

DRAFT
FOR DISCUSSION ONLY

RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

For November 2-3, 2012 Drafting Committee Meeting

Without Prefatory Note and With Reporter's Drafting Comments

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ON UNIFORM STATE LAWS

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October 16, 2012

**DRAFTING COMMITTEE ON RESIDENTIAL REAL ESTATE MORTGAGE
FORECLOSURE PROCESS AND PROTECTIONS**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

WILLIAM R. BREETZ, JR., Connecticut Urban Legal Initiative, Inc., University of Connecticut
School of Law, Knight Hall Room 202, 35 Elizabeth St., Hartford, CT 06105, *Chair*
THOMAS J. BUITEWEG, 4215 Westbrook Dr., Ann Arbor, MI 48108
BRUCE A. COGGESHALL, Merrill's Wharf, 254 Commercial St., Portland, ME 04101-4664
MICHAEL A. FERRY, 200 N. Broadway, Suite 950, St. Louis, MO 63102
DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712
MELISSA HORTMAN, Minnesota House of Representatives, State Office Bldg., Room 377,
100 Dr. Rev. MLK Jr. Blvd., St. Paul, MN 55155
RUSTY N. LAFORGE, 6301 Waterford Blvd., Suite 407, Oklahoma City, OK 73118
CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402
FRED H. MILLER, 80 S. 8th St., 500 IDS Center, Minneapolis, MN 55402-3796
CARLYLE C. RING, 1401 H St. NW, Suite 500, Washington, DC 20005
MICHAEL H. RUBIN, 301 Main St., One American Pl., 14th Floor, Baton Rouge, LA 70825
MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563
LEE YEAKEL, United States Courthouse, P.O. Box 164196, Austin, TX 78716-4196
JAMES C. SMITH, University of Georgia School of Law, 225 Herty Dr., Athens, GA 30602,
Co-Reporter
ALAN M. WHITE, CUNY School of Law, 2 Court Sq., Long Island City, NY 11101-4356, *Co-Reporter*

EX OFFICIO

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE
19899, *President*
BARRY C. HAWKINS, 300 Atlantic St., Stamford, CT 06901, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

BARRY B. NEKRITZ, 233 S. Wacker Dr., 7800 Willis Tower, Chicago, IL 60606, *ABA Advisor*
NEIL S. KESSLER, 1001 Haxall Point, 15th Floor, Richmond, VA 23219-3944, *ABA Section
Advisor*
NEIL J. RUBENSTEIN, 55 2nd St., Suite 1700, San Francisco, CA 94105-3493, *ABA Section Advisor*

AMERICAN LAW INSTITUTE ADVISOR

TERESA WILTON HARMON, 1 S. Dearborn St., Chicago, IL 60603, *ALI Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
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FORECLOSURE PROCESS AND PROTECTIONS**

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

3 **ARTICLE 1**

4 **TITLE AND DEFINITIONS**

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

7 **NOTE** – The ABA advisor, Committee Chair and Reporters unanimously suggest an alternative
8 name for the Act, such as the Uniform Residential Mortgage Foreclosure Act.

9
10 **SECTION 102. DEFINITIONS.** In this [act]:

11
12 (1) “Borrower” means a person that owns an interest in the mortgaged property or owes
13 payment or other performance of an obligation, whether absolute or conditional, secured under a
14 mortgage. The term includes secondary obligors.

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

21 (3) “Creditor” means a person in whose favor a mortgage is created or provided for or the
22 creditor’s agents, loan servicers, successors, or assigns.

23 (4) “Expenses of foreclosure” means the lesser of the reasonable expenses incurred by a
24 foreclosing creditor or the maximum amounts permitted by other law of this State for expenses
25 in connection with a foreclosure. These expenses include costs of transmission of notices,
26 advertising, title searches, inspections and examinations of the mortgaged property, management
27 and securing of the mortgaged property, insurance, filing and recording fees, attorney’s fees and

1 litigation expenses incurred to the extent provided in the mortgage or authorized by law,
2 appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction,
3 fees of court-appointed receivers, and other expenses reasonably necessary to the foreclosure.

4 (5) "Foreclosure" means any process, proceeding or other action to terminate the
5 borrower's interest in the mortgaged property or to obtain possession of the mortgaged property
6 for the creditor, including judicial and nonjudicial procedures. Foreclosure includes any action
7 to terminate a land installment sale contract.

8 (6) "Individual" means a natural person.

9 (7) "Interest holder" means a person that holds a legally-recognized interest in real or
10 personal property that is subordinate in priority to a mortgage foreclosed under this [act].

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

12 (9) "Loss mitigation" means any program that the creditor offers to borrowers in default
13 or facing imminent default, as an alternative to a foreclosure sale, including a repayment plan,
14 forbearance agreement, loan modification, short sale, partial mortgage insurance claim,
15 negotiated transfer and deed in lieu of foreclosure.

16 (10) "Mediation agency" means [the administrative or judicial agency designated by the
17 state to supervise foreclosure mediation.]

18 (11) "Mortgage" means a mortgage, deed of trust, security deed, contract for deed, land
19 sale installment contract, lease, or other document that creates or provides for an interest in real
20 property to secure payment or performance of an obligation, whether by acquisition or retention
21 of a lien, a lessor's interest under a lease, or title to the real property. A document is a mortgage
22 even if it also creates or provides for a security interest in personal property. If a mortgage
23 provides that a default under any other agreement is a default under the mortgage, the mortgage
24 includes the other agreement. The term includes a modification or amendment of a mortgage and

1 a document creating a lien on real property to secure an obligation owed by an owner of the real
2 property to an association in a common interest community or under covenants running with the
3 real property.

4 (12) “Mortgaged property” means residential real property, together with any personal
5 property held or used in connection with the real property, which is subject to a mortgage.

6 (13) “Obligation” means a debt or other liability that is secured by a mortgage.

7 (14) “Person” means an individual, corporation, business trust, estate, trust, partnership,
8 limited liability company, association, joint venture, government; governmental subdivision,
9 agency, or instrumentality; public corporation, or any other legal or commercial entity.

10 (15) “Real property” means any estate or interest in, over, or under land, including
11 minerals, structures, fixtures, and other things that by custom, usage, or law pass with a
12 conveyance of land whether or not described or mentioned in the contract of sale or instrument
13 of conveyance. The term includes the interest of a landlord or tenant and, unless the interest is
14 personal property under the law of the state in which the property is located, an interest in a
15 common interest community.

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

18 (17) “Residential real property” means real property that, when a mortgage is entered into
19 with respect to the property, is used or is intended by its owner to be used primarily for the
20 personal, family, or household purposes of its owner and is improved, or is intended by its owner
21 to be improved, by one to [four] dwelling units. Residential real property includes single-family
22 units in a common interest community.

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

1 the United States.

2 **Reporter's Drafting Note**

3
4 1. Many of the definitions are taken from the Uniform Non-Judicial Foreclosure Act,
5 while the drafters have also added several new definitions, including 'Borrower', 'Lender', 'Loss
6 Mitigation' and 'Mediation Agency'.
7

8 2. In some states, a land sale installment contract does not constitute a 'mortgage', with
9 all the attendant consequences for borrowers and creditors, until a specified percentage of the
10 original principal amount has been paid to the creditor. In Illinois, for example, that percentage
11 is 50% of the original principal amount. In those States where the issue arises, statutory drafters
12 should make appropriate amendments to this act to track existing practice in that state.
13

14 **SECTION 103. SCOPE.** This Act applies to the foreclosure of every mortgage on
15 residential real property that commences after the effective date of this Act, even if the mortgage
16 was created before this Act takes effect.

17 **Reporter's Drafting Comment**

18
19 1. This Act applies whenever a creditor forecloses on a mortgage on residential real
20 property, whether by judicial process or by non-judicial measures. The definitions of
21 "foreclosure" and "residential real property" in Section 1-102 must be consulted to determine
22 which actions taken by creditors have the legal effect of making the Act applicable to the parties
23 to a mortgage.
24

25 2. This Act applies to the foreclosure of mortgages created before the effective date of
26 this Act, unless the creditor has taken action to foreclose before the effective date.
27

28 3. The Drafting Committee may well wish to expand the 'scope' section to address the
29 question of how this Act is to be blended with existing state law.
30

31 **ARTICLE 2**

32 **NOTICES, RIGHT TO CURE**

33 **SECTION 201. PRE-FORECLOSURE NOTICES REQUIRED.** Before a creditor
34 may commence foreclosure or any other legal action to enforce the obligation, the creditor shall
35 give the borrower both a notice of default, intent to accelerate and the right to cure pursuant to
36 Section 202 and a notice of mediation pursuant to 301.

37 **Drafter's Notes** - We debated a threshold policy issue raised by these notice provisions [201 and
38 202] and by the mandatory provisions of Article 3 on mediation. That issue is whether this act

1 should apply – as it is presently drafted - to ‘any...legal action to enforce the obligation’ (that is,
2 to any creditor action seeking recovery of the debt) or only to actions that would have the effect
3 of depriving the borrower of the right to occupy the home – primarily, a foreclosure. The issue is
4 posed most directly in those cases where the creditor may choose to sue, either first or
5 exclusively - on the note rather than to foreclose the mortgage.
6

7 As drafted, the notices and mandatory mediation would apply to both and to other actions
8 that a lender might theoretically take, such as seeking a receivership in the case of, for example,
9 an owner-occupied 3 family house. Those advocating for a narrower rule would argue that the
10 primary purpose of this act is to keep the borrower in the house and a suit on the note is no
11 different than a suit by any other unsecured creditor.
12

13 The matter becomes even more complicated when one considers those states that have a
14 ‘one action’ rule, where a suit on the note would have the effect of barring a subsequent action to
15 foreclose on the mortgage.
16

17 **SECTION 202. NOTICE OF DEFAULT, INTENT TO ACCELERATE AND**

18 **RIGHT TO CURE.** A creditor may not commence foreclosure or other legal action to enforce
19 the obligation until 30 days after it has delivered to the borrower the notice of default, intent to
20 accelerate and right to cure described in Section 201. The notice shall state:

21 (a) the nature of the default including a detailed itemization of all past due payments, fees
22 and other charges;

23 (b) the specific action(s) the borrower must take to cure the default, including the exact
24 amounts that must be paid;

25 (c) the date by which the borrower must cure the default, which shall be no sooner than
26 one day prior to the first scheduled foreclosure sale;

27 (d) the fact that if the borrower does not cure, the creditor may demand payment of the
28 full amount due, not just past due payments, and may foreclose and sell the property;

29 (e) the effect of curing the default, including the right to have the terms of the note and
30 mortgage remain in effect;

31 (f) the borrower’s right to dispute the default or raise any other defenses to foreclosure
32 and how that right may be exercised;

1 (g) the specific basis for asserting that the foreclosing party has the right to foreclose;

2 (h) the borrower's right to request a copy of the borrower's mortgage note and copies of
3 any assignments of mortgage or deed of trust required to demonstrate the right to foreclose on
4 the mortgage; and

5 (i) a reference to the fact that the borrower will receive separate notices of available
6 foreclosure alternatives and mediation.

7 **Reporter's Drafting Comment**

8 1. The mortgage obligation may be accelerated by filing a complaint, scheduling a sale,
9 or by separate notice of acceleration – the notice of intent to accelerate does not by itself
10 accelerate the debt. The notice need not refer to acceleration if the creditor does not intend to
11 accelerate the obligation, for example if it is fully matured. The phrase "other legal action"
12 includes other legal methods that may be used to terminate the borrower's interest in the
13 mortgaged property, such as a quiet title or ejectment action in the case of an installment land
14 sale contract. Purchasers of foreclosed properties are protected from assertions that the sale was
15 invalid because the chain of loan ownership described in the pre-foreclosure notice was
16 incorrect; the borrower must raise challenges to the notice and other defenses before the sale,
17 pursuant to Section 4-107.

18
19 2. Items (a) through (f) are the elements of notice in the standard Fannie/Freddie
20 mortgage instrument. Item (c) adds a specific deadline to cure the default. Items (g) and (h) are
21 the ownership statement required by the national servicing settlement, and call for the servicer to
22 identify its basis for standing at the outset of foreclosure proceedings, so that any disputes can be
23 resolved promptly. Including this information complements Section 4-107, providing conclusive
24 effect to a completed foreclosure sale. This notice would not displace all state-specific aid
25 program and counseling notices which necessarily will depend on state funding – for example,
26 Pennsylvania requires a separate 30-day notice of how to apply for its Homeowner's Emergency
27 Mortgage Assistance Program.

28
29 **SECTION 203. MANNER OF NOTICE DELIVERY.** Both notices required by
30 Section 201 must be sent by first class mail to the borrower's last known address, and to the
31 mortgaged property address. If the borrower or borrower's representative has provided an
32 electronic mail address to the creditor, both notices must also be sent by electronic mail to the
33 electronic mail address. The notices may be sent at the same time, but may not be combined
34 with each other, or with any other notices, or with the [complaint, in a judicial state or] Notice of
35 Sale.

1 **Comment**

2 The Complaint in a judicial foreclosure state, or Notice of Sale in a nonjudicial
3 foreclosure state, must be delivered according to existing law, usually by personal service. The
4 requirement for additional electronic mail notice does not displace the paper notices required by
5 this act or other law.
6

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

8 (a) A borrower may cure a default by tendering the amount or performance specified in
9 subsection (b) at any time until one day before the first scheduled foreclosure sale. The right to
10 cure may not be exercised more than three times in a calendar year.

11 (b) To cure a default under this section, a borrower must:

12 (1) Tender in cash or certified funds all sums that would have been due at the time
13 of tender in the absence of default or acceleration.

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

16 (3) Tender all reasonable costs and attorney fees of proceeding to foreclosure that
17 are (A) specified in writing by the creditor and (B) actually incurred prior to the date of tender.

18 (4) Tender any reasonable late fees, if provided for in the mortgage.

19 (c) Cure of a default pursuant to this section restores the residential mortgage debtor to
20 the same position as if the default had not occurred.

21 **Reporter's Drafting Comment**

22
23 1. The right of a residential mortgage borrower to cure a default has the effect of de-
24 accelerating the payments due after acceleration, but before a completed foreclosure sale. Once
25 a sale is completed, the interests of potential purchasers militate against further extending the
26 possibility of a borrower cure. The borrower receives notice detailing the amounts needed to
27 cure the default pursuant to Section 202, and identifying any nonpayment defaults, such as
28 failure to maintain insurance. The right to cure is independent of any right to redeem.
29

30 2. In the event of a dispute between the creditor and borrower concerning the amounts
31 needed to cure, or any nonmonetary performance that may be claimed as due, either party may
32 seek declaratory relief from an appropriate court, and if appropriate, a temporary stay of any
33 foreclosure sale to resolve the cure dispute.

1
2 3. This language is adapted from Pennsylvania’s statute, 41 Pa. Stat. §404. Using the sale
3 date as the deadline for a cure provides an appropriate balance between rights of creditors and
4 borrowers.
5

6 ARTICLE 3

7 MEDIATION

8 **Drafter’s Notes – We offer several preliminary thoughts on this Article.**
9

10 **1. What shall we name this process?** At the June meeting, there was considerable
11 discussion suggesting that the Act describe this process as something other than ‘mediation.’
12 Among the suggestions were: (i) Dispute Resolution; (ii) Loss Mitigation; (iii) Mortgage
13 Negotiation; (iv) Foreclosure Diversion; or (v) some combination of the above. The drafters
14 have no special insight on the appropriate name and recognize that the subject will engender
15 considerable debate no matter what our initial choice might be. So, solely for purposes of this
16 draft, we have retained ‘mediation’ for no better reason than the fact that all concerned will
17 recognize what we mean by that term.
18

19 **2. What policy choices are embedded in this particular version of the ‘mediation’**
20 **process? What are some of the implications of this set of choices?** Our basic set of choices
21 here involves these discrete elements:
22

23 **First**, by mandating ‘mediation’ before foreclosure may commence, we eliminate the so-
24 called ‘dual tracking’ problem, where borrowers find themselves simultaneously in a mortgage
25 modification discussion and a defendant in a foreclosure action.
26

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

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

38 The Chair’s memorandum accompanying this draft includes explanatory materials
39 describing the NPV process and the negotiation process by which both lender and borrower
40 representatives in that State apparently reached an agreement to support this process in
41 Washington.
42

43 To refresh the Committee’s recollection,¹ the fundamental concept here is that the lender,

¹ 1 FHFA has published a document entitled ‘**Review of Options Available for Underwater Borrowers and Principal Forgiveness**, which was released on July 31, 2012. At page 8, the document describes the HAMP program in generally understandable ‘lay’ terms:

1 using either the Treasury's 'Mod In a Box' calculator or its own proprietary formula, is expected
2 to gather the borrower's income and expense information, together with its own calculations of
3 the mortgaged property's likely sales value in foreclosure plus the costs of foreclosure.
4 Simultaneously, the lender is expected, at least under federal HAMP standards, to determine
5 whether a loan modification that reduces the borrower's monthly payment to a sum which is no
6 greater than 31% of the borrower's net monthly income, has, on a Net Present Value basis, a
7 greater value to the investor than would the value the investor would receive after foreclosure of
8 the mortgaged property and its subsequent sale.

9 The detailed explanation offered by the United States Treasury Department, entitled *Home*
10 *Affordable Modification Program, Base Net Present Value (NPV) Model V5.0, Model*
11 *Documentation*, Effective: June 1, 2012, can be found at this link:

12 [https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvmodeldocumentationv50.p](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvmodeldocumentationv50.pdf)
13 [df](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvmodeldocumentationv50.pdf).

14
15 The drafters acknowledge that most states' current statutes differ dramatically from the
16 approach taken by the State of Washington and broadly reflected in Section 303 of this Act. For
17 that reason, in the absence of a mandate imposed at the federal level, we acknowledge that it
18 would be difficult conceptually to mandate that each state engage the services of a third party
19 'mediator' intended to independently review the servicers' determination of net present value, as
20 they are now required to do under FHFA regulations, the law of states such as Washington and
21 the Attorney Generals' Servicer settlement.

22
23 At the same time, in the absence of some means of ensuring that the borrowers' interests
24 are being properly calculated by servicers who, by many accounts, have an economic interest in
25 preferring foreclosure to loan modification, it is not realistic to assume that borrowers will have
26 the independent capacity to consider the accuracy of that calculation.
27

"1. For HAMP, an affordable payment is achieved by taking specified sequential steps (called the waterfall), as needed, in order to bring a troubled borrower's monthly payment down to 31 percent of their gross monthly income. Specifically, servicers:

- ☐ Capitalize the arrearages, including accrued interest and escrow advances.
- ☐ Reduce the interest rate in increments of 1/8 to get as close as possible to 31 percent of the homeowners gross monthly income with the lowest possible interest rate set at 2 percent.
- ☐ If reducing the interest rate does not achieve an affordable monthly payment, servicers then extend the term and re-amortize the mortgage by up to 480 months (40 years).
- ☐ If reducing the interest rate *and* extending the term does not achieve an affordable monthly payment, servicers then provide principal forbearance down to 115 percent of the property's current market value or as much as 30 percent of the unpaid principal, whichever is greater.

2 If a borrower does not qualify for HAMP, the Enterprises' then look to employ a proprietary modification, sometimes referred to as a "standard modification." The features of a proprietary modification are also applied sequentially to a loan's mark-to-market LTV and include:

- ☐ Capitalizing the arrearage, including accrued interest and escrow advances.
- ☐ Providing principal forbearance down to 115 percent of the property's current value or as much as 30 percent of the unpaid principal balance, whichever is less.
- ☐ Setting the interest rate to a fixed-rate mortgage, currently at 4.625 percent.
- ☐ Extending the term to 480 months (40 years).

After calculating the modified payment terms, the mortgage loan must result in at least a 10 percent reduction in the homeowner's principal and interest payment."

1 **SECTION 301. NOTICE OF MEDIATION.**

2 (a) Before any creditor may commence foreclosure or any other legal action to enforce
3 the obligation, the creditor must give the borrower notice of mediation.

4 (b) If the mediation agency, by rule, establishes a procedure for the mediation agency to
5 send notice of mediation to borrowers, the creditor must request that a notice of mediation be
6 sent by the mediation agency to the creditor and the borrower. If the mediation agency does not
7 send the notice, the creditor shall send the notice.

8 (c) The notice of mediation must include the following:

9 (1) The names, addresses and telephone numbers of the housing counseling
10 agencies, lawyer referral services and legal aid agencies serving the borrower's geographic area
11 that are designated from time to time by the mediation agency.

12 (2) The name, address, telephone number and e-mail address of the person
13 designated by the creditor as the borrower's single point of contact, if a person has been so
14 designated.

15 (3) The location, date and time at which the borrower may appear for an in-person
16 mediation session with the creditor, under the supervision of the mediation agency, together with
17 instructions on how to reschedule the in-person mediation.

18 (4) A description of all documents the borrower should bring to the mediation
19 session, in accordance with rules promulgated by the mediation agency.

20 **Comment**

21 Between 2007 and 2012 eighteen states adopted statewide foreclosure mediation
22 programs, and local jurisdictions in at least eight additional states have established mediation
23 programs. The programs vary greatly in their timing and design, and exist in both judicial and
24 nonjudicial foreclosure states. Most programs in judicial foreclosure states call for mediation
25 after a foreclosure complaint is filed. While most stakeholders recognize that starting mediation
26 earlier in the process would increase the chances of success and reduce costs, most existing state
27 laws do not provide a means to initiate mediation before the judicial process begins. Pre-
28 foreclosure mediation permits early sorting of foreclosure cases, into those where the borrower

1 wants to find a solution other than foreclosure, and those cases that are uncontested or where
2 there is no realistic alternative to foreclosure.

3
4 Automatic scheduling of mediation meetings is the opt-out approach now used in
5 Connecticut, Philadelphia County and a number of counties in Indiana, among others. The opt-
6 in alternative used in other jurisdictions calls for the notice to inform the borrowers that they
7 have a right to request a mediation conference within a designated period, and the specific means
8 for requesting the conference, by telephone, internet or other suitable means established by the
9 mediation agency. Experience has shown that the opt-out approach, with automatic scheduling of
10 foreclosure mediation, results in much higher rates of homeowner response, and ultimately
11 higher success rates in preventing foreclosure sales and maximizing creditor recoveries.

12 13 **SECTION 302. DUTY TO PARTICIPATE IN MEDIATION AND NEGOTIATE**

14 **IN GOOD FAITH.** Both parties must negotiate in good faith to seek a resolution other than a
15 foreclosure sale. The creditor shall inform the borrower of the loss mitigation options that are
16 available to the borrower. The borrower shall provide reasonably available financial and other
17 information to permit the creditor to evaluate any loss mitigation option. The creditor shall
18 notify the borrower and the mediator, facilitator or mediation agency of its willingness or refusal
19 to offer any loss mitigation option requested by the borrower, and of the reasons for any refusal
20 and the information on which the refusal is based. The creditor may not charge the borrower any
21 fees for the mediation process. The parties shall comply with any scheduling order established by
22 the mediation agency.

23 **Comment**

24 As provided in Section 303, the mediation agency may impose additional requirements
25 on the parties, for example requiring the creditor or its agent to appear in person or to have a
26 person with authority to approve loss mitigation alternatives available by telephone at the time of
27 the mediation session, to perform a net present value analysis, to disclose the assumptions on
28 which the analysis is based, or requiring borrowers to meet with a housing counselor to qualify
29 for mediation. The agency will also regulate procedural matters, such as time limits for
30 exchanging documents, scheduling and concluding mediation meetings, reports by mediators or
31 facilitators, and the like. States should continue to have flexibility in the design and
32 implementation of mediation programs.

33 34 **SECTION 303. STANDARDS FOR CONDUCT OF MEDIATION.**

35 (a) The mediation agency shall adopt regulations pursuant to [insert reference to State

Administrative Procedures Act or, if the mediation agency is the judicial system, to the rules of court] describing the mediation process.

(b) In addition to other regulations that the agency may adopt, in order to assist the parties in addressing issues of foreclosure, the mediator must require the participants to consider the following:

(1) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

(2) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

(3) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not required, then the creditor must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide.]

Chair's Note - Sub-section (b) is excerpted from a statute enacted earlier this year in the State of Washington; See RCW 61.24.163(7). As reported by Attorney Bruce Neas, who was involved in the ultimate legislative negotiations:

“In the negotiations leading up to the compromise bill, an operating premise was that in order to make mediation effective for borrowers, there would have to be a series of specific requirements and some standards to apply at the mediation. Merely having an opportunity to discuss the issues leading up to a foreclosure would be meaningless. That had already been proven by the Legislature’s adoption of a “meet and confer” requirement as a condition precedent to a

1 foreclosure. I should add that Washington being a non-judicial foreclosure state
2 makes the necessity for a third party intervention acute.

3
4 Primarily, the NPV test is a disclosure mechanism for the facilitation of a
5 productive mediation. Under RCW 61.24.163(7), ‘The participants in mediation
6 must address the issues of foreclosure that may enable the borrower and the
7 beneficiary to reach a resolution, including but not limited to reinstatement,
8 modification of the loan, restructuring of the debt, or some other workout plan.
9 To assist the parties in addressing issues of foreclosure, the mediator must require
10 the participants to consider’ the information described in the statute.”

11
12 Attorney Neas further informed the Chair that the lending community signed off on the
13 compromise language; I have no knowledge of the political environment in which such
14 cooperation was offered.

15
16 **SECTION 304. NO FORECLOSURE DURING MEDIATION.**

17 (a) After the mediation process has begun, the creditor may not commence foreclosure or
18 other legal action to enforce the obligation unless:

19 (1) the borrower does not respond to the mediation notice, by either appearing at
20 the scheduled mediation session or by sending a written request for loss mitigation to the creditor
21 within 60 days of the mediation notice; or

22 (2) The mediation agency provides the creditor with a notice that the parties have
23 negotiated in good faith and reached an impasse, or that the borrower has failed to participate or
24 provide required information after a reasonable opportunity.

25 (b) Notwithstanding the limitations in subsection (a), the creditor may proceed to enforce
26 its mortgage if [the Drafting Committee should discuss any time or other limitations on the
27 mediation process.]

28 **Comment**

29 Numerous states have recently enacted mandatory mediation or loss mitigation laws
30 whose object is to delay or prevent foreclosure until the borrower has had the opportunity to
31 request loss mitigation or mediation: Arkansas Act 885 (2011) Sec 3, Ark Code 18-50-104
32 (beneficiary must certify to selling attorney or trustee that it has notified borrower of ineligibility
33 for loss mitigation options before nonjudicial sale); California Assembly Bill 278 (enacted July
34 11, 2012, prohibits foreclosure when loan modification request is pending); Idaho Code 45-1506,
35 HB 331 Idaho now requires notice of right to apply for loan modification and bars nonjudicial

1 sale until creditor responds to borrower's request); Indiana Act 170 of 2011 (same; also prohibits
2 servicer or attorney fees for mediation or loss mitigation); Massachusetts Chapter 194 of Acts of
3 2012 (creditor must offer mortgage modification prior to foreclosing, if modification would
4 maximize value for mortgagee); Michigan Compiled Laws §3205a (amended Act 302 of 2011);
5 Nevada Rev. Stat. §107.086; Washington Chapter 58 Laws of 2011, amending RCW 61.24
6 (delays foreclosure 90 days if borrower requests meeting with creditor to request loss mitigation,
7 and for cases referred by housing counselor to mediation, until the parties comply with duty to
8 mediate in good faith). Requiring a complete mediation process prior to initiation of foreclosure
9 allows necessary foreclosures to go forward promptly and efficiently after cases suitable for
10 other resolutions are identified and resolved.

11 12 **ARTICLE 4**

13 **RIGHT TO FORECLOSE, EFFECTS OF FORECLOSURE**

14 **SECTION 401. RIGHT TO FORECLOSE.**

15 (a) Only a creditor who has the right to foreclose may commence a judicial foreclosure
16 proceeding or a nonjudicial foreclosure proceeding.

17 (b) A creditor has a right to foreclose its mortgage after default in the obligation if all
18 conditions required by the mortgage as prerequisites to foreclosure are satisfied and one of the
19 following conditions is met:

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

21 (A) the holder of the instrument;

22 (B) a nonholder in possession of the instrument who has the rights of a
23 holder; or

24 (C) a person not in possession of the instrument who establishes the right
25 to enforce that instrument due to its loss or destruction by meeting the requirements of Section 4-
26 104.

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

29 (c) In a judicial foreclosure proceeding, the plaintiff must allege and prove facts
30 demonstrating that it holds the right to foreclose under subsection (b). If the plaintiff relies upon

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

5 (d) In a nonjudicial foreclosing proceeding, the creditor must prepare an affidavit
6 attesting to facts demonstrating that it holds the right to foreclose under subsection (b), which
7 affidavit shall be included with the notice of foreclosure required by section 202.

8 (e) In a judicial or nonjudicial foreclosing proceeding, a person who holds the right to
9 foreclose may exercise that right by authorizing an agent to foreclose in an authenticated record.

10 In that event, the complaint or affidavit described in subsection (c) or (d) shall name the principal
11 and the agent.

12 **Reporter's Drafting Comment**

13
14 1. Section 4-101(b)(1) follows the language of UCC § 3-301, which defines "person
15 entitled to enforce" an instrument. When the payee of the negotiable instrument has retained
16 possession of the instrument, that person has the right to foreclose. When the payee has
17 transferred possession of the negotiable instrument to another person, the facts must be examined
18 to determine who has the right to enforce the note. The subsequent possessor may become a
19 holder under UCC Article 3 by obtaining a special endorsement or blank endorsement, but this
20 section does not require that a subsequent possessor become a holder in order to acquire the right
21 to foreclose. Such a subsequent possessor may be entitled to enforce the note, but will have to
22 allege and prove facts that are sufficient to establish the right to enforce.

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

32
33 3. In judicial foreclosure, under existing law the creditor generally must confirm
34 possession or account for possession of the original note at the time of filing or prior to the
35 foreclosure sale. In some nonjudicial foreclosure states, the law appears not to require
36 confirmation of possession of the original note prior to commencement of foreclosure
37 proceedings or the sale. This section requires that the foreclosing person have possession of the

1 instrument prior to the commencement of foreclosure, whether the proceeding is judicial or
2 nonjudicial, unless that person prepares a lost note affidavit meeting the requirements of Section
3 4-103.

4
5 4. This section does not state a separate rule for determining when a creditor who holds a
6 security interest in a note has the right to foreclose. UCC Article 9 covers both sales of
7 instruments and assignments of instruments that secure an obligation of the assignor. A creditor
8 who takes possession of a negotiable instrument will acquire the right to foreclose. A creditor
9 who takes possession of an instrument that is not negotiable ordinarily will not acquire the right
10 to foreclose; the issue turns on whether the rights granted to the creditor are sufficient to make
11 the creditor the “owner” of the obligation (in other words, a “buyer” of the payment rights).

12
13 5. Multiple persons may hold the right to foreclose a mortgage. Other law, including
14 UCC Article 3 and the law of agency, determines whether the right to foreclose may be exercised
15 by fewer than all such persons.

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

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

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

39 40 **SECTION 402. TRANSFER OF MORTGAGE.**

41 (a) A transfer of an obligation secured by a mortgage also operates to transfer the
42 mortgage. If the transfer is accomplished by assignment, an assignment may be recorded in the
43 office in which mortgages are recorded.

44 (b) [ALT. # 1 - A person who has the right to enforce the obligation under Section 401

1 may foreclose without obtaining or recording a writing that evidences an assignment of the
2 mortgage.

3 (b) [ALT. # 2 - A person who has the right to enforce the obligation under Section 401
4 may not foreclose without obtaining and recording a writing that evidences an assignment of the
5 mortgage.

6 **Reporter's Drafting Comments**

7
8 1. Subsection (b) starkly poses the fundamental question of whether a creditor may
9 foreclose a mortgage in the absence of a writing, whether or not recorded on the land records,
10 demonstrating that the mortgage has been assigned to the foreclosing creditor.

11
12 2. The first alternative in sub-section (b) of this section adopts the principle stated in
13 UCC § 9-203(g), which provides that an Article 9 transfer of a instrument also transfers the
14 mortgage (more formally, § 9-203(g) provides that attachment of a security interest in a right to
15 payment or performance secured by personal or real property automatically transfers the security
16 interest to the secured party). Section 9-203(g) covers sales of negotiable instruments, other
17 instruments, and payment intangibles, as well as lending transactions in which those rights serve
18 as collateral to secure an obligation of the transferor.

19
20 As drafted, this alternative in this section is broader than § 9-203(g); it applies regardless
21 of whether the transferee obtains an attached Article 9 security interest. It also encompasses
22 involuntary transfers such as inheritance and judicial sales. Restatement (Third) of Property
23 (Mortgages) § 5.4(a) (1997) proposes a similar rule: "A transfer of an obligation secured by a
24 mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Under
25 the Restatement rule, parties to the transfer may agree otherwise, but this section does not permit
26 severance of the obligation from the mortgage, following UCC § 9-203(g) and common-law
27 authorities in a number of states.

28
29 3. When the foreclosing party is not the originating creditor there is conflicting state law,
30 both in judicial foreclosure and nonjudicial foreclosure states, as to (1) whether the foreclosing
31 party must have an express assignment of the mortgage, or a chain of assignments running back
32 to the original mortgagee, and (2) whether that assignment or the chain of assignments must be
33 recorded in the county land records.

34
35 In some states, a statute explicitly requires a recorded assignment. E.g., Ga. Code § 44-
36 14-162: "The security instrument or assignment thereof vesting the secured creditor with title to
37 the security instrument shall be filed prior to the time of sale in the [county land records]." In
38 many states, judicial decisions going in both directions interpret statutes that do not on their face
39 provide immediately obvious answers to these questions. E.g, In re Vasquez, 266 P.3d 1053
40 (Ariz. 2011) (recording assignments of deeds of trust is not required, although trustee must
41 record notice of trustee's sale); U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011)
42 (requiring written chain of assignments). The first alternative in this section adopts the position
43 that an express assignment is unnecessary; note that subsection (a) implies an assignment upon a

1 transfer of the obligation. In addition, this section adopts the position that recordation of an
2 assignment (or notice of an implied assignment) is not a prerequisite for foreclosure.

3
4 4. In contrast, Alternative # 2 in sub-section (b) confirms the rule in many states- a rule
5 which is intended to protect the interests of borrowers and subsequent purchasers – that a written
6 assignment in favor of the foreclosing creditor is a necessary pre-condition to instituting a
7 foreclosure.

8
9 The principle that “the mortgage follows the note”, e.g., Restatement of Property §5.4(a),
10 means that the current holder or owner of the mortgage obligation has an equitable right to obtain
11 and record an assignment of the mortgage or deed of trust from any prior record mortgagee,
12 mortgage assignee or beneficial owner, unless the parties intended otherwise.

13
14 In rare cases, the debt obligation may be transferred without the mortgage: for example,
15 when a mortgage on multiple parcels is released as to one parcel. Because note transfers are not
16 generally recorded, advocates for mandating this outcome believe that recording of mortgage
17 assignments is necessary to provide a complete public record of land title transfers, to protect
18 borrowers from double liability, and to prevent post-sale title challenges.

19
20 The complaint or affidavit required by Section 401 must identify and describe all
21 necessary assignments and substitutions. Recordation of a separate assignment, or endorsement
22 on the mortgage itself, provides record notice of the chain of mortgage ownership, and insulates
23 the foreclosure sale purchaser from attacks on title based on transfer defects. The mortgage
24 transfer should be described in the complaint in a judicial proceeding or the affidavit in a
25 nonjudicial proceeding and appear of record prior to the recording of the foreclosure sale deed.
26 It is sufficient to record an assignment to the foreclosing person’s agent, so long as the agency is
27 described in the complaint or affidavit. When the mortgage is in the form of a deed of trust,
28 transfer is generally effected by recording a substitution of trustee. The recorded substitution of
29 trustee must describe any transfers of beneficial ownership.

30 31 **SECTION 403. LOST INSTRUMENT; AFFIDAVIT.**

32 (a) If an instrument secured by a mortgage has been lost [or destroyed], the owner of the
33 instrument may enforce the instrument by satisfying the requirements of [UCC § 3-309] and by
34 making an affidavit attesting to the facts stated in [UCC § 3-309(a)(1) through (a)(3)].

35 (b) In a judicial foreclosure proceeding, the affidavit described in subsection (a) shall be
36 filed with the complaint.

37 (c) In a nonjudicial foreclosing proceeding, the creditor shall include the affidavit
38 described in subsection (a) with the notice of foreclosure required by Section 2-103 together with
39 a statement that the borrower has the right to petition the [name of appropriate court] where the

property is located for an order requiring the creditor to provide adequate protection against a claim by another person.

Reporter's Drafting Comment

1. In specifying when a creditor is entitled to enforce a negotiable instrument secured by mortgage notwithstanding its inability to confirm possession of the instrument, this section tracks the requirements of UCC § 3-309 (2002). Section 3-309(b) 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.

In some states, the circumstances in which a creditor is allowed to enforce an unavailable instrument are broader than under § 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 § 7-105.1 (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.”).

2. 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. In other states that still have the 1990 Official Text of Article 3 there are a few cases holding that the affidavit must be signed by the person who lost the note. See, e.g., *Atlantic Nat. Trust, LLC v. McNamee*, 984 So. 2d 375 (Ala. 2007) (examining prior cases; holding that assignee of promissory note that was not in possession when lost may enforce the note).

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

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

13 **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.**

14 (a) A creditor may sell or cause the sale of the mortgaged property at a public sale only
15 after giving a commercially reasonable public advertisement of the sale.

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

17 (1) the name of the borrower who signed the mortgage and, if not the same, the
18 name of the present owner of the mortgaged property;

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

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

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

23 (5) any improvements and personal property that are included in the sale;

24 (6) the amount of the debt, including costs, to be satisfied by proceeds of the sale;

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

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

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

30 (10) a telephone number and email address from which a person may obtain

1 additional information concerning the mortgaged property and the sale.

2 (c) The public advertisement does not have to contain a legal description of the
3 mortgaged property or recording information for the mortgage or other instruments of record.

4 (d) The creditor may post the public advertisement, or other information pertaining to the
5 sale, at the location of the mortgaged property.

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

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

13 (2) For a newspaper advertisement, the timing of publication is commercially
14 reasonable if published once per week for three consecutive weeks before the sale, with the first
15 publication nor more than 30 days before the sale.

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

19 (f) The creditor shall send a copy of the public advertisement to the borrower and to any
20 other person who is obligated to pay or perform the obligation. The notice of public
21 advertisement may be sent with the notice of commencement of foreclosure or may be sent
22 separately.

23 **Reporter's Drafting Comment**

24 1. This section allows a public sale of the mortgaged property only if the creditor first
25 gives a commercially reasonable public advertisement. The purpose is to ensure that the public

1 has a meaningful opportunity to learn of the proposed sale in order to appear and engage in
2 competitive bidding.

3
4 2. Subsection (b) states minimum requirements for the public advertisement. An
5 advertisement that lacks any of the information set forth in subsection (b) is insufficient as a
6 matter of law. An advertisement may contain additional information about the mortgaged
7 property or the sale.
8

9 3. Traditionally the law required the advertisement of foreclosure sales in local
10 newspapers. This section allows the creditor to continue that practice, but no longer specifies
11 newspaper advertisement as required or sufficient in all cases. Whether a newspaper
12 advertisement alone is sufficient depends upon whether it is commercially reasonable under the
13 facts, which must be determined based upon the nature of the property, the newspaper, and other
14 local circumstances. Similarly, whether it is commercially reasonable for a creditor *not* to
15 publish a newspaper advertisement, relying instead on other outlets, depends upon the facts. In
16 many communities, newspaper advertisements are no longer an effective means of informing the
17 public about upcoming foreclosure sales. Under these circumstances, a creditor's decision not to
18 publish in a newspaper benefits both the creditor and the borrower by saving the expense.

19 4. Subsection (c) adopts a bright-line rule with respect to legal descriptions of the real
20 property and recording information. The failure to include such information does not make the
21 public advertisement insufficient. This information is seldom of importance to a person who
22 reads a foreclosure advertisement for the purpose of deciding whether the person has potential
23 interest. Anyone who develops a potential interest is highly likely to investigate further before
24 appearing at the sale to bid. That investigation may include title information, which will disclose
25 the legal description and recording references for the mortgage and other recorded instruments in
26 the chain of title, and typically will include other information as well bearing on the property.
27

28 5. Subsection (d) authorizes the creditor to post the public advertisement or a sign on the
29 property, regardless of whether that right is reserved in the mortgage. [*Note: Is this appropriate?*
30 Do foreclosure signs including "bank sale" signs have negative consequences for the
31 neighborhoods? What about zoning and HOA covenants that may restrict or limit signs?]
32

33 6. Subsection (e) creates three safe harbors. First, the method of publication is
34 commercially reasonable if the creditor publishes the public advertisement both in a local
35 newspaper and with an appropriate Internet website. The Internet site may be one operated by
36 the newspaper or by any other person, whether or not located in the jurisdiction where the
37 mortgaged property is located. The Internet site, however, must be one that has characteristics
38 suggesting that interested members of the public are likely to find and to read the posting. There
39 are two safe harbors with respect to timing for newspaper advertisements and Internet
40 advertisements, which seek to ensure public access to the advertisement for approximately one
41 month preceding the date of sale.
42

43 **SECTION 405. NOTICE OF SALE.** The creditor shall give the borrower written
44 notice of the date, time and place of the scheduled foreclosure sale. If the sale is postponed, the
45 creditor shall give the borrower a new written notice of the date, time and place of the sale.

1 Notice of sale, including postponed sales, shall be delivered by first class mail to the borrowers
2 last known address, and by personal delivery to the property address. Notice of sale shall be
3 delivered at least 30 days prior to the sale date, or the postponed sale date.

4 **SECTION 406. CONFIRMATION OF SALE.**

5 (a) [In the case of a judicial sale,] within _____ days of the auction sale of the
6 mortgaged property, the person conducting the sale shall file a report of sale with the court,
7 which must name the purchaser and describe the property, the amount bid, the amount paid to
8 date, and any other material terms.

9 (b) After notice and a hearing, the court shall grant an order confirming the sale unless it
10 finds:

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

13 (2) the terms of sale were unconscionable;

14 (3) the sale was conducted fraudulently; or

15 (4) justice was otherwise not done.

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

18 (d) If the court confirms the sale, the purchaser will receive a certificate of sale [in
19 recordable form] within _____ days after the later of the order of confirmation or payment in
20 full of the price.

21 **Reporter's Drafting Comment**

22 1. As originally drafted by the Reporter, this Section was intended to apply to both a
23 judicially supervised sale and to a nonjudicial foreclosure sale. During the drafters' discussions,
24 the drafters generally concluded that in the case of a judicial foreclosure, this section was not
25 essential because it was possible to determine from the court records, regardless of the propriety
26 of the sale itself, whether the sale satisfied the minimal standards necessary to convey good title.
27 Therefore, it seemed to the drafters that the standards set by this section were especially

1 important to justify the ‘conclusive effect’ granted to a sale in the nonjudicial context described in
2 the following section.

3
4 2. However, the drafters are equally concerned as to the enactability of a requirement for
5 judicial review in the case of nonjudicial foreclosures. On the one hand, it is clear to the drafters
6 that at least a theoretical risk of unmarketable title exists in the absence of some independent
7 review of self-serving recorded documents stating that the affiant has complied with the statute.
8 On the other hand, in those several states where self-serving recording is the custom today, we
9 think the likely response of the lending community will be ‘too much cost, too much delay.’

10
11 3. In many states the court has substantial discretion with respect to confirmation of
12 auction sales, consistent with traditional doctrine that foreclosure is an action in equity. Case
13 law often provides guidance and sets parameters on the court’s exercise of equitable discretion.
14 The standard for confirmation set forth in subsection (b) is modeled upon 735 Ill. Comp. Stat.
15 5/15-1508. In some states, the statutory standard is briefer. Minnesota, for example, requires the
16 entry of a confirmation order unless “it appears upon due examination that justice has not been
17 done.” Minn. St. § 581.08.

18
19 4. Subsection (b) does not require the court to make an express finding with respect to the
20 value of the property in all cases. When a party, however, has made an objection to the report of
21 the sale based on the amount of the bid, evidence of value is relevant. It is well established that a
22 low price by itself is not grounds for rejecting the sale. A number of states express the rule as
23 calling for rejection when the bid is “grossly inadequate” or “shocks the conscience.” *E.g.*,
24 *Intervest Nat. Bank v. Ashburton 70, LLC*, 928 N.Y.S.2d 475 (App. Div. 2011) (price “was not
25 so low as to shock the conscience of the court”); *Irwin Union Nat. Bank and Trust Co. v.*
26 *Famous*, 4 A.3d 1099 (Pa. Super. Ct. 2010) (to set aside sale the price must be “grossly
27 inadequate”). Subsection (b) does not adopt either of those formulations, but allows the court to
28 refuse confirmation when the price is “unconscionable.”

29
30 5. When the court finds there is a reason not to confirm the sale, ordinarily a resale of the
31 property is appropriate. Subsection (c), however, makes a resale permissive rather than
32 mandatory. Depending upon the nature of the flaw, it may be appropriate for the court to approve
33 the sale if the purchaser agrees to a modification of the terms of the sale.

34
35 6. This section does not set forth details with respect to the procedures for confirmation
36 or contractual obligations. Notice and opportunity to be heard are fundamental and are expressly
37 required by subsection (b), but specific parameters are not stated. If no objections are made to
38 the report of sale, the hearing does not necessarily have to consist of an in-court proceeding with
39 counsel present. *See U.S. Bank Nat. Ass’n v. Bjeljac*, 43 So. 3d 851 (Fla. Dist. Ct. App. 2010)
40 (hearing is required when creditor timely files objection based upon low price and creditor’s
41 failure to attend sale due to mistake).

42
43 7. Ordinarily a confirmation of sale is a final judgment, having the legal effect of final
44 judgments in general, including immunity from mortgaged property attack. The purchaser does
45 not have enforceable contract rights prior to confirmation of the sale by the court. Whether the
46 purchaser is allowed to rescind his offer to purchase prior to confirmation depends upon other
47 law.

1 **SECTION 407. CONCLUSIVE EFFECT OF FORECLOSURE SALE.** A final and
2 non-appealable court order confirming the sale pursuant to Section 406 conclusively establishes
3 compliance with this Act in favor of purchasers of the mortgaged property in good faith for
4 value. [For purposes of this section, the foreclosing creditor is not a good faith purchaser for
5 value.]

6 **Reporter's Drafting Comment**

7 1. If the judicial confirmation approach is not adopted, the alternative solution the
8 drafters considered adopting is to follow Section 605 of the Uniform Non-Judicial Act (2002).
9 That section provides:

10
11 **SECTION 605. COMPLETION OF FORECLOSURE; DEED TO**
12 **SUCCESSFUL BIDDER; AFFIDAVIT; TIME OF FORECLOSURE.**

13
14 (a) To complete a foreclosure by auction pursuant to [Article] 3, a
15 foreclosure by negotiated sale pursuant to [Article] 4, or a foreclosure by
16 appraisal pursuant to [Article] 5, the foreclosing creditor shall:

17 (1) execute, deliver, and record in [the office of the county
18 recorder] a deed without warranty of title, execute and deliver a bill of sale or
19 other appropriate document of transfer with respect to personal property, if
20 applicable, and execute and deliver any other documents that are necessary in
21 order for the deed to be recorded, transferring the collateral:

22 (A) to or as directed by the successful bidder in the case of
23 a foreclosure by auction;

24 (B) to or as directed by the contract purchaser in the case of
25 a foreclosure by negotiated sale; or

26 (C) to the foreclosing creditor in its own capacity or to its
27 nominee, in the case of a foreclosure by appraisal.

28 (2) execute and record in [the office of the county recorder] an
29 affidavit containing:

30 (A) the recording data for the security instrument;

31 (B) identification of the foreclosing creditor and the debtor;

32 (C) a legally sufficient description of the real property
33 collateral;

34 (D) the recording data for the notice of foreclosure;

35 (E) identification of the persons to which notice of
36 foreclosure was given and the recording data for documents reflecting their
37 interests in the collateral;

38 (F) the method of foreclosure employed and, if the
39 foreclosure was by negotiated sale or by appraisal, a statement that no person
40 entitled to object to the foreclosure made a timely objection, or identifying any

1 person that made a timely objection and stating whether the person's interest was
2 discharged by the secured creditor or was preserved from the effect of the
3 foreclosure by the giving of a notice of preservation under Section 210;

4 (G) identification of any additional persons to which
5 notices of preservation under Section 210 were given;

6 (H) a statement that the foreclosing creditor has complied
7 with all provisions of this [Act] for a valid foreclosure; and

8 (I) identification of the person acquiring title to the
9 collateral by virtue of the foreclosure.

10 (b) The time of recording of the deed is the time of foreclosure.

11
12 2. In any event, after the foreclosure sale has occurred, the powers of a court to change the
13 result are limited. Damages may be assessed against a foreclosing creditor or trustee that has
14 failed to comply with the Act or other legal or equitable duties in carrying out the foreclosure.
15 For example, if there is proof that notices were not properly given, the court might award
16 damages against the foreclosing creditor or trustee to the debtor or to third parties whose
17 interests were terminated by the foreclosure without notice.

18
19 However, the court must recognize that if the proper documents have been recorded, or a
20 judicial sale has been confirmed, compliance with the Act is conclusive in favor of a bona fide
21 purchaser (BFP) of the mortgaged property . For example, if the mortgaged property has passed
22 into the hands of a BFP, the court would not be authorized to issue an order taking the mortgaged
23 property out of the BFP's hands in order to order a re-foreclosure on account of failure to give
24 proper notices, but could nonetheless grant an award of damages.

25
26 3. As drafted, this conclusive effect of a nonjudicial foreclosure sale under the Act depends
27 on the recording, at a minimum, of two documents: the notice of foreclosure, and the affidavit.
28 Thus, at a minimum, anyone relying on the title derived from a foreclosure under the Act must
29 verify that these documents are recorded. In a judicial foreclosure, the court order confirming
30 the sale serves the same function as the notice and affidavit in a nonjudicial foreclosure.

31
32 4. Courts should employ their powers to grant damage awards or to set aside foreclosure
33 sales only in cases in which the violation of the Act or the principles of law and equity are
34 sufficiently serious that it is likely that they had a substantial detrimental impact on the
35 foreclosure sale amount or the borrower's ability to redeem. No remedy should be awarded for
36 minor violations that had no significant effect on the outcome of the foreclosure.

37
38 5. This section makes a foreclosure sale under the Act conclusive only with respect to
39 compliance with the provisions of the Act itself. It does not ensure that there are no defects in the
40 mortgage or the creditor's right to foreclose. For example, if the mortgage is a forgery or was
41 procured by fraud in the execution, the courts typically hold that any foreclosure under it will be
42 void. This section does not change that result. Similarly, if the secured obligation was not in
43 default, or had been fully paid, the secured creditor would have had no right to foreclose. In that
44 case, the conclusive effect of this section will not validate the foreclosure.

45
46 6. This provision and comment are edited from the uniform nonjudicial foreclosure act. In
47 lieu of the recorded notice and affidavit called for in the nonjudicial foreclosure act, this

1 provision relies on the entry of an order confirming the sale. In the event that the judicial
2 confirmation of all foreclosure sales is not adopted, there would be a need for a recorded
3 affidavit or other publicly filed document to establish that the procedures of the statute have been
4 properly followed. The notice of foreclosure is presumably the second notice, i.e. a notice of an
5 actual sale, rather than the preliminary notices of acceleration and the right to mediation.
6 Reference to a trustee is needed for states in which deed of trust sales are used, in order for the
7 statute to function in states with various foreclosure sale methods.

8
9 7. The brackets around the last sentence of the section reflect an unresolved discussion
10 among the drafters as the effect – and intended effect – of the language.

11 12 **ARTICLE 5**

13 **OTHER PROVISIONS**

14 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN** 15 **SATISFACTION OF OBLIGATION.**

16 (a) A borrower may transfer the mortgaged property to a creditor in full satisfaction of
17 the obligation to that creditor secured by that property if:

18 (1) The borrower and the creditor agree to the transfer in a record authenticated by
19 both parties after the borrower's default;

20 (2) The borrower receives at least the consideration described in subsection (b);
21 and

22 (3) An authenticated notification of objection to the proposed transfer is not
23 received from any person entitled to notice under section 502 within 20 days after notification
24 was sent to that person.

25 (b) In exchange for the borrower's performance of an agreement to transfer the
26 mortgaged property in satisfaction of the obligation, the borrower shall receive as consideration
27 either:

28 (1) The right to continue to occupy the mortgaged property for a period of not less
29 than ____ [days, weeks, months] after the date the parties agree to the transfer in an authenticated
30 record;

1 (2) A cash payment of not less than __ percent of the principal amount of the
2 obligation secured by the mortgaged property on the date the parties agree to the transfer in an
3 authenticated record; or

4 (3) Both a right to continue to occupy the mortgaged property for a fixed period
5 of time and a cash payment, which combined have a value of not less than the consideration
6 described in subparagraph (1) or (2).

7 (c) Notwithstanding subsection (a)(2), if neither the borrower nor a person claiming
8 under the borrower is in possession of the mortgaged property, the borrower and the creditor may
9 agree to a transfer of the mortgaged property under this section without the borrower's receipt of
10 at least the consideration described in subsection (b).

11 **Comment**

12
13 The Section authorizes a transfer from the borrower to the creditor in full satisfaction of
14 the debt or other obligation. In so doing, it provides a framework for existing workout
15 arrangements such as cash-for-keys agreements and deed-in-lieu of foreclosure transactions.
16 This Section and the following two sections provide for a safe harbor by specifying the effect of
17 a transfer that meets the requirements of paragraphs (1) through (3) of subsection (a). This
18 Section is based in part on UCC § 9-620, which provides for the acceptance of personal property
19 mortgaged property by a secured party in full or partial satisfaction of a secured obligation. . The
20 important innovation here is to discharge junior liens on the property without the need for a
21 foreclosure sale.

22 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

23
24 (a) If no proceeding to foreclose on the mortgaged property is pending at the time a
25 borrower and creditor negotiate a proposed transfer under Section 501, the creditor shall send a
26 notice by first class mail to every person holding a mortgage on the mortgaged property.

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

1 (c) If a negotiated transfer pursuant to Section 501 is proposed at a time when a
2 nonjudicial foreclosure proceeding is pending with respect to the mortgaged property, the
3 creditor must send notice of the proposed negotiated transfer to:

4 (1) any person from which the creditor has received, before the borrower and the
5 creditor agreed to the proposed transfer, an authenticated notification of a claim of an interest in
6 the mortgaged property; and

7 (2) any other creditor or lienholder that, 10 days before the borrower and the
8 creditor agreed to the proposed transfer, held a mortgage or other lien on the mortgaged property
9 perfected by a filing in the public records.

10 **Comment**

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

17
18 2. Subsection (b) closely follows UCC § 9-621, which provides for a notification
19 procedure for an acceptance of personal property or mortgaged property by a secured party in
20 full or partial satisfaction of a secured obligation.

21 **SECTION 503. HEARING ON OBJECTIONS TO NEGOTIATED TRANSFER.**

22
23 (a) If the court receives an effective notification of objection from any person holding an
24 interest in the mortgaged property that would be affected by the negotiated transfer, the court
25 shall promptly schedule a hearing regarding that objection.

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

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

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

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

9 (a) A borrower's transfer of the mortgaged property to a creditor in full satisfaction of the
10 obligation to that creditor it secures:

11 (1) discharges the obligation in full;

12 (2) transfers to the creditor all of the borrower's rights in the mortgaged property ,
13 except for any right of the borrower to continue to occupy the mortgaged property pursuant to
14 the agreement between the borrower and the creditor;

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

17 (4) terminates any other subordinate interest.

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

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

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

4 (e) A transfer of the mortgaged property waives all rights of the borrower to redeem the
5 mortgaged property.

6 (f) Except in the case of vacant property as provided in subsection (c) of Section 501, a
7 borrower may not transfer the mortgaged property to a creditor pursuant to Sections 501 through
8 504 in partial satisfaction of the obligation it secures. Nothing in Sections 501 through 504
9 prevents a borrower from offering a deed in lieu of foreclosure to a creditor or a borrower and
10 creditor from entering into any other form of agreement on mutually agreeable terms, but except
11 in the case of vacant property as provided in subsection (c) of Section 501, the effects of a
12 negotiated transfer described in these sections do not apply to an agreement that fails to provide a
13 borrower with at least the consideration described in subsection (b) of section 501.

14 (g) Nothing in this article affects the rights of any creditor holding an interest in the
15 mortgaged property which is senior to the interests of the creditor that takes title to the
16 mortgaged property pursuant to this section.

17 **Reporter's Drafting Comment**

18
19 1. This section is based upon UCC § 9-622, which specifies the effect of acceptance of
20 personal property mortgaged property by a secured party in full or partial satisfaction of a
21 secured obligation. Subsection (a) specifies the effect of a transfer of the mortgaged property in
22 full satisfaction of the secured obligation. The transfer to which it refers is one that results from
23 performance of the agreement made by the borrower and the creditor. If a timely objection is
24 received by the court or by the creditor from a person entitled to notification, then neither this
25 subsection nor subsection (b) applies. Paragraph (1) expresses the fundamental consequence of
26 accepting the mortgaged property in full satisfaction of the secured obligation—the obligation is
27 discharged.

28
29 2. Paragraphs (2) through (4) indicate the effects of a transfer on various property rights
30 and interests. Under paragraph (2), the creditor acquires “all of the borrower’s rights in the
31 mortgaged property.” Under paragraph (3), all junior encumbrances are discharged. Paragraph
32 (4) provides for the termination of other subordinate interests. Under existing law, a deed-in-lieu

1 of foreclosure accepted by a creditor does not terminate subordinate mortgages, subordinate
2 liens, or other subordinate property rights. This Act changes by result by authorizing a transfer in
3 full satisfaction of the obligation, which terminates junior interests.

4
5 3. Subsection (c) specifies that the status of the borrower who continues to occupy the
6 property after entering into an agreement to transfer the property to the creditor in full
7 satisfaction of the obligation is that of a licensee. The parties' agreement and other state law
8 determine the rights and obligations of the parties as licensor and licensee.

9
10 **SECTION 505. ABANDONED PROPERTY.**

11 (a) "Abandoned property" means mortgaged property with respect to which the borrower
12 and persons claiming through the borrower, including tenants, have relinquished possession.

13 (b) The presence of one or more of the following conditions constitutes prima facie
14 evidence that the mortgaged property is abandoned property:

15 (1) Windows or entrances to the mortgaged property are boarded up or closed off.

16 (2) Multiple window panes on the mortgaged property are broken and unrepaired.

17 (3) One or more doors to the mortgaged property are smashed through, broken
18 off, unhinged, or continuously unlocked.

19 (4) Gas service, electric service, water service, or other utility service to the
20 mortgaged property has been terminated.

21 (5) Rubbish, trash, or debris has accumulated on the mortgaged property.

22 (6) The mortgaged property is deteriorating and is either below or in imminent
23 danger of falling below minimum community standards for public safety and sanitation.

24 (7) The creditor has changed the locks on the mortgaged property and for at least
25 fifteen days after the changing of the locks the borrower has not requested entrance to the
26 mortgaged property.

27 (8) There exist one or more written statements, including documents of
28 conveyance, signed by the borrower that indicate a clear intent to abandon the mortgaged
29 property.

1 (9) The police or sheriff's office has received at least two reports of trespassers on
2 the mortgaged property or of vandalism or other illegal acts being committed on the mortgaged
3 property.

4 (10) The borrower has died and there is no evidence that a survivor of the
5 borrower is in actual possession of the mortgaged property.

6 (c) In a judicial foreclosure proceeding, the plaintiff may petition the court for a
7 determination that the mortgaged property is abandoned property. After notice and a hearing, the
8 court may issue an order finding that the mortgaged property is abandoned property.

9 (d) In a nonjudicial foreclosure proceeding, the creditor may seek a determination that the
10 mortgaged property is abandoned property by submitting a request accompanied by an affidavit
11 to [name of official]. The creditor must send a copy of the request and affidavit to the borrower
12 and other persons entitled to notice under Section 201. After personal inspection of the
13 mortgaged property, which shall include entry into the dwelling unit, the [name of official] may
14 issue a written determination finding that the mortgaged property is abandoned property. The
15 [name of official] shall send the written determination to the creditor, the borrower, and other
16 persons entitled to notice under Section 201.

17 **Reporter's Drafting Comment**

18
19 1. This Act authorizes an expedited foreclosure procedure for abandoned properties for
20 both judicial foreclosure and for nonjudicial foreclosures.² An expedited procedure is appropriate
21 for two reasons. First, the borrower is no longer making a valuable economic use of the property
22 to provide shelter for the borrower or the borrower's family or someone claiming under the
23 borrower, such as a tenant. A foreclosure sale will not result in a possessor being forced to
24 relocate to other housing. Second, properties that are facing foreclosure and that are vacant have
25 significant negative impacts on neighborhoods and the surrounding communities. Vacancies
26 reduce the market values of neighboring properties. Neighborhood crime increases. The vacant
27 properties tend to suffer from lack of repair and maintenance, creating public health risks,
28 including infestations by vermin, mosquitoes, and other insects. There are fiscal impacts on local
29 governments, who find property taxes on vacant properties often become delinquent; yet the

² Defer for later discussion by the Committee maintenance and repair obligations of borrowers and creditors with respect to abandoned property.

1 governments are faced with added expenses to provide essential services to blighted
2 neighborhoods, such as police and fire protection. By providing for an expedited foreclosure
3 procedure, this Act seeks to return abandoned properties to the stock of occupied, well-
4 maintained housing as soon as reasonably possible.

5
6 2. The conditions giving rise to prima facie evidence of abandonment set forth in
7 Subsection (b)(1) through (b)(8) closely track the criteria set forth in Ind. Code § 32-30-10.6-
8 5(a)(2) through (9) (effective March 16, 2012). The presence of one or more of the statutory
9 conditions is prima facie evidence, giving rise to a presumption of abandonment. Such
10 conditions are not conclusive on the issue of abandonment. If the borrower or another person
11 holding under the borrower is in actual possession of the mortgage property, the property is not
12 abandoned notwithstanding the existence of such conditions. Likewise, mortgaged property may
13 be abandoned under this Section notwithstanding the absence of any of the statutory conditions.

14
15 3. Mortgaged property often becomes vacant, both under standard mortgage and reverse
16 mortgage transactions, when the borrower dies. Under Subsection (b)(10) proof of death of the
17 borrower constitutes prima facie evidence that the mortgaged property is abandoned, provided
18 that there is no evidence that an heir or other beneficiary of the borrower's estate is in actual
19 possession. Of course if there are multiple borrowers, this condition is met only if all the
20 borrowers have died.

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

28 29 **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

30 (a) If the court issues an order finding that the mortgaged property is abandoned property
31 pursuant to Section 504(c), at the same time the court shall order an expedited sale of the
32 property. A public sale of the property shall take place no sooner than ____ days and no later
33 than ____ days after entry of the order.

34 (b) In a nonjudicial foreclosure proceeding, upon the issuance of a written determination
35 that the mortgaged property is abandoned property pursuant to Section 504(d), the creditor may
36 conduct an expedited sale of the property. A public sale of the property may take place any time
37 after the expiration of ____ days after the issuance of the written determination. The creditor
38 shall comply with the notice requirements of Section 405, except that ____ days advance notice of

1 the sale is sufficient.

2 **Reporter's Drafting Comment**

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

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

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

16
17 (a) In a judicial foreclosure proceeding, a creditor shall maintain abandoned property
18 from the time the court issues an order finding that the mortgaged property is abandoned
19 property pursuant to Section 504(c).

20 (b) In a nonjudicial foreclosure proceeding, a creditor shall maintain abandoned property
21 from the time of issuance of a written determination that the mortgaged property is abandoned
22 property pursuant to Section 504(d).

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

27 (d) The creditor's obligation to maintain abandoned property shall continue until the
28 conveyance of the property through foreclosure to a purchaser other than the creditor.

29 (e) For purposes of this section, "failure to maintain" means (i) failure to care for the
30 exterior of the property, including, but not limited to, permitting excessive foliage growth that
31 diminishes the value of surrounding properties; (ii) failing to take action to prevent trespassers or

1 squatters from remaining on the property; (iii) failing to take action to prevent mosquito larvae
2 from growing in standing water; or (iv) other conditions that create a public or private nuisance.

3 (f) A creditor who has the obligation to maintain abandoned property shall have the right
4 peaceably to enter the property, or to cause others peaceably to enter the property, for the limited
5 purposes of inspection, repair, and maintenance as required by this section. All reasonable
6 expenses incurred by the creditor pursuant to this section shall be an obligation of the borrower
7 and shall be secured by the mortgage.

8 (g) The following persons shall have the right to enforce the obligations created by this
9 section in any appropriate action or proceeding:

10 (1) The city or other governmental entity in which the mortgaged property is
11 located.

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

14 (h) The rights and remedies provided in this section are cumulative and in addition to any
15 other rights and remedies provided by law.

16 **Reporter's Drafting Comment**

17
18 1. This Section requires creditors to maintain abandoned properties under certain
19 circumstances. The obligation may arise based upon action of the creditor or action of the
20 municipality or other governmental entity where the property is located. The creditor does not
21 become obligated to maintain merely by commencing foreclosure proceedings at a time when the
22 dwelling unit is vacant. Rather, the obligation arises when the creditor seeks to use the expedited
23 foreclosure procedure authorized by Section 505 and obtains either a judicial order or official
24 determination that the property is abandoned. Under subsection (c) the obligation may also arise
25 any time after the creditor has commenced foreclosure proceedings if the municipality or other
26 local governmental entity cites the property as both abandoned and presenting a threat to public
27 safety or health.

28
29 2. Subsection (e) defines the scope of the creditor's obligation to maintain abandoned
30 property. The focus is on the outward appearance of the property, including yards and other
31 exterior spaces, and other conditions that are likely to have significant impacts on the
32 neighborhood, such as interior spaces frequented by squatters or persons engaged in criminal
33 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 (g) 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. The rights and remedies provided in the section are cumulative of other laws, including state and local registration laws that apply to vacant and abandoned properties.

[Alternative # 1]

SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.

[This alternative provides super priority for all regular periodic common charges plus interest, but does not give super priority for association's legal fees, for special assessments or for other charges]

[Alternative # 2]

SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.

[This alternative adds limited attorneys fees as (a)(iii); otherwise, same as # 1]

(a) The association has a statutory lien on a unit for (i) any common expense assessment attributable to that unit based on the periodic budget adopted by the association pursuant to the declaration and the statutes of this state authorizing creation of the common interest community in which the unit is located; and (ii) interest which may have accrued on those assessments[; **ALT. # 2** and (iii) the association's actual legal fees and court costs incurred in enforcing the lien, limited to the greater of (A) 25% of the lien amount described in (i) above or (B) [\$1,200].].

(b) In addition to the statutory lien provided in subsection (a), the association has a

1 statutory lien on a unit for any other assessment attributable to that unit or fines imposed against
2 its unit owner. Unless the declaration otherwise provides, reasonable attorney's fees and costs,
3 other fees, charges, late charges, fines, and interest charged pursuant to other law and any other
4 sums due to the association under the declaration, this [act], or as a result of an administrative,
5 arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid
6 assessments under this sub-section. If an assessment described in this subsection is payable in
7 installments, the lien is for the full amount of the assessment from the time the first installment
8 thereof becomes due.

9 (c) A lien under subsection (a) is prior to all other liens and encumbrances on a unit
10 except liens for real estate taxes and other governmental assessments or charges against the unit.

11 (d) A lien under subsection (b) is prior to all other liens and encumbrances on a unit
12 except:

13 (1) liens and encumbrances recorded before the recordation of the declaration;

14 (2) a first mortgage on the unit recorded before the date on which the assessment
15 or other charge sought to be enforced became delinquent; and

16 (3) liens for real estate taxes and other governmental assessments or charges
17 against the unit.

18 (e) Subsections (a) and (b) do not affect the priority of mechanics' or materialmen's
19 liens. A lien under this section is not subject to [insert appropriate reference to state homestead,
20 dower and curtesy, or other exemptions].

21 (f) Unless the declaration otherwise provides, if two or more associations have liens for
22 assessments created at any time on the same property under either subsection (a) or (b), all liens
23 created under either subsection have equal priority.

24 (g) Recording of the declaration constitutes record notice and perfection of the lien. No

1 further recordation of any claim of lien for assessment under this section is required.

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

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

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

8 **[Alternative # 3 increases the amount of the super priority liens in cases of delayed**
9 **foreclosure.**

10
11 **Alternative # 4 provides the association the right to accelerate either its own foreclosure or**
12 **the creditor's foreclosure when common charges remain unpaid**

13
14 **WRB note** – Alternatives 3 and 4, which appear in highlighted text below as new subsections (h)
15 through (l), are presented in the context of amendments to the current priorities language as
16 contained in Section 3-116 of the Uniform Common Interest Ownership Act (2008).

17
18 **SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.**

19 (a) The association has a statutory lien on a unit for any assessment attributable to that
20 unit or fines imposed against its unit owner. Unless the declaration otherwise provides,
21 reasonable attorney's fees and costs, other fees, charges, late charges, fines, interest and any
22 other sums due to the association under the declaration, this [act], or as a result of an
23 administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as
24 unpaid assessments under this section. If an assessment is payable in installments, the lien is for
25 the full amount of the assessment from the time the first installment thereof becomes due.

26 (b) A lien under this section is prior to all other liens and encumbrances on a unit except:
27 (1) liens and encumbrances recorded before the recordation of the declaration;
28 (2) except as otherwise provided in subsection (c), a first mortgage on the unit
29 recorded before the date on which the assessment sought to be enforced became delinquent; and

1 amount of the super priority lien granted to the association under subsection (a) shall
2 automatically increase by an additional month of common expense assessment for each
3 additional month or part thereof that subsequently passes without judgment having entered and
4 titled having passed.

5 **[NEW ALTERNATIVE # 4]**

6 **[Association acceleration of foreclosure for non-payment of common charges.]**

7 (i) In a foreclosure action of either (A) a first or second mortgage against a unit in a
8 common interest community or (B) a lien for unpaid assessments under subsection (a) of this
9 section, the association may move for an expedited judgment on the grounds that at least [three]
10 months have passed without payment of any common charges on that unit. Whether or not the
11 unit owner has filed an appearance in that action, the association shall deliver a copy of the
12 motion by first class mail to the address of the unit and by personal service in the same manner
13 as is required in this state for service of the original complaint.

14 (j) The court shall hold a hearing on the motion. If the court finds that (i) service of the
15 motion was made as required, and (iii) at least [three] months have passed without payment of
16 any common charges on that unit, the court shall enter an order that judgment in the action shall
17 enter not later than forty-five days after the hearing and that the unit shall promptly be sold as
18 otherwise required by law.

19 (k) Either the unit owner or the plaintiff in the foreclosure action may, at any time before
20 judgment, move to postpone the entry of judgment pursuant to this section. The moving party
21 shall simultaneously submit a sworn affidavit accompanied by appropriate supporting evidence,
22 documenting that all common charges due to the association with respect to that unit have been
23 paid as of the date of the motion. The moving party shall also represent that it will continue to
24 pay common charges as they become due during the pendency of the action.

1 (l) Upon receipt of a motion pursuant to subsection (k), unless the association objects on
2 the grounds that the common charges have not been paid as stated in the affidavit, the court shall
3 postpone the entry of judgment, without prejudice to the right of the association to renew its
4 motion if the common charges are not thereafter paid in accordance with the representations
5 made pursuant to sub-section (k).

6 **ARTICLE 6**

7 **SECTION 601. BORROWER REMEDIES.** A borrower may assert any material
8 violation of this statute as a defense in a judicial foreclosure, or seek injunctive relief against any
9 nonjudicial foreclosure sale, prior to the confirmation of the sale pursuant to Section 406. A
10 borrower injured by any violation of this statute may bring an action in [specify court] for
11 damages against the foreclosing creditor before or after confirmation of the foreclosure sale. The
12 court shall award reasonable attorney's fees and costs to a borrower who prevails in an action
13 under this Section.

14 **Comment**

15
16 Prior to confirmation of the foreclosure sale, a material violation of the statute, for
17 example a materially inaccurate notice of the amounts needed to cure a default, may be raised by
18 the borrower to prevent the foreclosure sale (or confirmation), until the violation has been
19 corrected and remedied. After a foreclosure sale the borrower's remedy for violations of the
20 statute is to seek damages from the foreclosing creditor, and a bona fide sale purchaser is entitled
21 to rely on the conclusive effect under Section 407.