consumer and county recorder opposition. Also, in essence the creation of the registry is only an overlay on present state law and does not change it and is not mandatory. It is evidentiary – a way to establish what is necessary under state law. Thus arguably it is not a delegation of legislative authority to the designated state agency, particularly since there are extensive statutory requirements for the agency's regulation in Article 8.

4. § 403. Minor changes may be desirable to cover the meaning of "destroyed" when the note is registered and destroyed; and in § 403(a) to recognize possession is not lost upon registration.

COMMENT

Are there other provisions that may need minor tweaking?

5. Change § 706(a) to read:

If an obligation is registered in the registry, a creditor, or a secured party described in Section 401(d)(2), that has the rights of a holder in due course or who seeks to enforce an agreement waiving claims or defenses is subject only to the claims and defenses described in subsection (b) of this section that the obligor or homeowner can establish against the initial person entitled to enforce the obligation. For an obligation not registered in the registry, whether a person can be a holder in due course or enforce an agreement to waive claims and defenses depends on law of this state other than this Act.

COMMENT

This may go further than we need to go, and is not literally necessary to establish the registry. But it promotes the registry by limiting claims and defenses that might be available, and thus perhaps promotes the Act, allows a compromise with consumers, and helps securitization as registrants, even though they are subject to limited claims and defenses, are protected as the Act also allows recourse back down the transfer chain because the registry established in Article 8 will allow a registrant subject to an allowable claim or defense to sue its warrantor and any prior warrantor back to the original payee holder of the note without need for privity, and thus each transferee can know and assess their transferor and take appropriate steps to protect themselves. The warranties will replicate those of UCC § 3-416. This approach thus allows the same argument made in support of the FTC Holder rule, that you can know and thus protect yourself from problems of your assignor. Non-registrants may not be protected but probably are not in many cases today, as immediate payees seldom can be holders in due course now and their transferees, to the extent there are any, usually by case or statutory law are seldom better off.

B. With the foregoing changes, Add a new Article 8 as follows:

[ARTICLE] 8
REGISTRY

New § 801

(a) The (appropriate state agency) shall establish, or contract for the establishment, and operate a secure registry meeting the purposes as specified in § 102(14) of this Act for obligations as defined in § 102(18) of this Act secured by mortgaged property as defined in § 102(23) of this Act, when the mortgaged property is located in this state. The registry shall be implemented pursuant to regulation, and the regulation or any contract pursuant to it shall be consistent with the provisions designated in § 803 of this Act.

(b) The (appropriate state agency) shall determine if registries for obligations secured by mortgaged property established pursuant to the law of other states substantially enacting the uniform version of this Act, or a substantially similar law, are sufficiently similar to the law of this state, have adequate funding, and are in accordance with any regulation promulgated by the agency of this state, and, if so, shall give full faith and credit to the information and legal consequences provided by those other registries.

(c) If a registry having substantially similar terms and procedures to the registry established in this state, and having adequate funding and operating in accordance with the regulation of the agency of this state, is established by at least 24 other states pursuant to a compact approved if necessary by Congress and to which this state and the other states are parties, the agency of this state by regulation shall designate the registry established by compact as the operative registry for this state and for obligations secured by mortgaged property located in this state. The agency of this state, with the consent of the state legislature, may enter into funding agreements to contribute to the maintenance of the registry established by compact. The agency of this state may exercise the power in this subsection with respect to a compact of less than 24 states if it determines it would advance the goal of having a registry for mortgage obligations.

(d) If a registry having substantially similar terms and procedures to the registry established in this state, and having adequate funding and operating in accordance with the regulation of the agency of this state is established by Congress, with any implementing federal regulation, the agency of this state by regulation shall designate the federal registry as the operative registry for this state and for obligations secured by mortgaged property located in this state. The agency of this state with the consent of the state legislature may enter into funding agreements to contribute to the maintenance of the federal registry.

New § 802

An obligation or other document registered in the registry of this state is subject to the same laws of this state that it was subject to prior to registration except as otherwise provided in this Act, and the validity or invalidity of the obligation or document is not affected by its registration, nor is the failure of the registrant or the registry to properly perform any function or give any notice a ground to invalidate the function or notice or transaction involved, but such failure of performance does afford an aggrieved party a right of action for appropriate other relief.

New § 803

(a) The registry established by this Article shall include provisions:

(1) designating the only person or persons that can register an obligation, which shall be the person entitled to enforce the obligation before it is registered, and that person, except as provided in subsection (d)(2) of Section 401 of this Act, shall be the only person authorized to instruct the registry to modify or transfer an obligation, and to provide information as to the discharge of the obligation or the foreclosure of the mortgage securing the obligation after registration;

(2) providing for registration as the equivalent of possession or control of the obligation by the registrant or a transferee of the registrant, or a secured party, and for a transfer instruction as the equivalent of an indorsement of the obligation and an assignment of the mortgage securing it in a manner consistent with the Uniform Commercial Code as enacted in this state, whether or not the obligation is obligation evidenced by an instrument under UCC Article 3 or a non-negotiable obligation;

(3) providing for the survival of a security interest in the obligation as well as its perfection and priority as existed prior to registration and for taking and perfecting a security interest in an obligation that has been registered, including its priority in relation to other security interests that may exist, in a manner consistent with the UCC Article 9 as enacted in this state;

(4) providing for the destruction of an obligation if evidenced by a paper instrument when the obligation is registered and held after registration in electronic form without any loss of rights;

(5) providing for the registered obligation to be identified by a unique registry locater number, and procedures to assure that it is unalterable thereafter, that are not inconsistent with the Uniform Electronic Transactions Act, if enacted in this state, or the Electronic Signatures in Global and National Commerce Act;

(6) providing for fees from participants adequate to recover costs of operating the registry;

(7) providing for registrants to have recorded the mortgage securing a registered obligation in the appropriate land records as a condition to registration, and to promptly report to the registry when an obligation has been discharged or a mortgage securing an obligation has been foreclosed or released so that may be noted on registry records;

(8) providing for the general availability of agency records and who may

obtain them, consistent with a policy of transparency at least equal to that of the recording laws of this state with reference to mortgages and the provisions of this Act, and for recordkeeping requirements, including adequate security procedures for registry records;

(9) providing for whatever other information the registry may determine by regulation to accept, such as the identification of an owner of an obligation, or the identity of an agent or service provider and their authority to act for a registrant;

(10) providing for non-disclaimable and non-variable transfer warranties of the type and with the remedies in UCC § 3-416 of this state to be given by the registrant to the registrant's transferee and all subsequent transferees; and

(11) providing for the resolution of claims the registry has received adequate notification of and has had reasonable time to act on, and that are adverse to the rights of the registrant or a secured party to a registered obligation and the mortgage securing it, and for the method of asserting a recognizable claim, including those of more than one secured party or a judgment creditor or a creditor holding a lien by legal process prior to or after the registration of the obligation, which claims shall be resolved in accordance with or by analogy to relevant applicable law of this state, if at all possible and as applicable prior to the registration of the obligation.

(b) The (appropriate state agency) shall promulgate a regulation to carry out the purposes of the registry which shall, in addition to the specific requirements listed in subsection (a) and as necessary, cover general procedures and the rights and obligations of parties, and may contain appropriate additional requirements beyond those listed in this section. The regulation may contain classifications, differentiations, or other provisions, may provide for adjustments and exceptions for all or any class of circumstances as in the judgment of the agency are necessary or proper to effectuate the purpose of the registry, to prevent circumvention or evasion of requirements of the registry, or to facilitate compliance with the provisions of the registry, or to reflect developments occurring after the establishment of the registry that are relevant to the operation of the registry.

(c) Promulgation of regulations by the agency is subject to the APA of this state.

(d) A regulation governing rights and obligations of specific parties is effective even if the regulation affects another party who is not the principal subject of the regulation.

(e) A person who substantially complies in good faith with the regulation of the state agency is not liable if the regulation or a relevant part of it is later declared void by a final court decision.

COMMENT

Subsection (b) is an amalgam of § 107 of the FRB draft and 15 U.S.C. § 1604(a) (Truth in Lending) and is designed for flexibility. Subsection (a) is designed to withstand challenges of improper legislative delegation. Subsection (a) is taken from the ccring draft with additions from the FRB draft. Subsection (d) may not be needed but is based on UCC § 4-103(b). Subsection (e) is based on a protection from Truth in Lending Act § 1640, but the protection may be too broad. A limitation could be added at the end, such as "except for foreseeable economic actual damages that could not be avoided or mitigated."

[END OF MILLER/RING PROPOSAL]

[ARTICLE] ~~8~~9

MISCELLANEOUS PROVISIONS

SECTION 901. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 902. GENERAL PRINCIPLES OF LAW APPLICABLE.

The principles of law and equity, including the law of principal and agent, supplement this [act] unless displaced by its particular provisions.

Comment

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

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

SECTION 903. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 904. 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 905. 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.

Comments

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

2. At the same time, this Act was drafted with the expectation that existing state foreclosure procedures would remain in place. This Act is not intended to displace all existing foreclosure laws in each state, but rather

to be an overlay on existing law. For example, and most fundamentally, the Act does not anticipate or provide that a state employ a judicial foreclosure process when the customary practice is to foreclose under a power of sale procedure, nor does the Act contemplate that a state should enact a non-judicial foreclosure process in the absence of existing state laws. It is for that reason that the legislative drafters in each state should carefully consider how best to integrate the provisions of the Act with existing state laws governing the foreclosure process.

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

SECTION 906. EFFECTIVE DATE. This [act] takes effect . . . .

[APPENDIX]

Legislative note – model rules are not part of the Act, they are for use of the agency designated under Article 3]

MODEL PRE-FORECLOSURE RESOLUTION PROGRAM RULES

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

2. The purpose of the foreclosure pre-foreclosure resolution program is to assist a creditor and a homeowner to reach a voluntary agreement that avoids foreclosure and achieves a sustainable pre-foreclosure resolution or mitigates damages in cases where foreclosure is unavoidable.

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

4. If a homeowner requests pre-foreclosure resolution, the agency shall open a pre-

foreclosure resolution case. Within five days of the request the agency shall send notice to the homeowner and creditor [by mail, by electronic mail] to provide the agency with required documents and information for the pre-foreclosure resolution process. The document exchange notice to the homeowner shall also include a list of available housing counseling agencies that can assist the homeowner.

5. The agency shall schedule a meeting within 60 days after the homeowner's request for pre-foreclosure resolution.

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

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

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

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

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

9. The agency or neutral may request additional documents from either party as appropriate. Either originals or copies of documents may be exchanged for the pre-foreclosure resolution. The neutral and the agency will not resolve disputes regarding authenticity of documents.
10. The homeowner and creditor shall provide the documents requested by the agency no later than 10 days after the sending of the document exchange notice.

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

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

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

13. Before accepting appointment as neutral, the neutral shall (a) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the neutral, including a financial or personal interest in the outcome of the pre-foreclosure resolution and an existing or past relationship with a party to the pre-foreclosure resolution or foreseeable participant in the pre-foreclosure resolution, and (b) disclose such known fact to the parties as soon as is practical before the first pre-foreclosure resolution meeting. If, after accepting a pre-foreclosure resolution, a neutral learns any fact that a reasonable individual would consider likely to affect the impartiality of the neutral, including a financial or personal interest in the outcome of the pre-foreclosure resolution and an existing or past relationship with a party to the pre-foreclosure resolution or foreseeable participant in the pre-foreclosure resolution, the neutral shall disclose it as soon as is practical.

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

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

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

provide additional documentation to support its decision.

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

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

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

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

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

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

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

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

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

25. All personal financial information as defined by [section of Act] disclosed by the parties in the course of the pre-foreclosure 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 pre-foreclosure resolution.

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

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