

**[MODEL NEGOTIATED ALTERNATIVE TO
FORECLOSURE ACT]**

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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WITH COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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[MODEL NEGOTIATED ALTERNATIVE TO FORECLOSURE ACT]

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[MODEL NEGOTIATED ALTERNATIVE TO FORECLOSURE ACT]

SECTION 1. SHORT TITLE. This [act] may be cited as the [Model Negotiated Alternative to Home Foreclosure Act].

SECTION 2. DEFINITIONS. In this [act]:

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

(2) “Creditor” means a person that is entitled to foreclose a mortgage under the law of this State.

(3) “Foreclosure” means a process, proceeding, or action to enforce a mortgage by terminating a homeowner’s interest in mortgaged property or obtaining possession of mortgaged property. The term does not include a voluntary transfer by the homeowner or a process, proceeding, or action to recover possession of property after a completed foreclosure sale. “Foreclose” has a corresponding meaning.

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

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

(6) “Mortgaged property” means real property improved with not more than four dwelling units which is subject to a mortgage. The term includes:

(i) an attached single-family unit;

(ii) a single-family manufactured-housing unit or a time share in a dwelling unit if either is treated as real property under law of this state other than this [act];

(iii) real property on which construction of not more than four dwelling units has commenced; and

(iv) a single-family unit in a common-interest community.

The term does not include real property that, when the mortgage being foreclosed was created, was used or intended to be used primarily for nonresidential purposes.

(7) “Negotiated transfer” means a transfer of title to mortgaged property pursuant to Section 3.

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

(9) “Obligor” means a person that:

(A) owes payment or performance of an obligation;

(B) has signed a mortgage agreement with respect to mortgaged property; or

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

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

(11) “Record”, used as a noun, means information that is inscribed on a tangible medium

or is stored in an electronic or other medium and is retrievable in perceivable form.

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

Comment

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

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

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

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

5. In Section 2(6), real property is “mortgaged property” only if its primary use is residential. It includes but is not limited to owner-occupied principal residences and second or vacation homes. The definition includes a broad range of structures commonly used for residential purposes, so long as the property does not consist of more than four dwelling units. The enumerated examples include such common structures as

- “attached single-family units”, which are commonly described as “townhouses” or “row houses”;
- “single-family manufactured housing units”—a broad category of structures ranging from factory-built single family homes to mobile homes or trailers which are permanently located on a foundation and connected to utility lines, so long as they are treated as real estate under state law; and
- “time shares”—often known as ‘interval ownership’—in single family dwelling units,

so long as those interests are treated as real estate under state law.

The definition excludes parcels of real property that are used primarily for non-residential business purposes but which also contain one-to-four dwelling units, such as a farm with a farmhouse or a manufacturing facility that includes a residence for the company's chief executive officer. Accordingly, this act does not apply to the foreclosure of mortgages on such a property; such mortgages are generally made as commercial mortgage loans with markedly different terms and underwriting standards than those used for home mortgage lending. Likewise, the term "mortgage" does not include a blanket mortgage that covers multiple parcels containing more than four dwelling units in the aggregate.

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

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

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

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

(3) the creditor or court sends notice of the proposed negotiated transfer to the persons entitled to notice under Section 4; and

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

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

(c) This section does not authorize a transfer of mortgaged property to a creditor in partial

satisfaction of the obligation it secures.

(d) A negotiated transfer does not affect the rights of a person holding an interest in mortgaged property, if the interest has priority over the interest of a creditor to whom title to the property is transferred under this section.

Comment

1. This section authorizes a transfer from the homeowner to the creditor in satisfaction of the debt or other obligation. In so doing, it provides a framework for existing workout arrangements such as cash-for-keys agreements and deed-in-lieu of foreclosure transactions. This section and the following two sections provide for a safe harbor by specifying the effect of a transfer that meets the requirements of this section. This section is based in part on UCC § 9-620, which provides for the acceptance of mortgaged personal property by a secured party in full or partial satisfaction of a secured obligation. The important innovations here are, first, to provide an expedited procedure to discharge junior liens on the property without the need for a foreclosure sale; and second, to resolve a number of collateral issues that flow from the expedited procedure, as detailed in Section 6.

2. This section does not specify a minimum consideration to be received by the homeowner in exchange for the homeowner's agreement to transfer the mortgaged property in satisfaction of the obligation. The sole exception is that if the homeowner is in possession and there are third parties entitled to notification of the proposed transfer, the agreement may not require the homeowner to vacate possession prior to the expiration of the period for notified persons to submit an objection. As a consequence, this section confers a substantial benefit on mortgage creditors in the form of a new mechanism for converting every 'deed in lieu' transaction into an accelerated means of clearing title of junior encumbrancers without the need for a more traditional judicial foreclosure. In doing so, the section does not require any minimum benefit on homeowners, other than the general statement of effects of such an agreement contained in Section 6 and the rights of possession noted in the preceding paragraph.

3. The second sentence of Section 3(b) contemplates a circumstance where, for example, in a typical 'cash for keys' agreement, the lender and homeowner had agreed that the homeowner would move within a short period in return for a sum of money. If there are junior lienholders, however, the possibility exists that there may be an objection to the proposed transfer, that the agreement would not be approved, and that the benefits contemplated by a homeowner under Section 6 from an early move-out would not be realized. This sentence makes certain that the homeowner need not be displaced, even voluntarily, until the parties know whether there would be objection from a junior lienholder. In those cases where there are no junior lienholders or other holders of subordinate interests, it is likely that the parties would often choose to use a traditional deed in lieu of foreclosure to accomplish their agreement, instead of following this statutory negotiated transfer procedure; see section 6(f).

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

5. Subsection (c) prohibits the creditor from accepting the mortgaged property in partial satisfaction of the obligation it secures in a negotiated transfer under this [act]. Because the effect of a negotiated transfer under section 6(a)(1) is to completely discharge the obligation, this section does not require any consent from an obligor who is not also a homeowner. Whether the parties may enter into another type of agreement for the transfer of the mortgaged property in partial satisfaction of the obligation is determined by other law of this state.

SECTION 4. NOTICE OF NEGOTIATED TRANSFER.

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

(b) If a homeowner and creditor propose a negotiated transfer when a judicial foreclosure is not pending, the creditor shall send notice of the proposed transfer to:

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

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

Comment

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

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

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

4. The notification procedure under subsection (b) is allowed in both judicial foreclosure and nonjudicial foreclosure states, provided the creditor has not filed a foreclosure complaint when it sends notice. Under Section 3(a)(1), there must be a default before the creditor and the homeowner agree to a negotiated transfer.

SECTION 5. OBJECTION TO NEGOTIATED TRANSFER.

(a) Except as otherwise provided in this section, if a judicial foreclosure is pending and the court receives an objection from a person holding an interest in the mortgaged property which would be affected by a proposed negotiated transfer, the court shall set a date not later than [30] days after the date of the objection by which the person objecting may tender to the creditor that is a party to the transfer an amount equal to the obligation to be satisfied under Section 3. If the person tenders the amount to the creditor on or before the date set by the court, the person is entitled to the benefit of the proposed transfer, and all interests subordinate in priority to the interest of the creditor that is a party to the proposed transfer are extinguished effective on the date of tender. If the person does not tender the amount to the creditor on or before the date set by the court, the interest of the person objecting and all other interests subordinate to the interest of the creditor that is a party to the proposed negotiated transfer are extinguished, effective on the date set by the court by which the tender could have been made.

(b) If a judicial foreclosure is pending and the court receives an objection from more than one person holding an interest in the mortgaged property which would be affected by a negotiated transfer, the court promptly shall determine the relative priorities of the interests held by each person that filed an objection. The court shall set separate days by which each objecting person holding an interest in the mortgaged property may tender the amounts described in

subsection (a) to the creditor proposing the negotiated transfer and the amounts due to other persons holding interests in the mortgaged property which are junior in priority to the interest of the creditor proposing the negotiated transfer. The court shall assign the days to the objecting parties in the reverse order of their priorities, with the objecting party holding the most junior interest receiving the first tender date.

(c) If a judicial proceeding is not pending and a creditor that sends a notice under Section 4(b) receives an objection from a person holding an interest in the mortgaged property which would be affected by the negotiated transfer, the negotiated transfer may not proceed unless the creditor initiates a judicial proceeding to allow the objecting person to tender the amount due to the creditor. The judicial proceeding must be conducted as provided in this section.

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

(e) If an objecting person holding the most junior interest in the mortgaged property does not tender the amounts described in subsection (b) on or before the date set by the court, the interests of the person that failed to tender are extinguished, and the objecting party with the next tender date is entitled to tender to all creditors that are senior in priority to the objecting party in the same manner described in subsection (b). This process continues until each objecting person has been paid in full or has its interest extinguished.

Comment

1. Section 5 provides a process to addresses those situations that may arise when there are either: (i) multiple objections to a negotiated transfer by junior lien holders; or (ii) nonobjecting lien holders whose interests are subordinate to the creditor who proposed the negotiated transfer, but senior to the interests of an objecting lien holder.

2. This section and Section 6 make clear that a negotiated transfer extinguishes all property rights and interests in the mortgaged property that are subordinate in priority to the interest—whether a mortgage or other lien—of the creditor who enters into the negotiated transfer with the homeowners. Persons who own those subordinate interests are the holders of ‘junior interests’, as that term is used in this section. Junior interest holders are not limited to mortgagees and other lienholders. They include the holders of other property rights, such as leases and options to buy the property.

3. In contrast, of course, persons that hold interests that have priority over the interest of the creditor who enters into the negotiated transfer with the homeowners—so-called ‘senior interests’—would not be affected by the negotiated transfer, and the creditor taking title by negotiated transfer would take only what the transferee had. This is precisely the same result as would occur if the creditor entering into the negotiated transfer instead chose to foreclose its interest, rather than entering into a negotiated transfer. Thus, for example, if that creditor held only a second mortgage, and there was a first mortgage and an outstanding lien for unpaid real estate taxes, that creditor would own the mortgaged property after the negotiated transfer become final, subject to both the first mortgage and the lien for unpaid real estate taxes, since both those interests are senior in priority to the second mortgage that is being foreclosed.

SECTION 6. EFFECT OF NEGOTIATED TRANSFER.

(a) A homeowner’s transfer of mortgaged property pursuant to Section 3 to a creditor in satisfaction of an obligation to the creditor:

(1) discharges the obligation in full;

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

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

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

termination by law other than this [act].

(b) A subordinate interest is discharged or terminated under subsection (a) despite the creditor's or court's noncompliance with this [act]. A creditor that fails to comply with this [act] is liable to a person damaged by that failure for damages in the amount of any loss caused by the creditor's failure.

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

(d) Transfer of mortgaged property under Section 3 terminates any right of the creditor to obtain a personal judgment against the homeowner and any other person liable for the obligation secured by the property, including attorney's fees, costs, and other expenses.

(e) Transfer of mortgaged property under Section 3 terminates any right of the homeowner and other persons to redeem the property.

(f) This [act] does not prevent a homeowner and creditor from entering into an agreement other than a negotiated transfer, but the consequences of a negotiated transfer described in this section do not apply to an agreement that does not state it is made pursuant to Section 3.

Comment

Under Section 6, a negotiated transfer of title is final and conclusive, as is the discharge of all junior liens, despite any errors in the negotiated transfer process. The policy issue posed by this issue is whether to impose costs and damages on the bona fide good faith homeowner who surrendered title to the mortgaged property in reliance on a finalized negotiated transfer—and simultaneously on those who purchase the mortgaged property from the creditor who participated in the negotiated transfer—or whether the better outcome is to simply impose on that same creditor an obligation to make whole those who may have been damaged by a defective transfer. If the creditor did not cause the noncompliance with the rules of this Section, law other than this act governs the liability of other parties.

SECTION 7. GENERAL PRINCIPLES OF LAW APPLICABLE. The principles of law and equity, including the law of principal and agent, supplement this [act] unless displaced by its particular provisions.

Comment

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

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

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

SECTION 9. TRANSITION. This [act] applies to a negotiated transfer of property subject to a mortgage created before, on, or after [the effective date of this [act]], unless the creditor commenced a foreclosure before [the effective date of this [act]].

SECTION 10. REPEALS; CONFORMING AMENDMENTS.

- (a)
- (b)
- (c)

SECTION 11. EFFECTIVE DATE. This [act] takes effect