

D R A F T
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

January 31 – February 2, 2014 Committee Meeting

Without Prefatory Note and with Reporters' Drafting Notes

Final Meeting Draft - Redline

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January 17, 2014

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HOME FORECLOSURE PROCEDURES

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1 **HOME FORECLOSURE PROCEDURES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

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

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

12 (B) used or held for use by the homeowner as a vacation home or seasonal home;
13 and

14 (C) physically secured and in substantial compliance with the law of this state and
15 all applicable ordinances, codes, and rules.

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

22 (3) “Creditor” means a person that has the right to foreclose a mortgage under Section
23 401(b). The term does not include a person that does not own, hold or service more than five

1 mortgages at the time the notice required by Section 201 is sent.

2 **Drafters' Notes**

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

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

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

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

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

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

25 **Drafters' Note**

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

38
39 (5) "Facilitation" means the assistance of a third-party neutral at an in-person

1 meeting or other communication where the parties and facilitator can simultaneously hear one
2 another with the objective of reaching an agreement between the creditor and the homeowner for
3 a commercially reasonable alternative to foreclosure.

4 **Drafters' Note**

5
6 The definition of 'Facilitation' requires at least one 'in-person' meeting or
7 other communication between the parties and a third-party neutral. The
8 alternative requirements of either an 'in-person' meeting or other form of
9 electronic communication contemplates the continuation of the practice in many
10 jurisdictions that, as an alternative to a 'face-to-face' meeting, the parties may
11 meet by telephone, video conference or other electronic means so long as all the
12 parties and the neutral are able to simultaneously hear or communicate with one
13 another.

14
15 (6) "Facilitation agency" means [the administrative or judicial agency designated by the
16 state to supervise foreclosure facilitation].

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

21 **SEE ISSUES MEMORANDUM, SECTION 102(8) 'GOOD FAITH':**

22
23 (8) *CURRENT AMENDED DRAFT* "Good faith" means: (i) in the case of a creditor or;
24 servicer, ~~or an agent of either,~~ honesty in fact and the observance of reasonable commercial
25 standards of fair dealing ~~in the mortgage industry~~ and (ii) in the case of a homeowner or obligor,
26 honesty in fact.

27 (8) *RING PROPOSAL* (Pure 'UCC') "Good faith" means: ~~(i) in the case of a creditor,~~
28 ~~servicer, or an agent of either,~~ honesty in fact and the observance of reasonable commercial
29 standards of fair dealing ~~and (ii) in the case of a homeowner or obligor, honesty in fact.]~~

30 (8) *MILLER PROPOSAL* "Good faith" means: (i) in the case of a creditor or servicer,

1 honesty in fact and the observance of reasonable commercial standards of fair dealing and (ii) in
2 the case of a homeowner or obligor, honesty in fact and the observance of generally accepted
3 standards of fair dealing.

4 (9) “Holder” means the person in possession of a negotiable instrument that is payable
5 either to bearer or to an identified person ~~that is the person~~ in possession of a negotiable
6 instrument.

7 **Drafters’ Note**

8
9 The definition of ‘holder’ is taken from revised Article 1: UCC § 1-201(b)(21)(A)
10 and the terms ‘bearer’ and ‘identified person’ have the same meanings in this act
11 as in the UCC. The definition of ‘holder’ in unrevised Article 1 has slightly
12 different language, but is the same in substance.

13
14 **SEE ISSUES MEMORANDUM,**
15 **SECTION 102(10), ‘HOMEOWNER’**

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

18 **Drafters’ Notes**

19
20 At the November meeting, there were suggestions from several persons for more
21 expansive comments; please let the Reporters know of any desired additional
22 comments.

23
24 (11) “Loss mitigation” means an alternative to foreclosure offered by a creditor to a
25 homeowner in default or facing imminent default.

26 **Drafters’ Note**

27
28 The comments will be expanded to make clear that ‘loss mitigation’ includes such
29 actions as a repayment plan, forbearance agreement, loan modification, short sale,
30 partial mortgage insurance claim, negotiated transfer and deed in lieu of
31 foreclosure.

32
33 (12) “Mortgage” means a consensual interest in residential property ~~which that~~ secures an
34 obligation. The term does not include a lien that secures an obligation owed to a homeowner’s

1 association in a common interest community.

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

3 **Drafters’ Note**

4
5 In this Act the term “mortgage” refers to the lien held by the creditor, which
6 secures payment of the obligation, whereas the term “mortgage agreement” refers
7 to the writing or other record that memorializes the parties’ agreement and creates
8 the mortgage. Depending upon local usage and custom, the mortgage agreement
9 may be denominated as a mortgage, deed of trust, trustee deed, security deed,
10 deed to secure debt, or the like.

11
12 (14) “Mortgage registry” means an electronic registry, created pursuant to federal law~~s~~,
13 of holders of the right to enforce mortgages and obligations secured by mortgages~~s~~; which
14 maintains the records of those mortgages and obligations pursuant to standards designed to
15 ensure that the record of each mortgage and obligation is unique, identifiable, and unalterable.

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

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

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

23 **Drafters’ Note**

24
25 In states that allow one or more types of nonjudicial foreclosure of residential
26 mortgages, the drafter should insert a reference to the relevant statute or statutes
27 here. In states that do not allow nonjudicial foreclosure, this definition should be
28 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.

29
30 (18) “Obligation” means a debt or other duty or liability of a homeowner.

Drafters' Note

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

(19) "Obligor" means a person that, with respect to an obligation:

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

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

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

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

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

(21) "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.

**SEE ISSUES MEMORANDUM,
SECTION 102(22), 'RESIDENTIAL PROPERTY'**

(22) "Residential property" means real property ~~[in this state?]~~ improved with not more than four dwelling units, ~~including structures ancillary to a unit~~ with respect to which, when a mortgage is created, a property owner occupies or intends to occupy at least one unit for personal, family, or household purposes. The term includes an attached single-family unit, a single-family manufactured-housing unit treated as real property under law of this state, a time share in residential property if that time share is treated as real property under law of this state, real property on which construction of not more than four dwelling units has commenced, and a single-family unit in a common-interest community. The term does not include a parcel of real

1 property used primarily for non-residential purposes such as farming, commercial, or industrial
2 uses when a mortgage is created.

3 Drafters' Note

4 1. This revision to the definition of “residential property” limits the scope of the
5 Act to residential property that is owner-occupied at the time of loan origination. The
6 definition also excludes parcels of real property that are used primarily for non-residential
7 business purposes but which also contain one-to-four dwelling units, such as a farm with
8 a farmhouse.

9
10 2. The term “residential property” does not include property rented or held for
11 rental by the owner when the mortgage is created, unless an owner personally occupies at
12 least one dwelling unit. If the property is owner-occupied when a mortgage is created,
13 the property remains to be “residential property” under this Act notwithstanding an
14 owner’s subsequent conversion of the property to rental property.

15
16 (23) “Servicer” means a person responsible for servicing an obligation, including a
17 person that makes, holds or owns an obligation if that person also services the obligation.

18 (24) “Servicing” means:

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

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

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

26 **Comment**

27 The definitions of ‘Servicer’ and ‘Servicing’ are adapted from the Real Estate
28 Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R.
29 § 3500.2 (b) and have the same meanings as in that Act.

30
31 (25) “State” means a state of the United States, the District of Columbia, Puerto Rico, the

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

Drafters' Notes

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

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

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

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

Drafters' Notes

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

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

40
41 **Example:** Buyer purchases a residential condominium unit, financing the

1 purchase with a mortgage. A foreclosure of the mortgage is within the scope of
2 this Act, regardless of Buyer's intended use or actual use of the property.
3 Similarly, if Buyer purchases five units in the same condominium community,
4 each financed with a separate mortgage, a foreclosure of any of those mortgages
5 is within the scope of this Act.
6

7 3. However, the Act also makes clear that while this Act would apply to
8 the foreclosure of mortgages created before the effective date of this Act, it would
9 not apply to a foreclosure action that the creditor had commenced before the
10 effective date of the Act; this is made clear in Section 701, describing the
11 'Effective Date' of the Act.
12

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

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

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

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

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

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

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

27 **SEE ISSUES MEMORANDUM.**

28 **SECTION 106, 'APPLICATION OF LOCAL REGULATIONS'**

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

30 (a) Notwithstanding (insert reference to any applicable Home Rule' provisions under the
31

1 | law of this state)] No ordinance or regulation of a -municipality, county or other political
2 | subdivision in this state may (i) regulate, restrict or limit the process by which mortgages on
3 | residential property are foreclosed, or (ii) impose any obligation on a person holding an interest
4 | in a mortgage or deed of trust on residential property which is not imposed on all owners of real
5 | property in that political subdivision, unless expressly authorized by legislation of this state.]

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

9 | **Comment**

10 |
11 | This section generally tracks the prohibition on local regulation of condominium
12 | conversions contained in Section 1-106 of the Uniform Common Interest
13 | Ownership Act and is intended to insure that foreclosure will be governed by a
14 | single uniform standard throughout the state.

15 |
16 | Otherwise, under subsection (b), however, municipal ordinances generally
17 | applicable to real estate in a municipality would not be affected by this act,
18 | regardless of who owns the property, and therefore will apply with equal force to
19 | real estate owned by homeowners or lenders.

20 |
21 | Accordingly, for example, a local ordinance mandating the maintenance of yards
22 | and blighted property would apply with equal force to a blighted property whether
23 | or not owned by a homeowner or lender, and an ordinance enabling a
24 | municipality to repair blighted property and lien the property for the costs of the
25 | work, if it were otherwise lawful under applicable state law, would not be barred
26 | by subsection (a).

27 |
28 | **SEE ISSUES MEMORANDUM,**

29 | **MILLER PROPOSAL RE ADDITIONAL GENERAL PROVISIONS**

30 | **[ARTICLE] 2**

31 | **NOTICES; RIGHT TO CURE**

32 | **SEE ISSUES MEMORANDUM,**

33 | **SECTION 201 (a) and (b) 9, 'NOTICE TO HOMEOWNER AND OBLIGOR'**

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

2 (a) ~~Foreclosure~~A creditor or servicer may not commence foreclosure until 30 days after
3 the creditor or servicer sends separately to each [homeowner and] obligor a notice of intent to
4 foreclose and right to cure.

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

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

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

12 (3) the date by which the default must be cured;

13 (4) that if the homeowner or obligor does not cure, the creditor or servicer may
14 demand payment of the full amount due, not just past-due payments, and may foreclose the
15 mortgaged property;

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

18 (6) that the homeowner or obligor may dispute the default or raise any other
19 defense to foreclosure or payment of the obligation and how to exercise those rights;

20 (7) the ~~specific basis for the right of the creditor or servicer to foreclose and,~~
21 person entitled to foreclose under Section 401; and if the creditor or servicer is acting on behalf
22 of the owner of the obligation, the identity of the owner;

23 (8) that the homeowner or obligor may request a copy of the homeowner's

1 mortgage note or other evidence of the obligation and a copy of any record required to
2 demonstrate the right to foreclose as provided in Section 401; and
3 ~~(9) that the homeowner or obligor will receive a separate notice of available~~
4 ~~foreclosure alternatives and facilitation; and~~
5 (9) ~~(10)~~ if sent to an obligor other than the homeowner, that the notice is being
6 sent to the homeowner as well as any other obligor regardless of whether the obligor has an
7 interest in the mortgaged property.

8 (c) The notice may state that additional sums may come due after the date of the notice.

9 **Drafters' Notes**

10
11 1. The itemization of the amount due as of the notice date is a critical
12 piece of information for the homeowner or obligor and should be stated as exactly
13 as possible. The amount included for attorneys' fees should be limited to those
14 accrued prior to the date of the notice, and thus should not include retainers or
15 advances to attorneys that would be refunded in the event of a prompt cure.
16 Amounts chargeable to the homeowner or obligor for services by third parties
17 such as title examiners should only be estimated if the exact amount is not readily
18 ascertainable when the notice is prepared.

19
20 2. The mortgage obligation may be accelerated by filing a complaint,
21 scheduling a sale, or by separate notice of acceleration – the notice of intent to
22 foreclose does not by itself accelerate the debt. The notice need not refer to
23 acceleration if the creditor does not intend to accelerate the obligation, for
24 example if it is fully matured. The definition of “foreclosure” in section 102
25 includes other legal methods that may be used to terminate the homeowner's
26 interest in the mortgaged property, such as a quiet title or ejectment action in the
27 case of an installment land sale contract.

28
29 3. Items (1) through (6) are adapted from the elements of notice in the
30 standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific
31 deadline to cure the default. Items (7) and (8) are the ownership statement
32 required by the national servicing settlement, and call for the servicer to identify
33 its basis for standing at the outset of foreclosure proceedings, so that any disputes
34 can be resolved promptly. This notice would not displace all state-specific aid
35 programs and counseling notices which necessarily will depend on state funding –
36 for example, Pennsylvania requires a separate 30-day notice of how to apply for
37 its Homeowner's Emergency Mortgage Assistance Program.

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SECTION 203. RIGHT TO CURE DEFAULT.

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

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

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

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

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

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

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

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

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

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Drafters' Notes

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

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

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

SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.

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

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

30 (2) the identity of the person.

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

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Drafters' Notes

1. Section 205 is based on UCC § 9-605. Its purpose is to relieve the creditor from duties owed to a homeowner or obligor if the creditor or servicer does not know about that person. This may be the case, for example, when an

1 original homeowner has sold the property to a purchaser, or when the original
2 homeowner has died and his or her interest has passed to an heir or devisee.
3

4 2. In defining what it is that a creditor ‘knows’, this Section intends that
5 the creditor or servicer must have actual knowledge of the facts described, as
6 opposed to constructive knowledge. In that sense, the word ‘knows’ in this
7 Section has the same meaning as it does under UCC Section 1-202 of revised
8 UCC Article 1, which, in turn, derived from former UCC Section 1-201 (25-27).
9

10 **[ARTICLE] 3**

11 **FACILITATION**

12
13 **SEE ISSUES MEMORANDUM, ARTICLE 3- FACILITATION-INTRODUCTION**
14 **AND HIGER PROPOSAL TO**
15 **SEPARATE FACILITATION ARTICLE AS OPTIONAL**
16

17 **INTRODUCTION AND CHAIRMAN’S NOTE**
18

19 What follows are excerpts from a longer Note which appears in the Issues Memorandum.
20

21 At the November Drafting Committee meeting, Commissioner Elizabeth Kent led a
22 discussion which in some ways advocated an alternative approach to the existing draft’s ‘best
23 practices.’
24

25 Following that meeting and at my request, Commissioner Kent undertook to review
26 several of the ‘best practices’ contained in the prior draft, and convert certain of those practices
27 into proposed draft rules that the facilitation agency in an enacting state might adopt.
28

29 In the course of her efforts, Commissioner Kent sought and received assistance from
30 former Dean (and former ULC Commissioner) Nancy Rogers; Professor Rogers was, among
31 other things, the Reporter for the Uniform Mediation Act (already adopted in 12 states).
32 Her initial drafts both of suggested rules and revised ‘best practices;’ appear in the Issues
33 Memorandum at Article 3, together with the current draft of the ‘Best Practices’ which were
34 originally in the November Draft. .
35

36 In the course of discussions about this drafting effort, however, it became clear that there
37 are important differences of opinion on how best to approach this subject in the statute itself.
38

39 Rather than spending time in San Diego reviewing Commissioner Kent’s work on draft
40 rules and a revised set of best practices - important though her work is - I propose to use our time
41 to consider the broader issues that exist in the field of foreclosure dispute resolution. If the
42 Drafting Committee is able to resolve those policy questions – also contained in the Issues
43 Memorandum - I believe we will be able to provide direction to the Reporters and those tasked
44 with drafting the best practices and proposed rules.

1 | the draft rules will be deferred until the Drafting Committee has resolved the
2 | several policy issues posed by the questions appearing in the Issues
3 | Memorandum.

4 | **SECTION 302. NOTICE OF FACILITATION.**

5 | (a) Not later than 30 days after a creditor or servicer has sent the notice of intent to
6 | foreclose required by Section 201, the creditor or servicer must send to the homeowner and
7 | obligor a notice of their right to participate in facilitation.

8 | (b) If the facilitation agency establishes a procedure for the agency to send notice of
9 | facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to
10 | the creditor or servicer and to each homeowner and obligor. Subject to the agency's rules, the
11 | notice may be sent before or after commencement of a foreclosure action, but must be sent
12 | before a creditor or servicer may request entry of a default or foreclosure judgment or give a
13 | notice of a judicial or nonjudicial-foreclosure sale.

14 | (cb) If there is no procedure for the agency to send notice, the creditor or servicer shall
15 | send a notice of facilitation to each homeowner and obligor, in the same manner as required for
16 | the notice under Section 201 before a creditor or servicer may request entry of a default or
17 | foreclosure judgment or give a notice of a judicial or nonjudicial-foreclosure sale.

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

20 | (d) The notice of facilitation under subsection (ca) or (cb) must include the following:

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

24 | (2) The name, address, telephone number, and e-mail address of any person

1 ~~designated the appropriate contact person or group assigned by the creditor or servicer to the~~
2 ~~homeowner or obligor by the creditor or servicer pursuant to rules of the federal Consumer~~
3 ~~Finance Protection Bureau. 12 C.F.R. §1024.40 as the homeowner or obligor's [single point of~~
4 ~~contact].~~

5 (3) The fact that the homeowner or obligor may request a facilitation meeting and
6 the ~~name and contact information for the person to contact~~ instructions to request facilitation
7 under the facilitation agency rules.

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

10 **SECTION 303. DUTY TO PARTICIPATE IN FACILITATION ~~IN GOOD~~**
11 **~~FAITH.~~**

12 (a) If a homeowner makes a request for facilitation that complies with the facilitation
13 agency rules, the agency shall schedule a meeting in accordance with its rules. ~~Each party to a~~
14 ~~facilitation must participate in facilitation in good faith.~~ The parties shall comply with agency
15 rules and any scheduling or other order established by the facilitator or the facilitation agency.

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

22 (c) A homeowner or obligor that elects to participate in facilitation shall provide
23 reasonably available financial and other information to permit the creditor to evaluate any loss-

1 mitigation options.

2 (d) Failure to ~~participate in good faith~~comply with subsection (a) includes failingure:

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

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

6 (3) to designate a person with authority to reach a settlement agreement, if such
7 authority exists;

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

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

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

15 (e) Nothing in [this Act] imposes a duty on a creditor or servicer to provide a borrower
16 with any specific loss mitigation option.

17 **Drafters' Notes**

18
19 1. As provided in Section 3013, the facilitation agency rules and
20 orders may impose additional requirements on the parties, for example requiring
21 the creditor, servicer or its agent to appear in person or to have a person with
22 authority to approve loss mitigation alternatives available by telephone at the time
23 of the facilitation session, to perform a net present value analysis, to disclose the
24 assumptions on which the analysis is based, or requiring homeowners to meet
25 with a housing counselor to qualify for facilitation. The agency will also regulate
26 procedural matters, such as time limits for exchanging documents, scheduling and
27 concluding facilitation meetings, reports by facilitators, and the like. States should
28 continue to have flexibility in the design and implementation of facilitation
29 programs, but should establish and publish the standards as required by section
30 3013. The model rules and best practices principles of facilitation set forth

1 following Section 304 should aid state facilitation agencies in designing their
2 programs.
3

4 Facilitation cannot succeed in reaching a resolution other than a
5 foreclosure sale unless both parties participate in good faith the manner
6 contemplated by the facilitation agency's rules. This requires not only the
7 participation of a person representing the creditor or servicer who has the
8 authority to enter into a settlement agreement, but also the participation of
9 necessary persons on the borrower's side - those who own the home and
10 those who are liable on the mortgage debt.

11 **SEE ISSUES MEMORANDUM.**

12 **SECTION 304, 'FORECLOSURE ACTIONS DURING FACILITATION'**

13 **SECTION 304. ~~NO~~ FORECLOSURE ACTIONS DURING FACILITATION.**

14
15 (a) After a notice of facilitation has been sent to a homeowner or obligor, a creditor or
16 servicer may, subject to other law, commence a foreclosure, but may not ~~commence a judicial~~
17 ~~foreclosure action~~, file a default or dispositive motion in a foreclosure action, or schedule or
18 cause to be scheduled a foreclosure sale unless:
19

20 (1) the homeowner or obligor does not respond to the facilitation notice, by either
21 sending a written request for loss mitigation to the creditor or servicer not later than 60 days after
22 sending the facilitation notice or by appearing at the scheduled facilitation session;:

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

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

29 (b) Notwithstanding subsection (a), a creditor or servicer may proceed to enforce the
30 mortgage [90] days after sending the notice under Section 302, unless the parties agree to

1 continue the facilitation process or the facilitation agency or court directs the parties to continue
2 the facilitation process. [The facilitation agency or court may, if it extends the facilitation period,
3 impose appropriate conditions, including the tender of periodic payments by the homeowner.]

4 **Drafters' Notes**

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

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

35
36 3. Subsection (b) contemplates a variety of situations where the 90 day
37 waiting period before foreclosure may be finalized should be extended. Examples
38 of particular situations that might warrant such an order include cases where the
39 servicer has failed to evaluate a homeowner's completed request for loss
40 mitigation in a timely manner, has failed to comply with material aspects of
41 federal servicing regulations, 12 CFR §1024.41, or has requested additional
42 documents from the homeowner late in the facilitation process.

1 [ARTICLE] 4

2
3 RIGHT TO FORECLOSE; SALE PROCEDURES

4
5 **SEE ISSUES MEMORANDUM,**
6 **SECTION 401, ' RIGHT TO FORECLOSE'**

7
8 SECTION 401. RIGHT TO FORECLOSE.

9 (a) A person described in subsection (b) may commence a foreclosure only after default
10 in the obligation and satisfaction of all conditions required by the mortgage agreement and law
11 of this state.

12 **Drafters' Notes**

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

16 2. In subsection (a), the phrase 'law of this state' includes this act as
17 well as all other law of this state

18
19 3. The conditions referred to in this subsection are those indicated in
20 the mortgage agreement or under other law as necessary to accomplish before the
21 commencement of foreclosure.

22
23 **Alternative A**

24 (b) (1) Except as otherwise provided in paragraph (2), the only person who may
25 commence a foreclosure is: ~~(1) except as otherwise provided in paragraph (3), if the obligation is~~
26 ~~evidenced by a negotiable instrument, the a~~ "person entitled to enforce" the ~~instrument specified~~
27 ~~in [U.C.C. Section 3-301]; provided, if that person is not in possession of the instrument due to~~
28 ~~its loss, theft or destruction, that person must meet the requirements of Section 403.~~ obligation
29 secured by the mortgage, determined by law of this state other than this [act].

30 **Drafters' Notes**

31 1. Alternative A for subsection (b)(1) resolves the problem of who has
32 standing to foreclose by designating the person who is entitled to enforce the
33 obligation, to be determined under other law. When the obligation is evidenced

1 by a negotiable instrument, Article 3 of the Uniform Commercial Code provides
2 the governing rules. When the obligation is not evidenced by a negotiable
3 instrument, law other than the Uniform Commercial Code will determine who is
4 entitled to enforce the obligation. One example of other law is the Uniform
5 Electronic Transactions Act (UETA), which grants to a person having control of a
6 “transferable record” the rights to enforce a promissory noted evidenced by an
7 “electronic record,” as those terms are defined in that act.

8
9 **Alternative B**

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

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

13 ~~(A) the holder of the negotiable instrument;~~

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

16 (b)(1) In this paragraph, “mortgagee of record” means a person whose name is provided
17 in a mortgage agreement or other instrument recorded in the [county land records office] as:

18 (A) with respect to a judicial-foreclosure proceeding, the owner, grantee, holder,
19 or beneficiary of the mortgage, grantee, or beneficiary; but if the mortgage has been assigned of
20 record, the mortgagee of record is the last person to whom the mortgage has been assigned of
21 record; or

22 (B) with respect to a nonjudicial-foreclosure proceeding, a person authorized to
23 exercise a power of sale; but if authorization to exercise the power of sale has been assigned of
24 record, the mortgagee or record is the last person to whom the power of sale has been assigned of
25 record. The term includes a trustee or substitute trustee under a deed of trust or a mortgagee who
26 holds a power of sale.

27 (C) Except as otherwise provided in paragraph (2), the only person who may

1 commence a foreclosure is the mortgagee of record, whether or not the mortgagee of record is
2 the person entitled to enforce the obligation. The obligation secured by the mortgage is
3 discharged to the extent of the net proceeds realized from the foreclosure proceedings, even if the
4 mortgagee of record is not entitled to enforce the obligation.

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

7 (3b)(2) ~~Whether or not the obligation is evidenced by a negotiable instrument, if~~
8 the obligation is registered in a mortgage registry, the only person with the right to foreclose who
9 may commence a foreclosure is the person identified as entitled to enforce the obligation ~~and the~~
10 ~~mortgage~~ on a ~~[certificate]~~ record issued by a mortgage registry as of the time the foreclosure is
11 commenced.

12 (c) In a judicial-foreclosure proceeding, the plaintiff ~~must~~ prove that it has the right to
13 foreclose under subsection (b). If the ~~plaintiff relies on~~ obligation is evidenced by a negotiable
14 instrument ~~under subsection (b)(1)~~, the [complaint] must include— a copy of the negotiable
15 instrument in its present condition ~~including any endorsement or allonge and either~~

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

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

20 If the obligation is not evidenced by a negotiable instrument under subsection ~~(b)(2)~~, the
21 [complaint] must include a copy of the records evidencing the obligation and the plaintiff's
22 ~~ownership of~~ right to enforce the obligation.

23 (d) In a nonjudicial-foreclosure proceeding, the creditor or servicer must attest by

1 affidavit to facts demonstrating that the creditor or servicer has the right to foreclose under
2 subsection (b). The affidavit must be included with the notice of foreclosure required by Section
3 201.

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

7 (f) If an obligation is evidenced by a negotiable instrument and a person with the right to
8 foreclose under subsection (b) does not own the obligation, the [complaint] described in
9 subsection (c) or the affidavit described in subsection (d) must disclose the name of the owner of
10 the obligation.

11 **Drafters' Notes**

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

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

27 The draft also makes conforming changes in subsections 401(a), 401 (b),
28 401(c) and 401(d) by making, in each case, appropriate references to subsection
29 (g).

30
31 2. This section designates the "person entitled to enforce" a negotiable
32 instrument under revised UCC Article 3 as the person with the right to foreclose
33 the mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which

1 defines who is “person entitled to enforce” a negotiable instrument. When the
2 payee of the negotiable instrument has retained possession of the instrument, that
3 person has the right to foreclose. When the payee has transferred possession of
4 the negotiable instrument to another person, the facts must be examined to
5 determine who has the right to enforce the note. The subsequent possessor may
6 become a holder under UCC Article 3 by obtaining a special endorsement or
7 blank endorsement, but this section does not require that a subsequent possessor
8 become a holder in order to acquire the right to foreclose. Such a subsequent
9 possessor may be entitled to enforce the note, but will have to allege and prove
10 facts that are sufficient to establish the right to enforce.
11

12 3. Subsection (b)(2) includes situations in which the secured obligation is
13 evidenced by an instrument that is not negotiable and situations in which the
14 obligation is not evidenced by any type of instrument authenticated by the debtor.
15 As an example of the former, an owner may sign a promissory note that has terms
16 that makes the note nonnegotiable. As an example of the latter, under the law of
17 some states an installment land contract creates a mortgage relationship between
18 the parties, in which the vendee’s obligation to pay the price usually is not
19 reflected in a negotiable instrument. In all such cases, the owner of the obligation
20 who has the right to foreclose will be either the original obligee or an assignee.
21

22 4. In judicial foreclosure, under existing law the creditor generally must
23 confirm possession or account for possession of the original note at the time of
24 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the
25 law appears not to require confirmation of possession of the original note prior to
26 commencement of foreclosure proceedings or the sale. This section requires that
27 the foreclosing person have possession of the negotiable instrument prior to the
28 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,
29 unless that person prepares a lost note affidavit meeting the requirements of
30 Section 4-103.
31

32 5. The decision in subsection (b)(1) to require foreclosure by the holder of
33 a negotiable instrument, paired with the decision in subsection (b)(2) to require
34 foreclosure by the owner of other obligations, seeks to reach an appropriate
35 balance between the interests and expectations of borrowers, lenders, and their
36 assignees. It recognizes the traditional importance of qualifying as a holder of a
37 negotiable instrument under Article 3, and seeks to protect borrowers by ensuring
38 that proceeds of foreclosure sales will discharge the obligation. With respect to
39 obligations evidenced by non-negotiable instruments and other writings,
40 possession of those writings, although sometimes important, generally has less
41 significance. Thus, section (b)(2), by authorizing foreclosure by the owner of
42 such an obligation, makes irrelevant the possession of a non-negotiable
43 promissory note or another writing such as the mortgage agreement or an
44 installment land contract.
45

46 Although this distinction seems beneficial, the two-tier system does have

1 some costs, including but not limited to complexity. By authorizing the holder of
2 a negotiable instrument to foreclose, sometimes the power is conferred upon a
3 person who has no economic stake in the obligation or the collateral. The holder,
4 however, will usually have an obligation, created by contract or other law, to the
5 owner who does have an economic stake, giving it some incentive to behave
6 properly.
7

8 The two-tiered system makes it necessary to determine whether a
9 promissory note is negotiable for some cases. Uncertainty as to whether the note
10 is negotiable creates cost. If a single person both possesses the note and owns the
11 obligation, the problem is not major. If it is unclear whether the secured
12 obligation is evidenced by a negotiable instrument or by an instrument that is not
13 negotiable, the creditor may choose to proceed by complying with both
14 subsections (b)(1) and (b)(2). If, however, different persons possess the note and
15 own the obligation, the problem is harder. For example, consider a promissory
16 note secured by a mortgage and payable to the order of Creditor. Creditor enters
17 into a signed contract with Assignee pursuant to which Creditor sells the
18 promissory note to Assignee. Assignee pays Creditor, but Creditor retains
19 possession of the promissory note (and is not possessing the note as agent for
20 Assignee). If the promissory note is a negotiable instrument under UCC Article 3,
21 Creditor can commence a foreclosure under this Section, but Assignee cannot
22 (because Creditor is the holder of the note). If the promissory note is not a
23 negotiable instrument, however, Assignee is its owner and can commence a
24 foreclosure, but Creditor cannot. If Creditor and Assignee cannot reliably
25 determine, before foreclosure, whether the promissory note meets the standards
26 for negotiability, neither one will hold a clear right to foreclose. The uncertainty
27 can be cleared up only by litigation or their agreement to make a further transfer
28 (Creditor delivers the note to Assignee, or Assignee resells the note to Creditor).
29

30 6. This section does not state a separate rule for determining when a
31 creditor who holds a security interest in a note to secure an obligation owed to the
32 creditor has the right to foreclose. UCC Article 9 covers both sales of instruments
33 and assignments of instruments that secure an obligation of the assignor. A
34 creditor who takes possession of a negotiable instrument will acquire the right to
35 foreclose. Other law determines when a creditor who takes possession of an
36 instrument that is not negotiable to secure an obligation owed to the creditor
37 acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide
38 rules indicating when a secured party has the right to collect on collateral and to
39 enforce the debtor's rights with respect to property that secures obligation owed to
40 the debtor (i.e., the obligation to pay the mortgage loan to the debtor).
41

42 7. Multiple persons may hold the right to foreclose a mortgage. Other law,
43 including UCC Article 3 and the law of agency, determines whether the right to
44 foreclose may be exercised by fewer than all such persons.
45

46 8. When the obligation is owned by a trust, the owner of the obligation for

1 purposes of this Section is the trustee, not the beneficial owner or owners of the
2 trust property.
3

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

12 10. Subsection (e) authorizes the person who has the right to foreclose to
13 exercise that right through an agent. By requiring a description of the agency it
14 does not permit the principal to remain undisclosed. An agent authorized to
15 foreclose may be a loan servicer who has a pre-existing contractual relationship
16 with the creditor, or any other person appointed at any time. If the secured
17 obligation is evidenced by a negotiable instrument, the agent or the principal (the
18 person entitled to enforce the note) may hold and retain possession of the note.
19 Subsection (e) is not intended to change existing laws that authorize a third
20 person, such as a trustee under a deed of trust, to foreclose in nonjudicial
21 proceedings. In such circumstances, subsection (e) allows the beneficiary to
22 appoint an agent, but does not speak to the procedure for appointing a substitute
23 trustee.
24

25 11. Section 401 as drafted, allowing an agent or representative to
26 foreclose, is consistent with the standing decision in *Sprint Communications Co.*
27 *v. APCC Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had
28 assigned claims for compensation from long-distance carriers to collection firms.
29 In *Sprint* the Court permitted an assignee of a legal claim for money to pursue that
30 claim in federal court, even when the assignee had promised to remit the proceeds
31 of the litigation to the assignor.
32

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

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

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

1 **Drafters' Notes**

2 1. Subsection (a) restates the principle stated in UCC § 9-203(g), which
3 provides that an Article 9 transfer of a negotiable instrument also transfers the
4 mortgage (more formally, § 9-203(g) provides that attachment of a security
5 interest in a right to payment or performance secured by personal or real property
6 automatically transfers the security interest to the secured party). Section 9-
7 203(g) covers sales of negotiable instruments, other instruments, and payment
8 intangibles, as well as lending transactions in which those rights serve as
9 collateral to secure an obligation of the transferor.

10 Subsection (a) is broader than § 9-203(g); it applies regardless of whether
11 the transferee obtains an attached Article 9 security interest. It also encompasses
12 involuntary transfers such as inheritance and judicial sales. Restatement (Third)
13 of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: “A transfer of an
14 obligation secured by a mortgage also transfers the mortgage unless the parties to
15 the transfer agree otherwise.” Under the Restatement rule, parties to the transfer
16 may agree otherwise, but this section does not permit severance of the obligation
17 from the mortgage, following UCC § 9-203(g) and common-law authorities in a
18 number of states.

19
20 2. When the foreclosing party is not the originating creditor there is
21 conflicting state law, both in judicial foreclosure and nonjudicial foreclosure
22 states, as to (1) whether the foreclosing party must have an express assignment of
23 the mortgage, or a chain of assignments running back to the original mortgagee,
24 and (2) whether that assignment or the chain of assignments must be recorded in
25 the county land records.

26
27 In some states, a statute explicitly requires a recorded assignment. E.g.,
28 Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the
29 secured creditor with title to the security instrument shall be filed prior to the time
30 of sale in the [county land records].” In many states, judicial decisions going in
31 both directions interpret statutes that do not on their face provide immediately
32 obvious answers to these questions. E.g, *In re Vasquez*, 266 P.3d 1053 (Ariz.
33 2011) (recording assignments of deeds of trust is not required, although trustee
34 must record notice of trustee’s sale); *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d
35 40 (Mass. 2011) (requiring written chain of assignments).

36
37 Subsection (b) adopts the position that an express assignment is
38 unnecessary; note that subsection (a) implies an assignment upon a transfer of the
39 obligation. In addition, subsection (b) adopts the position that recordation of an
40 assignment (or notice of an implied assignment) is not a prerequisite for
41 foreclosure.

42 3. By allowing foreclosure by an assignee or transferee who qualifies as
43 the person to foreclose under Section 401, without a requirement of recording any

1 documents in the real property records, this Act makes it unnecessary to follow
2 the procedure authorized by UCC § 9-607(b), which grants a secured party the
3 right to record a copy of the security agreement and an affidavit in the real
4 property records. Compliance with the requirements of Section 401 is sufficient.
5

6 **SECTION 403. LOST, ~~STOLEN OR DESTROYED~~, OR STOLEN NEGOTIABLE**
7 **INSTRUMENT; AFFIDAVIT.**

8 **Alternative A**

9 ~~(a) If a negotiable instrument secured by a mortgage has been lost, stolen or destroyed,~~
10 ~~and the obligation is not registered in a mortgage registry, the creditor or servicer may foreclose~~
11 ~~the mortgage only if the creditor or servicer makes an affidavit attesting to the facts specified in~~
12 ~~[UCC Section 3-309(a)(1) through (3).]~~

13 **Alternative B**

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

17 (1) either (A) the creditor was entitled to enforce the instrument when loss of
18 possession occurred, or (B) the creditor has directly or indirectly acquired ownership of the
19 instrument from a person who was entitled to enforce the instrument when loss of possession
20 occurred;

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

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

1 **Revised Legislative Note:** *This subsection incorporates the language of Section 3-309 of*
2 *Revised UCC Article 3 (2002). This language is recommended both for States that have*
3 *adopted Revised Article 3 and those that have adopted a prior version of UCC Article 3.*

4
5 (b) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis
6 for its right to foreclose, the notice of intent to foreclose sent under Section 201 must state that
7 the instrument is unavailable and set forth information establishing the creditor’s right to
8 foreclose under subsection (a). In a nonjudicial-foreclosure proceeding, the notice must further
9 (1) advise the homeowner or obligor that there may be a risk that a person other
10 than the creditor will seek to enforce the instrument and that the homeowner or obligor has the
11 right to petition the [name of appropriate court] where the mortgaged property is located for an
12 order requiring the creditor to provide adequate protection against a claim by another person and
13 (2) include the indemnity described in subsection (c).

14 Drafters’ Notes

15 1. This lost-note disclosure is compatible with the Settlement Term Sheet
16 of the National Servicer Settlement, which requires for all states that the Servicer
17 send, “no later than 14 days prior to referral to foreclosure attorney or foreclosure
18 trustee,” “a statement setting forth facts supporting Servicer’s or holder’s right to
19 foreclose.” A single notice may satisfy both this subsection and the National
20 Settlement. The Settlement Term Sheet requires the following for lost notes
21 (Section II C 4):

22
23 If the original note is lost or otherwise unavailable, Servicer shall comply
24 with applicable law in an attempt to establish ownership of the note and
25 the right to enforcement. Servicer shall ensure good faith efforts to
26 obtain or locate a note lost while in the possession of Servicer or
27 Servicer’s agent and shall ensure that Servicer and Servicer’s agents who
28 are expected to have possession of notes or assignments of mortgage on
29 behalf of Servicer adopt procedures that are designed to provide
30 assurance that the Servicer or Servicer’s agent would locate a note or
31 assignment of mortgage if it is in the possession or control of the
32 Servicer or Servicer’s agent, as the case may be. In the event that
33 Servicer prepares or causes to be prepared a lost note or lost assignment
34 affidavit with respect to an original note or assignment lost while in
35 Servicer’s control, Servicer shall use good faith efforts to obtain or locate
36 the note or assignment in accordance with its procedures. In the affidavit,

1 sworn statement or other filing documenting the lost note or assignment,
2 Servicer shall recite that Servicer has made a good faith effort in
3 accordance with its procedures for locating the lost note or assignment.
4

5 2. In a non-judicial foreclosure proceeding, the additional content for the
6 notice is required because the homeowner or obligor is unlikely to appreciate the
7 risk associated with lost instruments, and it is unlikely that a court will consider
8 the issue unless the homeowner or obligor initiates consideration.
9

10
11 (bc) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis
12 for its right to foreclose or servicer makes an affidavit pursuant to subsection (a), the homeowner
13 or obligor is entitled to adequate protection against loss that might occur by reason of a claim by
14 another person to enforce the negotiable instrument. The creditor must provide in a record an
15 indemnity against loss by the homeowner or obligor. Whether adequate protection requires more
16 than the indemnity is determined by the facts of each case. In a judicial-foreclosure proceeding,
17 the court may require additional protection on ~~On~~ motion by the homeowner or obligor or on its
18 own motion, a court may require additional protection. In a nonjudicial-foreclosure proceeding,
19 the homeowner or obligor has the right to petition the [name of appropriate court] where the
20 mortgaged property is located for an order requiring the creditor to provide adequate protection
21 against a claim by another person.

22 **Drafters' Notes**

23 The act does not detail what form of any additional protection might be adequate
24 in a particular case, since the court will determine the adequacy of needed
25 additional protection in any given case. This subsection creates no presumption
26 that the indemnity is adequate. It might be, for ~~For~~ example, ~~that~~ if the foreclosing
27 party were a single purpose entity with no assets other than the mortgage being
28 foreclosed, the court might require a bond, letter of credit, or a parent guarantee.
29

30 (ed) In a judicial-foreclosure proceeding, the creditor or servicer shall file ~~the an~~ affidavit
31 attesting to facts that establish the creditor's right to foreclose under ~~described in~~ subsection (a)
32 with the [complaint]. The creditor shall provide the indemnity described in subsection (c) no

1 [later than \[confirmation of the foreclosure sale.\]](#)

2 **Drafter's Note**

3
4 This section requires a lost-note affidavit in a judicial foreclosure proceeding, thus
5 following the procedure adopted by most states in their judicial foreclosure laws.
6 The act does not require the preparation of a lost-note affidavit in a non-judicial
7 foreclosure proceeding. If an action is filed to contest or to confirm a non-judicial
8 foreclosure, the court should have the discretion to decide what proof of a lost,
9 destroyed, or stolen negotiable instrument is sufficient.

10
11 ~~(d) In a nonjudicial foreclosure proceeding, the creditor or servicer shall include with the~~
12 ~~notice of foreclosure required by Section 201:~~

13 ~~(i) the affidavit described in subsection (a);~~

14 ~~(ii) the indemnity described in subsection (b); and~~

15 ~~(iii) a statement that the homeowner or obligor has the right to petition the [name~~
16 ~~of appropriate court] where the mortgaged property is located for an order requiring the creditor~~
17 ~~to provide adequate protection against a claim by another person.~~

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

19 ~~(1) identify the owner of the negotiable instrument;~~

20 ~~(2) state from whom and the date on which the owner acquired ownership;~~

21 ~~(3) state that the negotiable instrument was not located after thorough and diligent~~
22 ~~efforts to search the records of the creditor and any prior holders or owners of the negotiable~~
23 ~~instrument and their agents; and~~

24 ~~(4) describe the nature and extent of those efforts.~~

25
26
27
28
29 A particular phrasing of the affidavit is not required. The following form of affidavit, when
30 completed, provides sufficient information:

31 INSERT SAFE HARBOR LOST NOTE AFFIDAVIT HERE

32

1 **Drafters' Notes**

2
3 1. Subsection (a) deals with the problem of lost or destroyed promissory
4 notes by requiring the preparation of an affidavit. The substance of this
5 requirement follows the 2002 amendments to Article 3. In specifying when a
6 creditor is entitled to enforce a negotiable instrument secured by a mortgage
7 notwithstanding its inability to confirm possession of the instrument, subsection
8 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted
9 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person
10 who lost possession may be a predecessor of the creditor who seeks to enforce the
11 instrument.
12

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

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

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

44 4. This section does not discuss the evidentiary effect of the affidavit in
45 judicial proceedings. Some states have statutory law on point. For example, an

1 Alabama statute provides that a lost note affidavit “must be received as
2 presumptive evidence both of the contents and loss or destruction of such
3 negotiable instrument, unless the defendant by answer, verified by affidavit,
4 denies the execution of such bond, note or bill or the endorsement, acceptance, or
5 the contents thereof, in which case proof of such execution, endorsement,
6 acceptance, or contents must be made by the plaintiff.” Ala. Code § 6-5-284.
7

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

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

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

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

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

33 (ii) posted on an Internet website that is reasonably expected to be viewed by
34 persons having an interest in purchasing the mortgaged property at least 21 days before the sale
35 and the Internet posting remains regularly available between the time of posting and the time of

1 sale.

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

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

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

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

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

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

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

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

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

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

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

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

22 **Drafters' Note**

23
24 The bracketed alternatives represent a drafting suggestion from the Style
25 Committee that is appropriate for the entire Committee to address.

1 (e) A creditor or servicer must send a copy of the public advertisement under subsection
2 (a) to the homeowner and to each obligor. The notice of public advertisement may be sent with
3 the notice of commencement of foreclosure or may be sent separately.

4 **Drafters' Notes**

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

11
12 2. This section does not specify the person who is obligated to give the
13 advertisement of sale. In many states, that person will be the creditor, but in other
14 states, another person such as a trustee or sheriff performs that function. This act
15 does not mandate a change in who is responsible for advertising the sale.

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

20
21 4. Subsection (b) states minimum requirements for the public
22 advertisement. An advertisement that lacks any of the information set forth in
23 subsection (b) is insufficient as a matter of law. An advertisement may contain
24 additional information about the mortgaged property or the sale.

25
26 5. Traditionally the law required the advertisement of foreclosure sales in
27 local newspapers. Subsection (a) allows the creditor to continue that practice, but
28 no longer specifies newspaper advertisement as required or sufficient in all cases.
29 Whether a newspaper advertisement alone is sufficient depends upon whether it is
30 commercially reasonable under the facts, which must be determined based upon
31 the nature of the property, the newspaper, and other local circumstances.
32 Similarly, whether it is commercially reasonable for a creditor *not* to publish a
33 newspaper advertisement, relying instead on other outlets, depends upon the facts.
34 In many communities, newspaper advertisements are no longer an effective
35 means of informing the public about upcoming foreclosure sales. Under these
36 circumstances, a creditor's decision not to publish in a newspaper benefits both
37 the creditor and the homeowner and any obligors by saving the expense.

38 Subsection (a) also creates a safe harbor regarding circumstances when an
39 advertisement would be commercially reasonable. Specifically, the method of
40 publication is commercially reasonable if the creditor publishes the public

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

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

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

25
26 **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor or servicer shall

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

31 **Drafters' Note**

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

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

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

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

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

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

14 **Drafters' Note**

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

1 [ARTICLE] 5

2 ACCELERATED DISPOSITIONS

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

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

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

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

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

14 (b) If the homeowner or a person claiming under the homeowner is in possession of the
15 mortgaged property, the agreement must specify the date and time when the homeowner is to
16 surrender possession to the creditor. If there is any person entitled to notice under section 502,
17 then, regardless of the terms of the proposed transfer, the homeowner is not obligated to
18 surrender possession before the 20-day period described in subsection (a)(~~32~~) has elapsed.

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

21 **Drafters’ Notes**

22
23 1. This section authorizes a transfer from the homeowner to the creditor in
24 satisfaction of the debt or other obligation. In so doing, it provides a framework
25 for existing workout arrangements such as cash-for-keys agreements and deed-in-
26 lieu of foreclosure transactions. This section and the following two sections

1 provide for a safe harbor by specifying the effect of a transfer that meets the
2 requirements of this section. This section is based in part on UCC § 9-620, which
3 provides for the acceptance of personal property mortgaged property by a secured
4 party in full or partial satisfaction of a secured obligation. The important
5 innovations here are, first, to provide an expedited procedure to discharge junior
6 liens on the property without the need for a foreclosure sale; and second, to
7 resolve a number of collateral issues that flow from the expedited procedure, as
8 detailed in Section 504.
9

10 2. This section does not specify a minimum consideration to be received
11 by the homeowner in exchange for the homeowner's agreement to transfer the
12 mortgaged property in satisfaction of the obligation. The sole exception is that if
13 the homeowner is in possession and there are third parties entitled to notification
14 of the proposed transfer, the agreement may not require the homeowner to vacate
15 possession prior to the expiration of the period for notified persons to submit an
16 objection.
17

18 As a consequence, this section as now drafted confers a substantial benefit
19 on mortgage creditors in the form of a new mechanism for converting every 'deed
20 in lieu' transaction into an accelerated means of clearing title of junior
21 encumbrancers without the need for a more traditional judicial foreclosure. In
22 doing so, the section does not require any minimum benefit on homeowners, other
23 than the general statement of effects of such an agreement contained in Section
24 504 and the rights of possession noted in paragraph 2 above,
25

26 **Drafters' Note**
27

28 The second sentence of Section 501(b) contemplates a circumstance where, for
29 example, the lender and homeowner had agreed, in a common 'cash for keys'
30 agreement, that the homeowner would move within a short period in return for a
31 sum of money. If there are junior lienholders, however, the possibility exists that
32 there may be an objection to the proposed transfer, that the agreement would not
33 be approved, and that the benefits contemplated by a homeowner under Section
34 504 from an early move-out would not be realized. This sentence makes certain
35 that the homeowner need not be displaced, even voluntarily, until the parties knew
36 whether there would be objection from a junior lienholder.
37

38 In those cases where there are no junior lienholders or other holders of
39 subordinate interests, it is likely that the parties would often choose to use a
40 traditional deed in lieu of foreclosure to accomplish their agreement, instead of
41 following this statutory negotiated transfer procedure; see section 504(f).
42

43 **Drafters' Notes**
44

45 The comments will make clear that in the case of multiple owners of residential
46 property, all the owners need to consent to a negotiated transfer; the act does not

1 authorize a forced transfer outside of foreclosure for a non-consenting co-owner.

2
3 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

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

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

12 (1) any person from which the creditor has received, before the homeowner and
13 the creditor agreed to the proposed transfer, notice of a claim-of-an-claimed interest in the
14 mortgaged property; and

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

18 **Drafters' Notes**

19
20 1. This section is based in part on UCC § 9-621, which provides for a
21 notification procedure for an acceptance of personal property by a secured party
22 in satisfaction of a secured obligation.

23
24 2. Subsection (a) provides for the court to notify parties to the foreclosure
25 proceeding of an agreement proposed by the homeowner and creditor for a
26 transfer in full satisfaction of the debt or other obligation. If there are no parties
27 to the action, other than the homeowner and the creditor, then there is no one to
28 notify. Holders of subordinate interests in the mortgaged property should have
29 been joined as necessary parties to the foreclosure action.

30
31 3. Subsection (b) provides for the creditor to notify persons who have

1 subordinate interests in the mortgaged property of an agreement proposed by the
2 homeowner and creditor for a transfer in full satisfaction of the obligation. Such
3 subordinate interest holders may have their rights terminated by the negotiated
4 transfer, and therefore they have the right to request protection pursuant to
5 Section 503.

6
7 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.**
8

9 (a) If a judicial-foreclosure proceeding is pending with respect to mortgaged property
10 and the court receives an objection from a person holding an interest -in the mortgaged property
11 which would be affected by a negotiated transfer under Section 504, the court promptly shall
12 schedule a ~~prompt~~ hearing on the objection to be held within [20] days after the objection is
13 received.

14 (b) [relocated without change from former subsection (d)] If a creditor that sent a notice
15 under Section 502(b) receives an objection from a person holding an interest in the mortgaged
16 property that would be affected by the negotiated transfer, the negotiated transfer may not
17 proceed unless the creditor initiates a judicial proceeding seeking a hearing on the objection.
18 The hearing shall be conducted as provided by subsections (c) and (d).

19 (~~bc~~) If a hearing is held under subsection (a) and if the court finds, based on an ~~the~~
20 proposed transferee demonstrates by appraisal or other wise evidence, that that there is no equity
21 in the mortgaged property available to satisfy the interests of the objecting interest holder, the
22 court shall overrule the objection. In that event, the rights of the objecting party and all other
23 interests junior to the interest of the creditor that is a party to the proposed transfer under this
24 section are extinguished effective on the date of the court's determination.

25 (~~de~~) If a hearing is held under subsection (a) and if the court finds, based on an ~~the~~
26 objecting party demonstrates by appraisal or other wise evidence, that there is equity in the
27 mortgaged property available to satisfy the interest of the objecting interest holder, the court

1 shall set a date not later than [30] days after the date of the hearing by which the objecting party
2 may tender to the creditor that is a party to the proposed transfer a sum equal to the obligation
3 owed to the creditor. ~~including interest and court costs.~~ If the objecting party tenders that sum
4 to the creditor within the time set by the court, the objecting party is entitled to the benefit of the
5 proposed negotiated transfer, and all interests junior to the interest of the objecting creditor are
6 extinguished effective on the date of tender. Otherwise, the rights of the objecting party and all
7 other interests junior to the interest of the creditor that is a party to the proposed transfer under
8 this section are extinguished, effective on the date set by the court by which the tender could
9 have been made.

10 SECTION 504. EFFECT OF NEGOTIATED TRANSFER.

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

13 (1) discharges the obligation in full;

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

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

20 (4) terminates any subordinate interest that is not insulated from termination
21 under other law.

22 Drafter's Notes

23 The comments will make clear that this act, in stating that a negotiated transfer
24 terminates all subordinate interest, does not terminate a subordinate interest that is

1 insulated under other law from termination as a result of foreclosure. The clearest
2 examples are be the common provisions in state statutes providing that various
3 kinds of residential leasehold interests are not automatically terminated by a
4 foreclosure, but may only be terminated by the creditor when they would be
5 terminable under the terms of the lease itself in the absence of foreclosure. This
6 act does not overturn the results under those statutes.

7
8 . (b) A subordinate interest is discharged or terminated under subsection (a), even in the
9 event of noncompliance with the requirements of this [act]. A creditor that fails to comply with
10 the requirements of this [act] is liable for damages in the amount of any loss caused by its failure
11 to comply.

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

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

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

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

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

1 **Drafters' Notes**

2
3 1. This section is based in part on UCC § 9-622, which specifies the effect
4 of acceptance of personal property by a secured party in full or partial satisfaction
5 of a secured obligation.
6

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

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

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

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

37 The converse of the policy is reflected in this observation from Reporter
38 Smith:

39 “I believe the better policy is to displace existing state laws on “deed in
40 lieu” transactions within the scope of this act. Among other problems, if
41 we keep both, there will be transactions in which the lender has not clearly
42 documented whether the intent to proceed under this act or under other
43 law.”
44

45 5. The act as drafted does not require notice of the proposed negotiated

1 transfer to a senior creditor because the interest of the senior creditor will not be
2 affected by that transfer. It may well be that a negotiated transfer would result in
3 a violation of a 'due on sale' clause in the senior mortgage, but whether or not
4 such a violation results would not be affected by notice to a senior creditor, and
5 the act should not suggest a contrary result.
6

7 Moreover, a practical concern for the junior creditor and borrower may be
8 that after receiving notice, the senior creditor may intervene in the hearing and
9 seek to impose a charging order on any consideration offered by the junior
10 creditor in connection with the negotiated transfer, a tactic that might jeopardize
11 the entire transfer. A junior creditor may well be willing to satisfy the senior debt
12 but more eager to quickly clear subordinate liens; no valid purpose would be
13 served by requiring more notice to senior lien holders than would be required in a
14 conventional foreclosure.
15

16 **SEE ISSUES MEMORANDUM,**
17 **SECTIONS 505-507, 'ABANDONED PROPERTY'**
18

19 **SECTION 505. ABANDONED PROPERTY.**

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

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

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

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

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

32 (5) A creditor has changed the locks on the property and, for at least 30 days after

1 the changing of the locks, the homeowner has not contacted the creditor to request entrance to
2 the property.

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

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

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

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

14 (c) In addition to serving a copy of the motion on the property owner and other parties
15 holding an interest in the property as required by other law, the party filing the motion shall post
16 a written notice on the mortgaged property [insert any posting standards such as type size,
17 location of notice, number of postings, mandatory language etc.]

18 (d) When a motion is filed pursuant to subsection (b), the court shall issue an order to
19 show cause commanding the parties it considers appropriate to appear before the court on a day
20 and at a place stated in the order. The appearance date may not be less than 15 nor more than 25
21 days after the date of the order to show cause. A copy of the motion must be attached to the
22 order to show cause.

23 (e) At the hearing on the order to show cause, if evidence is presented supporting the

1 allegations in the motion and no appearance is made to oppose the relief sought, the court shall
2 enter an order finding that the mortgaged property is abandoned property.

3 (f) A defendant's failure to appear at the hearing after service of process is conclusive
4 evidence of abandonment by the defendant.

5 (g) In the absence of affidavits or written statements, or if rebuttal evidence is offered by
6 the defendant or a party lawfully claiming through the defendant, the court may consider any
7 competent evidence, including oral testimony, concerning any allegation in the complaint or
8 motion.

9 Drafters' Notes

10 Subsections (d) through (g) are based in substantial part on Minn. Stat. §
11 582.032, which provides for expedited foreclosure for abandoned homes.
12 Minnesota generally provides a statutory right of redemption (post-foreclosure-
13 sale) of six months or one year, which is reduced to five weeks when the lender
14 uses the statutory procedure for abandoned property; this section does not include
15 a comparable right of redemption.

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

21 (1) The person seeking the determination must send a notice to each homeowner
22 and other person entitled to notice under Section 201 and post the notice on the mortgaged
23 property in the manner described in subsection (c) of this section. The notice must include a
24 copy of the request and the affidavit, describe the consequences that will follow from a
25 determination of abandonment, and inform the recipient that the recipient may contact the
26 [government official] to obtain further information or to object to the proposed determination of
27 abandonment.

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

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

7 **Drafters' Notes**

8
9 1. This Act authorizes an expedited foreclosure procedure for abandoned
10 properties for both judicial foreclosure and for nonjudicial foreclosures. An
11 expedited procedure is appropriate for two reasons. First, the homeowner is no
12 longer making a valuable economic use of the property to provide shelter for the
13 homeowner or the homeowner's family or someone claiming under the
14 homeowner, such as a tenant. A foreclosure sale will not result in a possessor
15 being forced to relocate to other housing. Second, properties that are facing
16 foreclosure and that are vacant have significant negative impacts on
17 neighborhoods and the surrounding communities. Vacancies reduce the market
18 values of neighboring properties. Neighborhood crime increases. The vacant
19 properties tend to suffer from lack of repair and maintenance, creating public
20 health risks, including infestations by vermin, mosquitoes, and other insects.
21 There are fiscal impacts on local governments, who find property taxes on vacant
22 properties often become delinquent; yet the governments are faced with added
23 expenses to provide essential services to blighted neighborhoods, such as police
24 and fire protection. By providing for an expedited foreclosure procedure, this Act
25 seeks to return abandoned properties to the stock of occupied, well-maintained
26 housing as soon as reasonably possible.

27
28 2. The conditions giving rise to prima facie evidence of abandonment set
29 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code
30 § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance
31 of a determination that the mortgaged property is abandoned by itself constitutes
32 prima facie evidence of abandonment. In some localities, after such a
33 determination the government will mark the property as abandoned. The
34 government's determination, finding, or order might not use the word
35 "abandoned"; it might, for example, refer to the property as vacant. Of course, the
36 homeowner or another person has the right to challenge the correctness of the
37 governmental determination.

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

1 evidence, giving rise to a presumption of abandonment. Such conditions are not
2 conclusive on the issue of abandonment. Many residential properties will exhibit
3 at least one such condition, when the homeowner is still in possession of the
4 property. If the homeowner or another person holding under the homeowner is in
5 actual possession of the mortgage property, the property is not abandoned
6 notwithstanding the existence of such conditions. Likewise, mortgaged property
7 may be abandoned under this Section notwithstanding the absence of any of the
8 statutory conditions.
9

10 3. Mortgaged property often becomes vacant, both under standard
11 mortgage and reverse mortgage transactions, when the homeowner dies. Under
12 Subsection (a)(8) proof of death of the homeowner is one of the conditions that
13 may give rise to a presumption that the mortgaged property is abandoned,
14 provided that there is no evidence that an heir or other beneficiary of the
15 homeowner's estate is in actual possession. Of course if there are multiple
16 homeowners, this condition is met only if all the homeowners have died.
17

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

26 Judicial review of the decision is available to any interested person.
27 Subsection (c) does not specify the nature of that action, which in many
28 jurisdictions will be a mandamus action.
29

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

31 (a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c)
32 finding that mortgaged property is abandoned property and the court has previously rendered or
33 at the same time renders a judgment of foreclosure, the court shall either (i) order a public sale of
34 the abandoned property not earlier than [30] days but not later than [60] days after entry of the
35 order or, (ii) upon a motion of the creditor, if the court, based on an appraisal or other evidence,
36 finds that there is no equity in the mortgaged property available to satisfy the interests of junior
37 creditors, the court shall order a transfer of the abandoned property directly to the creditor
38 without public sale and, upon the transfer, the rights of all interests junior to the interest of the

1 plaintiff are extinguished.

2 **Drafters' Notes**

3
4 The alternative of a direct transfer to the creditor is one of the components
5 set forth in an Ohio bill that would provide expedited foreclosure procedures for
6 abandoned property. Obviously if the Committee decides that this alternative has
7 merit, further provisions are necessary dealing with matters such as the
8 termination of junior interests and the payment of expenses by the creditor. The
9 Ohio bill requires that a creditor who chooses a direct transfer pay any unpaid
10 taxes and assessments on the property.

11
12 (b) In a non judicial-foreclosure proceeding, on the issuance of a determination under
13 Section 505(d) that the mortgaged property is abandoned property, a creditor, servicer or trustee
14 may conduct an expedited public sale of the property. The sale may take place not earlier than
15 [30] days but not later than [60] days after the issuance of the determination, unless judicial
16 review of the determination is commenced. The creditor or servicer shall comply with the notice
17 requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

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

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

27 **Drafters' Notes**

28
29 1. This Section provides for an expedited public sale of the mortgaged
30 property after a determination that the mortgaged property is abandoned. In a

1 judicial foreclosure, the court must order the sale to take place no longer than ___
2 days after the court enters its order finding the property to be abandoned, unless
3 the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor
4 may select the date, provided it is no sooner than [___] days after the written
5 determination of abandonment.
6

7 2. This Section does not authorize a disposition of abandoned property
8 other than public sale, but other dispositions are available under other sections of
9 this Act. For example, the homeowner and creditor may agree to a negotiated
10 transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash
11 for keys agreement].
12

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

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

31 On the other hand, the consequences of a creditor's failure to either
32 commence and complete a foreclosure action or to release its mortgage, on other
33 stakeholders in the abandoned property – including the fee owner, the
34 municipality and neighbors in which the abandoned property is located, and
35 where appropriate, a homeowners association - are very real. The act as drafted
36 resolves these conflicting policies by offering the lender a choice of how it wishes
37 to proceed.
38

39 4. In states that afford the homeowner and other persons a statutory right
40 of redemption after completion of a foreclosure sale, subsection (d) serves to
41 terminate those redemption rights.
42

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

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

1 (1) care for the yard and exterior of any building on the property, including
2 removing excessive foliage growth that diminishes the value of surrounding properties;
3 (2) prevent trespassers or squatters from remaining on the property;
4 (3) prevent mosquito larvae from growing in standing water; and
5 (4) take any other actions needed to prevent conditions on the property that create
6 a public or private nuisance.

7 (b) If a creditor is the plaintiff in a judicial-foreclosure proceeding, that creditor is
8 obligated to maintain the property ~~after-beginning when the court renders~~ an order finding that
9 the mortgaged property is abandoned property pursuant to Section 505(c) ~~is rendered~~.

10 (c) If a creditor institutes a nonjudicial-foreclosure proceeding, that creditor is obligated
11 to maintain abandoned property ~~beginning when after~~ a determination in a record that the
12 mortgaged property is abandoned property pursuant to Section 505(d) is issued.

13 (d) In the absence of a judicial order under subsection (b) or a determination under
14 subsection (c), a creditor that has commenced foreclosure proceedings is obligated to maintain
15 the mortgaged property ~~after-beginning when~~ it receives notice that a governmental entity has
16 issued a determination, finding, or order stating that the mortgaged property is abandoned
17 property and is in a condition that poses a threat to public safety or health.

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

21 (f) A creditor that is obligated to maintain abandoned property may enter the property
22 peacefully and cause others to enter the property peacefully for the limited purpose of inspection,
23 repair, and maintenance as required by this section. All reasonable expenses incurred by a

1 creditor pursuant to this section are an obligation of the homeowner and are secured by the
2 mortgage.

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

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

8 (1) a governmental subdivision that has jurisdiction of the mortgaged property; or

9 (2) a homeowners association, condominium association, or cooperative

10 association, if the property is subject to the rules of the association; ~~or~~

11 ~~(3) a community development corporation serving the area where the mortgage~~
12 ~~property is located.~~

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

18 **Drafters' Notes**

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

1 cites the property as both abandoned and presenting a threat to public safety or
2 health.

3
4 2. Subsection (e) defines the scope of the creditor’s obligation to maintain
5 abandoned property. The focus is on the outward appearance of the property,
6 including yards and other exterior spaces, and other conditions that are likely to
7 have significant impacts on the neighborhood, such as interior spaces frequented
8 by squatters or persons engaged in criminal activities. This subsection is modeled
9 closely on Cal. Civ. § 2929.3(b), enacted in 2008.

10
11 3. Subsection (f) grants a license to the creditor and to its agents or
12 contractors to enter abandoned property for the purpose of inspection, repair, and
13 maintenance, regardless of whether that right is reserved in the mortgage.
14 Similarly, this subsection authorizes the addition of the creditor’s reasonable
15 maintenance expenses under this section to the debt secured by the mortgage,
16 regardless of whether the mortgage contains a provision to that effect.

17
18 4. Subsection (h) provides for enforcement by the local government that
19 has jurisdiction over the abandoned property. When the property is located in a
20 common-interest community, it also provides standing for the association as a
21 means to protect neighboring property owners whose interests are likely to be
22 harmed by the creditor’s failure to maintain the property. In conferring standing
23 both to the local government and to owners’ associations, this subsection follows
24 the approach taken by N.Y. Real Prop. Acts. § 1307(3), enacted in 2009. This
25 subsection does not grant a direct enforcement right to neighbors. If negatively
26 impacted, such persons may have a remedy under other laws, such as public or
27 private nuisance.

28
29 5. At common law a creditor who takes possession of mortgaged property
30 prior to the completion of foreclosure becomes a “mortgagee in possession,” who
31 by virtue thereof undertakes a number of obligations to the homeowner with
32 respect to maintenance and care of the property. Subsection (i) expressly
33 provides that a creditor who enters the property for the purpose of complying with
34 its obligations under this Section does not assume the liabilities of a mortgagee in
35 possession.

36
37 **[ARTICLE] 6**

38 **REMEDIES**

39 **SECTION 601. EFFECT OF VIOLATION.**

40 (a) In a judicial foreclosure proceeding, ~~if if the court determines that~~ a creditor or
41 servicer ~~has-is shown to have~~ committed a material violation of this [act], the court ~~shall~~ may

1 dismiss the action, ~~or~~ stay the action on appropriate terms and conditions or impose other
2 appropriate sanctions until the violation is cured. Dismissal must be without prejudice unless the
3 court determines that a new foreclosure action would unfairly burden the homeowner. ~~due to a~~
4 ~~creditor's repeated violations or other aggravating circumstances.~~

5 (b) In a non judicial-foreclosure proceeding, a homeowner or obligor may initiate an
6 action to enjoin or restrain the foreclosure on the grounds that a creditor or servicer committed a
7 material violation of this Act. If the court finds that a material violation of this [act] occurred, the
8 court shall nevertheless allow foreclosure to continue after the violation is cured, unless the court
9 determines that continuation of the foreclosure action would unfairly burden the homeowner.
10 ~~should be permanently barred due to a creditor's repeated violations or other aggravating~~
11 ~~circumstances.~~

12 (c) If a material violation of this [act] is established pursuant to subsection (a) or (b), the
13 creditor may not add to the amount of the obligation any attorney's fees ~~and/or~~ costs incurred as a
14 result of the violation, before it cures the violation.

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

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

20 (e) In addition to the damages recoverable under subsections (d) ~~and (e)~~, a homeowner
21 or obligor may recover, as the court may allow, ~~punitive statutory~~ damages not exceeding
22 \$[15,000] ~~per obligor and homeowner~~ in the case of a pattern or practice of noncompliance. In
23 determining whether to award statutory damages and the amount of ~~recovery~~ statutory damages

1 under this subsection, the court shall consider, among other relevant factors:

2 (1) the frequency and persistence of noncompliance [in dealing with the

3 homeowner][in its business practices] by the creditor or servicer;

4 (2) the nature of the noncompliance, and

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

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

8 (g) In opposing the imposition or amount of ~~punitive-statutory~~ damages for violations of
9 the act established by the obligor or homeowner, the creditor, servicer or its agent may show
10 that:

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

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

15 **SEE ISSUES MEMORANDUM,**
16 **SECTION 601 (h), 'CLASS ACTIONS'**

17
18 [(h) **Alternative A**] No class action shall be permitted pursuant to sub-sections (e)
19 and (f) of this section]

20 **Alternative B** In the case of a class action alleging a claim arising under
21 subsections (e) or (f), an award may not exceed an amount equal to the sum of--

22 (A) any actual damages to each of the borrowers in the class as a result of the failure; and

23 (B) any additional damages, as the court may allow, in the case of a pattern or practice of

24 noncompliance with the requirements of this section, in an amount not greater than \$1,000 for

25 each member of the class, except that

1 (C) the total amount of damages under this subparagraph in any class action may not
2 exceed the lesser of--

3 (i) \$500,000; or

4 (ii) 1 percent of the net worth of the creditor or servicer.]

5 [Alternative C] Delete subsection (h) in its entirety so that this act remains silent on the
6 issue of class actions and the viability of any potential class action would then depend on other
7 state law.

8 **End of Alternatives**

9 **Drafters' Notes**

10
11 1. At the November 13 meeting the Committee voted to delete former
12 subsection 601(e) providing for minimum damages for all violations. Further, a
13 motion to delete subsection 601(f) failed but consensus seemed to favor removing
14 references to “punitive” damages.

15
16 2. The statutory damages for individuals under subsection (e) (former
17 subsection (f)) have been amended to require a pattern or practice of
18 noncompliance, similar to the RESPA provision for statutory damages.

19
20 3. The comments should be expanded to discuss the circumstances under
21 which a permanent bar to foreclosure under either subsections (a) or (b) would be
22 appropriate and cite cases where that extraordinary relief has been granted.
23 Examples would include cases where the creditor or servicer has repeatedly
24 violated this act or other law, or other aggravating circumstances.

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

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

1 However, after a foreclosure sale, under established principles of real
2 estate law, unless the homeowner under state law has an independent right of
3 redemption, a bona fide sale purchaser is entitled to rely on the conclusive effect
4 of the sale, and the homeowner's only remedy for violations of the statute would
5 be to seek damages from the foreclosing creditor or any other remedy allowed
6 under state or federal law; see Section 602.

7
8 **SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW.** Nothing in this

9 [act] displaces any defense or remedy a homeowner or obligor may have under federal law or

10 law of this state other than this [act].

11 **Drafter's Note**

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

26
27 **SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL**
28 **FORECLOSURE.**

29 (a) A homeowner or obligor may bring an action against a creditor or servicer asserting a

30 defense to a nonjudicial foreclosure. [An action to enjoin a foreclosure sale must be brought

31 before the sale.]

32 **Drafter's Note**

33 The bracketed language in subsection (a) complements the 1-year limitations
34 period in section 601(f) for damage actions.
35

1 (b) In an action under this section, if the court determines that a defense to the nonjudicial
2 foreclosure exists, the court may render an order that is just and equitable under the
3 circumstances, including an award of any remedy provided in Section 601.

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

8 **SECTION 605. ENFORCEMENT BY [ATTORNEY GENERAL].** In addition to
9 enforcing any remedies available under other law, the [attorney general or other state official or
10 agency] may bring an action to enjoin a pattern of violating this [act]. In such an action the court
11 may issue an injunction or order against a creditor, servicer, their agents, or any other person
12 violating this [act], which may include requiring steps to be taken to remedy violations or the
13 payment of damages to aggrieved homeowners. In such an action, the court may assess a civil
14 penalty of not less than \$[____] nor more than \$[____]. ~~The injunction or order may bind a~~
15 ~~creditor, servicer, their agents, or any other person violating this [act].~~

16 **SEE ISSUES MEMORANDUM.**
17 **SECTION 606, HOLDER IN DUE COURSE**
18

19 **SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE IN**
20 **FORECLOSURES.**

21 ~~**[Alternative # 1 – complete abrogation]** Notwithstanding [insert reference to State UCC~~
22 ~~§3-305][NCohen # 179: and any agreement by the homeowner or obligor] a creditor or servicer~~
23 ~~who commences a foreclosure under this act is subject to all claims and defenses that the~~
24 ~~homeowner or obligor could assert against the [creditor who first owned the obligation]~~
25 ~~[NCohen # 182: original obligee of the obligation]~~

1 ~~[Alternative # 2—limited abrogation similar to FTC Rule]~~ (a) Notwithstanding [insert
2 reference to State UCC §3-305], ~~[NCohen # 183;~~ and any agreement by the homeowner or
3 obligor], when a party with the right to foreclose under Section 401 initiates foreclosure, the
4 homeowner or obligor may assert any claim or defense that the debtor could assert against the
5 original creditor of the obligation secured by the mortgage. If the party initiating the foreclosure
6 is not the original creditor of the obligation or its agent, aAny recovery by the homeowner or
7 obligor shall not exceed a recoupment or set-off against the total outstanding balance due on the
8 mortgage obligation ~~plus amounts paid by the homeowner or obligor to the creditor or servicer~~
9 ~~bringing the foreclosure action.~~

10 ~~[Alternative #3—statute of limitations]~~ Notwithstanding [insert reference to State UCC
11 3-305], when a party with the right to foreclose under Section 401 initiates foreclosure, and if the
12 notice required by Section 201 is sent not later than ten years after the claim or defense arose, the
13 homeowner or obligor may assert any claim or defense that the debtor could assert against the
14 original creditor of the mortgage. ~~Any recovery by the homeowner or obligor shall not exceed a~~
15 ~~recoupment or setoff against the total outstanding balance due on the mortgage obligation plus~~
16 ~~amounts paid by the homeowner or obligor to the creditor or servicer bringing the foreclosure~~
17 ~~action.~~

18 (b) Whether the party who initiates foreclosure is the original creditor of the obligation
19 secured by the mortgage or a subsequent holder of that obligation, the homeowner or obligor
20 may not assert a claim or defense in the foreclosure if the claim or defense would be barred by a
21 statute of limitations if asserted in a foreclosure action by the original creditor of the obligation.

22 ~~[Alternative # 4—~~

23 (c) This section only applies to obligations secured by mortgages on residential property

1 in this state which are incurred after the date this [act] becomes effective in this state.

2 **[ARTICLE] 7**

3 **MISCELLANEOUS PROVISIONS**

4 **SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.**

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

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

8 **Drafters' Note**

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

13
14 **SECTION 702. REPEALER.**

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

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

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

19 **Drafters' Notes**

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

33
34 2. At the same time, this Act was drafted with the expectation that existing

1 state foreclosure procedures would remain in place. This Act is not intended to
2 displace all existing foreclosure laws in each state, but rather to be an overlay on
3 existing law. For example, and most fundamentally, the Act does not anticipate
4 or provide that a state employ a judicial foreclosure process when the customary
5 practice is to foreclose under a power of sale procedure, nor does the Act
6 contemplate that a state should enact a non-judicial foreclosure process in the
7 absence of existing state laws. It is for that reason that the legislative drafters in
8 each state should carefully consider how best to integrate the provisions of the
9 Act with existing state laws governing the foreclosure process.

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

17
18 **SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

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

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