

D R A F T
FOR DISCUSSION ONLY

Mortgage Modifications Act

Uniform Law Commission

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Mortgage Modifications Act

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Mortgage Modifications Act

Prefatory Note

I. Purpose of the Act

The Mortgage Modifications Act resolves problems and uncertainty in the law governing the modification of mortgage loans and other obligations secured by a mortgage. Current law is not clear, leading to unnecessary expense and delay in loan modifications and in some cases to foreclosures that could have been avoided by a modification. The purpose of the act is to save time and expense for borrowers and lenders and to facilitate agreed upon loan modifications to avoid foreclosure. The Act benefits both homeowners and commercial borrowers in distress by making it easier to modify a loan as an alternative to foreclosure.

II. Why the Act Is Needed

The parties to a mortgage often agree to modify the terms of the mortgage loan or other obligation secured by the mortgage after the initial transaction is completed. Typical modifications include extending the maturity date of a loan, changing the interest rate or the method by which interest is calculated, increasing the loan amount by agreeing to additional advances, capitalizing unpaid interest, modifying escrow or insurance requirements, and modifying financial covenants.

The reasons for modifying secured obligations vary. A lender may agree to modify a loan in response to a borrower's default in payment or the borrower's financial distress. Some commercial credit facilities are modified on a periodic basis to reflect changing conditions in debt markets or to substitute debt tranches.

The common law is not clear on the issue of whether the modification of a mortgage loan or other obligation secured by a mortgage affects the priority of the mortgage as against junior interest holders. In addition, confusion exists as to whether a mortgage modification agreement should be recorded in order to maintain mortgage priority. Finally, cases hold that if a modification constitutes a novation of an obligation secured by a mortgage, the mortgage no longer secures that obligation.

This lack of clarity in the law causes delay and unnecessary expense for borrowers and in some cases may mean that a loan is foreclosed rather than modified. In commercial transactions, attorneys are reluctant to issue unqualified opinion letters for modifications. Even with modifications that only change the terms of the debt, borrowers may be required to pay for recording a modification agreement, for a title update to confirm that there are not intervening liens, for a title insurance endorsement, or for a qualified opinion letter. For residential borrowers in distress, obtaining the acknowledgment required for a modification agreement to be recorded may prove difficult. Furthermore, a junior lienholder may obstruct an attempted modification even when the modification will not prejudice the junior lienholder.

III. Typical Provisions of Mortgages and Modification Agreements

The Mortgage Modifications Act does not operate in a vacuum. It operates on mortgages and on modification agreements that typically contain several relevant provisions.

First, a well-drafted mortgage will contain a provision to the effect that the mortgage secures all modifications, amendments, extensions, and restatements of the loan. The operation of the act is not dependent on such a provision in a mortgage.

Second, most commercial mortgages contain a due-on-encumbrance clause, which provides that the lender may accelerate the loan if the collateral is encumbered without the consent of the lender. A commercial mortgage may also contain a covenant by the borrower not to further encumber the mortgaged property without the lender's consent. If the holder of a senior mortgage agrees to a junior lien, the parties will generally enter into an intercreditor agreement defining their respective rights and obligations with respect to the collateral and the loans. Residential mortgages generally do not contain a due-on-encumbrance clause because the Garn-St. Germain Act, 12 U.S.C. 1701j-3, prohibits the exercise of a due-on-encumbrance clause in a residential mortgage. Thus, residential borrowers may and often do obtain secondary financing such as a home equity loan.

Finally, a well-drafted mortgage loan modification agreement will contain a no-novation provision to the effect that the modification does not constitute a novation of the secured obligation or the mortgage.

IV. Operation of the Act and Exclusions from the Act

The act creates safe harbor modifications of a mortgage loan or other transaction secured by a mortgage. For the listed modifications: (1) the mortgage continues to secure the obligation as modified; (2) the modification does not affect the priority of the mortgage; (3) the recording of a mortgage modification agreement is not necessary to the retention of priority; and (4) the modifications are not so substantial as to constitute a novation. The types of modifications that are within the safe harbors are set forth in the act and described in reporter's notes. Included among the safe harbor modifications are the extension of the maturity of the loan, a decrease in the interest rate of the loan, capitalization of unpaid interest, changes to escrow or insurance provisions, modification of an existing condition to an advance of funds that was allowed before the modification, and changes to financial covenants. The safe harbor modifications are ones that generally would not materially prejudice a junior interest holder.

Modifications outside of the safe harbors are governed by other law. An example of the type of modification that falls outside of the safe harbor is a new advance not contemplated by the original loan. Such an increase in the principal of the loan is not in the safe harbor because it would materially prejudice a junior lienholder. Cases hold that the senior lienholder loses priority to the extent of the increase. Another example is an increase in the interest rate of a loan because such an increase can materially prejudice a junior interest holder.

Some transactions are expressly excluded from the operation of the act and thus are also

1 governed by other law. These include changes in the collateral, changes in the identity of a
2 borrower or guarantor, and transfers of a loan.

3
4 The act removes roadblocks to modification by making the law more certain and by
5 protecting the priority of a mortgage for specified modifications within the safe harbor. The act
6 seeks to adopt the appropriate balance between the rights of the parties to a senior mortgage to
7 modify loan terms and the rights of a junior interest holder to avoid material prejudice to its lien
8 position. The act defines as a matter of statutory law certain modifications that will not be treated
9 as materially prejudicial to junior interests. With greater clarity in the law, for many
10 modifications, borrowers will avoid the costs of recording, of a title policy endorsement, and of a
11 legal opinion. In addition, by facilitating modifications, borrowers may be able to avoid a
12 foreclosure.

13 14 **NOTES TO COMMITTEE:**

15
16 **1. “Questions for the Committee” within the draft are not intended to be exhaustive,**
17 **and we hope that the Committee will have many questions and comments of their own.**

18
19 **2. These brackets {} indicate a choice for the committee. Straight brackets []**
20 **indicate a choice for an enacting state.**

21
22 **3. The ULC has asked the vice chairs and chairs of all drafting committees to work**
23 **with the reporters of the committees to prepare the prefatory notes and comments. This**
24 **development accounts for the change in the title of the prefatory note.**

25
26 **4. The reporter, vice chairs, and chair will appreciate comments and suggestions**
27 **from everyone on the roster about the entire draft; that is, the text of the act, prefatory**
28 **note, and reporter’s notes. We are looking for typographical errors, substantive errors,**
29 **and inconsistencies between the text of the act and the prefatory note and the reporter’s**
30 **notes or comments.**

31
32 **5. As used in these notes and questions, “Committee” includes Commissioners,**
33 **Advisors, Observers, and any others to whom this draft is distributed.**

1 **Mortgage Modifications Act**

2 **Section 1. Title**

3 This [act] may be cited as the Mortgage Modifications Act.

4 **Section 2. Definitions**

5 In this [act]:

6 (1) “Financial covenant” means an obligation to satisfy a test of or to provide
7 evidence of an obligor’s continued creditworthiness or the adequacy of the value of security.

8 (2) “Mortgage” means a consensual interest in real property to secure payment or
9 performance of an obligation regardless of how the record creating the interest is denominated,
10 including a mortgage, deed of trust, trust deed, security deed, indenture, or deed to secure debt.

11 The term does not include a consensual interest to secure an obligation owed by a unit owner to a
12 condominium association, owners’ association, or cooperative housing association for
13 association dues, fees, or assessments.

14 (3) “Mortgage agreement” means a record that creates a mortgage.

15 (4) “Obligation” means a debt or other duty or liability secured by a mortgage.

16 (5) “Obligor” means a person that:

17 (A) owes payment or performance of an obligation;

18 (B) granted a mortgage; or

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

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

1 (7) “Record”, used as a noun, means information:

2 (A) inscribed on a tangible medium; or

3 (B) stored in an electronic or other medium and retrievable in perceivable
4 form.

5 (8) “Transaction document” means a record that creates, evidences, secures, or
6 otherwise relates to an obligation and may include a promissory note, loan agreement, credit
7 agreement, mortgage document, or other record executed in connection with an obligation.

8 **Reporter’s Notes**

9 **1. Financial Covenant.** Examples of financial covenants include requirements for a
10 borrower to maintain a certain level of income or net worth, for maintenance of a certain loan-to-
11 value ratio or debt service ratio, for furnishing financial records, for production of tax returns,
12 and for maintenance of deposit accounts with the lender.
13

14 **2. Mortgage.** A “mortgage” is a consensual interest in real property to secure payment or
15 performance of an obligation. Depending upon local usage and custom, a record that creates a
16 consensual interest in real property to secure payment or performance of an obligation may be
17 denominated a mortgage, deed of trust, trust deed, security deed, indenture, deed to secure debt,
18 or the like. Under the law of some states, an installment land contract, sometimes called a
19 contract for deed, may create a consensual interest in real property to secure payment or
20 performance of an obligation.
21

22 The definition excludes a consensual interest to secure an obligation owed by a unit
23 owner to a condominium association, owners’ association, or cooperative housing association for
24 association dues, fees, or assessments because the act is not intended to apply to the modification
25 of a declaration of covenants, conditions, and restrictions or other record that evidences an
26 obligation owed by a unit owner to the association for association dues, fees, or assessments. A
27 unit owner includes a homeowner, condominium owner, or cooperative unit owner/lessee who is
28 a member of the association (or a shareholder in the case of a cooperative). The reason for the
29 exclusion is that the modification of such a record does not raise the same types of issues raised
30 by modifications of other consensual liens.
31

32 **3. Mortgage agreement.** A mortgage agreement is a record that creates a mortgage.
33 Depending upon local usage and custom, a record that creates a mortgage may be denominated a
34 mortgage, deed of trust, trust deed, security deed, indenture, deed to secure debt, or the like. An
35 installment land contract, sometimes called a contract for deed, is included within the definition
36 of a mortgage agreement if under state law it creates or retains a consensual interest in real
37 property to secure payment or performance of an obligation.
38

1 A mortgage agreement may also create a security interest in fixtures and personal
2 property in addition to the real property that it encumbers, and in such a case, it is still a
3 mortgage.
4

5 **4. Obligation.** The term includes a non-recourse debt, whether the debt is non-recourse
6 due to the application of anti-deficiency judgment legislation, agreement of the parties, or for other
7 reasons.
8

9 **5. Obligor.** This definition is based on the definition of the term in the Uniform Home
10 Foreclosure Procedures Act. Subsection (a) covers the borrower or debtor; subsection (b) covers
11 a mortgagor who is not the borrower or debtor; and subsection (c) covers a guarantor.
12

13 **6. Person.** The definition of “person” is the standard Uniform Law Commission
14 definition.
15

16 **7. Record.** The definition of “record”, used as a noun, is the standard Uniform Law
17 Commission definition.
18

19 **8. Transaction Document.** The term is intended to broadly cover any record creating,
20 evidencing, or relating to a transaction secured by a mortgage, including a loan transaction,
21 credit facility, debt offering, or other obligation. The term includes a promissory note, credit
22 agreement, loan agreement, indenture, transferable record, and the like, as well as the mortgage
23 agreement itself.
24

25 **Section 3. Scope and Exclusions**

26 (a) Except as provided in subsections (b), (c), and (d), this act applies to the modification
27 of a transaction document.

28 (b) This [act] does not affect:

29 (1) the law of this state that governs the required content of a mortgage
30 agreement;

31 (2) a statute of limitations or other statute of this state governing the expiration of
32 the right to enforce an obligation or a mortgage;

33 (3) a recording statute of this state;

34 (4) except as provided in Section 4(b)(8), the law of this state governing the
35 priority of future advances.

36 (c) This [act] does not affect:

1 (1) a release of, or addition to, property encumbered by a mortgage;

2 (2) a release of, or other change in the identity of, an obligor; or

3 (3) an assignment or other transfer of an obligation.

4 (d) This act does not affect the priority of an interest that is senior to a mortgage before
5 modification of a transaction document.

6 **Reporter's Notes**

7 1. **Exclusions.** The act does not change or override certain laws, and subsection (a) lists
8 those laws. Subsection (b) lists modifications and transactions to which the act does not apply.

9
10 2. **Laws governing contents of a mortgage.** The act does not affect any state law that
11 requires a mortgage to include certain terms, such as a statute that requires that a mortgage state
12 the maximum principal of a loan.

13
14 3. **Statutes of limitations.** The act does not override statutes of limitations, statutes of
15 repose, marketable title acts or other statutes that govern the expiration of the right to enforce an
16 obligation or a mortgage and that may depend upon the maturity date of a loan that is stated in a
17 recorded mortgage.

18
19 4. **Recording acts.** The act does not affect state recording acts.

20
21 5. **Laws governing the priority of future advances.** The Act does not override existing
22 law governing future advances except that a waiver or modification of an existing condition to a
23 future advance is within the safe harbor as provided in section 4.

24
25 6. **Release of or addition to collateral.** The act does not apply to a modification of a
26 mortgage that releases or adds to the mortgaged property.

27
28 7. **Change in identity of obligor.** The act does not apply to a release or other change in
29 the identity of a borrower, mortgagor, guarantor, or other obligor.

30
31 8. **Assignment of an obligation.** The act does not apply to the assignment or other
32 transfer of a mortgage loan or other obligation secured by a mortgage because such a transfer is
33 not a modification. This section makes clear that transfers are not covered by the act.

34 9. **Senior interests.** The act does not affect the priority of senior interests including tax
35 liens that have priority by statute.

36 **Section 4. Modification of Transaction Document**

37 (a) If a transaction document is modified as described in subsection (b):

- 1 (1) the mortgage secures the obligation as modified;
- 2 (2) the modification does not affect the priority of the mortgage;
- 3 (3) the recording of an agreement modifying the mortgage is not necessary to
- 4 retain the priority of the mortgage; and
- 5 (4) the modification does not constitute a novation.

6 (b) Subsection (a) applies to any one or more of the following:

- 7 (1) an extension of the maturity date of an obligation;
- 8 (2) a decrease in the interest rate of an obligation;
- 9 (3) a modification of the method of calculating interest that does not result in an
- 10 increase in the interest rate as calculated on the date that the modification becomes effective;
- 11 (4) a capitalization of unpaid interest or another unpaid obligation;
- 12 (5) a forgiveness, forbearance, or other reduction of principal, accrued interest, or
- 13 other monetary obligation;
- 14 (6) an addition, modification, or elimination of a requirement for maintaining an
- 15 escrow or reserve account for payment of taxes, insurance, or another obligation;
- 16 (7) an addition or modification of a requirement for acquiring or maintaining
- 17 insurance;
- 18 (8) a modification of an existing condition to an advance of funds that was
- 19 allowed under the provisions of a transaction document before the modification;
- 20 (9) an addition or modification of a financial covenant of an obligor; or
- 21 (10) a modification of the payment amount or schedule resulting from another
- 22 modification described in this subsection.

23 (c) The effect of a modification not described in subsection (b) is governed by other law.

1 **NOTES TO THE COMMITTEE:**

2
3 **QUESTIONS FOR THE COMMITTEE:**

4
5 **1. Should we omit or add any safe harbor modifications or change the wording of**
6 **any of the safe harbor modifications?**

7
8 **2. Should we have a safe harbor for a modification from interest only to amortized**
9 **or requiring periodic installments of principal? This is a common modification if a**
10 **construction loan is extended after completion of construction.**

11
12 **Reporter's Notes**

13 **1. Applicability.** Section 4 applies to the modification of a transaction document. The
14 provisions of subsection (a) apply to modifications that are within the list in subsection (b) of
15 safe harbor modifications. The provisions of subsection (a) also apply to a restatement of a
16 mortgage transaction record that has only those modifications that are within the safe harbor list.

17
18 **2. Priority.** The act creates a safe harbor for modifications that will not cause the loss of
19 priority of a mortgage. Under common law and the Restatement, if an obligation secured by a
20 mortgage is modified, the mortgage “retains priority as against junior interests in the real estate,
21 except to the extent that the modification is materially prejudicial to the holders of such interests.
22 . . .” Restatement Third) of Property—Mortgages § 7.3(b). However, parties must sometimes
23 litigate whether a modification is materially prejudicial. The act creates certainty by providing
24 that certain modifications of obligations do not cause a loss of priority. With greater clarity in the
25 law, borrowers will avoid the costs of recording, of a title policy endorsement, and of a legal
26 opinion for many types of modifications.

27
28 **3. Recording.** For modifications within the safe harbor, recording of a mortgage
29 modification is not required to maintain the priority of the mortgage, but recording may be
30 desirable for other reasons. For example, if the mortgage itself is modified, a lender may want to
31 record a modification agreement to give notice to third parties of the modifications. If the
32 maturity date of a loan is extended, a lender may want to record a modification agreement to give
33 public notice of the extension of the statute of limitations for enforcement of the mortgage.

34
35 **4. No novation.** A novation, in the context of a mortgage loan, means a replacement of
36 the existing obligation with a new obligation. Courts may find that a modification of a loan is so
37 substantial that it is treated as a new loan. If a modification is so substantial as to constitute a
38 novation of the loan, some cases have held that the mortgage no longer secures the modified
39 loan. *See, e.g., In re Fair Finance Co.*, 834 F.3d 651 (2016). Subsection (a)(4) provides that
40 modifications that fall within the safe harbor are not so substantial as to constitute a novation.
41 Thus, if a modification is within the safe harbor, the mortgage continues to secure the loan or
42 other obligation.

43
44 **5. Safe harbor modifications.** Subsection (b) lists modifications that fall within the safe
45 harbor. The listed modifications are those that generally would not be materially prejudicial to a

1 junior interest holder. Some of the listed modifications, such as decreasing the interest rate or
2 forgiving unpaid interest, would always be of benefit to a junior interest holder. Other
3 modifications in the list could arguably prejudice a junior interest holder under certain
4 circumstances but would usually not be materially prejudicial.

5
6 **a. Extension of maturity date.** Most courts hold that a junior lienholder is not
7 materially prejudiced by the extension of the maturity date of a loan. *See, e.g.,* Lennar Northeast
8 Partners v. Buice, 57 Cal. Rptr. 2d 435 (Cal. Ct. App. 1996); Shultis v. Woodstock Land Dev.
9 Assocs., 594 N.Y.S.2d 890, 893 (N.Y. App. Div. 1993). In some circumstances, a junior
10 lienholder could be prejudiced if the value of the property falls during the extended term of the
11 loan. The Restatement position is that an extension of the maturity of a senior mortgage loan is
12 generally beneficial to junior lienholders because it makes foreclosure of the senior lien less
13 likely. See Restatement Third) of Property—Mortgages § 7.3 cmt. c. An extension of the
14 maturity of a loan is a very common modification, and clarity that it does not cause a loss of
15 priority will save time and expense, facilitate loan modification to avoid foreclosure, and avoid
16 litigation.

17
18 **b. Decrease in interest rate.** A decrease in the interest rate does not prejudice a
19 junior interest holder. A decrease in the interest rate benefits a junior interest holder by
20 decreasing the amount of the obligation and by making it more likely that the borrower can pay.

21
22 **c. Modification of method of calculating interest.** Parties may agree to change
23 the index used for calculating interest or may change from a fixed to a variable rate or vice versa.
24 Such a modification may result in an increase or decrease in the amount of interest owed, and the
25 parties may not know at the time of the modification whether it will ultimately result in an
26 increase or decrease in the total amount of interest to be paid. Subsection (b)(3) creates a safe
27 harbor for those changes that do not result in an increase in the interest rate as calculated at the
28 time of the modification. A temporary decrease in the interest rate with a later increase above the
29 original rate would not be within the safe harbor if interest as calculated on the date of the
30 modification would be more than before the modification. Whether a change from a fixed to a
31 floating rate or vice versa is within the safe harbor is determined based on the floating rate on the
32 date of the modification.

33
34 **d. Capitalization of unpaid interest or another unpaid obligation.**
35 Capitalization of unpaid interest increases the principal of a loan; however, unpaid obligations
36 are already owed and secured by a mortgage. Thus, it does not prejudice a junior lienholder in
37 the same way that a new advance would. *See* Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R.
38 642 (Bankr. E.D. Pa. 2020), *aff'd*, 2021 WL 4037508 (E.D. Pa. 2021). Capitalization of unpaid
39 interest is a modification that commonly occurs when a borrower is in default and the lender has
40 agreed to the modification as an alternative to foreclosure. Avoiding foreclosure by a senior
41 mortgage holder benefits a junior lienholder. In addition, when unpaid amounts are capitalized,
42 the loan is no longer in default; thus, default interest and late charges will stop accruing, which
43 also benefits a junior lienholder.

44
45 **e. Forgiveness or reduction of obligation.** Forgiving or otherwise reducing a
46 monetary obligation benefits a junior interest holder.

1 **f. Insurance and escrow requirements.** Changes in the requirements for
2 maintaining insurance and changes in requirements for maintaining an escrow account should
3 not prejudice a junior lienholder and might be a benefit if the modification better protects the
4 collateral and insures the payment of insurance premiums and taxes.

5
6 **g. Modification of an existing condition to an advance of funds.** If a loan
7 already provides for an advance, the waiver or modification of a condition to that advance should
8 not materially prejudice a junior lienholder in most circumstances. In a construction loan, the
9 advance of funds allows the borrower to continue construction and to pay contractors and
10 subcontractors, which should be of benefit to a junior lienholder.

11
12 **h. Modification of a financial covenant.** Financial covenants are commonly
13 modified in commercial loans and should not generally cause material prejudice to a junior
14 lienholder. Examples of financial covenants include requirements for a borrower to maintain a
15 certain level of income or net worth, for maintenance of a certain loan-to-value ratio or debt
16 service ratio, for furnishing financial records, for production of tax returns, and for maintenance
17 of deposit accounts with the lender.

18
19 **i. Modification of payment amount or schedule.** Some of the safe harbor
20 modifications may result in changes in the payment amount or schedule. For example, a decrease
21 in the interest rate may result in lower payments, and an extension of the maturity date of a loan
22 will result in a changed payment schedule. These modifications are also within the safe harbor.

23
24 **6. Modifications not within the safe harbor.** Modifications that are not within the safe
25 harbor are governed by other law. Under common law, a mortgage as modified retains its
26 priority except to the extent that a modification materially prejudices junior interest holders. *See*
27 *Fraction v. Jacklily, LLC (In re Fraction)*, 622 B.R. 642, 649 (Bankr. E.D. Pa. 2020), *aff'd*, 2021
28 WL 4037508 (E.D. Pa. 2021). Under the Restatement, a “mortgage as modified retains priority
29 as against junior interests in the real estate, except to the extent that the modification is
30 materially prejudicial to the holders of such interests and is not within the scope of a reservation
31 of right to modify as provided in Subsection (c).” Restatement (Third) of Property—Mortgages §
32 7.3(b). The safe harbor modifications in this act are those that generally would not prejudice a
33 junior interest holder. Other modifications may or may not materially prejudice a junior interest
34 holder and thus may or may not cause a loss of priority. Note that a modification may result in a
35 split priority with the senior mortgage losing priority only to the extent the that the modification
36 prejudices the junior interest holder. *See, e.g., Shultis v. Woodstock Land Dev. Assocs.*, 594
37 N.Y.S.2d 890, 893 (N.Y. App. Div. 1993). In a jurisdiction that has adopted Restatement §
38 7.3(c), if the mortgage has a provision reserving the right “to modify the mortgage or the
39 obligation it secures, the mortgage as modified retains priority even if the modification is
40 materially prejudicial to the holders of junior interests” unless the mortgagor has terminated that
41 right under § 7.3(d). Restatement (Third) of Property—Mortgages § 7.3(c), (d).

42
43 **7. Examples.** The following examples illustrate the operation of this section.

44
45 **a. Example 1:** A lender makes a loan evidenced by a promissory note in the
46 principal amount of \$100,000 secured by a mortgage. The interest rate on the loan is 7% per

1 annum. A creditor obtains a judgment lien against the mortgaged property. The borrower and
2 lender subsequently agree to extend the term of the loan for an additional five years, to reduce
3 the interest rate to 6% per annum, and to require flood insurance. The modifications result in a
4 change in the borrower's payments. Because the modifications are all within the safe harbor list,
5 the lender retains its priority as against the judgment lien creditor. Recordation of a modification
6 agreement is not necessary to retain priority, but the lender may choose to require recordation in
7 order to extend the statute of limitations based on the new maturity date.

8
9 **b. Example 2:** A lender makes a loan evidenced by a promissory note in the
10 principal amount of \$100,000 secured by a mortgage. The loan does not provide for additional
11 advances. A creditor obtains a judgment lien against the mortgaged property. The borrower and
12 lender subsequently agree to modify the loan to increase the principal amount of the loan to
13 \$150,000, and the lender advances the additional \$50,000. Because this modification is not
14 within the safe harbor list and materially prejudices a junior interest holder, the lender will lose
15 priority to the extent that the judgment lien creditor is prejudiced. Most courts would hold that
16 the priority is split, with the lender retaining priority as to the original loan terms and losing
17 priority only as to the new advance. *See, e.g., Shultis v. Woodstock Land Dev. Assocs.*, 594
18 N.Y.S.2d 890, 893 (N.Y. App. Div. 1993) (split priority for increase in interest rate).

19
20 **c. Example 3:** A lender makes a loan evidenced by a promissory note in the
21 principal amount of \$100,000 secured by a mortgage on the borrower's home. The borrower
22 subsequently obtains a home equity loan in the amount of \$20,000. The borrower later goes into
23 default on the first mortgage loan and negotiates with the loan servicer to modify the loan.
24 Modifications include an extension of the maturity date of the loan by three years, a reduction in
25 the interest rate on the loan for two years, the capitalization of unpaid interest, and the addition
26 of an escrow requirement for taxes and insurance. The first lien lender retains its priority as
27 against the home equity loan because the modifications are all within the safe harbor.
28 Recordation of a modification agreement is not necessary to retain priority.

29
30 **d. Example 4:** A lender makes a construction loan in the principal amount of
31 \$100,000 secured by a mortgage. The loan agreement lists conditions which must be satisfied
32 before each advance of funds. The lender agrees to waive one of the conditions to an advance so
33 that construction may continue. The lender retains its priority as against any mechanic's liens
34 because the waiver of the condition is within the safe harbor list. Recordation of a modification
35 agreement is not necessary to retain priority.

36
37 **e. Example 5:** A lender makes a construction loan in the principal amount of
38 \$100,000 secured by a mortgage with a floating interest rate based on an index. Because of a
39 dispute with a subcontractor, the subcontractor has filed a mechanic's lien, which is subordinate
40 to the lender's construction loan. After construction is complete, the parties negotiate to extend
41 the maturity of the loan by five years, to fix the interest rate at a rate that is 1% lower than the
42 floating rate on the date of the closing of the modification, and to add financial covenants. The
43 promissory note is restated with only the listed modifications. The lender retains its priority as
44 against the mechanic's liens because the modifications are all within the safe harbor list.
45 Recordation of a modification agreement is not necessary to retain priority.

1 f. **Example 6:** A lender makes a loan evidenced by a promissory note in the
2 principal amount of \$100,000 secured by a mortgage. A creditor subsequently obtains a
3 judgment lien against the mortgaged property. The borrower is in financial distress, and the
4 borrower and lender negotiate numerous modifications to the loan. Some of the modifications are
5 within the safe harbor list and others are not. If a court determines that the modifications not
6 within the safe harbor are not materially prejudicial to the judgment lien creditor, the lender
7 retains its priority under common law.

8 9 **Section 5. Uniformity of Application and Construction**

10 In applying and construing this uniform act, a court shall consider the promotion of
11 uniformity of the law among jurisdictions that enact it.

12 **Section 6. Relation to Electronic Signatures in Global and National Commerce Act**

13 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
14 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
15 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
16 described in 15 U.S.C. Section 7003(b).

17 ***Legislative Note:*** *It is the intent of this act to incorporate future amendments to the cited federal*
18 *law. A state in which the constitution or other law does not permit incorporation of future*
19 *amendments when a federal statute is incorporated into state law should omit the phrase “, as*
20 *amended”. A state in which, in the absence of a legislative declaration, future amendments are*
21 *incorporated into state law also should omit the phrase.*

22 23 **Reporter’s Note**

24 The federal Electronic Signatures in Global and National Commerce Act, popularly
25 known as "E-Sign", was adopted in 2000 to facilitate the use of electronic records and signatures
26 in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the
27 acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It
28 largely tracks the Uniform Electronic Transactions Act, adopted by the ULC in 1999, but
29 includes consumer consent provisions and prohibits state law from giving greater legal effect to
30 any specific technology or technical specification. Under Section 102 of E-Sign, state legislation
31 attempting to regulate electronic records and signatures can opt out of federal preemption,
32 allowing some modification to the federal law, so long as the State treats the records or
33 signatures consistent with E-Sign. In order to take advantage of the exception to preemption, the
34 state law must take specific reference to E-Sign as provided in Section 6. See 15 U.S.C. Section
35 7002(a)(2)(B).

36 37 **Section 7. Transitional Provision**

This [act] applies to a modification of a transaction document if the modification is made on or after [the effective date of this [act]] regardless of when the mortgage was created.

Reporter's Notes

1. Prospective application. The act applies prospectively to modifications that occur after the effective date of the act. It does not apply retroactively to modifications that occurred before the effective date of the act. The act can apply to a modification made to a mortgage that was created before the act as long as the modification occurs after the act.

2. **Example:** At the time that the act becomes effective, A has a first mortgage, and B has a second mortgage on a borrower's property. After the effective date of the act, A and the borrower modify the first mortgage loan to extend its maturity. The act applies, and A does not lose priority.

[Section 8. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.

[Section 9. Repeals; Conforming Amendments

(a) . . .

(b) . . .]

Legislative Note: A state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to {...}. See Section { }.

Section 10. Effective Date

This [act] takes effect . . .