

DRAFT
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

November 14-15, 2014 Drafting Committee Meeting

REDLINE DRAFT

Without Prefatory Note and with Reporters' Drafting Notes

Copyright 2014
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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

November 6, 2014

DRAFTING COMMITTEE ON HOME FORECLOSURE PROCEDURES

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

WILLIAM R. BREETZ, JR., Connecticut Urban Legal Initiative, Inc., University of Connecticut School of Law, Knight Hall Room 202, 35 Elizabeth St., Hartford, CT 06105, *Chair*
THOMAS J. BUI TEWEG, 3025 Boardwalk St., Suite 120, Ann Arbor, MI 48108
BRUCE A. COGGESHALL, Merrill's Wharf, 254 Commercial St., Portland, ME 04101-4664
MICHAEL A. FERRY, 200 N. Broadway, Suite 950, St. Louis, MO 63102
BARRY C. HAWKINS, 300 Atlantic St., Stamford, CT 06901
DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712
MELISSA HORTMAN, Minnesota House of Representatives, State Office Bldg., Room 377, 100 Dr. Rev. MLK Jr. Blvd., St. Paul, MN 55155
ELIZABETH KENT, Legislative Section, Hawaii Dept. of the Attorney General, 425 Queen St., Honolulu, HI 96813
RUSTY N. LAFORGE, 6301 Waterford Blvd., Suite 407, Oklahoma City, OK 73118
CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402
FRED H. MILLER, 80 S. 8th St., 500 IDS Center, Minneapolis, MN 55402-3796
CARLYLE C. RING, 1401 H St. NW, Suite 500, Washington, DC 20005
MICHAEL H. RUBIN, 301 Main St., One American Pl., 14th Floor, Baton Rouge, LA 70825
MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563
LEE YEAKEL, United States Courthouse, P.O. Box 164196, Austin, TX 78716-4196
JAMES CHARLES SMITH, University of Georgia School of Law, 225 Herty Dr., Athens, GA 30602, *Co-Reporter*
ALAN M. WHITE, CUNY School of Law, 2 Court Sq., Long Island City, NY 11101-4356, *Co-Reporter*

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., Saint Paul, MN 55102, *President*
THOMAS BUI TEWEG, 3025 Boardwalk St., Suite 120, Ann Arbor, MI 48108, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

BARRY B. NEKRITZ, 311 S. Wacker Dr., Suite 4400, Chicago, IL 60606, *ABA Advisor*
NEIL S. KESSLER, 1001 Haxall Point, 15th Floor, Richmond, VA 23219-3944, *ABA Section Advisor*
NEIL J. RUBENSTEIN, 55 2nd St., Suite 1700, San Francisco, CA 94105-3493, *ABA Section Advisor*

AMERICAN LAW INSTITUTE ADVISOR

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

EXECUTIVE DIRECTOR

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

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

HOME FORECLOSURE PROCEDURES

TABLE OF CONTENTS

**[ARTICLE] 1
GENERAL PROVISIONS**

SECTION 101. SHORT TITLE 1
SECTION 102. DEFINITIONS..... 1
SECTION 103. SCOPE..... 9
SECTION 104. DUTY OF GOOD FAITH; COMMERCIAL REASONABLENESS..... 9
SECTION 105. PROHIBITED ACTS..... 10
SECTION 106. APPLICATION OF LOCAL REGULATIONS..... 10
SECTION 107. SERVICERS..... 11
SECTION 108. NO WAIVER..... 12
[SECTION 109. NOTICE AND KNOWLEDGE.]..... 12

**[ARTICLE] 2
NOTICES; RIGHT TO CURE**

SECTION 201. NOTICE OF DEFAULT; RIGHT TO CURE..... 14
SECTION 202. MANNER OF NOTICE DELIVERY..... 16
SECTION 203. RIGHT TO CURE DEFAULT..... 17
SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR..... 19

**[ARTICLE] 3
EARLY RESOLUTION**

SECTION 301. EARLY-RESOLUTION PROGRAM..... 19
SECTION 302. NOTICE OF EARLY RESOLUTION..... 21
SECTION 303. ELIGIBILITY FOR PARTICIPATION IN EARLY RESOLUTION..... 23
SECTION 304. PARTICIPATION IN EARLY RESOLUTION..... 24
SECTION 305. FORECLOSURE ACTION DURING EARLY RESOLUTION..... 27

**[ARTICLE] 4
RIGHT TO FORECLOSE; PUBLIC SALE PROCEDURE**

SECTION 401 [A]. RIGHT TO FORECLOSE - JUDICIAL FORECLOSURE..... 34
SECTION 401 [B]. RIGHT TO FORECLOSE- NONJUDICIAL FORECLOSURE..... 35
SECTION 402. ASSIGNMENT OF MORTGAGE UNNECESSARY..... 39
SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE INSTRUMENT;
AFFIDAVIT..... 40
SECTION 404. PUBLIC ADVERTISEMENT OF PUBLIC SALE..... 45
SECTION 405. NOTICE OF PUBLIC SALE..... 49
SECTION 406. POSTPONEMENT OR CANCELLATION OF PUBLIC SALE..... 49
[SECTION 407. CONFIRMATION OF PUBLIC SALE.]..... 51

[ARTICLE] 5
NEGOTIATED TRANSFER

SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN SATISFACTION OF OBLIGATION.	52
SECTION 502. NOTICE OF NEGOTIATED TRANSFER.	55
SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.	56
SECTION 504. EFFECT OF NEGOTIATED TRANSFER.	57

[ARTICLE] 6
ABANDONED PROPERTY

SECTION 601. PRESUMPTION OF ABANDONMENT.	61
SECTION 602. DETERMINATION OF ABANDONMENT IN JUDICIAL FORECLOSURE.	64
SECTION 603. DETERMINATION OF ABANDONMENT IN NONJUDICIAL FORECLOSURE.	66
SECTION 604. WITHDRAWAL OF ABANDONED PROPERTY PROCEEDING.	68
SECTION 605. FORECLOSURE OF ABANDONED PROPERTY.	69
SECTION 606. MAINTENANCE OF ABANDONED PROPERTY.	72

[ARTICLE] 7
REMEDIES

SECTION 701. EFFECT OF VIOLATION.	75
SECTION 702. DEFENSE OR REMEDY OF HOMEOWNER OR OBLIGOR UNDER OTHER LAW.	78
SECTION 703. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL FORECLOSURE.	78
SECTION 704. ATTORNEY’S FEES AND COSTS.	79
SECTION 705. ENFORCEMENT BY [ATTORNEY GENERAL].	79
SECTION 706. EFFECT OF THE HOLDER IN DUE COURSE RULE.	79

[ARTICLE] 8
MISCELLANEOUS PROVISIONS

SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION.	85
SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	85
SECTION 803. PRE-EFFECTIVE DATE TRANSACTIONS.	85
SECTION 804. REPEALER; CONFORMING AMENDMENTS.	86
SECTION 805. EFFECTIVE DATE.	87

1 **HOME FORECLOSURE PROCEDURES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

4 **SECTION 101. SHORT TITLE.** This [act] may be cited as the

5 [Uniform][Model] Home Foreclosure Procedures Act.

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

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

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

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

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

17 (2) “Common-interest community” means real property with respect to which a
18 person, by virtue of ownership of a unit, is obligated to pay real~~-~~property taxes ~~;~~ or
19 insurance premiums; or for maintenance, ~~or~~ improvement of other real property, ~~or for~~
20 services described in a declaration or other governing document, however denominated.

21 ~~A common-interest community~~The term includes properties held by a cooperative-
22 housing corporation. In this paragraph, “ownership” includes a leasehold interest if the
23 period of the lease is at least [20] years, including renewal options.

24 (3) “Creditor” means a person that commences a foreclosure or has the right to
25 foreclose a mortgage under Section 401(b). [The term does not include a person that ~~does~~

1 ~~not owns, holds, or services more than~~ five or fewer mortgages at the time the notice
2 required by Section 201 is sent.]

3 **Drafters' Notes**

4
5 1. An alternative to making a broad exception from the entire act
6 for lenders owning 5 or less mortgages would be to exempt these lenders
7 from the obligation to participate in the 'early resolution' process of
8 Article 3. If the bracketed language remains, add a Legislative Note that
9 explains to the States why the small lender exemption is made.

10
11 2. The Chair (and perhaps he alone) has struggled with the
12 definition of 'creditor'. However elegant the current definition may be, it
13 is ultimately circular – in that it includes the very servicers to whom the
14 creditor may delegate duties under Section 107. Further, the definition
15 does not describe the creditor's relationship to the borrower or the debt,
16 but simply characterizes the 'creditor' as any PETE under 401(b); this is,
17 again, a reference that clearly includes entities that are not traditional
18 creditors but are, indeed, persons who may owe a duty to the traditional
19 creditor once the foreclosure process is complete and the proceeds of sale
20 are in hand.

21
22 Finally, Section 401(b)(2) provides that 'only the person
23 designated as the owner or holder of the obligation by the registry may
24 commence a foreclosure'. While the [act] does not define what 'owner of
25 the obligation' means, it surely does not mean a servicer who is under
26 contract with that owner to commence the foreclosure.

27
28 Reporter White suggests that an alternative approach might to
29 define the creditor as "a person entitled to receive payment or performance
30 under an obligation". Section 107 – describing the relationship between
31 servicer and holder – would then completely address the situation where
32 the servicer is the PETE. This alternative definition would also be entirely
33 consistent with the current definition of 'mortgage registry' which refers
34 to 'the owner of an obligation'.

35
36 (4) "Early resolution" means the assistance of a third-party neutral at an in-person
37 meeting or other communication ~~where-in~~ which a creditor, obligor, the parties and third-
38 party-neutral ~~can~~ simultaneously hear can communicate with one another with the
39 objective of reaching an agreement between the ~~creditor and obligor parties~~ for a
40 commercially reasonable alternative to foreclosure.

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

6
7 Foreclosure Mediation Foreclosure Conciliation
8 Foreclosure Resolution Foreclosure Diversion
9 Pre-Foreclosure [etc.]
10 Dispute Resolution Early Resolution
11 Mediation [alone]
12

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

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

19 (6) “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 (7) ~~“Foreclose” and~~ “Foreclosure” means a process, proceeding, or action by a
25 creditor to terminate a homeowner’s interest in mortgaged property or obtain possession
26 of mortgaged property for the creditor. The term does not include a voluntary transfer by
27 a homeowner or an action to recover possession of property after a completed foreclosure
28 sale. “Foreclose” has a corresponding meaning.

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

1 (9) “Homeowner” means a person that owns an interest in mortgaged property,
2 other than a mortgage, lien, easement, servitude, or leasehold with an initial term of less
3 than [20] years, including renewal options ~~whether or not the person is an obligor.~~

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

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

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

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

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

17 (15) ~~“Mortgaged property” means residential property that is subject to a~~
18 ~~mortgage, and any personal property held or used in connection with the residential~~
19 ~~property that is subject to the mortgage.~~

20 Chair’s note – this Draft combines the definitions of ‘Mortgaged
21 property’ and ‘Residential property’; while the preserved term will be
22 ‘mortgaged property’, this draft temporarily leaves the text where
23 ‘Residential property’ had been in order to best display the style changes.
24 In making this change, the revised definition abandons the suggestion in
25 the former definition of ‘mortgaged property’ that the mortgage might
26 cover personal property that was not also a fixture.
27

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

3 (17) “Nonjudicial foreclosure” means a foreclosure that proceeds without judicial
4 process ~~pursuant to~~under [insert statutory reference].

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

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

8 (A) owes payment or performance of ~~the~~an obligation;

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

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

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

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

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

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

23 (23) “~~Residential property~~Mortgaged property” means real property improved

1 with not more than four dwelling units ~~that which is subject to a mortgage~~. The term
2 includes an attached single-family unit, a single-family manufactured-housing unit
3 treated as real property under law of this state other than this [act], a time share in
4 ~~residential property a dwelling unit~~ if that time share is treated as real property under law
5 of this state other than this [act], real property on which construction of not more than
6 four dwelling units has commenced, and a single-family unit in a common-interest
7 community. The term does not include real property that, when the mortgage being
8 foreclosed was created, was used or ~~was~~ intended to be used primarily for non-residential
9 purposes such as farming, commercial, or industrial use ~~when a mortgage was created~~.

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

13 (25) “Servicing” means:

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

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

19 (C) ~~in the case of making a payment to the obligor under~~ a home ~~equity~~
20 conversion mortgage or reverse mortgage, ~~making payments to the obligor;~~ or

21 (D) evaluating ~~an the~~ obligor for loss mitigation or communicating ~~to an~~
22 with the obligor with respect to loss mitigation.

23 (26) “State” means a state of the United States, the District of Columbia, Puerto

1 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
2 jurisdiction of the United States.

3 ***Legislative Note***
4

5 In states that allow one or more types of nonjudicial foreclosure of
6 residential mortgages, a reference to the relevant statute ~~or statutes~~ should
7 be added to the definition of “nonjudicial foreclosure.” In states that do
8 not allow nonjudicial foreclosure, this definition should be deleted, along
9 with references to “nonjudicial foreclosure” elsewhere in this [\[aAct\]](#).

10
11 **Drafters’ Notes**
12

13 1. The definition of “abandoned property” works in tandem with
14 the factors listed in Section 505(a). Whether mortgaged property is
15 “abandoned property” is determined by the facts of each case. The Section
16 505(a) factors are not exclusive; they serve an evidentiary purpose. The
17 core question is whether the homeowner is presently in possession of the
18 property. The question must be answered by evaluating the facts related to
19 the homeowner’s use of the property.
20

21 2. The definition of “early resolution” requires at least one “in-
22 person” meeting or other communication between the parties and a third-
23 party neutral. The alternative requirements of either an “in-person”
24 meeting or other form of electronic communication contemplates the
25 continuation of the practice in many jurisdictions that, as an alternative to
26 a “face-to-face” meeting, the parties may meet by telephone, video
27 conference or other electronic means so long as all the parties and the
28 neutral are able to simultaneously hear or communicate with one another.
29

30 3. The definition of “expenses of foreclosure” limits the expenses
31 that a foreclosing party may impose on a borrower in connection with the
32 foreclosure process to ‘reasonable’ expenses, even if other law of the state
33 would allow expenses which would otherwise not satisfy that standard.
34 The definition contemplates that these allowable expenses would include
35 the reasonable costs of all typical foreclosure expenses, including such
36 costs as sending notices, advertising, title searches, inspections and
37 examinations of the mortgaged property, management and securing of the
38 mortgaged property, insurance, filing and recording fees, attorney’s fees
39 and litigation expenses incurred to the extent provided in the mortgage or
40 authorized by other law, appraisal fees, the fee of the person conducting
41 the sale in the case of a foreclosure by auction, the fee of a
42 court-appointed receiver, and other expenses reasonably necessary to the
43 foreclosure.
44

1 4. The definition of “holder” is taken from revised Article 1: UCC
2 § 1-201(b)(21)(A) and the terms “bearer” and “identified person” have
3 the same meanings in this act as in the UCC. The definition of “holder” in
4 unrevised Article 1 has slightly different language, but is the same in
5 substance.
6

7 4a. The terms "homeowner" and "obligor" are separately defined
8 because some provisions of this [act] apply to one rather than to both
9 individuals. For most home mortgage transactions, the same individual
10 (or individuals) will be both a homeowner and an obligor. However,
11 occasionally, an individual will be a homeowner but not an obligor;
12 examples might include a spouse or heir who acquires an ownership
13 interest, but has not assumed the mortgage obligation. Similarly, from
14 time to time an individual will be an obligor but not a homeowner;
15 examples might include a guarantor or a person who conveys ~~her~~ an
16 ownership interest to another person after signing a mortgage agreement.
17

18 5. “loss mitigation” includes such actions as a repayment plan,
19 forbearance agreement, loan modification, short sale, partial mortgage
20 insurance claim, negotiated transfer and deed in lieu of foreclosure.
21

22 6. The term “mortgage” refers to the lien held by the creditor,
23 which secures payment of the obligation, whereas the term “mortgage
24 agreement” refers to the writing or other record that memorializes the
25 parties’ agreement and creates the mortgage. Depending upon local usage
26 and custom, the mortgage agreement may be denominated as a mortgage,
27 deed of trust, trustee deed, security deed, deed to secure debt, or the like.
28

29 In some states, a land sale installment contract does not constitute a
30 ‘mortgage’, with all the attendant consequences for homeowners and
31 creditors, until a specified percentage of the original principal amount has
32 been paid to the creditor. In Illinois, for example, that percentage is 50%
33 of the original principal amount. In those States where the issue arises,
34 statutory drafters should make appropriate amendments to this act to track
35 existing practice in that state.
36

37 ~~7. The definitions of “mortgage” and “obligor” refer to the payment of an~~
38 ~~obligation, and do not use the phrasing found in UCC Article 9 definitions~~
39 ~~that includes “payment or other performance” of obligations. Almost~~
40 ~~always the basis for a residential mortgage foreclosure is the failure to pay~~
41 ~~a monetary obligation.~~
42

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

1 followed. On the other hand, the good faith standard would bar dishonest
2 conduct that is literally in compliance, for example, seeking an abandoned
3 property determination under §505 for a home the creditor knows is not
4 abandoned, although it may meet the statutory criteria that give rise to a
5 presumption of abandonment.

6
7 2. The obligation to act in good faith set forth in subsection (a)
8 relates to the performance of specific duties and obligations imposed on
9 persons by this act and by their agreement. It is not the source of
10 independent obligations to take or refrain from taking certain actions.

11
12 **SECTION 105. ~~CERTAIN ACTS-PROHIBITED ACTS.~~** A creditor may not:

13 (1) ~~M~~make a misleading ~~oral or written~~ statement orally or in writing to a
14 homeowner or obligor ~~that~~ which would discourage a reasonable person from
15 participating in loss mitigation or early resolution; or

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

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

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

22 (C) the obligor is not eligible for a loss-mitigation options when ~~loss-~~
23 ~~mitigation-the~~ options ~~are~~ is available and the creditor has not evaluated ~~those-the~~
24 options.

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

26 (a) [Notwithstanding [(insert reference to any applicable “~~H~~home ~~R~~rule”
27 provisions under the law of this state)]]; ~~no ordinance or regulation of~~ a municipality,
28 [county], or other political subdivision in this state may not impose a regulations,
29 restrictions, or limitations on ~~the-foreclosure~~ ~~process~~ or add to or vary the rights and

1 obligations of a creditors, servicers, homeowners, or obligors ~~set forth in~~ under this [act].

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

6 **Drafters' Notes**

7
8 1. This section addresses local laws that regulate residential properties that
9 are in foreclosure or have been sold at foreclosure. During recent years, local
10 governments in a number of states have enacted ordinances that establish
11 mediation or ~~“dispute resolution”~~ programs or that regulate abandoned
12 properties. Lenders have expressed concern that such local programs are often
13 burdensome, especially due to their limited geographical scope. A number of state
14 legislatures have passed statutes to preempt various types of local legislation that
15 affect mortgage lending and the enforcement of mortgages. This section seeks to
16 address the issue. The drafting committee discussed prior versions of this section
17 at its January 2014 and May 2014 meetings. One major decision is whether field
18 preemption or conflict preemption is more appropriate. Although the current
19 language reflects the former model, the committee has not yet made a decision. It
20 will consider the matter at its fall 2014 meeting.

21
22 2. Subsection (b) makes it clear that municipal ordinances generally
23 applicable to real property in a municipality would not be affected by this act,
24 regardless of who owns the property, and therefore will apply with equal force to
25 property owned by homeowners or lenders. Accordingly, for example, a local
26 ordinance mandating the maintenance of yards and blighted property would apply
27 with equal force to a blighted property whether or not owned by a homeowner or
28 creditor, and an ordinance enabling a municipality to repair blighted property and
29 lien the property for the costs of the work, if it were otherwise lawful under
30 applicable state law, would not be barred by this section.

31 **SECTION 107. SERVICERS.**

32
33 (a) A creditor may ~~perform any of its duties~~ delegate a duty under this [act]
34 ~~through to~~ a servicer.

35 (b) A servicer who is authorized to ~~take action~~ act on behalf of a creditor:

36 1. has all the rights conferred on creditors by this [act] with respect to the

1 authorized action, unless limited by contract; and

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

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

5 **SECTION 108. NO WAIVER.** Except as otherwise provided in Section 501,
6 the effect of provisions of this [act] that give rights to of an obligor or homeowner or
7 impose and duties on of a creditor under this [act] may not be waived or varied by
8 agreement.

9 **Drafters' Note**

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

13 **[SECTION 109. NOTICES AND KNOWLEDGE.**

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

15 the notice or notification :

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

17 (2) ~~It~~ is duly delivered in a form manner reasonable under the

18 circumstances at the place of business through which the contract was made or at another
19 location held out by ~~that the~~ person as the place for receipt of a similar such
20 communications.

21 (b) In this subsection, "organization" means a person other than an individual.

22 Notice, knowledge, or a notice or notification received by an organization is effective for
23 a particular transaction foreclosure from the time when it is brought to the attention of the
24 individual conducting that transaction the foreclosure and, in any event, from the time it
25

1 would have been brought to the individual's attention if the organization had exercised
2 due diligence. An organization exercises due diligence if it maintains reasonable routines
3 for communicating significant information to the ~~person~~individual conducting the
4 ~~transaction~~foreclosure and there is reasonable compliance with the routines. Due
5 diligence does not require an individual acting for the organization to communicate
6 information unless the communication is part of the ~~individual's~~ regular duties of the
7 individual or the individual has reason to know of the ~~transaction~~foreclosure and that the
8 ~~transaction~~foreclosure would be materially affected by the information.

9 ~~(e) “Organization” means a person other than an individual.]~~

10 **Drafter’s Note**

11 This Section incorporates without change those parts of Revised UCC § 1-
12 202 that are relevant for this act.

13
14 Chair’s Note- this Section is bracketed as a signal for Committee
15 discussion.

16
17 ~~**SECTION 110. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless~~
18 ~~displaced by the particular provisions of this [act], the principles of law and equity,~~
19 ~~including the law relative to capacity to contract, principal and agent, estoppel, fraud,~~
20 ~~misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or~~
21 ~~invalidating cause supplement its provisions.~~

22 ~~**Drafters’ Note**~~

23 ~~This new section responds to comments made at our past Committee~~
24 ~~meetings that our act should explicitly indicate that its provisions are to be~~
25 ~~supplemented by general principles of law and equity, following UCC~~
26 ~~jurisprudence. Our Committee discussion has focused particularly on~~
27 ~~making it clear that the law of principal and agent applies as a general~~
28 ~~matter. The text above is taken verbatim from Revised UCC § 1-103(b)~~
29 ~~with one modification—this Section omits the § 1-103(b) reference to “the~~
30 ~~law merchant” on the basis that such principles are not likely to apply to~~

1 ~~our subject matter.~~

2 [ARTICLE] 2

3 NOTICES; RIGHT TO CURE

4 SECTION 201. NOTICE OF DEFAULT; ~~AND~~ RIGHT TO CURE.

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

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

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

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

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

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

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

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

23 (7) the names of

24 ~~(A)~~ the creditor and the particular facts that establish the

1 creditor's right to foreclose;

2 ~~(ii)(B)~~ the servicer, if different ~~than from the creditor~~; and

3
4 ~~(iii)(C)~~ the legal owner of the obligation, if the -creditor is not the legal
5 owner;

6 (8) that the obligor may request a copy of the negotiable instrument or
7 other evidence of the obligation and a copy of any record that demonstrates the right to
8 foreclose ~~as provided in Section 401~~; and

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

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

13 **Drafters' Notes**

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

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

31
32 3. This Act refers in several sections to the 'foreclosure process';
33 see, for example, Sections 102(7), 104(a), 106 and this section 201. The
34 notice of default under this Section is the beginning of the foreclosure

1 process prescribed by this Act. However, the “first notice or filing” under
2 federal regulations mandating a 120-day waiting period, 24 C.F.R. §
3 1024.41(f)(1), is the [Complaint or other first court filing in judicial
4 state][Notice of Sale in non-judicial state]. Therefore the notice of default
5 may be sent during the 120-day waiting period under the federal rule.
6

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

17 5. In subsection (b)(2), the actions the homeowner needs to take in
18 order to cure the default are governed by § 203. If the default by its nature
19 cannot be cured, for example if the property has been forfeited or
20 foreclosed by a senior lienholder, the notice may simply state that the
21 default may not be cured.
22

23 6. If a homeowner or obligor has cured a default, any subsequent
24 foreclosure based on a later default must be preceded by a new notice,
25 subject to the limitations on repeated defaults contained in Section 203.
26 This is because a cure restores the homeowner to the same legal position
27 as if no default had occurred, §203(c). If, on the other hand, as a result of
28 early resolution or otherwise, the homeowner has tendered payments
29 under a forbearance plan or other workout but has not fully cured the
30 default that was the subject of the notice, no new notice is required in the
31 event the workout fails and the creditor chooses to proceed with
32 foreclosure.
33

34 ~~[The Reporters intend to draft a ‘safe harbor’ notice for subsection (b)]~~
35

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

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

1 mail address.

2 **Drafters' Notes**

- 3
- 4 1. The complaint in a judicial foreclosure state, or notice of sale in a
5 nonjudicial foreclosure state, must be delivered according to existing
6 law, usually by personal service. The requirement for additional
7 electronic mail notice does not displace the paper notices required by
8 this act or other law.
- 9
- 10 2. Notice must be sent by ordinary first class mail. First class mail has
11 the characteristic that it will be delivered to the last known address
12 whether or not the recipient accepts delivery in person. The creditor
13 may supplement first class mail with certified mail or overnight
14 delivery but may not rely solely on methods that require the recipient
15 to accept delivery in person.

16

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

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

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

24 (c) To cure a default under this section, an obligor ~~must~~shall:

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

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

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

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

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

5 (e) ~~Nothing in the This~~ section does not ~~impairs any~~ greater right to cure a default
6 that the obligor ~~may have has~~ under ~~the terms of~~ the mortgage agreement or the record
7 that creates the obligation.

8 (f) ~~Nothing in t~~This section does not ~~limits a~~the right of an obligor to redeem the
9 mortgaged property by paying the full amount of the accelerated obligation at any time
10 ~~prior to the completion of before~~ the foreclosure sale is completed.

11 **Drafters' Notes**

12
13 1. The right of a homeowner or obligor to cure a default on an
14 obligation secured by a mortgage has the effect of de-accelerating the
15 payments due after acceleration, but before a completed foreclosure sale.
16 The homeowner and obligor receive notice detailing the amounts needed
17 to cure the default pursuant to Section 202, and identifying any
18 nonpayment defaults, such as failure to maintain insurance.

19
20 2. The right to cure as used in this Act includes the right to
21 reinstate the mortgage after acceleration. "Cure" is used in a broad sense
22 here, similar to the use of the term in the Bankruptcy Code, §1322(b)(5).
23 ~~Some state laws use the term "redeem" to refer to payment of all amounts~~
24 ~~due prior to a foreclosure sale, and those provisions are superseded by this~~
25 ~~right to cure.~~

26
27 ~~3~~2. The statutory right to cure provided by this section may not be
28 waived by contract. In the event of a dispute between the creditor and a
29 homeowner or obligor concerning the amounts needed to cure, or any
30 nonmonetary performance that may be claimed as due, either party may
31 seek declaratory relief from an appropriate court, and if appropriate, a
32 temporary stay of any foreclosure sale to resolve the cure dispute.

33
34 ~~4.~~ 4. If a default is cured, restoring the homeowner and obligor to the
35 same position as if no default occurred means that if there is a later
36 default, new notices must be sent prior to foreclosure. Conversely, if as a

1 result of early resolution under Article 3 or otherwise, a settlement is
2 reached but the homeowner or obligor does not fully cure the default, new
3 notices are not required. However, nothing in this [act] requires a lender
4 who properly assessed late fees or default interest following a default to
5 disgorge those fees if the default is subsequently cured.

6
7 5. ‘Immediately available funds’ include certified checks, cashier’s
8 checks, money orders, electronic transfers, and other payments that
9 provide reasonable certainty of prompt payment.

10
11 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

12 (a) A creditor does not ~~owe~~have a duty under Section 201, ~~or 302, 404(e) or 405~~
13 to notify ~~a person that is~~ a homeowner or obligor unless the creditor knows:

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

15 (2) the identity of the person.

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

20 **Drafters’ Notes**

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

27
28 **[ARTICLE] 3**

29 **EARLY RESOLUTION**

30 **SECTION 301. EARLY ~~RESOLUTION PROGRAM~~ESTABLISHED.**

31 [The court or agency serving as the early resolution agency] is ~~designated~~ the early
32 resolution agency. The ~~early resolution~~ agency shall adopt rules ~~pursuant to~~under [insert

1 reference to state administrative procedures act or, if the ~~early resolution~~ agency is the
2 judicial system, to the rules of court] establishing procedures and standards for ~~the~~ early
3 resolution ~~process~~.

4 **Drafters' Notes**

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

10
11 2. Early resolution is defined in Section 102 as the assistance of a
12 third-party neutral at an in-person meeting between the parties with the
13 objective of achieving a commercially reasonable alternative to
14 foreclosure, resulting in an agreement between the creditor and
15 homeowner.

16
17 Between 2007 and 2012 eighteen states adopted statewide
18 foreclosure diversion or mediation programs, and local jurisdictions in at
19 least eight additional states have established similar programs. The
20 programs vary greatly in their timing and design, and exist in both judicial
21 and nonjudicial foreclosure states. Most programs in judicial foreclosure
22 states call for intervention after a foreclosure complaint is filed. While
23 most stakeholders recognize that starting mediation or early resolution
24 earlier in the process would increase the chances of success and reduce
25 costs, most existing state laws do not provide a means to initiate ~~early~~
26 resolution before the judicial process begins. Pre-foreclosure early
27 resolution permits early sorting of foreclosure cases, into those where the
28 homeowner wants to find a solution other than foreclosure, and those
29 cases that are uncontested or where there is no realistic alternative to
30 foreclosure.

31
32 3 The Act does not prescribe standards or procedures for a state's
33 early resolution program. However, tThe Appendix to ~~Article 3~~ the [act]
34 sets forth model rules and best practices that state agencies are urged to
35 adopt.

36
37 4. ~~Foreclosure~~ Early resolution is not mediation as defined in the
38 Uniform Mediation Act. The agency or court determination under §304
39 whether to permit foreclosure to proceed requires reporting of information
40 concerning the early resolution process. The Uniform Mediation Act
41 generally bars mediators from making reports. Article 3 and the model
42 rules in the Appendix to Article 3 do, however, include some key

1 principles form the Uniform Mediation Act, including the protection of
2 confidential information exchanged in early resolution and the avoidance
3 of conflicts of interest on the part of the neutral.
4

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

6 (a) Not later than 30 days after a creditor ~~has sent the~~sends a notice of ~~intent to~~
7 ~~foreclosed~~default and right to cure required by Section 201, or, ~~30 days after a creditor has~~
8 ~~filed in a judicial foreclosure, not later than service of~~ a mortgage foreclosure
9 ~~[complaint] on the homeowner, as provided by early resolution agency rules,~~ the creditor
10 ~~must~~shall send to the homeowner and obligor a notice under subsection (c) of the right to
11 participate in early resolution ~~under subsection (e)~~, or ~~must~~shall request that the early-
12 resolution agency send the notice under subsection (b). ~~However,~~ A creditor is not
13 required to send or request a notice if ~~there has been a determination~~ a court or
14 governmental agency has determined under Section 505 that the property is abandoned
15 ~~under Section 505~~. If a court or governmental agency later determines that the property
16 is not abandoned and a foreclosure sale has not been completed, the creditor ~~must~~shall
17 request the notice under subsection (b) or send the notice under subsection (c).

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

25 (c) If the early resolution agency does not establish a procedure for the agency to

1 send notice ~~of early resolution~~required by subsection (a), the creditor shall send notice to
2 each homeowner and obligor, in the same manner as required for the notice under Section
3 201,~~before the creditor or servicer may request entry of a default or foreclosure judgment~~
4 ~~or give a notice of a judicial or nonjudicial foreclosure sale.~~ Subject to the agency's
5 rules, the notice shall be sent before or after commencement of a foreclosure action, as
6 provided by the early resolution agency's rules.

7 (d) ~~A~~The notice of the right to participate in early resolution must include the
8 following ~~information~~:

9 (1) ~~The~~The name, address, and telephone number of each housing counseling
10 agency, lawyer-referral service, and legal-aid agency serving the homeowner's
11 geographic area of the mortgaged property that which is designated by the early-
12 resolution ~~early resolution~~ agency;

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

16 (3) ~~The fact~~ that the homeowner or obligor may request an early
17 resolution meeting, ~~the fact~~ that the request must be made within not later than 30 days ~~of~~
18 after the sending of the notice is sent, the instructions ~~to for~~ requesting early resolution,
19 and all eligibility requirements under the early-resolution agency rules;

20 (4) ~~a~~A description of all documents the homeowner or obligor must bring
21 to the early resolution meeting, under the early-resolution agency rules; and

22 (5) ~~a~~A form prescribed by the agency for the homeowner or obligor to
23 request early resolution and to affirm that the homeowner or obligor meets the eligibility

1 requirements of Section 303.

2 **Drafter's Notes**

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

10
11 2. If the property is not abandoned, but the agency or court
12 determines that the homeowner has rented the dwelling unit to a person
13 other than a family member, the obligor and homeowner are not eligible
14 for early resolution, under §303. However, the creditor or agency must
15 still send the notice of early resolution. If the agency determines, based on
16 the obligor's request for early resolution or other information, that the
17 property is rental property, it must then permit foreclosure to proceed,
18 under Section 304.

19
20 **SECTION 303. ELIGIBILITY FOR; PARTICIPATION IN EARLY**
21 **RESOLUTION.**

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

26 (b) ~~When If the early--resolution~~ ~~the~~ agency schedules a meeting under subsection
27 (a), the creditor and homeowner or obligor shall attend and participate in compliance with
28 agency rules and any scheduling or other order ~~established-rendered~~ by the neutral or the
29 agency. Failure to comply with this subsection includes failure:

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

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

1 neutral;

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

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

5 and

6 (5) on the part of a creditor or servicer, to advise the homeowner, obligor,
7 and the neutral of any loss-mitigation option that is available to the homeowner or obligor
8 or to consider the homeowner or obligor for the loss-mitigation option before or during
9 early resolution.

10 (c) ~~To be eligible for~~ A homeowner or obligor is eligible for early resolution only
11 if; the mortgaged property ~~must is~~ is not ~~be~~ abandoned property or rented to a person other
12 than the ~~obligor or~~ homeowner or obligor [or an immediate family member of either]. If
13 the mortgaged property contains more than one dwelling unit, early resolution is
14 available only if at least one dwelling unit is occupied by the homeowner or obligor [or
15 an immediate family member of either]. With ~~the a~~ a request for early resolution, the
16 homeowner or obligor shall submit to the early-resolution agency an affirmation that the
17 mortgaged property is not abandoned and that it is occupied either by an obligor or
18 homeowner [or an immediate family member of either]. If the agency determines that the
19 property is abandoned or is not occupied by a ~~obligor or~~ homeowner or obligor [or an
20 immediate family member of either], the agency ~~will may~~ may not schedule a meeting under
21 subsection (a), but instead ~~must shall~~ shall permit the creditor to proceed with foreclosure
22 under Section 3054.

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

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

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

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

13 ~~(g) Failure to comply with subsection (b) includes failing:~~

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

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

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

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

21 ~~and~~

22 ~~(5) on the part of a creditor or servicer, to advise the homeowner, obligor~~
23 ~~and the neutral of any loss-mitigation option that is available to the homeowner or obligor~~

1 ~~or to consider the homeowner or obligor for the loss mitigation option before or during~~
2 ~~early resolution.~~

3 (dh) ~~Nothing in [t]This [a]Act or the early resolution agency rules imposes or~~
4 ~~may does not~~ impose a duty on a creditor ~~or servicer~~ to provide a borrower with any
5 specific loss mitigation option. The early-resolution agency rules may not impose a duty
6 on a creditor to provide any specific loss--mitigation option.

7 (ei) ~~The A~~ homeowner or obligor may be accompanied at an early-resolution
8 meeting by an attorney, housing counselor, or other ~~person~~individual at the early
9 ~~resolution session.~~

10 (fj) Personal financial information exchanged during early resolution is
11 confidential and not subject to disclosure under [state FOIA or sunshine laws]. Neither
12 the early resolution agency nor the neutral ~~shall be is~~ required to respond to ~~any a~~
13 discovery requests in a ~~court proceeding~~any litigation other than the foreclosure action,
14 ~~where if~~ the discovery seeks personal financial information of a homeowner or obligor
15 exchanged during early resolution.

16 (gk) ~~A n~~Neutral ~~s~~ shall disclose potential conflicts of interest in the time and
17 manner, as provided by the early--resolution agency rules.

18 **Drafters' Notes**

19
20 1. Abandoned properties are not eligible for early resolution
21 and no notice of early resolution to an abandoned property is required.
22 Investors who are renting a property otherwise covered by this Act are
23 also ineligible for early resolution, but notice must be sent to the property
24 prior to foreclosure. A homeowner must certify that the property is not a
25 rental property (or, if it is, that the homeowner or obligor [or an immediate
26 family member of either] occupies at least one unit) in order to request
27 early resolution. Existing foreclosure mediation programs generally limit
28 eligibility to owner-occupants. *E.g.* N.Y. C.P.L.R. §3408 (“foreclosure . .
29 . in which the defendant is a resident of the property”); Conn. Public Act

1 No. 11-201 (applies to residential real property defined as “a one-to-four
2 family dwelling occupied as a residence by a mortgagor”); see also 12
3 C.F.R. §1024.30(c)(2) (loss mitigation notice and appeal rules only apply
4 to a mortgage loan that is secured by a property that is a borrower’s
5 principal residence).
6

7 2. As provided in Section 301, the agency rules and orders
8 may impose additional requirements on the parties, for example requiring
9 the creditor, servicer or its agent to appear in person or to have a person
10 with authority to approve loss mitigation alternatives available by
11 telephone at the time of the early resolution session, to perform a net
12 present value analysis, to disclose the assumptions on which the analysis is
13 based, or requiring homeowners to meet with a housing counselor to
14 qualify for early resolution. The agency will also regulate procedural
15 matters, such as time limits for exchanging documents, scheduling and
16 concluding early resolution meetings, reports by neutrals, and the like.
17 States should continue to have flexibility in the design and implementation
18 of early resolution programs, but should establish and publish the
19 standards as required by section 301. The model rules and best practices
20 principles of early resolution set forth following Section 304 were
21 developed by the Uniform Laws Commission after extensive collaboration
22 with a number of state agency heads and outside consultants, and should
23 aid state new early resolution agencies in designing their programs.
24

25 3. In existing state foreclosure mediation programs, a creditor will
26 commonly delegate to its servicer whatever duties the statute imposes on
27 the creditor, and this [act] contemplates that procedure will continue to
28 prevail under the procedures set forth in this Article 3. Section 107
29 provides ample authority for that delegation and articulates both the rights
30 and responsibilities of the servicer in the mediation process. For that
31 reason, in this Article and throughout the [act], the only reference is to the
32 ‘creditor’, rather than to the ‘creditor and servicer’.
33

34 **SECTION 3054. FORECLOSURE ACTIONS DURING EARLY**

35 **RESOLUTION.**

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

1 (1) ~~neither~~ the homeowner ~~nor~~ obligor ~~does not~~ responds to the early
2 resolution notice by making a request for ~~early resolution to the agency not later than 30~~
3 days after the ~~sending of the~~ notice is sent;

4 (2) the agency ~~provides~~ notifies the creditor ~~with a notice~~ that
5 (A) the parties have participated in the meeting required by Section
6 303(a) and reached an impasse, or

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

10 (3) the court or agency ~~enters~~ renders an order ~~on good cause shown~~
11 permitting the creditor to proceed with foreclosure.

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

15 (c) ~~Notwithstanding subsection (a), A~~ a creditor may proceed to ~~enforce the~~
16 mortgage file a default or dispositive motion in a foreclosure action, or schedule or cause
17 to be scheduled a foreclosure sale, [90] days after sending the notice required by Section
18 302, unless the parties agree in a record to continue ~~the~~ early resolution ~~process~~ or the
19 court or early-resolution agency ~~or court~~ directs the parties to continue ~~the~~ early
20 resolution ~~process~~.

21 (de) The court or early-resolution agency ~~or court~~ may render an order imposing
22 appropriate conditions on the parties to early resolution, including the payment of
23 ~~reasonable~~ fees and costs of ~~early resolution to the agency~~ authorized by Section 304(b)

1 or the tender of periodic payments by the homeowner or obligor to the ~~lender~~creditor.

2 **Drafters' Notes**

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

30
31 2. -Subsection (a)(3) contemplates a variety of situations where,
32 notwithstanding the 90-day waiting period before foreclosure may be
33 commenced under subsection (b), either the court or early resolution
34 agency may enter an order permitting foreclosure to proceed in less than
35 90 days. Examples of particular situations that might warrant such an
36 order may include a case where the homeowner has already agreed to
37 vacate the property, or has failed to participate in early resolution, or if
38 emergency conditions short of abandonment would justify an accelerated
39 foreclosure.

40
41 3. Subsection (b) contemplates a variety of situations where the 90
42 day waiting period before foreclosure may be finalized should be
43 extended. Examples of particular situations that might warrant such an
44 order include cases where the servicer has failed to evaluate a
45 homeowner's completed request for loss mitigation in a timely manner,

1 has failed to comply with material aspects of federal servicing regulations,
2 *see* 12 C.F.R. §1024.41, or has requested additional documents from the
3 homeowner late in the early resolution process.
4

5 4. Subsection (c) authorizes the agency to charge the parties fees
6 sufficient to fund the costs of the early resolution program, a funding
7 mechanism used in several states. States may wish to include more
8 specific provisions about the fees the agency may impose. Subsection (c)
9 also authorizes the agency to direct the homeowner to tender periodic
10 payments during the early resolution process. Lenders should benefit
11 because the payment requirement may filter out borrowers who simply
12 want to buy time, with no realistic expectation that retaining the property
13 is possible.
14

15 APPENDIX TO ARTICLE 3 [TO BE MOVED TO END OF THE ACT]

16 MODEL EARLY RESOLUTION PROGRAM RULES

17 1. These rules apply to the foreclosure early resolution program under [Article 3 of the
18 Home Foreclosure Procedures Act.] “Agency” means the early resolution agency. The
19 agency is [name of court or agency]. All provisions referring to “creditor” include
20 “servicer” as defined in [the HFPA].
21

22 2. The purpose of the foreclosure early resolution program is to assist a creditor and a
23 homeowner to reach a voluntary agreement that avoids foreclosure and achieves a
24 sustainable early resolution or mitigates damages in cases where foreclosure is
25 unavoidable.
26

27 3. The early resolution notice required by §302 of the HFPA may be sent [at any time no
28 later than 30 days after the creditor sends the notice required by §201][no later than 30
29 days after the creditor files a complaint in foreclosure.] The notice shall instruct the
30 homeowner to contact the agency to request early resolution at the telephone number [or
31 electronic mail address] designated from time to time on the [agency web site][official
32 journal].
33

34 4. If a homeowner requests early resolution, the agency shall open a foreclosure early
35 resolution case. Within five days of the request the agency shall send notice to the
36 homeowner and creditor [by mail, by electronic mail] to provide the agency with required
37 documents and information for the early resolution process. The document exchange
38 notice to the homeowner shall also include a list of available housing counseling agencies
39 that can assist the homeowner.
40

41 5. The agency shall schedule a meeting within 60 days after the homeowner’s request for
42 early resolution.
43

44 6. The document exchange notice to the homeowner shall instruct the homeowner to

1 submit to the agency and the creditor necessary and relevant documents including

- 2
- 3 a) Documents showing income qualification for a loan modification, including copies
- 4 of pay stubs, W-2 forms, social security or disability income, retirement income, child
- 5 support income, or other income that the homeowner believes is relevant to the
- 6 homeowner's ability to repay the mortgage,
- 7 b) Documents supporting any dispute regarding the existence or amount of any
- 8 mortgage loan default,
- 9 c) Documents relating to any prior loan modification or other prior agreement
- 10 regarding the mortgage loan and
- 11 d) Documents relating to any pending request to modify the loan or negotiate a
- 12 settlement of the delinquency.
- 13

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

19

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

- 22
- 23 a) Any 45-day notice and 5-day notices required by CFPB rule 12 CFR §1024.39(b)
- 24 and §1024.41(b)(2)(i)(B) previously sent to the homeowner in connection with the
- 25 current default,
- 26 b) Any prior offers of loss mitigation, forbearance, modification or other agreements
- 27 made with the homeowner in connection with the current default,
- 28 c) a list of documents required by the creditor to evaluate the homeowner's request
- 29 for loss mitigation,
- 30 d) The homeowner's payment history from the date of default,
- 31 e) Itemization of all amounts due on the loan, including all fees,
- 32 f) copies of the promissory note, signed by the mortgagor, including any
- 33 endorsements, allonges, amendments, or riders that show the mortgage debt,
- 34 g) any lost note affidavit the creditor will rely on to foreclose the mortgage.
- 35

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

40

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

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

46

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

- 3
- 4 (1) The name and contact information of the assigned neutral,
- 5 (2) The date, time, and location of the early resolution session,
- 6 (3) Information about the conduct of the early resolution session, and
- 7 (4) Consequences and penalties for noncompliance with program rules.
- 8

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

21

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

26

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

28

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

36

37 17. The homeowner is entitled to have an attorney, housing counselor or other person of
38 the homeowner’s choosing accompany the homeowner to and participate in the early
39 resolution meeting.

40

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

44

45 18. If the homeowner fails without good cause to substantially and timely provide the
46 documents specified by the neutral or the agency, or to attend the early resolution

1 meeting, or if the agency determines that the homeowner requesting early resolution is
2 not occupying the property, the agency shall [enter an order][request the court to enter an
3 order] terminating the early resolution process and permitting foreclosure to proceed
4 pursuant to the HFPA §304.

5
6 19. If the creditor fails without good cause to substantially and timely provide the
7 documents specified by the neutral or the agency, or to appear at the early resolution
8 meeting with authority to act on any available loss mitigation alternatives, the agency
9 shall [enter an order][request the court to enter an order] extending the early resolution
10 period and the stay of foreclosure pursuant to the HFPA §304.

11
12 20. The parties are required to appear in person at the early resolution session and shall
13 have the authority to enter into a settlement to resolve the dispute. The creditor's
14 representative must have the ability to evaluate loss mitigation and to have the authority
15 to make a decision as required by the RESPA regulations of the Consumer Financial
16 Protection Bureau. However, upon written request provided to the neutral at least 30
17 days prior to the early resolution session, the neutral may waive the requirement of
18 having the parties physically present at the session and allow them to appear by telephone
19 or teleconference.

20
21 21. The parties shall create a signed record of any agreements reached during early
22 resolution. The neutral shall ensure that any agreement reached by the parties at the early
23 resolution session or during early resolution is promptly confirmed in a record and signed
24 by all parties.

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

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

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

33 25. All personal financial information as defined by [section of Act] disclosed by the
34 parties in the course of the early resolution is confidential and not subject to public
35 disclosure under [state freedom of information or sunshine laws] or any other state law.

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

38
39 27. The agency shall prepare and submit to the legislature annually, twenty days prior to
40 the convening of each regular session, a report containing an evaluation of the operation
41 and effects of the program. The report shall include a summary of the cases handled by

1 the program, including the type and frequency of different outcomes, recommendations
2 for changes, modifications, or repeal of the program or parts thereof with accompanying
3 reasons and data.

4
5 28. The agency or neutral may recommend or require in appropriate cases that the
6 homeowner tender monthly payments equal to at least 50% of the contractual mortgage
7 payment to the lender or to the agency as a condition of the early resolution.

8
9 29. The lender or creditor may at any time request, pursuant to HFPA §302(a)(2), an
10 order permitting the foreclosure to proceed on the basis that the homeowner has
11 materially failed to comply with rules and requirements of early resolution. The agency
12 shall act on the request no later than 30 days after receiving the request.

13
14 [30. Court early resolution programs in judicial foreclosures. The appearance of the
15 homeowner or obligor at an early resolution session will constitute an entry of
16 appearance in the foreclosure action.]

17
18 **[ARTICLE] 4**

19 **RIGHT TO FORECLOSE; PUBLIC SALE PROCEDURES**

20 **SECTION 401 [A]. RIGHT TO FORECLOSE - JUDICIAL**

21 **FORECLOSURE.**

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

25 (b) ~~The following rules apply:~~

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

29 (2) If the obligation is registered in a mortgage registry, ~~the only person~~
30 ~~who may commence a foreclosure is~~ the person designated as the owner or holder of the
31 obligation by the ~~mortgage registry as of the time the~~may commence a foreclosure ~~is~~
32 commenced.

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

2 (1) The creditor must plead that it has the right ~~to foreclose~~ under

3 subsection (b) to foreclose; and, ~~The following rules apply to a foreclosure~~:

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

6 (A) a copy of the ~~negotiable~~ instrument in its present condition,
7 including any indorsement or allonge and a statement ~~indicating who is~~ identifying the
8 person in possession of the ~~negotiable~~ instrument; or

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

13 (23) If the obligation is not evidenced by a negotiable instrument, the
14 [complaint] must include a copy ~~or printout~~ of the records evidencing the obligation and
15 the creditor's right to enforce the obligation.

16 (d) ~~In a foreclosure proceeding, the~~ The creditor ~~may~~, in a record, may authorize
17 another person to foreclose. The [complaint] described in subsection (c) must disclose the
18 name of ~~both~~ the creditor and ~~the name of~~ the person authorized by the creditor to
19 foreclose.

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

23 **SECTION 401 [B]. RIGHT TO FORECLOSE- NONJUDICIAL**

1 **FORECLOSURE.**

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

5 (b)

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

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

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

13 **Drafters' Notes**

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

19
20 2. The conditions referred to in subsection (a) are those indicated
21 in the mortgage agreement or under this act and other law as necessary to
22 accomplish before the commencement of foreclosure.

23
24 3. Subsection (b)(1) resolves the problem of who has standing to
25 foreclose by designating the person who is entitled to enforce the
26 obligation, to be determined under other law of this state. When the
27 obligation is evidenced by a negotiable instrument, Article 3 of the
28 Uniform Commercial Code provides the governing rules. When the
29 obligation is not evidenced by a negotiable instrument, law other than
30 UCC Article 3 will determine who is entitled to enforce the obligation.
31 One example of other law is the Uniform Electronic Transactions Act
32 (UETA), which grants to a person having control of a “transferable
33 record” the rights to enforce a promissory note evidenced by an

1 “electronic record,” as those terms are defined in that act.
2

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

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

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

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

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

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

1 9. Under subsection (c) the creditor’s production of the original
2 negotiable instrument is not necessary at the time of the filing of a
3 complaint in a judicial foreclosure. Production of the original would later
4 become appropriate if, during the course of the proceedings, the
5 homeowner or obligor seeks further demonstration of the copy’s
6 authenticity or the whereabouts of the original. Similarly, in a nonjudicial
7 foreclosure, if there are subsequent judicial proceedings, a court may
8 decide to order production of the original instrument if necessary to
9 resolve a particular issue.

10
11 10. Subsection (d) authorizes the person who has the right to
12 foreclose to exercise that right through an agent. By requiring a
13 description of the agency it does not permit the principal to remain
14 undisclosed. An agent authorized to foreclose may be a loan servicer who
15 has a pre-existing contractual relationship with the creditor, or any other
16 person appointed at any time. If the secured obligation is evidenced by a
17 negotiable instrument, the agent or the principal (the person entitled to
18 enforce the note) may hold and retain possession of the note. Subsection
19 (d) is not intended to change existing laws that authorize a third person,
20 such as a trustee under a deed of trust, to foreclose in nonjudicial
21 proceedings. In such circumstances, subsection (d) allows the beneficiary
22 to appoint an agent, but does not speak to the procedure for appointing a
23 substitute trustee.

24
25 In allowing an agent or representative to foreclose, this section is
26 consistent with the standing decision in *Sprint Communications Co. v.*
27 *APCC Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had
28 assigned claims for compensation from long-distance carriers to collection
29 firms. In *Sprint* the Court permitted an assignee of a legal claim for money
30 to pursue that claim in federal court, even when the assignee had promised
31 to remit the proceeds of the litigation to the assignor.

32
33 11. If the obligation is registered in a mortgage registry under
34 subsection (b)(2), the person designated in the registry as owner or holder
35 of the obligation may authorize an agent to foreclosure under subsection
36 (d) without filing an amendment with the mortgage registry to identify the
37 agent.

38
39
40 12. The alternative drafts for judicial and non-judicial foreclosure
41 highlight the differences between the [act’s] current requirements
42 regarding the information provided to the borrower in the two forms of
43 foreclosure.

44
45 Specifically, in subsection (c), (d) and (e) of the judicial
46 foreclosure version, the creditor is required to include the following

1 information in the complaint - and thereby advise the borrower of those
2 facts:

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

8
9 Second, if the note is not negotiable, a copy of the record
10 evidencing the obligation and the creditor's right to enforce it.

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

15
16 Fourth and finally, under (e), if the note is negotiable and a creditor
17 does not own it, the complaint must disclose the name of the legal owner.

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

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

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

35
36 **SECTION 402. ASSIGNMENT OF MORTGAGE UNNECESSARY.**

37 A person entitled to foreclose a mortgage ~~pursuant to~~under Section 401 ~~does not have~~is
38 not required to obtain or record an assignment of the mortgage from ~~the initial~~any prior
39 holder of the obligation.

40 **Drafters' Notes**

41 1. Existing state law conflicts as to (1) whether the foreclosing

1 party must have an express assignment of the mortgage, or a chain of
2 assignments running back to the original mortgagee, and (2) whether that
3 assignment or the chain of assignments must be recorded in the county
4 land records.

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

16
17 This section resolves the conflict by following the principle that a
18 transfer of an interest in an obligation secured by a mortgage also operates
19 to transfer a corresponding interest in the mortgage. UCC § 9-203(g). If a
20 transfer of the right to enforce an obligation is accompanied by a separate
21 assignment of the mortgage, the assignment may be recorded in the office
22 in which mortgages are recorded. However, the creditor is not required to
23 obtain a mortgage assignment, nor to record any assignment, in order to
24 establish a right to foreclose the mortgage. The requirements of section
25 401 are all that is needed to establish standing to foreclose.

26
27 2. By allowing foreclosure by an assignee or transferee who
28 qualifies as the person to foreclose under Section 401, without a
29 requirement of recording any documents in the real property records, this
30 Act makes it unnecessary to follow the procedure authorized by UCC § 9-
31 607(b), which grants a secured party the right to record a copy of the
32 security agreement and an affidavit in the real property records.
33 Compliance with the requirements of Section 401 is sufficient.

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

36 **INSTRUMENT; AFFIDAVIT.**

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

39 (1) ~~either~~

40 ~~(A)~~ the creditor was entitled to enforce the instrument when loss of

1 possession occurred; or

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

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

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

11 (b) If a creditor ~~relies upon~~seeks to foreclose under subsection (a) ~~as the basis for~~
12 ~~its right to foreclose~~, the notice of ~~intent to foreclose~~default and right to cure sent under
13 Section 201 must state that the instrument is unavailable and provide information
14 ~~indicating establishing that~~ the creditor ~~may's right to~~ foreclose under subsection (a). In
15 a nonjudicial-foreclosure-~~proceeding~~, the notice also ~~must also~~:

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

21 (2) include the indemnity ~~described in~~required by subsection (c).

22 (c) If a creditor ~~relies upon~~seeks to foreclose subsection (a) ~~as the basis for its~~
23 ~~right to foreclose~~, the homeowner or obligor is entitled to adequate protection against loss

1 that might occur by reason of a claim by another person to enforce the negotiable
2 instrument. The creditor must provide in a record an indemnity against loss by the
3 homeowner or obligor. ~~Whether adequate protection requires more than the indemnity is~~
4 ~~determined by the facts of each case.~~ In a judicial-foreclosure ~~proceeding~~, the court may
5 require additional protection against a claim by another person. In a nonjudicial-
6 foreclosure ~~proceeding~~, the homeowner or obligor may petition the [name of appropriate
7 court] where the mortgaged property is located for an order requiring the creditor to
8 provide ~~adequate~~ additional protection against a claim by another person.

9 (d) In a judicial-foreclosure ~~proceeding~~, ~~the~~ a creditor shall file with the
10 [complaint] an affidavit attesting to facts ~~that establish the creditor's right to foreclose~~
11 under subsection (a). The creditor shall provide the indemnity ~~described in~~ required by
12 subsection (c) ~~not~~ later than the ~~foreclosure public sale~~. ~~A particular phrasing of the~~ An
13 affidavit ~~is not required. That~~ that substantially complies with the following form of
14 ~~affidavit, when completed~~, provides sufficient information:

15 **FORM OF LOST NOTE AFFIDAVIT**

16
17 _____ *[Name of affiant]* (Affiant) being ~~duly~~ sworn deposes and
18 says:

19 *[Name of affiant]*

20
21 1. Affiant is _____ *[officer]* of _____ *[name of*
22 *creditor]*

23 _____ *[title or position]* _____ *[Name of creditor]*

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

25
26
27 2. Lender is the legal owner of a promissory note (Note) executed by

28 _____
29 _____ *[Name(s) of*
30 *obligor(s)]*

31 ~~*[name of obligor(s)]*~~ in the original principal amount of \$ _____
32 _____ *[dollar amount]*, dated _____

1 [date] and secured by _____
2 _____ [name of instrument], recorded in
3 _____
4 _____ [recording reference].

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

7
8 3. The Note is lost, destroyed, or stolen and for this reason cannot be produced.

9
10 4. On _____
11 _____ [insert date] Affiant made a diligent search for the Note by personal
12 examination of the books and records of Lender

13 _____
14 _____

15 _____
16 [describe search efforts including the books and records examined by
17 affiant Affiant].

18
19 _____
20 (name of Affiant)

21
22 **ACKNOWLEDGEMENT**

23
24 On (insert date), before me, personally appeared (insert name of affiant), (insert
25 affiant's title and name of creditor) who acknowledged the same to be affiant's
26 free act and deed and the free act and deed of (insert name of creditor).

27
28 _____ NOTARY PUBLIC or
29 (Name of Notary or other person authorized Other title
30 to administer oaths under the law of this state)

31
32
33 (e) The destruction of a negotiable instrument in connection with its registration
34 in a mortgage registry is not destruction of the instrument for purposes of this section.

35 ***Legislative Note:*** *Subsection (a) incorporates the language of Section 3-309 of Revised*
36 *UCC Article 3 (2002). This language is recommended ~~both~~ for States that have adopted*
37 *Revised Article 3. For States and those that have adopted a prior version of UCC Article*
38 *3, there is a split of authority as to whether an assignee of a lost, destroyed, or stolen*
39 *negotiable instrument may enforce the instrument when the assignee never obtained*
40 *possession of the instrument. States with a prior version of Article 3 should consider*
41 *whether subsection (a) will change the law in their State, and if so, whether that change*
42 *is desirable.*

Drafter’s Notes

1
2
3 1. This section requires a lost-note affidavit in a judicial
4 foreclosure ~~proceeding~~, thus following the procedure adopted by most
5 states in their judicial foreclosure laws. The substance of this requirement
6 follows the 2002 amendments to Article 3. In specifying when a creditor is
7 entitled to enforce a negotiable instrument secured by a mortgage
8 notwithstanding its inability to confirm possession of the instrument,
9 subsection (a) tracks the requirements of UCC § 3-309 (2002). In states
10 that have adopted the 2002 amendments to Article 3, Section 3-309 makes
11 it clear that the person who lost possession may be a predecessor of the
12 creditor who seeks to enforce the instrument. UCC § 9-109, Comment 5
13 provides a result similar to the 2002 Article 3 amendment (“Also, the right
14 under Section 3-309 to enforce a lost, destroyed, or stolen negotiable
15 promissory note may be sold to a purchaser who could enforce that right
16 by causing the seller to provide the proof required under that section.”).
17

18
19 2. In some states, the circumstances in which a creditor is allowed
20 to enforce an unavailable negotiable instrument are broader than under
21 either the 2002 version or the earlier version of UCC § 3-309. E.g., Va.
22 Code § 55-59.1(B) (“[i]f a note or other evidence of indebtedness secured
23 by a deed of trust is lost or for any reason cannot be produced”). In some
24 states, the circumstances are more restricted because the creditor’s
25 affidavit must attest to additional facts. E.g., Md. Code, Real Prop. § 7-
26 105.1(f) (affidavit not sufficient unless it “(1) Identifies the owner of the
27 debt instrument and states from whom and the date on which the owner
28 acquired ownership; (2) States why a copy of the debt instrument cannot
29 be produced; and (3) Describes the good faith efforts made to produce a
30 copy of the debt instrument.”).
31

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

42 4. This section does not discuss the evidentiary effect of the
43 affidavit in judicial proceedings. Some states have statutory law on point.
44 For example, an Alabama statute provides that a lost note affidavit “must
45 be received as presumptive evidence both of the contents and loss or
46 destruction of such negotiable instrument, unless the defendant by answer,

1 verified by affidavit, denies the execution of such bond, note or bill or the
2 endorsement, acceptance, or the contents thereof, in which case proof of
3 such execution, endorsement, acceptance, or contents must be made by the
4 plaintiff.” Ala. Code § 6-5-284.
5

6 5. This section does not require the preparation of a lost-note
7 affidavit in a non-judicial foreclosure ~~proceeding~~. If an action is filed to
8 contest or to confirm a non-judicial foreclosure, the court should have the
9 discretion to decide what proof of a lost, destroyed, or stolen negotiable
10 instrument is sufficient.
11

12 6. Subsection (b) requires the creditor to disclose that the
13 negotiable instrument is lost, destroyed, or stolen when it sends notice of
14 ~~intent to foreclose~~ default and right to cure under Section 201. In a non-
15 judicial foreclosure ~~proceeding~~, the additional content for the notice is
16 required because the homeowner or obligor is unlikely to appreciate the
17 risk associated with lost instruments, and it is unlikely that a court will
18 consider the issue unless the homeowner or obligor initiates consideration.
19

20 7. Subsection (c) follows UCC § 3-309(b), which requires
21 adequate protection for the obligor from the risk that at some point in the
22 future the instrument will surface and its possessor will assert the right to
23 be paid. (UCC § 3-309(b) was not affected by the 2002 amendments to
24 Article 3.) Subsection (b) requires that the affidavit include a written
25 indemnity, binding the creditor, to protect all obligors against the risk that
26 a person other than the creditor will seek to enforce the instrument. This
27 indemnity serves to reinforce the rights that the obligor already has under
28 principles of restitution and unjust enrichment. See, e.g., Restatement
29 (Third) of Restitution and Unjust Enrichment § 6 (2011): “*Payment of*
30 *Money Not Due*. Payment by mistake gives the payor a claim in restitution
31 against the recipient to the extent payment was not due.” In appropriate
32 cases, a court may require a bond in addition to a written indemnity.
33

34 8. Subsection (d) describes the affidavit required in a judicial-
35 foreclosure ~~proceeding~~ and includes a safe-harbor form. The affidavit
36 must be based upon the affiant’s personal knowledge and must describe
37 the efforts made to locate the negotiable instrument. A bare assertion that
38 the instrument is lost or cannot be found is not sufficient. The court should
39 apply its normal standards for determining the sufficiency of the affidavit.
40

41 **SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE**

42 **PUBLIC SALE.**

43 (a) Mortgaged property may be sold at a public sale only after the creditor has

1 published a commercially-reasonable public advertisement of the sale. ~~Whether the~~
2 ~~method or timing of publication of the advertisement is commercially reasonable is a~~
3 ~~question of fact.~~ A public advertisement is commercially reasonable if:

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

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

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

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

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

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

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

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

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

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

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

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

5 (c) ~~The public~~An advertisement under subsection (a) need not contain a legal
6 description of the mortgaged property or recording information for the mortgage or other
7 instruments of record.

8 (d) The ~~public creditor may post an~~ advertisement under subsection (a) or other
9 information pertaining to the sale ~~may be posted~~ at the location of the mortgaged
10 property.

11 (e) A creditor ~~must~~shall send a copy of the ~~public~~ advertisement under subsection
12 (a) to the homeowner and to each obligor no later than the date of newspaper publication
13 or Internet posting. The ~~notice of public advertisement~~creditor may be sent ~~send the copy~~
14 with the notice of ~~commencement of foreclosure~~public sale required by Section 405 or
15 ~~may be sent~~send it separately.

16 **Drafters' Notes**

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

24
25 2. ~~This section does not specify the person who is obligated to give~~
26 ~~the advertisement of sale.~~ In many states, ~~that a person will be other than~~
27 the creditor, ~~but in other states, another person~~ such as a trustee or sheriff,
28 performs ~~that functions~~some or all of the steps related to advertisement of
29 the public sale. This act does not mandate a change in who is responsible
30 for advertising the sale.

1 3. This act does not require the accomplishment of foreclosure by a
2 public auction sale. If other state law allows alternative methods of
3 foreclosure, such methods remain permissible. For example, Connecticut
4 law allows strict foreclosure without a sale of the property.
5

6 4. Subsection (b) states minimum requirements for the public
7 advertisement. An advertisement that lacks any of the information set
8 forth in subsection (b) is insufficient as a matter of law. An advertisement
9 may contain additional information about the mortgaged property or the
10 sale.
11

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

21 Subsection (a) also creates a safe harbor regarding circumstances when
22 an advertisement would be commercially reasonable. Specifically, the
23 method of publication is commercially reasonable if the creditor publishes
24 the public advertisement either in a local newspaper or with an appropriate
25 Internet website. The Internet site may be one operated by the newspaper
26 or by any other person, whether or not located in the jurisdiction where the
27 mortgaged property is located. The Internet site, however, must be one
28 that has characteristics suggesting that interested members of the public
29 are likely to find and to read the posting. The safe harbor exists, however,
30 only if period of time for newspaper and Internet advertisements, satisfies
31 the standards in the act, which seek to ensure public access to the
32 advertisement for approximately one month preceding the date of sale.
33

34 6. Subsection (c) adopts a bright-line rule with respect to legal
35 descriptions of the real property and recording information. The failure to
36 include such information does not make the public advertisement
37 insufficient. This information is seldom of importance to a person who
38 reads a foreclosure advertisement for the purpose of deciding whether the
39 person has potential interest. Anyone who develops a potential interest is
40 highly likely to investigate further before appearing at the sale to bid.
41 That investigation may include title information, which will disclose the
42 legal description and recording references for the mortgage and other
43 recorded instruments in the chain of title, and typically will include other
44 information as well bearing on the property.
45

1 date originally advertised. If ~~there is no such~~the announcement ~~of postponement is~~
2 not made at the date, time, and place advertised for the sale, a new public
3 advertisement under Section 404 is required.

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

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

12 **Drafters' Notes**

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

19
20 2. Once a ~~foreclosure~~public sale is scheduled, the creditor may
21 elect to postpone or cancel the sale for any reason the person considers
22 appropriate. A postponement might also take place for other reasons, such
23 as a judicial order or an automatic stay in bankruptcy. Homeowners and
24 obligors should receive prompt notice of any postponement or
25 cancellation. The rules of Section 405 do not apply to notices of
26 postponement or cancellation. Subsection (b) covers notices of
27 postponement and cancellation, requiring that the notice be commercially
28 reasonable under the facts and circumstances. A postponement may be as
29 short as one day. An oral announcement of the postponement, made at the
30 time and place of the originally scheduled sale, would suffice if the
31 homeowner and any obligor were present, in which event no written or
32 additional notice would be necessary.
33

1 [SECTION 407. CONFIRMATION OF ~~FORECLOSURE~~ PUBLIC SALE.

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

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

10 (c) The court that holds a hearing on the motion filed under subsection (b) ~~must~~
11 shall ~~grant an order~~ confirming the ~~foreclosure~~ sale unless ~~it finds~~ the court concludes:

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

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

15 (3) the sale was conducted fraudulently.

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

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

1 ~~good faith purchaser for value.~~

2 (f) Confirmation of ~~the a foreclosure~~public sale is not required. Unless the
3 creditor files a motion for confirmation of the sale, entry of the judgment of foreclosure
4 concludes the judicial-foreclosure ~~proceeding~~, subject to law of this state ~~governing~~
5 ~~finality and appeal~~other than this [act].]

6 *Legislative Note: In some ~~but not all~~ states, the law of judicial*
7 *foreclosure requires that the court confirm the foreclosure sale. Although*
8 *confirmation is mandatory, in the vast majority of the cases, no objection*
9 *to confirming the sale is made. This section provides for an optional*
10 *confirmation procedure, which allows the creditor the choice to seek*
11 *confirmation or to treat the sale as ending the proceeding, assuming that*
12 *no other party makes a post-sale challenge to the judgment or the sale.*
13 *The creditor generally will seek confirmation only if it desires the*
14 *conclusive effect that a confirmed sale has for title passing to a bona fide*
15 *purchaser or if it anticipates that another party is likely to challenge the*
16 *sale based upon alleged defects in post-judgment procedures. This*
17 *section is recommended only for states that presently require confirmation*
18 *of foreclosure sale in judicial-foreclosure ~~proceedings~~.*

19
20 **Drafters' Note**

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

29
30 **[ARTICLE] 5**

31 **ACCELERATED DISPOSITIONS-NEGOTIATED TRANSFER**

32 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED**

33 **PROPERTY IN SATISFACTION OF OBLIGATION.**

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

1 property if:

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

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

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

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

11 (b) If ~~the a~~ homeowner or ~~a~~ person claiming under the homeowner is in
12 possession of the mortgaged property, ~~the an~~ agreement under subsection (a) must
13 specify the date and time when the homeowner ~~is to~~must surrender possession to the
14 creditor. If ~~there is any a~~ person is entitled to notice under Section 502, the homeowner is
15 not obligated to surrender possession before the 20-day period ~~described~~provided in
16 subsection (a)(~~34~~) has ~~elapsed~~expired, regardless of the terms of the proposed transfer.

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

19 **Drafters' Notes**

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

1 property without the need for a foreclosure sale; and second, to resolve a
2 number of collateral issues that flow from the expedited procedure, as
3 detailed in Section 504.
4

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

13 As a consequence, this section as now drafted confers a substantial
14 benefit on mortgage creditors in the form of a new mechanism for
15 converting every 'deed in lieu' transaction into an accelerated means of
16 clearing title of junior encumbrancers without the need for a more
17 traditional judicial foreclosure. In doing so, the section does not require
18 any minimum benefit on homeowners, other than the general statement of
19 effects of such an agreement contained in Section 504 and the rights of
20 possession noted in the preceding paragraph.
21

22 3. The second sentence of Section 501(b) contemplates a
23 circumstance where, for example, the lender and homeowner had agreed,
24 in a common 'cash for keys' agreement, that the homeowner would move
25 within a short period in return for a sum of money. If there are junior
26 lienholders, however, the possibility exists that there may be an objection
27 to the proposed transfer, that the agreement would not be approved, and
28 that the benefits contemplated by a homeowner under Section 504 from an
29 early move-out would not be realized. This sentence makes certain that
30 the homeowner need not be displaced, even voluntarily, until the parties
31 knew whether there would be objection from a junior lienholder.
32

33 In those cases where there are no junior lienholders or other
34 holders of subordinate interests, it is likely that the parties would often
35 choose to use a traditional deed in lieu of foreclosure to accomplish their
36 agreement, instead of following this statutory negotiated transfer
37 procedure; *see* section 504(f).
38

39 4. When there are multiple owners of the mortgaged property, all
40 the owners need to consent to a negotiated transfer. The act does not
41 authorize a forced transfer outside of foreclosure for a non-consenting co-
42 owner.
43

44 5. Subsection (c) prohibits the creditor from accepting the
45 mortgaged property in partial satisfaction of the obligation it secures in a
46 negotiated transfer under this [act]. Because the effect of a negotiated

1 transfer under section 504(a)(1) is to completely discharge the obligation,
2 this section does not require any consent from an obligor who is not also a
3 homeowner. Whether the parties may enter into another type of
4 agreement for the transfer of the mortgaged property in partial satisfaction
5 of the obligation is determined by other law of this state.
6

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

8 (a) If a negotiated transfer under Section 501 is proposed when a judicial-
9 foreclosure ~~proceeding~~ is pending ~~with respect to the mortgaged property~~, the
10 homeowner and creditor ~~must~~shall request ~~that~~ the court to send notice of the proposed
11 negotiated transfer to all parties to the action other than the homeowner and creditor. The
12 court promptly shall send the notice.

13 (b) If a negotiated transfer under Section 501 is proposed when a judicial-
14 foreclosure ~~proceeding~~ is not pending ~~with respect to the mortgaged property~~, the creditor
15 ~~must~~shall send notice of the proposed transfer to:

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

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

22 **Drafters' Notes**

23
24 1. This section is based in part on UCC § 9-621, which provides
25 for a notification procedure for an acceptance of personal property by a
26 secured party in satisfaction of a secured obligation.

27
28 2. Subsection (a) provides for the court to notify parties to the
29 foreclosure ~~proceeding~~ of an agreement proposed by the homeowner and
30 creditor for a transfer in full satisfaction of the debt or other obligation. If
31 there are no parties to the action, other than the homeowner and the

1 creditor, then there is no one to notify. Holders of subordinate interests in
2 the mortgaged property should have been joined as necessary parties to the
3 foreclosure action.

4
5 3. Subsection (b) provides for the creditor to notify persons who
6 have subordinate interests in the mortgaged property of an agreement
7 proposed by the homeowner and creditor for a transfer in full satisfaction
8 of the obligation. Such subordinate interest holders may have their rights
9 terminated by the negotiated transfer, and therefore they have the right to
10 request protection pursuant to Section 503.

11
12 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED**
13 **TRANSFER.**

14 (a) If a judicial ~~_~~foreclosure ~~proceeding~~ is pending ~~with respect to mortgaged~~
15 ~~property~~ and the court receives an objection from a person holding an interest in the
16 mortgaged property which would be affected by a negotiated transfer under Section
17 ~~504501~~, the court ~~promptly~~ shall schedule a hearing on the objection. The hearing must
18 be held not later than [20] days after the objection is received.

19 (b) If a creditor that ~~sent~~ sends a notice under Section 502(b) receives an objection
20 from a person holding an interest in the mortgaged property ~~that~~ which would be affected
21 by the negotiated transfer, the negotiated transfer may not proceed unless the creditor
22 initiates a judicial proceeding seeking a hearing on the objection. The hearing ~~shall~~ must
23 be conducted as provided by subsections (c) and (d).

24 (c) If in a hearing ~~is~~ held under subsection (a), ~~and if~~ the court ~~finds, based on an~~
25 ~~appraisal or other evidence, that that~~ concludes there is no equity in the mortgaged
26 property available to satisfy the interest of the person objecting ~~interest holder to the~~
27 proposed negotiated transfer, the court shall overrule the objection to the negotiated
28 transfer. In that event, the rights of the person objecting ~~party~~ and all other interests
29 subordinate to the interest of the creditor that is a party to the proposed transfer under this

1 section are extinguished effective on the date of the court's ~~determination~~conclusion.

2 (d) If in a hearing ~~is~~ held under subsection (a), ~~and if~~ the court ~~finds, based on an~~
3 ~~appraisal or other evidence, that~~concludes there is equity in the mortgaged property
4 available to satisfy the interest of the person objecting ~~interest holder to the proposed~~
5 negotiated transfer, the court shall set a date not later than [30] days after the date of the
6 hearing by which the person objecting ~~party~~ may tender to the creditor that is a party to
7 the proposed transfer ~~a sum~~an amount equal to the obligation owed to the creditor. If the
8 person objecting ~~party~~ tenders ~~that sum~~the amount to the creditor within the time set by
9 the court, the person objecting ~~party~~ is entitled to the benefit of the proposed ~~negotiated~~
10 transfer, and all interests subordinate to the interest of the ~~objecting~~ creditor that is a party
11 to the proposed transfer are extinguished effective on the date of tender. ~~Otherwise~~If the
12 person objecting does not tender the amount to the creditor within the time set by the
13 court, the rights of the person objecting ~~party~~ and all other interests subordinate to the
14 interest of the creditor that is a party to the proposed transfer ~~under this section~~ are
15 extinguished, effective on the date set by the court by which the tender could have been
16 made.

17 Drafters' Note

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

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

22 (a) A homeowner's transfer of mortgaged property pursuant to Section 501 to a
23 creditor in satisfaction of an obligation to the creditor:
24

25 (1) discharges the obligation in full;

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

5 (3) discharges the mortgage held by the creditor and any mortgage or other
6 lien ~~that is~~ subordinate to the mortgage held by the creditor; and

7 (4) terminates any other subordinate interest ~~that is not~~ except an interest
8 protected from termination by ~~other~~ law other than this [act].

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

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

16 (d) Transfer of ~~the~~ mortgaged property ~~pursuant to~~ under Section 501 terminates
17 all rights of the creditor to obtain a personal judgment for the obligation, including
18 attorney's² fees, costs, and other expenses, against the homeowner and any other person
19 liable for the obligation secured by the property.-

20 (e) Transfer of ~~the~~ mortgaged property ~~pursuant to~~ under Section 501 terminates
21 ~~all~~ any rights of the homeowner and other persons to redeem the property.

22 (f) ~~Nothing in Sections 501 through 504 prevents~~ do This [article] does not prevent
23 a homeowner and creditor from entering into ~~any other~~ an agreement other than a

1 ~~negotiated transfer~~, but ~~the effects of~~ a negotiated transfer described in this section ~~do~~
2 ~~does~~ not apply to ~~unless the anyan~~ agreement that does not states it is made pursuant to
3 Section 501.

4 (g) ~~Nothing in t~~This [article] ~~affects~~ does not affect the rights of a person holding
5 an interest in ~~the~~ mortgaged property which has priority over the interests of a creditor
6 that takes title to the ~~mortgaged~~ property under this section.

7 **Drafters' Notes**

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

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

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

33
34 3. Subsection (a)(4) terminates subordinate interests, but with a
35 savings clause for a subordinate “protected from termination by other
36 law.” The clearest examples are the common provisions in state statutes
37 providing that various kinds of residential leasehold interests are not
38 automatically terminated by a foreclosure, but may only be terminated by
39 the creditor when they would be terminable under the terms of the lease
40 itself in the absence of foreclosure. This act does not overturn the results

1 under those statutes.
2

3 4. Subsection (b) affords a remedy to any person aggrieved by a
4 creditor's failure to comply with the requirements of this [article],
5 including the holder of a subordinate interest to whom a notice required by
6 Section 502 was not sent. Damages for noncompliance are those
7 reasonably calculated to put the aggrieved person in the position it would
8 have occupied but for the noncompliance. They include attorneys' fees
9 and costs.
10

11 45. Subsection (c) specifies that the status of the homeowner who
12 continues to occupy the property after entering into an agreement to
13 transfer the property to the creditor in full satisfaction of the obligation is
14 that of a licensee. The parties' agreement and other state law determine
15 the rights and obligations of the parties as licensor and licensee.
16

17 56. Subsection (f) authorizes homeowners and creditors to enter
18 into any other type of agreement that they might desire, but no such
19 agreement – presumably including a traditional 'deed in lieu' arrangement
20 – would confer the benefits of Section 504 unless the agreement expressly
21 provided that it was made pursuant to Section 501.
22

23 67. The act does not require notice of the proposed negotiated
24 transfer to a senior creditor because the interest of the senior creditor will
25 not be affected by that transfer. It may well be that a negotiated transfer
26 would result in a violation of a 'due on sale' clause in the senior mortgage,
27 but whether or not such a violation results would not be affected by notice
28 to a senior creditor, and the act should not suggest a contrary result.
29

30 Moreover, a practical concern for the junior creditor and borrower
31 may be that after receiving notice, the senior creditor may intervene in the
32 hearing and seek to impose a charging order on any consideration offered
33 by the junior creditor in connection with the negotiated transfer, a tactic
34 that might jeopardize the entire transfer. A junior creditor may well be
35 willing to satisfy the senior debt but more eager to quickly clear
36 subordinate liens; no valid purpose would be served by requiring more
37 notice to senior lien holders than would be required in a conventional
38 foreclosure.
39

40 [ARTICLE] 6

ABANDONED PROPERTY

1 **SECTION ~~505601~~. ABANDONED PROPERTY PRESUMPTION OF**
2 **ABANDONMENT.**

3 (a) ~~A Mortgaged property is presumed to be abandoned property if (1) a~~
4 governmental agency's determination, ~~es finding, or order~~ that ~~mortgaged the~~ property is
5 abandoned, ~~;~~ or (2) ~~the presence of not fewer than at least~~ three ~~or more~~ of the following
6 ~~conditions, establishes a presumption that~~ subparagraphs apply to the property ~~is~~
7 ~~abandoned property:~~

8 (1A) One or more doors to the property are boarded up, closed off,
9 smashed through, broken off, unhinged, or continuously unlocked; multiple windows are
10 boarded up or closed off; or multiple window panes are broken.

11 (2B) Gas, electric, or water service to the property has been terminated or
12 utility consumption is ~~extremely so low so as to~~ that it indicates that the property is not
13 regularly occupied.

14 (3C) Rubbish, trash, or debris has accumulated on the property.

15 (4D) A governmental entity agency has ~~issued an order or finding~~
16 ~~declaring determined~~ that the property is unfit for occupancy or constitutes a serious threat
17 to public health or safety.

18 (5E) A creditor has changed the locks or otherwise secured the property
19 and, for at least 30 days thereafter ~~the changing of the locks~~, the homeowner has not
20 contacted the creditor to request entrance to the property.

21 (6F) One or more written statements signed by the homeowner indicate a
22 clear intent to abandon the property.

23 (7G) A law -enforcement agency has received at least two separate reports

1 of trespass, vandalism, or other illegal acts being committed on the property in the 180
2 days before determination of abandonment is made.

3 (8H) The homeowner ~~has died~~ is dead and there is no evidence that a
4 survivor or an heir of the homeowner is in actual possession of the property.

5 (b) ~~If a person executes an~~ An affidavit attesting to the presence of conditions
6 described in subsection (a) ~~or to~~ and any other facts ~~bearing on~~ evidencing abandonment,
7 ~~the affidavit shall~~ must be signed by and based on personal knowledge of the affiant and
8 ~~shall~~ must state the basis for that personal knowledge. Photographic or other
9 documentary evidence that demonstrates the supporting facts ~~shall~~ must be attached to
10 the affidavit. A ~~party or~~ person may submit multiple affidavits as evidence of
11 abandonment. ~~An affidavit may be given by any person having personal knowledge,~~
12 ~~including a contractor, government employee, or neighbor of the mortgaged property.~~

13 **Drafters' Notes**

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

1 2. The conditions giving rise to prima facie evidence of
2 abandonment set forth in Subsection (a) through (a) closely track the
3 criteria set forth in Ind. Code § 32-30-10.6-5(a) (effective March 16,
4 2012). A government agency’s issuance of a determination that the
5 mortgaged property is abandoned by itself constitutes prima facie
6 evidence of abandonment. In some localities, after such a determination
7 the government will mark the property as abandoned. The government’s
8 determination, finding, or order might not use the word “abandoned”; it
9 might, for example, refer to the property as vacant. Of course, the
10 homeowner or another person has the right to challenge the correctness of
11 the governmental determination.
12

13 With respect to the statutory conditions listed in the subparagraphs
14 to sSubsection (a)(12) through (a)(8), the presence of ~~{three}~~ or more of
15 such conditions constitutes prima facie evidence, giving rise to a
16 presumption of abandonment. Such conditions are not conclusive on the
17 issue of abandonment. Many residential properties will exhibit at least
18 one such condition, when the homeowner is still in possession of the
19 property. If the homeowner or another person holding under the
20 homeowner is in actual possession of the mortgage property, the property
21 is not abandoned notwithstanding the existence of such conditions.
22 Likewise, mortgaged property may be abandoned under this Section
23 notwithstanding the absence of any of the statutory conditions.
24

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

37 ~~34.~~ Mortgaged property often becomes vacant, both under standard
38 mortgage and reverse mortgage transactions, when the homeowner dies.
39 Under Subsectionsubparagraph (a)(82)(H) proof of death of the
40 homeowner is one of the conditions that may give rise to a presumption
41 that the mortgaged property is abandoned, provided that there is no
42 evidence that an heir or other beneficiary of the homeowner’s estate is in
43 actual possession. Of course if there are multiple homeowners, this
44 condition is met only if all the homeowners have died.
45

46 5. An affidavit under subsection (b) may be given by any person

1 having personal knowledge, including a contractor, government employee,
2 or neighbor of the mortgaged property.

3
4 **SECTION ~~506~~602. DETERMINATION OF ABANDONMENT IN**
5 **JUDICIAL FORECLOSURE.**

6 (a) In a judicial ~~_foreclosure proceeding,~~ a party or a governmental subdivision in
7 which the mortgaged property is located may ~~make a motion~~move for a determination
8 that the property is abandoned property. If the property is located in a common-interest
9 community, the community association ~~that governs that community~~ may intervene in the
10 ~~proceeding~~foreclosure.

11 (b) ~~The party filing the motion~~A moving party under subsection (a) must shall
12 send separately to each homeowner and obligor a notice that ~~provides~~ contains the
13 following:

14 (1) a copy of the motion;

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

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

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

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

25 (d) ~~In a judicial foreclosure proceeding, the~~The party filing the a motion under

1 subsection (a) shall ~~personally~~ serve personally, or make two attempts to ~~personally~~ serve
2 personally, the notice described in subsection (b) on a homeowner at the mortgaged
3 property, ~~which~~ The attempts must be at least 72 hours apart. One attempt must be, and
4 ~~during different times of the day, either~~ before noon, ~~between noon and 6 P.M., or and~~
5 the other attempt must be between 6 P.M. and 10 P.M. Posting ~~a written~~ the notice on the
6 ~~mortgaged~~ property is not required.

7 (e) When a motion is filed ~~pursuant to~~ under subsection (a), the court ~~promptly~~
8 shall schedule a hearing -on the motion to be held not ~~be~~ less than [15] nor more than [30]
9 days after the filing of the motion. ~~The court shall send notice of the hearing and a copy~~
10 ~~of the motion to all parties.~~

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

15 **Drafters' Notes**

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

22
23 2. If no appearance is made at the hearing to oppose the motion to
24 determine that the mortgaged property is abandoned, under subsection (f)
25 the court may rely on affidavits to render an order that the property is
26 abandoned without taking testimony.
27

1 **SECTION ~~507603~~. DETERMINATION OF ABANDONMENT IN**
2 **NONJUDICIAL FORECLOSURE.**

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

9 (b) ~~The A~~ person ~~seeking a determination that the mortgaged property is~~
10 ~~abandoned property must~~ that submits a request under subsection (a) ~~-shall~~ send separately
11 to each homeowner and obligor a notice that ~~provides~~ contains the following:

12 (1) a copy of the request;

13 (2) a copy of ~~an~~ the affidavit attesting to abandonment, or a governmental
14 agency's determination, ~~finding, or order, that that~~ the property is abandoned;

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

17 (4) a statement that the recipient may contact the [governmental
18 ~~official~~agency] to obtain further information; ~~and~~

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

22 (6) a statement that the notification of objection ~~which~~ must be received
23 within 30 days after the notice was sent to the recipient, in which event the [governmental

1 ~~official~~agency] will not issue a determination of abandonment.

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

4 (d) ~~The A~~ person that submits a request under subsection (a) seeking a
5 determination that the mortgaged property is abandoned property shall ~~personally~~ serve
6 personally, or make two attempts to ~~personally~~ serve personally, the notice described in
7 subsection (b) on a homeowner at the mortgaged property, ~~which~~ The attempts must be
8 at least 72 hours apart. One attempt must be, ~~and during different times of the day, either~~
9 before noon, ~~between noon and 6 P.M., or~~ and the other attempt must be between 6 P.M.
10 and 10 P.M. Posting ~~a written~~ the notice on the mortgaged property is not required.

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

15 (1) the [governmental ~~official~~agency] has received evidence that notices
16 under subsection (b) ~~were~~ was sent to each homeowner and obligor;

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

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

23 (4) the [governmental ~~official~~agency] has personally inspected the

1 property.

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

4 (g) ~~The A~~ determination of abandonment under subsection (e) or the refusal of the
5 [governmental officialagency] to issue a determination is subject to de novo judicial
6 review.

7 **Drafters' Notes**

8
9 1. In a nonjudicial foreclosure ~~proceeding~~, the creditor may treat
10 the mortgaged property as abandoned only by submitting evidence of
11 abandonment to an independent third party. Subsection (a) provides for
12 the submission of evidence to a person, who as part of the decision making
13 process must personally visit the property. Normally jurisdictions enacting
14 this Act will designate an employee of local government, such as a
15 building inspector, who is responsible for evaluating the physical
16 condition of dwelling units.

17
18 2. Judicial review of the decision is available to any interested
19 person. Subsection (g) does not specify the nature of that action, which in
20 many jurisdictions will be a mandamus action. De novo judicial review is
21 appropriate to protect the homeowner from the significant limitations on
22 the homeowner's rights under this act that follow from a determination of
23 abandonment.

24 **SECTION ~~508604~~. WITHDRAWAL OF ABANDONED PROPERTY** 25 **PROCEEDING.**

26
27 (a) In a judicial ~~foreclosure proceeding~~, after a party has ~~filed a motion~~ moved for
28 a determination that the property is abandoned property, the motion may be withdrawn
29 only by leave of ~~the~~ court.

30 (b) In a nonjudicial ~~foreclosure proceeding~~, after a person has ~~filed a request~~ ed
31 ~~for~~ a determination that the property is abandoned property, the request may be
32 withdrawn only by the consent of the person submitting the request and each homeowner

1 and obligor.

2 Drafters' Note

3
4 Once a party has filed a motion in a judicial foreclosure for a
5 determination that the mortgaged property is abandoned, withdrawal of the
6 motion is allowed only by leave of court. This allows for judicial control
7 over the imposition of maintenance responsibilities under Section 606.

8
9 **SECTION ~~509~~605. FORECLOSURE OF ABANDONED PROPERTY.**

10 (a) In a judicial-foreclosure ~~proceeding~~, if a court determines ~~under Section 506~~
11 that mortgaged property is abandoned property and the court ~~has~~ previously rendered or
12 at the same time renders a judgment of foreclosure, the court shall:

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

15 (2) ~~upon on~~ a motion of the foreclosing creditor, if the court, ~~based on an~~
16 ~~appraisal or other evidence~~, determines that there is no equity in the mortgaged property
17 available to satisfy the interests of junior subordinate creditors, the court shall order a
18 transfer of the abandoned property directly to the foreclosing creditor without public sale,
19 ~~and, upon t~~The transfer of the property extinguishes; the rights of all interests subordinate
20 to the interest of the foreclosing creditor ~~are extinguished~~.

21 (b) In a nonjudicial-foreclosure ~~proceeding~~, ~~on the issuance of a determination~~
22 ~~under Section 507~~if a governmental agency has determined that the mortgaged property
23 is abandoned property, a creditor may conduct an expedited public sale of the property.
24 ~~The~~Unless an action for judicial review of the determination is pending, the sale may
25 take place not earlier than [30] days but not later than [60] days after issuance of the
26 determination, ~~unless an action for judicial review of the determination is pending~~. The
27 creditor ~~or servicer~~ shall comply with the notice requirements of Section 405, except that

1 [15]-days' ~~advance~~ notice of the sale is sufficient.

2 (c) After a judicial order or a determination ~~in a record finding by a governmental~~
3 ~~agency~~ that the mortgaged property is abandoned property ~~under Section 506 or 507~~, the
4 creditor shall ~~take necessary and appropriate action to~~ cause the ~~foreclosure public~~ sale or
5 transfer of the mortgaged property to the creditor to be completed ~~within not later than~~
6 120 days ~~after the order is rendered or the determination is rendered~~ ~~made~~ unless the
7 creditor releases its mortgage and ~~files~~ the release ~~is filed~~ in the [~~land real property~~
8 records]. Unless the creditor releases its mortgage, the creditor may not seek to end its
9 obligation to maintain the property under Section ~~510-606~~ by dismissing, terminating, or
10 suspending the foreclosure ~~proceeding~~.

11 (d) ~~Upon~~ ~~On~~ a ~~foreclosure public~~ sale or transfer of the mortgaged property to the
12 creditor ~~pursuant to~~ ~~under~~ subsection (a) or (b), any personal property remaining on the
13 abandoned property ~~shall be~~ ~~is~~ deemed to have been abandoned by the owner of ~~such the~~
14 personal property and may be disposed of by the purchaser or transferee of the property
15 [60] days after the sale or transfer. Neither the creditor nor ~~or~~ purchaser is liable to the
16 homeowner or obligor for disposal of personal property pursuant to this subsection.

17 (e) ~~The e~~Completion of a ~~foreclosure public~~ sale or ~~a~~ transfer of ~~the~~ mortgaged
18 property to the creditor ~~pursuant to~~ ~~under~~ subsection (a) or (b) terminates the rights of the
19 homeowner and any other person to redeem the property under law of this state other
20 than this [act].

21 *Legislative Note: In some states, homeowners have a statutory right of*
22 *redemption for a period of time after the completion of a public sale.*
23 *Some of those states also extend redemption rights to third parties, such as*
24 *subordinate lien holders. In states with statutory redemption, subsection*
25 *(e) eliminates those rights after a public sale or transfer to the creditor of*
26 *the mortgaged property. After a homeowner abandons the property, it*

1 serves no useful purpose to allow the homeowner an option to reacquire
2 the property after the completion of foreclosure.
3

4 **Drafters' Notes**

5

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

14 2. This Section does not authorize a disposition of abandoned
15 property other than public sale, but other dispositions are available under
16 other sections of this Act. For example, the homeowner and creditor may
17 agree to a negotiated transfer to the creditor in lieu of foreclosure pursuant
18 to Sections 501 to 504 ~~[cash for keys agreement]~~.
19

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

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

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

1 a choice of how it wishes to proceed.

2
3 4. In states that afford the homeowner and other persons a statutory
4 right of redemption after completion of a foreclosure sale, subsection (~~de~~)
5 serves to terminate those redemption rights.

6
7 **SECTION ~~510606~~. MAINTENANCE OF ABANDONED PROPERTY.**

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

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

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

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

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

17 (b) If a creditor is -a party ~~in-to~~ a judicial-foreclosure-~~proceeding~~, the creditor
18 shall maintain the mortgaged property beginning when the court renders an order
19 determining that the ~~mortgaged~~ property is abandoned property ~~pursuant to~~under Section
20 ~~506602~~.

21 (c) If a creditor commences a nonjudicial-foreclosure-~~proceeding~~, the creditor
22 shall maintain ~~abandoned the~~ mortgaged property beginning when a ~~determination in a~~
23 ~~record~~[governmental agency] determines that the ~~mortgaged~~ property is abandoned
24 property is issued ~~pursuant to~~under Section ~~507603~~.

25 (d) ~~In the absence of~~Absent a judicial order under subsection (b) or a
26 determination under subsection (c), a creditor that has commenced a foreclosure shall

1 maintain the mortgaged property beginning when ~~it~~ the creditor receives notice that a
2 [governmental entity agency] has issued a determination, ~~finding, or order stating~~ that the
3 ~~mortgaged~~ property is abandoned property and is in a condition that poses a threat to
4 public safety or health.

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

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

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

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

18 (1) a governmental subdivision ~~that has jurisdiction of~~ in which the
19 mortgaged property is located; [or]

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

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

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

7 **Drafters' Notes**

8
9 1. This Section requires creditors to maintain abandoned properties
10 under certain circumstances. The obligation may arise based upon action
11 of the creditor or action of the municipality or other governmental entity
12 where the property is located. The creditor does not become obligated to
13 maintain merely by commencing foreclosure ~~proceedings~~ at a time when
14 the dwelling unit is vacant. Rather, the obligation arises when the creditor
15 seeks to use the expedited foreclosure procedure authorized by Section
16 ~~505-605~~ and obtains either a judicial order or official determination that
17 the property is abandoned. Under subsection (c) the obligation may also
18 arise any time after the creditor has commenced foreclosure ~~proceedings~~ if
19 the municipality or other local governmental entity cites the property as
20 both abandoned and presenting a threat to public safety or health.

21
22 2. Subsection (e) defines the scope of the creditor's obligation to
23 maintain abandoned property. The focus is on the outward appearance of
24 the property, including yards and other exterior spaces, and other
25 conditions that are likely to have significant impacts on the neighborhood,
26 such as interior spaces frequented by squatters or persons engaged in
27 criminal activities. This subsection is modeled closely on Cal. Civ. §
28 2929.3(b), enacted in 2008.

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

37
38 4. Subsection (h) provides for enforcement by the local
39 government that has jurisdiction over the abandoned property. When the
40 property is located in a common-interest community, it also provides

1 standing for the association as a means to protect neighboring property
2 owners whose interests are likely to be harmed by the creditor’s failure to
3 maintain the property. In conferring standing both to the local government
4 and to owners’ associations, this subsection follows the approach taken by
5 N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This subsection does
6 not grant a direct enforcement right to neighbors. If negatively impacted,
7 such persons may have a remedy under other laws, such as public or
8 private nuisance.
9

10 5. At common law a creditor who takes possession of mortgaged
11 property prior to the completion of foreclosure becomes a “mortgagee in
12 possession,” who by virtue thereof undertakes a number of obligations to
13 the homeowner with respect to maintenance and care of the property.
14 Subsection (i) expressly provides that a creditor who enters the property
15 solely for the purpose of complying with its obligations under this Section
16 does not assume the liabilities of a mortgagee in possession.
17

18 **[ARTICLE] 76**

19 **REMEDIES**

20 **SECTION 7601. EFFECT OF VIOLATION.**

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

27 (b) In a non-judicial-foreclosure proceeding, ~~the~~a homeowner or obligor may
28 initiate an action to enjoin or restrain the foreclosure on the grounds that a creditor or
29 servicer committed a material violation of this [~~A~~act]. If the court finds that a material
30 violation of this [act] occurred, the court shall ~~nevertheless~~ allow foreclosure to continue
31 after the violation is cured, unless the court determines that continuation of the
32 foreclosure ~~action~~ would unfairly burden the homeowner.

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

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

8 (e) In addition to the damages recoverable under subsections (d), the court may
9 award a homeowner or obligor ~~may recover, as the court may allow,~~ statutory damages
10 not exceeding \$[15,000] ~~for in the case of~~ a pattern or practice of noncompliance violating
11 this [act]. In determining whether to award statutory damages and the amount of statutory
12 damages ~~under this subsection,~~ the court shall consider, ~~among other all~~ relevant factors,
13 including:

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

16 (2) the nature of the noncompliance violations, and

17 (3) the extent to which the noncompliance violations ~~were~~ intentional.

18 ~~(f) An action for damages brought under this section must be commenced not~~
19 ~~later than one year after the violation on which it is based.~~

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

23 (1) the violation was due to a mistake, other than a mistake of law, that

1 occurred notwithstanding reasonable procedures established to preclude such mistakes;
2 or

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

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

7 **Comments**

8
9 1. The statutory damages for individuals under subsection (e)
10 require a pattern or practice of noncompliance, similar to the federal
11 RESPA statute's provision for statutory damages, 12 U.S.C. §2605(f)

12
13 2. Dismissal with prejudice is a sanction of last resort, and should
14 be reserved for cases of very serious noncompliance by the creditor or
15 servicer. Dismissal with prejudice may be warranted, for example, when
16 there have been repeated and serious violations by the creditor. E.g. Bank
17 of New York v. Richardson, 2011 Me 38, 15 A.3d 756 (2011) (creditor
18 failed to appear at three successive mediation conferences in a case where
19 the homeowner asserted significant consumer law counterclaims); U.S.
20 Bank N.A. v. Solorin 934 N.Y.S.2d 655 (2012) (dismissal after 16-month
21 delay in filing required certification of accuracy of supporting documents).

22
23 3. Actual damages incurred by a homeowner or obligor under this
24 section may include damages for emotional distress. Whether or not the
25 homeowner may claim that damages caused by a servicer are chargeable
26 to the creditor who retained the servicer under theories of agency or
27 employer/employee law is not determined by this act but by other law.

28
29 4. Under subsection (a), before confirmation of the foreclosure
30 sale, the homeowner may raise a material violation of the statute - for
31 example, a materially inaccurate notice of the amounts needed to cure a
32 default - as a basis for asking the court to prevent the foreclosure sale (or
33 confirmation), until the violation has been corrected and remedied. If the
34 creditor can cure the violation in a timely way so that full compliance is
35 achieved, it would then be appropriate under this section for the
36 foreclosure may proceed.

37
38 However, after a foreclosure sale, under established principles of
39 real estate law, unless the homeowner under state law has an independent
40 right of redemption, a bona fide sale purchaser is entitled to rely on the

1 conclusive effect of the sale, and the homeowner's only remedy for
2 violations of the statute would be to seek damages from the foreclosing
3 creditor or any other remedy allowed under state or federal law; *see*
4 Section 602.

5
6 **SECTION ~~7602~~. DEFENSE OR REMEDY OF HOMEOWNER OR**

7 **OBLIGOR UNDER OTHER LAW.** ~~Nothing in t~~This [act] ~~displaces~~ does not displace

8 any defense or remedy a homeowner or obligor ~~may have~~ has under federal law or law of

9 this state other than this [act].

10 **Drafter's Note**

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

26
27 **SECTION ~~7603~~. PROCEDURE FOR ASSERTING DEFENSE IN**

28 **NONJUDICIAL FORECLOSURE.**

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

32 (b) In an action under this section, if the court determines that a defense to ~~the a~~
33 nonjudicial foreclosure exists, the court may ~~render an order that is just and equitable~~
34 ~~under the circumstances~~order any appropriate relief, including an award of any remedy

1 provided in Section 601.

2 **Drafter's Note**

3 The bracketed language in subsection (a) complements the 1-year
4 limitations period in section 7601(f) for damage actions.

5
6 **SECTION 7604. ATTORNEY'S FEES AND COSTS.** In an action in which a
7 party seeks a remedy under Section 7601 based on a violation of this [act], or asserts a
8 defense or remedy under Section 7602 or a defense under Section 7603, the court shall
9 award the costs of the action and reasonable attorney's fees to the prevailing party.

10 **SECTION 7605. ENFORCEMENT BY [ATTORNEY GENERAL].** In
11 addition to enforcing any remedies available under ~~other law~~ of this state other than this
12 [act], the [attorney general or other state official or agency] may bring an action to enjoin
13 a pattern or practice of violating this [act]. In such an action the court may (1) issue an
14 injunction or order against a creditor, servicer, their agents, or any other person violating
15 this [act], which may include requiring steps to be taken to remedy a violations or the
16 payment of damages to aggrieved homeowners; ~~In such an action, the court may~~ and (2)
17 assess a civil penalty of not less than \$[____] nor more than \$[____].

18 **SECTION 7606. EFFECT OF THE HOLDER IN DUE COURSE RULE.**

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

24 (b) An obligor or homeowner may assert against a holder in due course a claim or
25 defense, not otherwise subject to a statute of limitations or other preclusion, ~~that is~~ based

1 on fraud, material misrepresentation, or fundamental breach of promise in connection
2 with the original loan transaction.

3 **Alternative A**

4
5 ~~In this alternative, the obligor or homeowner may assert as either a defense to a~~
6 ~~foreclosure or in a declaratory judgment, any claim or defense she may have under~~
7 ~~subsection (b), in addition to whatever rights she may have under UCC3-305.~~
8 ~~However, this right is limited to a period of 3 years from the date of the original~~
9 ~~transaction or, if longer in the case of an interest rate adjustment or prepayment~~
10 ~~fee, an additional one year after the date of the adjustment. Further, the maximum~~
11 ~~amount of borrower's recovery in that case would be the balance owing on the note.~~

12
13 (c) If the creditor is a holder in due course under [insert reference to ~~State~~-UCC
14 Section 3-305] or seeks to enforce a waiver of claims and defenses, an obligor or
15 homeowner may:

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

19 2. bring a declaratory judgment action to establish any claim against the
20 holder in due course described in subsection (b). ~~;~~ ~~provided, that~~

21 ~~(d) A no such~~ claim or defense under subsection (c) may not be made or asserted
22 after the later of ~~three~~ six years after ~~the~~ execution of the record creating the obligation
23 being enforced or, if the claim or defense relates to an adjustment of the interest rate on
24 the obligation or a prepayment fee, one year after the creditor or servicer sends notice of
25 an adjustment or fee.

26 ~~(d)~~ (e) If an obligor or homeowner establishes a claim or defense under this
27 section, relief ~~shall be~~ is limited to reformation of the obligation and recoupment. ~~Any~~
28 ~~R~~recoupment ~~shall~~ must be in the amount of the economic loss caused by the fraud,

1 misrepresentation, or fundamental breach of promise and may not exceed the amount
2 owed on the obligation at the time of judgment. The court may determine whether the
3 effect of recoupment is to cure the default or reinstate the obligation pursuant to Section
4 201. ~~Any R~~recoupment ~~shall~~reduces both what the creditor is entitled to collect in
5 foreclosure and what the creditor is entitled to collect by other processes, including a
6 separate action to collect the obligation.

7 **Alternative B**

8 ~~Under this alternative, there is no time limit on when an obligor or~~
9 ~~homeowner may raise a defense in a foreclosure action. However, no declaratory~~
10 ~~judgment is authorized under this alternative, and therefore no relief is available to~~
11 ~~the borrower unless the creditor initiates foreclosure after the borrower's default.~~
12 ~~This alternative imposes the same limits on the economic recovery attributable to~~
13 ~~the defense as in Alternative A.~~

14
15 ~~(c) If the creditor is a holder in due course under [insert reference to State UCC 3-~~
16 ~~305] or seeks to enforce a waiver of claims and defenses, an obligor or homeowner may~~
17 ~~assert as a defense to the foreclosure, in addition to the defenses otherwise available~~
18 ~~under [insert reference to State UCC 3-305], any defense against the holder in due course~~
19 ~~described in subsection (b).~~

20 ~~(d) If an obligor or homeowner establishes a defense under this section, relief~~
21 ~~shall be limited to reformation of the obligation and recoupment. Any recoupment shall~~
22 ~~be in the amount of the economic loss caused by the fraud, misrepresentation, or~~
23 ~~fundamental breach of promise and may not exceed the amount owed on the obligation at~~
24 ~~the time of judgment. The court may determine whether the effect of recoupment is to~~
25 ~~cure the default or reinstate the obligation pursuant to Section 201. Any recoupment shall~~
26 ~~reduce both what the creditor is entitled to collect in foreclosure and what the creditor is~~
27 ~~entitled to collect by other processes, including a separate action to collect the obligation.~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

Alternative C

~~Under this alternative, as in Alternative B, there is no time limit on when an obligor or homeowner may raise a defense in a foreclosure action, and the same prohibition on affirmative claims applies. However, unlike Alternative B, any relief is limited to protection from a deficiency judgment.~~

~~(c) If the creditor is a holder in due course under [insert reference to State UCC 3-305] or seeks to enforce a waiver of claims and defenses, an obligor or homeowner may assert as a defense to the foreclosure, in addition to the defenses otherwise available under [insert reference to State UCC 3-305], any defense against the holder in due course described in subsection (b).~~

~~(d) If an obligor or homeowner establishes a defense under this section, the creditor shall be entitled to foreclose as if the defense had not been established, but the creditor may not obtain a deficiency judgment in connection with or after the foreclosure.~~

End of Alternatives

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

Drafters' Notes

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

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

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

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

1
2 (b) it applies only prospectively, and

3
4 (c) it preserves only claims and defenses based on fraud, material
5 misrepresentation, or fundamental breach of promise in connection with
6 the original loan transaction.
7

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

10
11 First, under subsection (a) the borrower's claims or defenses may
12 be asserted despite any waiver the borrower or other owner of the
13 mortgaged property may have signed;

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

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

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

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

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

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

34 ~~It presents three alternative 'compromise' positions for discussion.~~

35
36 ~~2. First, in all instances, this section: (1) caps the liability of the holder in~~
37 ~~due course to the outstanding loan balance, (2) applies only prospectively,~~

1 and (3) preserves only claims and defenses based on fraud, material
2 misrepresentation, or fundamental breach of promise in connection with
3 the original loan transaction.

4
5 ~~3. Further, under Alternative A, the borrower may bring a declaratory~~
6 ~~judgment to affirmatively assert one of these permitted claims, without the~~
7 ~~need to raise them only in a foreclosure action. However, in Alternative~~
8 ~~A, the borrower's right to assert either a claim or a defense is limited to a~~
9 ~~three year statute of limitation, with another year allowed in the case of an~~
10 ~~interest rate adjustment.~~

11
12 Under both Alternatives B and C, the borrower is limited to raising
13 the claims granted by subsection (b) only as defenses in a foreclosure
14 action rather than providing the borrower the right to bring an affirmative
15 action against the holder. In return, those defenses may be raised
16 whenever a foreclosure action is brought, and is not subject to the three
17 year statute of limitations in Alternative A.

18 Finally, under Alternative C, the only relief available to a
19 successful borrower is relief from a deficiency judgment.

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

28
29 ~~34. Under subsection (e), both Alternatives A and B, the relief granted to~~
30 ~~the borrower is framed in terms of recoupment or reduction in the balance~~
31 ~~of the outstanding loan, rather than requiring the holder to pay funds to the~~
32 ~~borrower. For example, if the obligor is personally liable to pay the~~
33 ~~obligation, recoupment under this section reduces what the creditor may~~
34 ~~collect outside of foreclosure, including by way of a deficiency judgment~~
35 ~~if foreclosure proceeds to a sale. In this respect, this section follows the~~
36 ~~broad approach taken by the FTC regulation. By making the creditor~~
37 ~~"subject to" claims and defenses, those claims and defenses, when proven,~~
38 ~~offset the amount due on the obligation.~~

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

1
2 [ARTICLE] **78**

3 MISCELLANEOUS PROVISIONS

4 **SECTION ~~703~~ 801. UNIFORMITY OF APPLICATION AND**
5 **CONSTRUCTION.** In applying and construing this uniform act, consideration must be
6 given to the need to promote uniformity of the law with respect to its subject matter
7 among states that enact it.

8 **SECTION ~~704~~ 802. RELATION TO ELECTRONIC SIGNATURES IN**
9 **GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or
10 supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.
11 Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act,
12 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
13 described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

14 **SECTION ~~701~~ 803. PRE-EFFECTIVE DATE TRANSACTIONS.**

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

18 ~~(b) This [act] does not affect a foreclosure commenced before this [act] takes~~
19 ~~effect. This [act] applies to foreclosure of a mortgage created before, on or after the~~
20 ~~effective date of this [act], unless the creditor has commenced a foreclosure before the~~
21 ~~effective date of this [act]. [WRB- At the suggestion of the Style Committee, the~~

22 **Drafter's note, with revisions, became the substantive provision.]**

23 ~~**Drafters' Note**This Act applies to the foreclosure of mortgages created before the~~
24 ~~effective date of this Act, unless the creditor has taken action to foreclose before~~
25 ~~the effective date.~~

1 should carefully consider how best to integrate the provisions of the Act
2 with existing state laws governing the foreclosure process.

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

11
12 **~~SECTION 703. UNIFORMITY OF APPLICATION AND~~**

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

16 **~~SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN~~**

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

22 **~~SECTION 7805. EFFECTIVE DATE.~~** This [~~a~~Act] takes effect on [insert
23 date].