

DRAFT  
FOR DISCUSSION ONLY

# HOME FORECLOSURE PROCEDURES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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For November 15-16, 2013 Committee Meeting

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

*Final Meeting Draft*

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November 5, 2013

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1                                   **HOME FORECLOSURE PROCEDURES ACT**

2   **[ARTICLE] 1**

3   **GENERAL PROVISIONS**

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

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

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

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

12                               (B) used or held for use by the homeowner as a vacation home or seasonal home,  
13 physically secured and in substantial compliance with the law of this state and all applicable  
14 ordinances, codes, and rules.

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 real property taxes, insurance premiums,  
17 maintenance, or improvement of other real property or for services described in a declaration or  
18 other governing document, 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 that has the right to foreclose a mortgage under Section  
22 401(b). The term does not include a person that does not own, hold or service more than five  
23 mortgages at the time the notice required by Section 201 is sent.

1 **Drafters' Notes**

2  
3 1. The last sentence of the definition of 'creditor' is an attempt to address  
4 Dale Whitman's and other comments to exclude 'mom & pop' lenders or one-off  
5 seller financing.  
6

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

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

19 (4) "Expenses of foreclosure" means the lesser of:

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

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

24 **Drafters' Note**

25 This definition limits the expenses that a foreclosing party may impose on a  
26 borrower in connection with the foreclosure process to 'reasonable' expenses,  
27 even if other law of the state would allow expenses which would otherwise not  
28 satisfy that standard. The definition contemplates that these allowable expenses  
29 would include the reasonable costs of all typical foreclosure expenses, including  
30 such costs as sending notices, advertising, title searches, inspections and  
31 examinations of the mortgaged property, management and securing of the  
32 mortgaged property, insurance, filing and recording fees, attorney's fees and  
33 litigation expenses incurred to the extent provided in the mortgage or authorized  
34 by other law, appraisal fees, the fee of the person conducting the sale in the case  
35 of a foreclosure by auction, the fee of a court-appointed receiver, and other  
36 expenses reasonably necessary to the foreclosure.  
37

38 (5) "Facilitation" means the assistance of a third-party neutral at an in-person  
39 meeting or other communication where the parties and facilitator can simultaneously hear one

another with the objective of reaching an agreement between the creditor and the homeowner for a commercially reasonable alternative to foreclosure.

### **Drafters' Note**

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

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

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

(8) "Good faith" means: (i) in the case of a creditor, servicer, or an agent of either, honesty in fact and the observance of reasonable standards of fair dealing in the mortgage industry and (ii) in the case of a homeowner or obligor, honesty in fact.

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

### **Drafters' Note**

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



(10) “Homeowner” means a person owning an interest in mortgaged property, other than a mortgage, lien, easement, servitude, or leasehold, whether or not the person is an obligor.

#### **Drafters’ Notes**

1. We need to consider to whom the Act requires ‘notice’ to be provided to a ‘homeowner’ v. an ‘obligor’ and how the creditor is able to identify each; *see* the proposed amendments to Sec. 401.

2. At the November meeting, there were suggestions from several persons for more expansive comments; to the extent these notes are inadequate, please let the Reporters know of any desired additional comments.

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

#### **Drafters’ Note**

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

(12) “Mortgage” means a consensual interest in residential property that secures an obligation. The term does not include a lien that secures an obligation owed to a homeowner’s association in a common interest community.

(13) “Mortgage agreement” means a record that creates or provides for a mortgage.

#### **Drafters’ Note**

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

(14) “Mortgage registry” means an electronic registry, created pursuant to federal laws, of holders of the right to enforce mortgages and obligations secured by mortgages, which

1 maintains the records of those mortgages and obligations pursuant to standards designed to  
2 ensure that the record of each mortgage and obligation is unique, identifiable, and unalterable.

3 (15) “Mortgaged property” means residential property that is subject to a mortgage, and  
4 any personal property held or used in connection with the residential property that is subject to  
5 the mortgage.

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

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

#### 10 **Drafters’ Note**

11  
12 In states that allow one or more types of nonjudicial foreclosure of residential  
13 mortgages, the drafter should insert a reference to the relevant statute or statutes  
14 here. In states that do not allow nonjudicial foreclosure, this definition should be  
15 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.

16  
17 (18) “Obligation” means a debt or other duty or liability of a homeowner .

18 (19) “Obligor” means a person that, with respect to an obligation:

19 (A) owes payment or performance of the obligation; or

20 (B) has provided property other than the mortgaged property to secure payment of  
21 the obligation; or

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

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

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

1           (22) “Residential property” means real property [in this state?] improved with not more  
2 than four dwelling units, including structures ancillary to a unit. The term includes an attached  
3 single-family unit, a single-family manufactured-housing unit treated as real property under law  
4 of this state, a time share in residential property if that time share is treated as real property under  
5 law of this state, real property on which construction of not more than four dwelling units has  
6 commenced, and a single-family unit in a common-interest community.

7           (23) “Servicer” means a person responsible for servicing an obligation, including a  
8 person that makes, holds or owns an obligation if that person also services the obligation.

9           (24) “Servicing” means:

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

12                   (B) making or advancing a payment to the owner of an obligation on account of  
13 an amount due from the homeowner or obligor under the terms of the mortgage servicing  
14 loan documents or a servicing contract, or

15                   (C) in the case of a home equity conversion mortgage or reverse mortgage,  
16 making payments to the homeowner or obligor.

17                                   **Comment**

18           The definitions of ‘Servicer’ and ‘Servicing’ are adapted from the Real Estate  
19 Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R.  
20 § 3500.2 (b) and have the same meanings as in that Act.

21  
22           (25) “State” means a state of the United States, the District of Columbia, Puerto Rico, the  
23 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of  
24 the United States.

1 **Drafters' Notes**

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

10 2. Whether mortgaged property is "abandoned property" is determined by  
11 the facts of each case. The factors listed in Section 505(a) are not exclusive. The  
12 core question is whether the homeowner is presently in possession of the  
13 property. The question must be answered by evaluating the facts related to the  
14 homeowner's use of the property.  
15

16 3. The definitions of "mortgage" and "obligor" refer to the payment of an  
17 obligation, and do not use the phrasing found in UCC Article 9 definitions that  
18 includes "payment or other performance" of obligations. Almost always the basis  
19 for a residential mortgage foreclosure is the failure to pay a monetary obligation.  
20

21 **SECTION 103. SCOPE.** This [act] applies to the foreclosure of a mortgage on  
22 residential property in this state.

23 **Drafters' Notes**

24  
25 1. This Act applies whenever a creditor forecloses on a mortgage on  
26 residential property, whether by judicial process or by non-judicial measures. The  
27 definition of "foreclosure" in Section 1-103 must be consulted to determine which  
28 actions taken by creditors have the legal effect of making the Act applicable to the  
29 parties to a mortgage.  
30

31 2. The term "residential property" is defined in Section 1-103 as real  
32 property improved with one-to-four dwelling units. Thus, this Act applies to the  
33 foreclosure of a mortgage on any one to four family property used for residential  
34 purposes, regardless of whether the homeowner occupies or intends to occupy one  
35 or more of the units as a principal residence or other residence. This means that  
36 this Act covers all rental properties of this type. The Act, however, does not  
37 apply if the mortgage covers five or more dwelling units, even if the homeowner  
38 personally occupies one or more of those units.  
39

40 **Example:** Buyer purchases a residential condominium unit, financing the  
41 purchase with a mortgage. A foreclosure of the mortgage is within the scope of  
42 this Act, regardless of Buyer's intended use or actual use of the property.  
43 Similarly, if Buyer purchases five units in the same condominium community,  
44 each financed with a separate mortgage, a foreclosure of any of those mortgages

1 is within the scope of this Act.

2  
3 3. However, the Act also makes clear that while this Act would apply to  
4 the foreclosure of mortgages created before the effective date of this Act, it would  
5 not apply to a foreclosure action that the creditor had commenced before the  
6 effective date of the Act; this is made clear in Section 701, describing the  
7 'Effective Date' of the Act.

8  
9 **SECTION 104. DUTY OF GOOD FAITH.** A creditor, servicer, obligor, or  
10 homeowner shall comply in good faith with the requirements of this [act].

11 **SECTION 105. CERTAIN ACTS PROHIBITED.** A creditor, servicer, or an agent of  
12 either, may not:

13 (1) Make a misleading oral or written statement to a homeowner or obligor that would  
14 discourage a reasonable person from participating in loss mitigation or facilitation; or

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

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

19 (B) the foreclosure has been stayed due to loss mitigation or facilitation and at  
20 the same time continuing with the foreclosure; or

21 (C) the homeowner or obligor is not eligible for loss-mitigation options when the  
22 creditor, servicer, or agent of either has not evaluated those options.

23 **[SECTION 106. APPLICATION OF LOCAL REGULATIONS.**

24 (a) Notwithstanding (insert reference to any applicable Home Rule' provisions under the  
25 law of this state)] No ordinance or regulation of a municipality, county or other political  
26 subdivision in this state may regulate, restrict or limit the process by which mortgages on  
27 residential property are foreclosed unless expressly authorized by legislation of this state.]

(b) Except as otherwise provided in subsection (a), the provisions of this [act] do not invalidate or modify any provision of any zoning, subdivision, building or safety code or other ordinance or regulation governing the use of real estate.

#### **Comment**

This bracketed section generally tracks the prohibition on local regulation of condominium conversions contained in Section 1-106 of the Uniform Common Interest Ownership Act and is intended to insure that foreclosure will be governed by a single uniform standard throughout the state.

Otherwise, under subsection (b), however, municipal ordinances generally applicable to real estate in a municipality would not be affected by this act, regardless of who owns the property, and therefore will apply with equal force to real estate owned by homeowners or lenders.

Accordingly, for example, a local ordinance mandating the maintenance of yards and blighted property would apply with equal force to a blighted property whether or not owned by a homeowner or lender, and an ordinance enabling a municipality to repair blighted property and lien the property for the costs of the work, if it were otherwise lawful under applicable state law, would not be barred by subsection (a).

## **[ARTICLE] 2**

### **NOTICES; RIGHT TO CURE**

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

(a) Foreclosure may not commence until 30 days after the creditor or servicer sends separately to each homeowner and obligor a notice of intent to foreclose and right to cure.

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

(1) the nature of the default, including an itemization, as of the date of the notice, of all past-due payments, fees, and other charges owed to the creditor, servicer or the creditor's or servicer's attorneys and an estimate of other amounts accrued but unknown in amount;

(2) the specific action the homeowner or obligor must take to cure the default, including the amount that must be paid;

- 1 (3) the date by which the default must be cured;
- 2 (4) that if the homeowner or obligor does not cure, the creditor or servicer may
- 3 demand payment of the full amount due, not just past-due payments, and may foreclose the
- 4 mortgaged property;
- 5 (5) the effect of curing the default, including the right to have the terms of the
- 6 obligation and mortgage remain in effect;
- 7 (6) that the homeowner or obligor may dispute the default or raise any other
- 8 defense to foreclosure or payment of the obligation and how to exercise those rights;
- 9 (7) the specific basis for the right of the creditor or servicer to foreclose and, if the
- 10 creditor or servicer is acting on behalf of the owner of the obligation, the identity of the owner;
- 11 (8) that the homeowner or obligor may request a copy of the homeowner's
- 12 mortgage note or other evidence of the obligation and a copy of any record required to
- 13 demonstrate the right to foreclose as provided in Section 401;
- 14 (9) that the homeowner or obligor will receive a separate notice of available
- 15 foreclosure alternatives and facilitation; and
- 16 (10) if sent to an obligor other than the homeowner, that the notice is being sent to
- 17 the homeowner as well as any other obligor regardless of whether the obligor has an interest in
- 18 the mortgaged property.
- 19 (c) The notice may state that additional sums may come due after the date of the notice.

#### **Drafters' Notes**

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

1 such as title examiners should only be estimated if the exact amount is not readily  
2 ascertainable when the notice is prepared.  
3

4 2. The mortgage obligation may be accelerated by filing a complaint,  
5 scheduling a sale, or by separate notice of acceleration – the notice of intent to  
6 foreclose does not by itself accelerate the debt. The notice need not refer to  
7 acceleration if the creditor does not intend to accelerate the obligation, for  
8 example if it is fully matured. The definition of “foreclosure” in section 102  
9 includes other legal methods that may be used to terminate the homeowner’s  
10 interest in the mortgaged property, such as a quiet title or ejectment action in the  
11 case of an installment land sale contract.  
12

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

22 4. In subsection (b)(2), the actions the homeowner needs to take in order  
23 to cure the default are governed by § 203.  
24

25 5. In subsection (b)(7), the basis on which a particular creditor may assert  
26 the right to foreclose is specified in §401. The notice may, but is not required to,  
27 explain that the agent has full authority on behalf of the owner to negotiate with  
28 the homeowner.  
29

30 6. If a homeowner or obligor has cured a default, any subsequent  
31 foreclosure based on a later default must be preceded by a new notice, subject to  
32 the limitations on repeated defaults contained in Section 203. This is because a  
33 cure restores the homeowner to the same legal position as if no default had  
34 occurred. If, on the other hand, as a result of facilitation or otherwise, the  
35 homeowner has tendered payments under a forbearance plan or other workout but  
36 has not fully cured the default that was the subject of the notice, no new notice is  
37 required in the event the workout fails and the creditor chooses to proceed with  
38 foreclosure.  
39

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

41 201 or Section 302 must be sent by first-class mail to the last known address of each homeowner  
42 and obligor. At least one mailed notice must also be addressed to the homeowner or to



“occupant” at the address of the mortgaged property. If the [homeowner or obligor or the homeowner’s or obligor’s representative] has requested to receive notice by electronic mail and has provided an electronic-mail address to the creditor or servicer, the notice also must be sent by electronic mail to the electronic-mail address.

#### **Drafters’ Notes**

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

#### **SECTION 203. RIGHT TO CURE DEFAULT.**

(a) A homeowner or obligor may cure a default by tendering in cash or immediately available funds the amount or performance specified in subsection (c) at any time before a scheduled or postponed foreclosure sale.

(b) A homeowner or obligor does not have the right to cure more than three times in a calendar year.

(c) To cure a default under this section, a homeowner or obligor must:

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

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

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

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

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

7 (e) A homeowner or obligor's right to cure may not be waived unless the waiver is  
8 contained in a negotiated transfer agreement under Section 501.

#### 9 **Drafters' Notes**

10  
11 1. The right of a homeowner or obligor to cure a default has the effect of  
12 de-accelerating the payments due after acceleration, but before a completed  
13 foreclosure sale. Once a sale is completed, the interests of potential purchasers  
14 militate against further extending the possibility of cure. The homeowner and  
15 obligor receive notice detailing the amounts needed to cure the default pursuant to  
16 Section 202, and identifying any nonpayment defaults, such as failure to maintain  
17 insurance. The right to cure is independent of any right to redeem.  
18

19 2. This section does not alter contractual rights to cure that are stronger,  
20 but the statutory right to cure may not be waived by contract. In the event of a  
21 dispute between the creditor and a homeowner or obligor concerning the amounts  
22 needed to cure, or any nonmonetary performance that may be claimed as due,  
23 either party may seek declaratory relief from an appropriate court, and if  
24 appropriate, a temporary stay of any foreclosure sale to resolve the cure dispute.  
25

26 3. If a default is cured, restoring the homeowner and obligor to the same  
27 position as if no default occurred means that if there is a later default, new notices  
28 must be sent prior to foreclosure. Conversely, if as a result of facilitation under  
29 Article 3 or otherwise, a settlement is reached but the homeowner or obligor does  
30 not fully cure the default, new notices are not required. However, nothing in this  
31 [act] requires a lender who properly assessed late fees or default interest following  
32 a default to disgorge those fees if the default is subsequently cured.  
33

#### 34 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

35 (a) A creditor or servicer does not owe a duty under Sections 201 or 302 to notify a  
36 person that is a homeowner or obligor unless the creditor or servicer knows:

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

2 (2) The identity of the person.

3 (b) If the creditor or servicer knows the identity of a homeowner or  
4 obligor but does not know the homeowner or obligor's current address, notice to the homeowner  
5 or obligor must be delivered to the address of the mortgaged property.

6 **Drafters' Notes**

7 1. Section 205 is based on UCC § 9-605. Its purpose is to relieve the  
8 creditor from duties owed to a homeowner or obligor if the creditor or servicer  
9 does not know about that person. This may be the case, for example, when an  
10 original homeowner has sold the property to a purchaser, or when the original  
11 homeowner has died and his or her interest has passed to an heir or devisee.

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

18  
19 **[ARTICLE] 3**

20 **FACILITATION**

21  
22 Chair's Notes: Following the annual meeting, Commissioner Elizabeth Kent of Hawaii –now a  
23 member of the Drafting Committee - prepared a detailed memorandum concerning this Article,  
24 based on her experience as a foreclosure mediator in Hawaii. Her memorandum will be  
25 distributed to the entire Drafting Committee, together with comments on the Annual meeting  
26 draft prepared by Heather Schweibe Kulp, for consideration at the November meeting.

27  
28 **SECTION 301. FACILITATION PROGRAM ESTABLISHED.** [Name of court or  
29 agency serving as facilitation agency] is designated as the facilitation agency. The facilitation  
30 agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if  
31 the facilitation agency is the judicial system, to the rules of court] establishing procedures and  
32 standards for the facilitation process.

**Drafters' Notes**

1. Facilitation is defined in Section 102 as the assistance of a third-party neutral at an in-person meeting between the parties with the objective of achieving a commercially reasonable alternative to foreclosure, resulting in an agreement between the creditor and homeowner.

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

2 The Act does not prescribe standards or procedures for the state facilitation program. Rather, the following best practices are recognized by lender and consumer advocates as well as mediation and facilitation program participants as necessary elements of a successful facilitation program.

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

b. The homeowner should have access to a housing counselor (or a lawyer) to assist in the facilitation process.

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

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

e. The neutral facilitator should disclose any conflicts of interest. A lawyer serving as a facilitator must inform unrepresented homeowners that the lawyer is not representing them.

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

1 g. If the homeowner makes a timely request for facilitation, or in an opt-  
2 out system, when the lender initiates foreclosure, the relevant agency must initiate  
3 the facilitation process within 14 days.  
4

5 h. Documentation information exchange.  
6

7 i. The creditor or servicer must specify whatever documents it  
8 requires from the homeowner within [5] days after initiation of the facilitation  
9 process.  
10

11 ii. The homeowner must provide the income and other documents  
12 required by the servicer listed in (a) above to the servicer and the facilitator not  
13 less than [30] days before the scheduled first facilitation session. If the  
14 homeowner fails to substantially provide the documents specified by the creditor  
15 or servicer within the time frame required by this paragraph, the facilitation  
16 process terminates.  
17

18 iii. The creditor or servicer must provide to the homeowner and the  
19 facilitation agency: (i) the homeowner's payment history from the date of default;  
20 (ii) itemized amounts due on the loan, including all fees.  
21

22 iv. The creditor or servicer should provide the facilitator its  
23 decision, including the inputs and results of any net present value calculations it  
24 relies on in deciding not to offer any particular loss mitigation alternative.  
25

26 i. The first facilitation session must take place within [XX] days after  
27 initiation of the facilitation process.

28 j. Participation – the creditor or servicer must have a lawyer and creditor  
29 or servicer representative present in person or by telephone or teleconference; the  
30 creditor or servicer must evaluate loss mitigation and make a decision as required  
31 by [the RESPA regulations of the Consumer Financial Protection Bureau.]  
32

33 k. The facilitation agency should clearly identify any eligibility restrictions  
34 for its program, such as property occupancy.  
35

36 l. Standards of practice for facilitators: There is consensus that facilitator  
37 conflicts of interest should be avoided or disclosed. Traditional mediator  
38 standards are problematic in some cases. For example, mediators traditionally do  
39 not disclose anything that takes place during facilitation or report to a court on the  
40 parties' conduct, whereas a facilitator may need to report on either party's  
41 conduct so that a court can decide whether to permit foreclosure to proceed, or to  
42 impose sanctions.  
43

44 m. Proceedings should be confidential, with appropriate exceptions to  
45 permit reporting outcomes and/or noncompliance with rules to the court or

1 supervising agency.

2  
3 n. States should establish programs to provide appropriate training and  
4 continuing education of facilitators.

5  
6 o. All agreements for foreclosure alternatives should be memorialized in  
7 writing and signed by both parties to minimize later disputes. The neutral  
8 (facilitator) should prepare a final written report for the facilitation agency  
9 indicating what agreements were reached, and indicating whether any party failed  
10 to comply with the rules, scheduling orders or information requests from the  
11 neutral.

12 p. Facilitation agencies should collect enough data to determine the  
13 outcomes of facilitation and whether it is achieving its objectives.

14  
15 q. States should provide adequate funding to train and provide facilitators  
16 and for the associated agency or court supervision.

17  
18 r. Original copies of documents (as opposed to true copies) should not be  
19 needed during facilitation. Issues about authenticity and possession should be  
20 resolved separately in litigation if need be.

#### 21 22 **Drafters' Note**

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

#### 29 **SECTION 302. NOTICE OF FACILITATION.**

30 (a) If the facilitation agency establishes a procedure for the agency to send notice of  
31 facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to  
32 the creditor or servicer and to each homeowner and obligor before a creditor or servicer may  
33 request entry of a default or foreclosure judgment or give a notice of a judicial or nonjudicial-  
34 foreclosure sale..

35 (b) If there is no procedure for the agency to send notice, the creditor or servicer shall  
36 send a notice of facilitation to each homeowner and obligor, in the same manner as required for  
37 the notice under Section 201 before a creditor or servicer may request entry of a default or

foreclosure judgment or give a notice of a judicial or nonjudicial-foreclosure sale.”

(c) A notice of facilitation must be requested or sent not later than 30 days after the sending of the notice of intent to foreclose under Section 201.

(d) The notice of facilitation under subsection (a) or (b) must include the following:

(1) The name, address and telephone number of each housing counseling agency, lawyer referral service and legal aid agency serving the homeowner’s geographic area that is designated by the facilitation agency.

(2) The name, address, telephone number, and e-mail address of any person designated by the creditor or servicer as the homeowner or obligor’s [single point of contact].

(3) The fact that the homeowner or obligor may request a facilitation meeting and the name and contact information for the person to contact to request facilitation.

(4) A description of all documents the homeowner or obligor must bring to the facilitation meeting, in accordance with rules promulgated by the facilitation agency.

### **SECTION 303. DUTY TO PARTICIPATE IN FACILITATION IN GOOD FAITH.**

(a) Each party to a facilitation must participate in facilitation in good faith. The parties shall comply with any scheduling order established by the facilitator or the facilitation agency.

(b) The creditor or servicer shall inform the homeowner and obligor and the facilitation agency of the loss mitigation options that are available to the homeowner and obligor. The creditor or servicer shall notify the homeowner and obligor and the facilitator or facilitation agency of its willingness or refusal to offer any loss mitigation option requested by the homeowner, the reasons for any refusal, and the information on which a refusal is based. The creditor or servicer may not charge the homeowner or obligor a fee for the facilitation process.

1 (c) A homeowner or obligor that elects to participate in facilitation shall provide  
2 reasonably available financial and other information to permit the creditor to evaluate any loss-  
3 mitigation options.

4 (d) Failure to participate in good faith includes failure:

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

6 (2) without good cause to provide, before a scheduled meeting, documents and  
7 information required by facilitation agency rules or reasonably requested by a facilitator;

8 (3) to designate a person with authority to reach a settlement agreement;

9 (4) without good cause to pay any required facilitation fee;

10 (5) to implement or comply with a settlement agreement in connection with  
11 foreclosure or facilitation; and

12 (6) on the part of a creditor or servicer to advise the homeowner, obligor and  
13 facilitator of any loss-mitigation option that is available to the homeowner or obligor and failure  
14 to consider the homeowner or obligor for the loss-mitigation option before or during facilitation.

#### 15 **Drafters' Notes**

16  
17 1. As provided in Section 303, the facilitation agency may impose  
18 additional requirements on the parties, for example requiring the creditor, servicer  
19 or its agent to appear in person or to have a person with authority to approve loss  
20 mitigation alternatives available by telephone at the time of the facilitation  
21 session, to perform a net present value analysis, to disclose the assumptions on  
22 which the analysis is based, or requiring homeowners to meet with a housing  
23 counselor to qualify for facilitation. The agency will also regulate procedural  
24 matters, such as time limits for exchanging documents, scheduling and concluding  
25 facilitation meetings, reports by facilitators, and the like. States should continue to  
26 have flexibility in the design and implementation of facilitation programs, but  
27 should establish and publish the standards as required by section 303. The best  
28 practices principles of facilitation set forth following Section 304 should aid state  
29 facilitation agencies in designing their programs.

30  
31 2. Facilitation cannot succeed in reaching a resolution other than a  
32 foreclosure sale unless both parties participate in good faith. This requires not



1 only the participation of a person representing the creditor or servicer who has the  
2 authority to enter into a settlement agreement, but also the participation of  
3 necessary persons on the borrower's side - those who own the home and those  
4 who are liable on the mortgage debt. In simplest case, in which one person is  
5 both the homeowner and the obligor, obviously there is no difficulty in  
6 determining who must participate on the borrower's side. In the common situation  
7 in which married spouses both own the home and are liable on the debt,  
8 significant problems will be infrequent. Both spouses have the right to participate  
9 in facilitation under this Act. If only one chooses to attend a facilitation meeting,  
10 that ordinarily would not present a problem with respect to negotiation of a  
11 settlement acceptable to both homeowners/obligors. However, when the  
12 "homeowner" and "obligor" are not the same person or persons, care must be  
13 taken to involve both the homeowner and the obligor. Their interests might be  
14 compatible, but they might diverge in some circumstances. For example, pursuant  
15 to a divorce settlement an ex-wife may own the home, with the ex-husband  
16 having sole personal liability on the mortgage debt. The participation of both in  
17 facilitation ordinarily will be necessary for a loan modification that to avoid  
18 foreclosure. The homeowner's primary objective may be retaining the right to  
19 possess the home, while the obligor's primary objective may be minimizing  
20 financial liability on the debt.

- 21
- 22 3. The Chair, ABA Advisor and Reporters contemplate that the facilitation  
23 agency would be authorized to charge a fee to the borrower for the facilitation.  
24
- 25 4. The Chair, ABA Advisor and Reporters have also discussed - but have not  
26 agreed on any - proposed additional limitations on the facilitation process in  
27 an effort to make the process workable while at the same time (i) encouraging  
28 more lender support for the process, and (ii) not losing the support of our  
29 borrower advocates. Among the ideas we have discussed are these:  
30
- 31 a. Encourage the Consumer Financial Protection Bureau to amend its regulations  
32 to provide that if those states that adopt HFPA, a lender may commence  
33 foreclosure without first sending two offers to modify mortgages for  
34 defaulting borrowers.  
35
- 36 b. If a lender complies with the CFPB rules by sending two offers to modify  
37 mortgages for defaulting borrowers, it need not participate in the Article 3  
38 facilitation process.  
39
- 40 c. In order for a borrower to invoke Article 3, the borrower would have to  
41 initially pay 'X' percent [10% /25% /50%] of her monthly mortgage payment  
42 either to the lender or into a fund maintained by the facilitation agency, and  
43 thereafter pay a similar sum each month during the mediation process.  
44
- 45 d. Impose a sunset provision for facilitation in each state, tied either to a calendar  
46 date or to some index reflecting the severity of foreclosures in that state.

1 e. Make Article 3 an optional provision for each state.

2  
3 f. Impose a shorter ‘hard stop’ time frame for the facilitation process [absent a  
4 finding of lender’s failure to abide by the facilitation process] measured from  
5 the date the lender triggers the process by sending a notice to the defaulting  
6 borrower – note: we already have a 90 day ‘hard stop’ in Section 304(b).  
7

8 **SECTION 304. NO FORECLOSURE DURING FACILITATION.**

9 (a) After a notice of facilitation has been sent to a homeowner or obligor, a creditor or  
10 servicer may not commence a judicial-foreclosure action, file a default or dispositive motion in a  
11 foreclosure action, or schedule or cause to be scheduled a foreclosure sale unless:

12 (1) the homeowner or obligor does not respond to the facilitation notice, by either  
13 sending a written request for loss mitigation to the creditor or servicer not later than 60 days after  
14 sending the facilitation notice or by appearing at the scheduled facilitation session.

15 (2) the facilitation agency provides the creditor or servicer with a notice that the  
16 parties have negotiated in good faith and reached an impasse, or that the homeowner or obligor  
17 has failed to participate in facilitation or provide required information after a reasonable  
18 opportunity to do so; or

19 (3) the court or facilitation agency enters an order on good cause shown  
20 permitting the creditor or servicer to proceed with foreclosure.

21 (b) Notwithstanding subsection (a), a creditor or servicer may proceed to enforce the  
22 mortgage [90] days after sending the notice under Section 302, unless the parties agree to  
23 continue the facilitation process or the facilitation agency or court directs the parties to continue  
24 the facilitation process.

25 **Comments**

26  
27 1. Numerous states have recently enacted mandatory facilitation or loss  
28 mitigation laws whose object is to delay or prevent foreclosure until the  
29 homeowner has had the opportunity to request loss mitigation or facilitation:

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

20 2. Subsection (a)(3) contemplates a variety of situations where,  
21 notwithstanding the 90 day waiting period before foreclosure may be commenced  
22 under subsection (b), either the court or facilitation agency may enter an order  
23 permitting foreclosure to proceed in less than 90 days. Examples of particular  
24 situations that might warrant such an order may include a case where the  
25 homeowner has already agreed to vacate the property, or has unequivocally  
26 declined to participate in facilitation, or if emergency conditions short of  
27 abandonment would justify an accelerated foreclosure.  
28

## 29 **[ARTICLE] 4**

### 30 **RIGHT TO FORECLOSE; SALE PROCEDURES.**

#### 31 **SECTION 401. RIGHT TO FORECLOSE.**

32  
33  
34 (a) A person described in subsection (b) may commence a foreclosure only after default  
35 in the obligation and satisfaction of all conditions required by the mortgage agreement and law  
36 of this state .

#### 37 **Drafters' Notes**

38 1. This act does not define events of default under the mortgage.  
39 Instead, like UCC Article 9, this act leaves the definition of default to contract  
40 law.

41 2. In subsection (a), the phrase 'law of this state' includes this act as

1 well as all other law of this state.

2  
3 **Alternative A**

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

5 (1) except as otherwise provided in paragraph (3), if the obligation is evidenced  
6 by a negotiable instrument, the “person entitled to enforce” the instrument specified in [U.C.C.  
7 Section 3-301]; provided, if that person is not in possession of the instrument due to its loss, theft  
8 or destruction, that person must meet the requirements of Section 403.

9 **Alternative B**

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

11 (1) except as otherwise provided in paragraph (3), if the obligation is evidenced  
12 by a negotiable instrument:

13 (A) the holder of the negotiable instrument;

14 (B) a person in possession of the negotiable instrument that is not the  
15 holder but has the right to enforce the instrument under [U.C.C. Article 3], or

16 (C) a person not in possession of the negotiable instrument due to its loss,  
17 theft or destruction that establishes the right to enforce the instrument by meeting the  
18 requirements of Section 403.

19 **End of Alternatives**

20  
21 ***Legislative Note:*** This Act contains two alternatives to designate the person with the right to  
22 foreclose when the obligation is evidenced by a negotiable instrument. A State should enact  
23 Alternative A if it has adopted Revised UCC Article 3 (2002) and should enact Alternative B if it  
24 has adopted a prior version of UCC Article 3.

25  
26 (2) except as otherwise provided in paragraph (3), if the obligation is not  
27 evidenced by a negotiable instrument, the owner of the obligation.

28 (3) Whether or not the obligation is evidenced by a negotiable instrument, if the

1 obligation is registered in a mortgage registry, the only person with the right to foreclose is the  
2 person identified as entitled to enforce the obligation and the mortgage on a [certificate –  
3 NCohen issue] issued by a mortgage registry as of the time the foreclosure is commenced.

4 (c) In a judicial-foreclosure proceeding, the plaintiff must prove that it has the right to  
5 foreclose under subsection (b). If the plaintiff relies on a negotiable instrument under subsection  
6 (b)(1), the [complaint] must include a copy of the negotiable instrument in its present condition  
7 including any endorsement or allonge and either

8 (1) a statement indicating who is in possession of the negotiable instrument; or

9 (2) a statement that the negotiable instrument has been lost, stolen or destroyed,  
10 in which case the [complaint] must include a lost-negotiable-instrument affidavit that complies  
11 with Section 403.

12 If the obligation is not evidenced by a negotiable instrument under subsection (b) (2), the  
13 [complaint] must include a copy of the records evidencing the obligation and the plaintiff's  
14 ownership of the obligation.

15 (d) In a nonjudicial-foreclosure proceeding, the creditor or servicer must attest by  
16 affidavit to facts demonstrating that the creditor or servicer has the right to foreclose under  
17 subsection (b). The affidavit must be included with the notice of foreclosure required by Section  
18 201.

19 (e) In any foreclosure proceeding, a person that has the right to foreclose may, in a record,  
20 authorize another person to foreclose. The [complaint] described in subsection (c) or the affidavit  
21 described in subsection (d) must disclose the name of each such person.

22 (f) If an obligation is evidenced by a negotiable instrument and a person with the right to  
23 foreclose under subsection (b)(1) does not own the obligation, the [complaint] described in

subsection (c) or the affidavit described in subsection (d) must disclose the name of the owner of the obligation.

### **Drafters' Notes**

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

To accommodate this possibility, the draft added new subsection (b)(3); it serves as a starting point for Committee discussion of the feasibility of including in the Act such a provision for the registration of documents for residential mortgage loans. Under this draft, a certificate or record issued by the sponsoring organization is conclusive evidence that the person named in the certificate as owning the obligation, holding the negotiable instrument (if the obligation is evidenced by an negotiable instrument), or acting on behalf of the owner or holder, has the right to foreclose under Section 401.

The draft also makes conforming changes in subsections 401(a), 401 (b), 401(c) and 401(d) by making, in each case, appropriate references to subsection (g).

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

3. Subsection (b)(2) includes situations in which the secured obligation is evidenced by an instrument that is not negotiable and situations in which the obligation is not evidenced by any type of instrument authenticated by the debtor. As an example of the former, an owner may sign a promissory note that has terms that makes the note nonnegotiable. As an example of the latter, under the law of some states an installment land contract creates a mortgage relationship between

1 the parties, in which the vendee's obligation to pay the price usually is not  
2 reflected in a negotiable instrument. In all such cases, the owner of the obligation  
3 who has the right to foreclose will be either the original obligee or an assignee.  
4

5 4. In judicial foreclosure, under existing law the creditor generally must  
6 confirm possession or account for possession of the original note at the time of  
7 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the  
8 law appears not to require confirmation of possession of the original note prior to  
9 commencement of foreclosure proceedings or the sale. This section requires that  
10 the foreclosing person have possession of the negotiable instrument prior to the  
11 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,  
12 unless that person prepares a lost note affidavit meeting the requirements of  
13 Section 4-103.  
14

15 5. The decision in subsection (b)(1) to require foreclosure by the holder of  
16 a negotiable instrument, paired with the decision in subsection (b)(2) to require  
17 foreclosure by the owner of other obligations, seeks to reach an appropriate  
18 balance between the interests and expectations of borrowers, lenders, and their  
19 assignees. It recognizes the traditional importance of qualifying as a holder of a  
20 negotiable instrument under Article 3, and seeks to protect borrowers by ensuring  
21 that proceeds of foreclosure sales will discharge the obligation. With respect to  
22 obligations evidenced by non-negotiable instruments and other writings,  
23 possession of those writings, although sometimes important, generally has less  
24 significance. Thus, section (b)(2), by authorizing foreclosure by the owner of  
25 such an obligation, makes irrelevant the possession of a non-negotiable  
26 promissory note or another writing such as the mortgage agreement or an  
27 installment land contract.

28 Although this distinction seems beneficial, the two-tier system does have  
29 some costs, including but not limited to complexity. By authorizing the holder of  
30 a negotiable instrument to foreclose, sometimes the power is conferred upon a  
31 person who has no economic stake in the obligation or the collateral. The holder,  
32 however, will usually have an obligation, created by contract or other law, to the  
33 owner who does have an economic stake, giving it some incentive to behave  
34 properly.  
35

36 The two-tiered system makes it necessary to determine whether a  
37 promissory note is negotiable for some cases. Uncertainty as to whether the note  
38 is negotiable creates cost. If a single person both possesses the note and owns the  
39 obligation, the problem is not major. If it is unclear whether the secured  
40 obligation is evidenced by a negotiable instrument or by an instrument that is not  
41 negotiable, the creditor may choose to proceed by complying with both  
42 subsections (b)(1) and (b)(2). If, however, different persons possess the note and  
43 own the obligation, the problem is harder. For example, consider a promissory  
44 note secured by a mortgage and payable to the order of Creditor. Creditor enters  
45 into a signed contract with Assignee pursuant to which Creditor sells the  
46 promissory note to Assignee. Assignee pays Creditor, but Creditor retains

1 possession of the promissory note (and is not possessing the note as agent for  
2 Assignee). If the promissory note is a negotiable instrument under UCC Article 3,  
3 Creditor can commence a foreclosure under this Section, but Assignee cannot  
4 (because Creditor is the holder of the note). If the promissory note is not a  
5 negotiable instrument, however, Assignee is its owner and can commence a  
6 foreclosure, but Creditor cannot. If Creditor and Assignee cannot reliably  
7 determine, before foreclosure, whether the promissory note meets the standards  
8 for negotiability, neither one will hold a clear right to foreclose. The uncertainty  
9 can be cleared up only by litigation or their agreement to make a further transfer  
10 (Creditor delivers the note to Assignee, or Assignee resells the note to Creditor).

11  
12 6. This section does not state a separate rule for determining when a  
13 creditor who holds a security interest in a note to secure an obligation owed to the  
14 creditor has the right to foreclose. UCC Article 9 covers both sales of instruments  
15 and assignments of instruments that secure an obligation of the assignor. A  
16 creditor who takes possession of a negotiable instrument will acquire the right to  
17 foreclose. Other law determines when a creditor who takes possession of an  
18 instrument that is not negotiable to secure an obligation owed to the creditor  
19 acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide  
20 rules indicating when a secured party has the right to collect on collateral and to  
21 enforce the debtor's rights with respect to property that secures obligation owed to  
22 the debtor (i.e., the obligation to pay the mortgage loan to the debtor).

23  
24 7. Multiple persons may hold the right to foreclose a mortgage. Other law,  
25 including UCC Article 3 and the law of agency, determines whether the right to  
26 foreclose may be exercised by fewer than all such persons.

27  
28 8. When the obligation is owned by a trust, the owner of the obligation for  
29 purposes of this Section is the trustee, not the beneficial owner or owners of the  
30 trust property.

31  
32 9. Under subsection (c) the creditor's production of the original negotiable  
33 instrument is not necessary at the time of the filing of a complaint in a judicial  
34 foreclosure. Production of the original would later become appropriate if, during  
35 the course of the proceedings, the homeowner or obligor seeks further  
36 demonstration of the copy's authenticity or the whereabouts of the original.  
37 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial  
38 proceedings, a court may decide to order production of the original instrument if  
39 necessary to resolve a particular issue.

40 10. Subsection (e) authorizes the person who has the right to foreclose to exercise  
41 that right through an agent. By requiring a description of the agency it does not  
42 permit the principal to remain undisclosed. An agent authorized to foreclose may  
43 be a loan servicer who has a pre-existing contractual relationship with the  
44 creditor, or any other person appointed at any time. If the secured obligation is  
45 evidenced by a negotiable instrument, the agent or the principal (the person



entitled to enforce the note) may hold and retain possession of the note. Subsection (e) is not intended to change existing laws that authorize a third person, such as a trustee under a deed of trust, to foreclose in nonjudicial proceedings. In such circumstances, subsection (e) allows the beneficiary to appoint an agent, but does not speak to the procedure for appointing a substitute trustee.

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

#### **SECTION 402. TRANSFER OF RIGHT TO ENFORCE MORTGAGE.**

(a) A transfer of a property interest in an obligation secured by a mortgage also operates to transfer a corresponding property interest in the mortgage.

(b) If a transfer of the right to enforce an obligation is accompanied by a separate assignment of the mortgage, the assignment may be recorded in the [office in which mortgages are recorded], but recordation is not required for the assignee to foreclose the mortgage pursuant to Section 401.

#### **Drafters' Notes**

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

Subsection (a) is broader than § 9-203(g); it applies regardless of whether the transferee obtains an attached Article 9 security interest. It also encompasses involuntary transfers such as inheritance and judicial sales. Restatement (Third) of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: “A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Under the Restatement rule, parties to the transfer

1 may agree otherwise, but this section does not permit severance of the obligation  
2 from the mortgage, following UCC § 9-203(g) and common-law authorities in a  
3 number of states.  
4

5 2. When the foreclosing party is not the originating creditor there is  
6 conflicting state law, both in judicial foreclosure and nonjudicial foreclosure  
7 states, as to (1) whether the foreclosing party must have an express assignment of  
8 the mortgage, or a chain of assignments running back to the original mortgagee,  
9 and (2) whether that assignment or the chain of assignments must be recorded in  
10 the county land records.  
11

12 In some states, a statute explicitly requires a recorded assignment. E.g.,  
13 Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the  
14 secured creditor with title to the security instrument shall be filed prior to the time  
15 of sale in the [county land records].” In many states, judicial decisions going in  
16 both directions interpret statutes that do not on their face provide immediately  
17 obvious answers to these questions. E.g, In re Vasquez, 266 P.3d 1053 (Ariz.  
18 2011) (recording assignments of deeds of trust is not required, although trustee  
19 must record notice of trustee’s sale); U.S. Bank Nat. Ass’n v. Ibanez, 941 N.E.2d  
20 40 (Mass. 2011) (requiring written chain of assignments).  
21

22 Subsection (b) adopts the position that an express assignment is  
23 unnecessary; note that subsection (a) implies an assignment upon a transfer of the  
24 obligation. In addition, subsection (b) adopts the position that recordation of an  
25 assignment (or notice of an implied assignment) is not a prerequisite for  
26 foreclosure.  
27

28 3. By allowing foreclosure by an assignee or transferee who qualifies as  
29 the person to foreclose under Section 401, without a requirement of recording any  
30 documents in the real property records, this Act makes it unnecessary to follow  
31 the procedure authorized by UCC § 9-607(b), which grants a secured party the  
32 right to record a copy of the security agreement and an affidavit in the real  
33 property records. Compliance with the requirements of Section 401 is sufficient.  
34

### 34 **SECTION 403. LOST, STOLEN OR DESTROYED NEGOTIABLE**

#### 35 **INSTRUMENT; AFFIDAVIT.**

##### 36 **Alternative A**

37 (a) If a negotiable instrument secured by a mortgage has been lost, stolen or destroyed,  
38 and the obligation is not registered in a mortgage registry, the creditor or servicer may foreclose  
39 the mortgage only if the creditor or servicer makes an affidavit attesting to the facts specified in

1 [UCC Section 3-309(a)(1) through (3).]

2 **Alternative B**

3 (a) If a negotiable instrument secured by a mortgage has been lost or destroyed and the  
4 obligation is not registered in a mortgage registry, the creditor or servicer may foreclose the  
5 mortgage only if the creditor or servicer makes an affidavit attesting to the following facts:

6 (1) either (A) the creditor was entitled to enforce the instrument when loss of  
7 possession occurred, or (B) the creditor has directly or indirectly acquired ownership of the  
8 instrument from a person who was entitled to enforce the instrument when loss of possession  
9 occurred;

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

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

16 **End of Alternatives**

17 **Legislative Note:** 1. This Act contains two alternatives to specify the content of the lost note  
18 affidavit. A State should enact Alternative A if it has adopted Revised UCC Article 3 (2002) and  
19 should enact Alternative B if it has adopted a prior version of UCC Article 3.

20  
21 (b) If a creditor or servicer makes an affidavit pursuant to subsection (a), the homeowner  
22 or obligor is entitled to adequate protection against loss that might occur by reason of a claim by  
23 another person to enforce the negotiable instrument. The creditor must provide in a record an  
24 indemnity against loss by the homeowner or obligor. Whether adequate protection requires more  
25 than the indemnity is determined by the facts of each case. On motion by the homeowner or

obligor, a court may require additional protection.

### **Drafters' Notes**

The act does not detail what form of any additional protection might be adequate in a particular case, since the court will determine the adequacy of needed additional protection in any given case. It might be, for example, that if the foreclosing party were a single purpose entity with no assets other than the mortgage being foreclosed, the court might require a letter of credit, or a parent guarantee.

(c) In a judicial-foreclosure proceeding, the creditor or servicer shall file the affidavit described in subsection (a) with the [complaint].

(d) In a nonjudicial-foreclosure proceeding, the creditor or servicer shall include with the notice of foreclosure required by Section 201:

- (i) the affidavit described in subsection (a);
- (ii) the indemnity described in subsection (b); and
- (iii) a statement that the homeowner or obligor has the right to petition the [name of appropriate court] where the mortgaged property is located for an order requiring the creditor to provide adequate protection against a claim by another person.

(e) In addition to the facts stated in subsection (a), the affidavit must:

- (1) identify the owner of the negotiable instrument;
- (2) state from whom and the date on which the owner acquired ownership;
- (3) state that the negotiable instrument was not located after thorough and diligent efforts to search the records of the creditor and any prior holders or owners of the negotiable instrument and their agents; and
- (4) describe the nature and extent of those efforts.

A particular phrasing of the affidavit is not required. The following form of affidavit, when completed, provides sufficient information:

1 INSERT SAFE HARBOR LOST NOTE AFFIDAVIT HERE

2  
3 **Drafters' Notes**

4  
5 1. Subsection (a) deals with the problem of lost or destroyed promissory  
6 notes by requiring the preparation of an affidavit. The substance of this  
7 requirement follows the 2002 amendments to Article 3. In specifying when a  
8 creditor is entitled to enforce a negotiable instrument secured by a mortgage  
9 notwithstanding its inability to confirm possession of the instrument, subsection  
10 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted  
11 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person  
12 who lost possession may be a predecessor of the creditor who seeks to enforce the  
13 instrument.  
14

15 Most states have not yet adopted the 2002 amendments. Most of these  
16 states follow the 1990 Official Text of Article 3. In these states there are a few  
17 cases holding that the affidavit must be signed by the person who lost the note.  
18 Other cases, however, interpret that version of Article 3 to allow enforcement by a  
19 successor. See, e.g., *Atlantic Nat. Trust, LLC v. McNamee*, 984 So. 2d 375 (Ala.  
20 2007) (examining prior cases; holding that assignee of promissory note that was  
21 not in possession when lost may enforce the note). This subsection rejects the  
22 cases holding that the affidavit must be signed by the person who lost the note,  
23 adopting the position expressly taken in Revised Article 3, but does require that  
24 the affiant state certain facts on which the affidavit is made; *see* subsection (e).

25 4. In some states, the circumstances in which a creditor is allowed to  
26 enforce an unavailable negotiable instrument are broader than under either the  
27 2002 version or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B)  
28 (“[i]f a note or other evidence of indebtedness secured by a deed of trust is lost or  
29 for any reason cannot be produced”). In some states, the circumstances are more  
30 restricted because the creditor’s affidavit must attest to additional facts. E.g., Md.  
31 Code, Real Prop. § 7-105.1(f) (affidavit not sufficient unless it “(1) Identifies the  
32 owner of the debt instrument and states from whom and the date on which the  
33 owner acquired ownership; (2) States why a copy of the debt instrument cannot be  
34 produced; and (3) Describes the good faith efforts made to produce a copy of the  
35 debt instrument.”).  
36

37 5. When the loan documents executed by the parties did not include a  
38 negotiable instrument, the creditor seeking to foreclose may or may not possess  
39 an original writing or record (including a counterpart) that evidences the  
40 obligation. This section does not require an affidavit for a creditor who lacks  
41 possession of such an original record. Some states require “lost note affidavits”  
42 under these circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond,  
43 note, contract, open account agreement, or other written evidence of debt”); Va.  
44 Code § 55-59.1(B) (“note or other evidence of indebtedness”).  
45

1           6. This section does not discuss the evidentiary effect of the affidavit in  
2 judicial proceedings. Some states have statutory law on point. For example, an  
3 Alabama statute provides that a lost note affidavit “must be received as  
4 presumptive evidence both of the contents and loss or destruction of such  
5 negotiable instrument, unless the defendant by answer, verified by affidavit,  
6 denies the execution of such bond, note or bill or the endorsement, acceptance, or  
7 the contents thereof, in which case proof of such execution, endorsement,  
8 acceptance, or contents must be made by the plaintiff.” Ala. Code § 6-5-284.  
9

10           7. Some statutes dealing with lost note affidavits appear to require an  
11 affidavit only if the creditor is unable to produce the original *or a copy* of the  
12 instrument.  
13

14           8. Subsection (b) follows UCC § 3-309(b), which requires adequate  
15 protection for the obligor from the risk that at some point in the future the  
16 instrument will surface and its possessor will assert the right to be paid. (UCC §  
17 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)  
18 requires that the affidavit include a written indemnity, binding the creditor, to  
19 protect all obligors against the risk that a person other than the creditor will seek  
20 to enforce the instrument. This indemnity serves to reinforce the rights that the  
21 obligor already has under principles of restitution and unjust enrichment. See,  
22 e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011):  
23 “*Payment of Money Not Due*. Payment by mistake gives the payor a claim in  
24 restitution against the recipient to the extent payment was not due.” In appropriate  
25 cases, a court may require a bond in addition to a written indemnity.  
26

#### 27       **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.**

28           (a) Mortgaged property may be sold at a public sale only after a commercially reasonable  
29 public advertisement of the sale. Whether the method or timing of publication of the  
30 advertisement is commercially reasonable is a question of fact. The public advertisement is  
31 commercially reasonable if both:

32                   (i) published in a newspaper having general circulation in the [county] where the  
33 mortgaged property is located once per week for three consecutive weeks before the sale, with  
34 the first publication not more than 30 days before the sale and

35                   (ii) posted on an Internet website that is reasonably expected to be viewed by  
36 persons having an interest in purchasing the mortgaged property at least 21 days before the sale

1 and the Internet posting remains regularly available between the time of posting and the time of  
2 sale.

3 (b) A public advertisement under subsection (a) must indicate:

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

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

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

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

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

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

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

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

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

19 (c) The public advertisement under subsection (a) need not contain a legal description of  
20 the mortgaged property or recording information for the mortgage or other instruments of record.

21 (d) The public advertisement under subsection (a) or other information pertaining to the  
22 sale may be posted at the location of the mortgaged property.

23 (e) A creditor or servicer must send a copy of the public advertisement under subsection

(a) to the homeowner and to each obligor. The notice of public advertisement may be sent with the notice of commencement of foreclosure or may be sent separately.

### **Drafters' Notes**

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

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

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

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

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

Subsection (a) also creates a safe harbor regarding circumstances when an advertisement would be commercially reasonable. Specifically, the method of publication is commercially reasonable if the creditor publishes the public advertisement both in a local newspaper and with an appropriate Internet website. The Internet site may be one operated by the newspaper or by any other person,



1 whether or not located in the jurisdiction where the mortgaged property is located.  
2 The Internet site, however, must be one that has characteristics suggesting that  
3 interested members of the public are likely to find and to read the posting. The  
4 safe harbor exists, however, only if period of time for newspaper and Internet  
5 advertisements, satisfies the standards in the act, which seek to ensure public  
6 access to the advertisement for approximately one month preceding the date of  
7 sale.  
8

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

20 7. Subsection (d) authorizes the creditor to post the public advertisement  
21 or a sign on the property, regardless of whether that right is reserved in the  
22 mortgage.  
23

24 **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor or servicer

25 shall give each homeowner and obligor written notice of the date, time, and place of a  
26 scheduled foreclosure sale. Notice of sale must be sent by first-class mail to the last-  
27 known address of each homeowner and obligor and be personally delivered to the  
28 property address. Notice of sale must be mailed or delivered at least 30 days before the  
29 sale date.

30 **Drafters' Note**

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

36 **SECTION 406. POSTPONEMENT OR CANCELLATION OF SALE.**

37 (a) A person conducting a foreclosure sale may postpone or cancel the sale for

1 any reason. Announcement of a postponement must include the date, time, and place of  
2 the rescheduled sale. If oral announcement of the postponement is made at the date, time,  
3 and place advertised for the sale, a new public advertisement is not required under  
4 Section 404 unless the sale is postponed for longer than 30 days from the date originally  
5 advertised.

6 (b) If a foreclosure sale is postponed the creditor shall promptly give each  
7 homeowner and obligor commercially reasonable notice of the postponement. The notice  
8 must include the date, time, and place of the rescheduled sale.

9 (c) If a foreclosure sale is cancelled, the creditor promptly shall notify each  
10 homeowner and obligor in the manner provided in Section 405. The notice must include a  
11 telephone number and electronic mail address from which a person may obtain additional  
12 information concerning the creditor's plan with respect to the mortgaged property,  
13 including any new sale date.

#### 14 **Drafters' Note**

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

1 [ARTICLE] 5

2 ACCELERATED DISPOSITIONS

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

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

7 (1) The homeowner and creditor agree to the transfer in a record after the  
8 homeowner's default;

9 (2) notice of the proposed negotiated transfer is sent to the persons entitled to  
10 notice under Section 502; and

11 (3) the person who sent the notice under Section 502 does not receive an  
12 objection to the proposed transfer in a record from any person entitled to notice under Section  
13 502 within 20 days after notice was sent to the person.

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

19 **Drafters' Notes**

20  
21 1. This section authorizes a transfer from the homeowner to the creditor in  
22 satisfaction of the debt or other obligation. In so doing, it provides a framework  
23 for existing workout arrangements such as cash-for-keys agreements and deed-in-  
24 lieu of foreclosure transactions. This section and the following two sections  
25 provide for a safe harbor by specifying the effect of a transfer that meets the  
26 requirements of this section. This section is based in part on UCC § 9-620, which  
27 provides for the acceptance of personal property mortgaged property by a secured  
28 party in full or partial satisfaction of a secured obligation. The important

1 innovations here are, first, to provide an expedited procedure to discharge junior  
2 liens on the property without the need for a foreclosure sale; and second, to  
3 resolve a number of collateral issues that flow from the expedited procedure, as  
4 detailed in Section 504.

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

13  
14 As a consequence, this section as now drafted confers a substantial benefit  
15 on mortgage creditors in the form of a new mechanism for converting every 'deed  
16 in lieu' transaction into an accelerated means of clearing title of junior  
17 encumbrancers without the need for a more traditional judicial foreclosure. In  
18 doing so, the section does not require any minimum benefit on homeowners, other  
19 than the general statement of effects of such an agreement contained in Section  
20 504 and the rights of possession noted in paragraph 2 above,

#### 21 22 **Drafters' Notes**

23  
24 The comments will make clear that in the case of multiple owners of residential  
25 property, all the owners need to consent to a negotiated transfer; the act does not  
26 authorize a forced transfer outside of foreclosure for a non-consenting co-owner.

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

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

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

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

1 property; and

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

#### 5 **Drafters' Notes**

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

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

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

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

25  
26 (a) If a judicial-foreclosure proceeding is pending with respect to mortgaged property  
27  
28 and the court receives an objection from a person holding an interest in the mortgaged property  
29 which would be affected by a negotiated transfer under Section 504, the court shall schedule a  
30 prompt hearing on the objection.

31 (b) If a hearing is held under subsection (a) and the proposed transferee demonstrates by  
32 appraisal or otherwise that that there is no equity in the mortgaged property available to satisfy  
33 the interests of the objecting interest holder, the court shall overrule the objection.

34 (c) If a hearing is held under subsection (a) and the objecting party demonstrates by

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

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

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

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

16 (1) discharges the obligation in full;

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

21 (3) discharges the mortgage held by the creditor and any mortgage or other lien  
22 that is junior in priority to the mortgage held by the creditor; and

23 (4) terminates any subordinate interest that is not insulated from termination

1 under other law.

## 2 **Drafter's Notes**

3 The comments will make clear that this act, in stating that a negotiated transfer  
4 terminates all subordinate interest, does not terminate a subordinate interest that is  
5 insulated under other law from termination as a result of foreclosure. The clearest  
6 examples are be the common provisions in state statutes providing that various  
7 kinds of residential leasehold interests are not automatically terminated by a  
8 foreclosure, but may only be terminated by the creditor when they would be  
9 terminable under the terms of the lease itself in the absence of foreclosure. This  
10 act does not overturn the results under those statutes.

11  
12 . (b) A subordinate interest is discharged or terminated under subsection (a), even in the  
13 event of noncompliance with the requirements of this [act], but a creditor that fails to comply  
14 with the requirements of this [act] is liable for damages in the amount of any loss caused by its  
15 failure to comply.

16 (c) If a homeowner and creditor have agreed that the homeowner has the right to continue  
17 to occupy the mortgaged property for a fixed time after a transfer, the agreement creates a license  
18 unless the parties have agreed in a record to enter into a landlord-tenant relationship.

19 (d) A transfer of the mortgaged property pursuant to Section 501 terminates all rights of  
20 the creditor to obtain a personal judgment for the obligation, including attorneys' fees, costs, and  
21 other expenses, against the homeowner and any other person liable for the obligation secured by  
22 the property..

23 (e) A transfer of the mortgaged property pursuant to Section 501 terminates all rights of  
24 the homeowner or other person to redeem the property.

25 (f) Nothing in Sections 501 through 504 prevents a homeowner and creditor from  
26 entering into any other agreement, but the effects of a negotiated transfer described in this  
27 section do not apply to an agreement that fails to state that the agreement is made pursuant to  
28 Section 501.

1 (g) Nothing in this [article] affects the rights of a creditor holding an interest in the  
2 mortgaged property which has priority over the interests of a creditor that takes title to the  
3 mortgaged property under this section.

#### 4 **Drafters' Notes**

5  
6 1. This section is based in part on UCC § 9-622, which specifies the effect  
7 of acceptance of personal property by a secured party in full or partial satisfaction  
8 of a secured obligation.  
9

10 Subsection (a) specifies that the effect of a transfer of the mortgaged  
11 property is full satisfaction of the secured obligation. The transfer to which it  
12 refers is one that results from performance of the agreement made by the  
13 homeowner and the creditor. If a timely objection is received by the court or by  
14 the creditor from a person entitled to notification, then neither this subsection nor  
15 subsection (b) applies. Paragraph (1) expresses the fundamental consequence of  
16 accepting the mortgaged property in full satisfaction of the secured obligation—  
17 the obligation is discharged.  
18

19 2. Paragraphs (2) through (4) indicate the effects of a transfer on various  
20 property rights and interests. Under paragraph (2), the creditor acquires “all of the  
21 homeowner’s rights in the mortgaged property.” Under paragraph (3), all junior  
22 encumbrances are discharged. Paragraph (4) provides for the termination of other  
23 subordinate interests. Under existing law, a deed-in-lieu of foreclosure accepted  
24 by a creditor does not terminate subordinate mortgages, subordinate liens, or other  
25 subordinate property rights. This Act changes that result by authorizing a transfer  
26 in full satisfaction of the obligation, which terminates junior interests.  
27

28 3. Subsection (c) specifies that the status of the homeowner who continues  
29 to occupy the property after entering into an agreement to transfer the property to  
30 the creditor in full satisfaction of the obligation is that of a licensee. The parties’  
31 agreement and other state law determine the rights and obligations of the parties  
32 as licensor and licensee.  
33

34 4. As drafted, the sentence authorizes homeowners and creditors to enter  
35 into any other type of agreement that they might desire, but no such agreement –  
36 presumably including a traditional ‘deed in lieu’ arrangement – would confer the  
37 benefits of Section 504 unless the agreement expressly provided that it was made  
38 pursuant to Section 501.  
39

40 The converse of the policy is reflected in this observation from Reporter  
41 Smith:

42 “I believe the better policy is to displace existing state laws on “deed in



lieu” transactions within the scope of this act. Among other problems, if we keep both, there will be transactions in which the lender has not clearly documented whether the intent to proceed under this act or under other law.”

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

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

#### **SECTION 505. ABANDONED PROPERTY.**

(a) A governmental agency’s determination, finding, or order that mortgaged property is abandoned, or the presence of not less than [three] of the following conditions, establishes a presumption that the property is abandoned property:

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

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

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

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

1                   (5) A creditor has changed the locks on the property and, for at least 30 days after  
2 the changing of the locks, the homeowner has not contacted the creditor to request entrance to  
3 the property.

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

6                   (7) A law enforcement agency has received at least two separate reports of  
7 trespass, vandalism or other illegal acts being committed on the property.

8                   (8) The homeowner has died and there is no evidence that a survivor or an heir of  
9 the homeowner is in actual possession of the property.

10               (b) In a judicial-foreclosure proceeding, the plaintiff or a governmental subdivision in  
11 which the mortgaged property is located may petition the court for a determination that the  
12 property is abandoned property. If the property is located in a common-interest community, the  
13 association that governs that community may intervene in the proceeding.

14               (c) In a judicial-foreclosure proceeding, after notice and hearing, the court may issue an  
15 order finding that the mortgaged property is abandoned property.

16               (d) In a non judicial-foreclosure proceeding, a creditor or servicer or a governmental  
17 subdivision in which the mortgaged property is located may seek a determination that the  
18 property is abandoned property by submitting a request accompanied by an affidavit attesting to  
19 facts indicating abandonment to [insert name of appropriate government official]. In addition:

20                   (1) The person seeking the determination must send a notice to each homeowner  
21 and other person entitled to notice under Section 201. The notice must include a copy of the  
22 request and the affidavit, describe the consequences that will follow from a determination of  
23 abandonment, and inform the recipient that the recipient may contact the [government official] to

1 obtain further information or to object to the proposed determination of abandonment.

2 (2) After personal inspection of the property, the [insert name of appropriate  
3 government official] may issue a determination in a record that the property is abandoned  
4 property. The [insert name of appropriate government official] shall send the determination to  
5 the creditor, the homeowner, and any other person entitled to notice under Section 201.

6 (3) The determination or the refusal of the [insert name of appropriate government  
7 official] to issue a determination is subject to de novo judicial review.

### 8 **Drafters' Notes**

9  
10 1. This Act authorizes an expedited foreclosure procedure for abandoned  
11 properties for both judicial foreclosure and for nonjudicial foreclosures. An  
12 expedited procedure is appropriate for two reasons. First, the homeowner is no  
13 longer making a valuable economic use of the property to provide shelter for the  
14 homeowner or the homeowner's family or someone claiming under the  
15 homeowner, such as a tenant. A foreclosure sale will not result in a possessor  
16 being forced to relocate to other housing. Second, properties that are facing  
17 foreclosure and that are vacant have significant negative impacts on  
18 neighborhoods and the surrounding communities. Vacancies reduce the market  
19 values of neighboring properties. Neighborhood crime increases. The vacant  
20 properties tend to suffer from lack of repair and maintenance, creating public  
21 health risks, including infestations by vermin, mosquitoes, and other insects.  
22 There are fiscal impacts on local governments, who find property taxes on vacant  
23 properties often become delinquent; yet the governments are faced with added  
24 expenses to provide essential services to blighted neighborhoods, such as police  
25 and fire protection. By providing for an expedited foreclosure procedure, this Act  
26 seeks to return abandoned properties to the stock of occupied, well-maintained  
27 housing as soon as reasonably possible.

28  
29 2. The conditions giving rise to prima facie evidence of abandonment set  
30 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code  
31 § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance  
32 of a determination that the mortgaged property is abandoned by itself constitutes  
33 prima facie evidence of abandonment. The government's determination, finding,  
34 or order might not use the word "abandoned"; it might, for example, refer to the  
35 property as vacant. Of course, the homeowner or another person has the right to  
36 challenge the correctness of the governmental determination.

37  
38 With respect to the statutory conditions listed in Subsection (a)(1) through  
39 (a)(8), the presence of [three] or more of such conditions constitutes prima facie

evidence, giving rise to a presumption of abandonment. Such conditions are not conclusive on the issue of abandonment. Many residential properties will exhibit at least one such condition, when the homeowner is still in possession of the property. If the homeowner or another person holding under the homeowner is in actual possession of the mortgage property, the property is not abandoned notwithstanding the existence of such conditions. Likewise, mortgaged property may be abandoned under this Section notwithstanding the absence of any of the statutory conditions.

3. Mortgaged property often becomes vacant, both under standard mortgage and reverse mortgage transactions, when the homeowner dies. Under Subsection (a)(8) proof of death of the homeowner is one of the conditions that may give rise to a presumption that the mortgaged property is abandoned, provided that there is no evidence that an heir or other beneficiary of the homeowner's estate is in actual possession. Of course if there are multiple homeowners, this condition is met only if all the homeowners have died.

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

Judicial review of the decision is available to any interested person. Subsection (c) does not specify the nature of that action, which in many jurisdictions will be a mandamus action.

#### **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

(a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c) finding that mortgaged property is abandoned property and the court has previously rendered or at the same time renders a judgment of foreclosure, the court shall order a public sale of the abandoned property not earlier than [30] days but not later than [60] days after entry of the order.

(b) In a non judicial-foreclosure proceeding, on the issuance of a determination under Section 505(d) that the mortgaged property is abandoned property, a creditor, servicer or trustee may conduct an expedited public sale of the property. The sale may take place not earlier than [30] days but not later than [60] days after the issuance of the determination, unless judicial

1 review of the determination is commenced. The creditor or servicer shall comply with the notice  
2 requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

3 (c) After a judicial order or a determination in a record finding that the mortgaged  
4 property is abandoned property under Section 505(c) or (d), the creditor or servicer shall take  
5 necessary and appropriate action to cause the foreclosure sale to be completed within a  
6 reasonable time unless the creditor releases its mortgage and files the release in the [land  
7 records]. Unless the creditor releases its mortgage, the creditor may not seek to end its obligation  
8 to maintain the property under Section 507 by dismissing, terminating, or suspending the  
9 foreclosure proceeding.

10 (d) The completion of a foreclosure sale pursuant to subsection (a) or (b) terminates the  
11 rights of the homeowner or any other person to redeem the property under other law of this state.

#### 12 **Drafters' Notes**

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

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

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

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

9  
10 On the other hand, the consequences of a creditor's failure to either  
11 commence and complete a foreclosure action or to release its mortgage, on other  
12 stakeholders in the abandoned property – including the fee owner, the  
13 municipality and neighbors in which the abandoned property is located, and  
14 where appropriate, a homeowners association - are very real. The act as drafted  
15 resolves these conflicting policies by offering the lender a choice of how it wishes  
16 to proceed.

17  
18 4. In states that afford the homeowner and other persons a statutory right  
19 of redemption after completion of a foreclosure sale, subsection (d) serves to  
20 terminate those redemption rights.

## 21 **SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.**

22  
23 (a) In this Section, “maintain” means to:

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

26 (2) prevent trespassers or squatters from remaining on the property;

27 (3) prevent mosquito larvae from growing in standing water; and

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

30 (b) If a creditor is the plaintiff in a judicial-foreclosure proceeding, that creditor is  
31 obligated to maintain the property after an order finding that the mortgaged property is  
32 abandoned property pursuant to Section 505(c) is rendered.

33 (c) If a creditor institutes a nonjudicial-foreclosure proceeding, that creditor is obligated  
34 to maintain abandoned property after a determination in a record that the mortgaged property is

1 abandoned property pursuant to Section 505(d) is issued.

2 (d) In the absence of a judicial order under subsection (b) or a determination under  
3 subsection (c), a creditor that has commenced foreclosure proceedings is obligated to maintain  
4 the mortgaged property after it receives notice that a governmental entity has issued a  
5 determination, finding, or order stating that the mortgaged property is abandoned property and is  
6 in a condition that poses a threat to public safety or health.

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

10 (f) A creditor that is obligated to maintain abandoned property may enter the property  
11 peacefully and cause others to enter the property peacefully for the limited purpose of inspection,  
12 repair, and maintenance as required by this section. All reasonable expenses incurred by a  
13 creditor pursuant to this section are an obligation of the homeowner and are secured by the  
14 mortgage.

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

18 (h) The following persons have the right to enforce the obligations created by this section  
19 in an action:

- 20 (1) a governmental subdivision that has jurisdiction of the mortgaged property;  
21 (2) a homeowners association, condominium association, or cooperative  
22 association, if the property is subject to the rules of the association; or  
23 (3) a community development corporation serving the area where the mortgage

1 property is located.

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

### 7 **Drafters' Notes**

8  
9 1. This Section requires creditors to maintain abandoned properties under  
10 certain circumstances. The obligation may arise based upon action of the creditor  
11 or action of the municipality or other governmental entity where the property is  
12 located. The creditor does not become obligated to maintain merely by  
13 commencing foreclosure proceedings at a time when the dwelling unit is vacant.  
14 Rather, the obligation arises when the creditor seeks to use the expedited  
15 foreclosure procedure authorized by Section 505 and obtains either a judicial  
16 order or official determination that the property is abandoned. Under subsection  
17 (c) the obligation may also arise any time after the creditor has commenced  
18 foreclosure proceedings if the municipality or other local governmental entity  
19 cites the property as both abandoned and presenting a threat to public safety or  
20 health.

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

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

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



1 both to the local government and to owners' associations, this subsection follows  
2 the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This  
3 subsection does not grant a direct enforcement right to neighbors. If negatively  
4 impacted, such persons may have a remedy under other laws, such as public or  
5 private nuisance.  
6

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

15 THIS SECTION HAS BEEN DELETED

16  
17 **[ARTICLE] 6**

18 **REMEDIES**

19 **SECTION 601. EFFECT OF VIOLATION.**

20 (a) In a judicial foreclosure proceeding, if the court determines that a creditor or servicer  
21 has committed a material violation of this [act], the court shall dismiss the action or stay the  
22 action on appropriate terms and conditions until the violation is cured. Dismissal must be  
23 without prejudice unless the court determines that a new foreclosure action would unfairly  
24 burden the homeowner due to a creditor's repeated violations or other aggravating  
25 circumstances.

26 (b) In a non judicial-foreclosure proceeding, a homeowner or obligor may initiate an  
27 action to enjoin or restrain the foreclosure on the grounds that a creditor or servicer committed a  
28 material violation of this Act. If the court finds that a material violation of this Act occurred, the  
29 court may nevertheless allow foreclosure to continue after the violation is cured, unless the court  
30 determines that the foreclosure should be permanently barred due to a creditor's repeated  
31 violations or other aggravating circumstances.

1 **Drafter's Notes**

2 The comments should discuss the circumstances under which a permanent bar to  
3 foreclosure would be appropriate and cite cases where that extraordinary relief  
4 has been granted.  
5

6 (c) If a material violation of this [act] is established pursuant to subsection (a) or (b), the  
7 creditor may not add to the amount of the obligation attorney's fees and costs incurred before it  
8 cures the violation.

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

12 **Drafters' Notes**

13 Whether or not the homeowner may claim that damages caused by a servicer are  
14 chargeable to the creditor who retained the servicer under theories of agency or  
15 employer/employee law is not determined by this act but by other law.  
16

17 (e) In addition to damages recoverable under subsection (d), a homeowner or obligor may  
18 recover \$[200] for each violation from the person violating this [act].

19 **Drafters' Notes**

20 We should make clear whether the \$200 per violation requires a finding that the  
21 violation was 'material'; it appears that the drafter's intention was that that the  
22 penalty could be imposed whether or not the violation was material, as is the case  
23 under some Truth In Lending circumstances.  
24

25 (f) In addition to the damages recoverable under subsections (d) and (e), a homeowner or  
26 obligor may recover, [NCohen draft rewrite-: as the court may allow, punitive damages not  
27 exceeding \$[15,000] per obligor and homeowner. In determining the amount of recovery] under  
28 this subsection, the court shall consider, among other relevant factors:

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

1 (2) the nature of the noncompliance, and

2 (3) the extent to which the noncompliance was intentional.

3 (g) An action brought under this section must be commenced not later than one year after  
4 the violation on which it is based. In opposing the imposition of punitive damages for violations  
5 of the act established by the obligor or homeowner, the creditor, servicer or its agent may show  
6 that:

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

9 (2) before the action was brought the violation was discovered by the creditor,  
10 servicer, or its agent, and cured.

11 [(h) No class action shall be permitted pursuant to sub-sections (e) and (f) of this section].

12 **Drafters' Notes**

13  
14 1. Actual damages may include damages for emotional distress.

15  
16 2. Prior to confirmation of the foreclosure sale, the homeowner may raise  
17 a material violation of the statute, for example a materially inaccurate notice of  
18 the amounts needed to cure a default, to prevent the foreclosure sale (or  
19 confirmation), until the violation has been corrected and remedied. After a  
20 foreclosure sale the homeowner's remedy for violations of the statute is to seek  
21 damages from the foreclosing creditor, and a bona fide sale purchaser is entitled  
22 to rely on the conclusive effect under Section 407. If a violation by the creditor  
23 can be cured timely so that full compliance is achieved, the foreclosure may  
24 proceed.

25  
26 **SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW.** Nothing in this  
27 [act] displaces any defense or remedy a homeowner or obligor may have under law other than  
28 this [act].

29 **Drafter's Note**

30 This act preserves rights and defenses available to homeowners and obligors  
31 under other state statutes, regulations, common law, and federal law. In many

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

13  
14 **SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL**  
15 **FORECLOSURE.**

16 (a) A homeowner or obligor may bring an action against a creditor or servicer asserting a  
17 defense to a nonjudicial foreclosure.

18 (b) In an action under this section, if the court determines that a defense to the nonjudicial  
19 foreclosure exists, the court may render an order that is just and equitable under the  
20 circumstances.

21 **SECTION 604. ATTORNEY'S FEES AND COSTS.** In an action in which a party  
22 seeks a remedy under Section 601 based on a violation of this [act], or asserts a defense or  
23 remedy under Section 602 or a defense under Section 603, the court shall award the costs of the  
24 action and reasonable attorney's fees to the prevailing party.

25 **SECTION 605. ENFORCEMENT BY [ATTORNEY GENERAL].** In addition to  
26 enforcing any remedies available under other law, the [attorney general or other state official or  
27 agency] may bring an action to enjoin a pattern of violating this [act]. In such an action the court  
28 may issue an injunction or order, which may include requiring steps to be taken to remedy  
29 violations or the payment of damages to aggrieved homeowners. In such an action, the court may  
30 assess a civil penalty of not less than \$[\_\_\_\_\_] nor more than \$[\_\_\_\_\_]. The injunction or order

1 may bind a creditor, servicer, their agents, or any other person violating this [act].

2           **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**  
3 **FORECLOSURES.**

4           **[Alternative # 1 - complete abrogation]** Notwithstanding [insert reference to State UCC  
5 §3-305] [NCohen # 179: and any agreement by the homeowner or obligor] a creditor or servicer  
6 who commences a foreclosure under this act is subject to all claims and defenses that the  
7 homeowner or obligor could assert against the [creditor who first owned the obligation ]  
8 [NCohen # 182: original obligee of the obligation]

9           **[Alternative # 2 – limited abrogation similar to FTC Rule]** (a) Notwithstanding [insert  
10 reference to State UCC §3-305], [NCohen # 183: and any agreement by the homeowner or  
11 obligor], when a party with the right to foreclose under Section 401 initiates foreclosure, the  
12 homeowner or obligor may assert any claim or defense that the debtor could assert against the  
13 original creditor of the obligation secured by the mortgage. Any recovery by the homeowner or  
14 obligor shall not exceed a recoupment or set-off against the total outstanding balance due on the  
15 mortgage obligation plus amounts paid by the homeowner or obligor to the creditor or servicer  
16 bringing the foreclosure action.

17           **[Alternative #3, statute of limitations]** Notwithstanding [insert reference to State UCC  
18 3-305], when a party with the right to foreclose under Section 401 initiates foreclosure, and if the  
19 notice required by Section 201 is sent not later than ten years after the claim or defense arose, the  
20 homeowner or obligor may assert any claim or defense that the debtor could assert against the  
21 original creditor of the mortgage. Any recovery by the homeowner or obligor shall not exceed a  
22 recoupment or setoff against the total outstanding balance due on the mortgage obligation plus  
23 amounts paid by the homeowner or obligor to the creditor or servicer bringing the foreclosure

1 action.

2 [Alternative # 4 – This section only applies to obligations secured by mortgages on  
3 residential property in this state which are incurred after the date this [act] becomes effective in  
4 this state.]

#### 5 Chairman's Note

6  
7 The Drafting Committee for the Home Foreclosure Procedures Act has  
8 discussed but has not taken a position on the proper role, if any, of the Holder in  
9 Due Course rule, as articulated in Article 3 of the Uniform Commercial Code,  
10 with respect to residential real estate loans.

11 The April 5, 2013 draft of this act set out three basic positions on what the  
12 Drafting Committee might do with the rule and the related waiver of defenses  
13 concept (together, the "Doctrine") in the Act; that is:

- 14
- 15 ▶ abolish the Doctrine as it applies to residential loans;
- 16 ▶ keep it unchanged; or
- 17 ▶ propose some undefined middle position

18 The Drafting Committee discussed but did not take a position on these  
19 alternatives. In order to further the discussion, the Chair of the committee then  
20 appointed a subcommittee composed of Commissioners Walters, Miller and  
21 Lisman; their charge was to study the matter further and present a report for the  
22 annual meeting to consider.

23 The sub-committee's Report appears in the separate policy paper which  
24 the Reporters, Committee Chair and the Advisor from the American Bar  
25 Association have prepared and which is being separately distributed.

26  
27 To assist the Commissioners with respect to the issues surrounding the  
28 Holder In Due Course doctrine, Professor James Charles Smith, one of the  
29 Drafting Committee's co-Reporters, has prepared a memorandum summarizing  
30 several aspects of the doctrine; it is attached to the sub-committee's Report in the  
31 Policy paper.

32  
33 In addition, those seeking additional information concerning this subject  
34 and the policy positions surrounding it will find a range of thoughtful comments  
35 provided by various stakeholders – consumer representatives, regulators,  
36 academic writers and the securitization industry – on the ULC website for the  
37 Drafting Committee.

1 [ARTICLE] 7

2 MISCELLANEOUS PROVISIONS

3 SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.

4 (a) Except as otherwise provided in this Section, this [act] applies to the foreclosure of a  
5 mortgage within its scope, even if the mortgage was created before this [act] takes effect.

6 (b) This [act] does not affect a foreclosure commenced before this [act] takes effect.

7 **Drafters' Note**

8  
9 This Act applies to the foreclosure of mortgages created before the effective date  
10 of this Act, unless the creditor has taken action to foreclose before the effective  
11 date.

12  
13 SECTION 702. REPEALER.

14 (a) The following acts and parts of acts are hereby repealed:

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

16 (b) In addition to the statutes specifically repealed under subsection (a), all other acts and  
17 parts of acts inconsistent with this Act are hereby repealed.

18 **Drafters' Notes**

19  
20 1. Subsection (a) of this section should be separately prepared for each  
21 state. In each state it is necessary to pay careful attention to how this Act is to be  
22 blended with existing state law. The statutes to be specifically repealed will  
23 include statutes relating to notices of default, intent to accelerate, and the right to  
24 cure to be sent to homeowners; notices and standards for mediation and other  
25 types of facilitation; determination of who has the right to commence foreclosure;  
26 and advertisement and notices of foreclosure sales; confirmation of sales. Given  
27 the scope of this Act, which is limited to residential foreclosures, care should be  
28 taken not to repeal statutes to the extent they should continue to apply to non-  
29 residential foreclosures. In some instances, instead of repeal it may be useful to  
30 amend other state statutes to limit their scope to foreclosures that are not within  
31 the scope of this Act.

32 2. At the same time, this Act was drafted with the expectation that existing  
33 state foreclosure procedures would remain in place. This Act is not intended to  
34 displace all existing foreclosure laws in each state, but rather to be an overlay on  
35 existing law. For example, and most fundamentally, the Act does not anticipate

1 or provide that a state employ a judicial foreclosure process when the customary  
2 practice is to foreclose under a power of sale procedure, nor does the Act  
3 contemplate that a state should enact a non-judicial foreclosure process in the  
4 absence of existing state laws. It is for that reason that the legislative drafters in  
5 each state should carefully consider how best to integrate the provisions of the  
6 Act with existing state laws governing the foreclosure process.  
7

8 3. In addition to the listed specific sections repealed by this Act,  
9 subsection (b) provides for the repeal of all other legislation in this state which is  
10 inconsistent with this Act. This provision is necessary to resolve those matters  
11 that may ultimately be presented to a court in construing the Act in cases where  
12 the specific repealer in subsection (a) fails to note an existing state statute which  
13 the court concludes is inconsistent with a provision of this Act.  
14

15 **SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

16 applying and construing this uniform act, consideration must be given to the need to promote  
17 uniformity of the law with respect to its subject matter among states that enact it.

18 **SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
19 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the  
20 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but  
21 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
22 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
23 U.S.C. Section 7003(b).

24 **SECTION 705. EFFECTIVE DATE.** This Act takes effect on [insert date].