

D R A F T
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

FINAL MEETING DRAFT
November 15-16, 2013

Without Prefatory Note and with Reporter's Drafting Comments

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November 5, 2013

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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

11 ~~diligently with reasonable diligence~~ to completion; or

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

13 ~~; and~~

14 ~~(C) is physically~~ secured and in substantial compliance with the law of this state

15 and 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 ~~owns or~~ has the right to ~~enforce an obligation~~
23 foreclose a mortgage under Section 401(b). The term does not include a person that does not

owns, ~~hold or service~~ no more than five mortgages ~~loans~~ at the time the notice required by
Section 201 is sent.

Drafters' Notes

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

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

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

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

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

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

Drafters' Note

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

1
2 (5) "Facilitation" means the assistance of a third-party neutral at an in-person meeting or
3 other communication where ~~between~~ the parties ~~and~~ facilitator can simultaneously hear one
4 another with the objective of reaching an agreement between the creditor and the homeowner for
5 a commercially reasonable alternative to foreclosure.

6 **Drafters' Note**

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

16
17
18 (6) "Facilitation agency" means [the administrative or judicial agency designated by the
19 state to supervise foreclosure facilitation].

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

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

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

1 **Drafters' Note**

2
3 The definition of 'holder' is taken from revised Article 1: UCC § 1-201(b)(21)(A)
4 and the terms 'bearer' and 'identified person' have the same meanings in this act
5 as in the UCC. The definition of 'holder' in unrevised Article 1 has slightly
6 different language, but is the same in substance.
7

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

10 **Drafters' Notes**

11
12 1. We need to consider to whom the Act requires 'notice' to be
13 provided to a 'homeowner' v. an 'obligor' and how the creditor is able to identify
14 each; *see* the proposed amendments to Sec. 401.
15

16 2. At the November meeting, there were suggestions from several persons
17 for more expansive comments; to the extent these notes are inadequate, please let
18 the Reporters know of any desired additional comments.
19

20 (11) "Loss mitigation" means ~~a program~~ an alternative to foreclosure offered by a
21 creditor ~~offers~~ to a homeowner ~~that is~~ in default or facing imminent default ~~as an alternative to~~
22 foreclosure.

23 **Drafters' Note**

24
25 The comments will be expanded to make clear that 'loss mitigation' includes such
26 actions as a repayment plan, forbearance agreement, loan modification, short sale,
27 partial mortgage insurance claim, negotiated transfer and deed in lieu of
28 foreclosure.
29

30 (12) "Mortgage" means a consensual interest in residential property that secures an
31 obligation ~~created by a mortgage agreement~~. The term does not include a lien that secures an
32 obligation owed to a homeowner's association in a common interest community.

33 (13) "Mortgage agreement" means a record that creates or provides for a mortgage.

34 **Drafters' Note**

35
36 In this Act the term "mortgage" refers to the lien held by the creditor, which

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

6
7 (14) “Mortgage registry” means an electronic registry, created pursuant to federal laws,
8 of holders of the right to enforce mortgages and obligations secured by mortgages, ~~federal~~
9 ~~statutes or regulations,~~ which maintains the records of those such-mortgages and obligations
10 pursuant to standards designed to ensure that the record of each mortgage and obligation is
11 unique, identifiable, and unalterable.

12 (15) “Mortgaged property” means residential property that is subject to a mortgage,
13 ~~together with and~~ any personal property held or used in connection with the residential property;
14 ~~which that~~ is subject to a the mortgage.

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

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

19 **Drafters’ Note**

20
21 In states that allow one or more types of nonjudicial foreclosure of residential
22 mortgages, the drafter should insert a reference to the relevant statute or statutes
23 here. In states that do not allow nonjudicial foreclosure, this definition should be
24 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.

25
26 (18) “Obligation” means a debt or other duty or liability-of a homeowner that is secured
27 by a mortgage.

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

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

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

1 the obligation; or

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

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

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

8 (22) "Residential property" means real property in this state? improved with not more
9 than four dwelling units, including structures ancillary to a unit. The term includes an attached
10 single-family unit, a single-family manufactured-housing unit treated as real property under
11 ~~insert reference to applicable state statute~~ law of this state, a time share in residential property if
12 that time share is treated as real property under law of this state, real property on which
13 construction of not more than four dwelling units has commenced, and a single-family unit in a
14 common-interest community.

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

17 (24) "Servicing" means:

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

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

23 (C) in the case of a home equity conversion mortgage or reverse mortgage,

1 making payments to the homeowner or obligor.

2 **Comment**

3 The definitions of ‘Servicer’ and ‘Servicing’ are adapted from the Real Estate
4 Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R.
5 § 3500.2 (b) and have the same meanings as in that Act.

6
7 (25) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
8 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
9 the United States.

10 **Drafters’ Notes**

11
12 1. In some states, a land sale installment contract does not constitute a
13 ‘mortgage’, with all the attendant consequences for homeowners and creditors,
14 until a specified percentage of the original principal amount has been paid to the
15 creditor. In Illinois, for example, that percentage is 50% of the original principal
16 amount. In those States where the issue arises, statutory drafters should make
17 appropriate amendments to this act to track existing practice in that state.

18
19 2. Whether mortgaged property is “abandoned property” is determined by
20 the facts of each case. The factors listed in Section 505(a) are not exclusive. The
21 core question is whether the homeowner is presently in possession of the
22 property. The question must be answered by evaluating the facts related to the
23 homeowner’s use of the property.

24
25 3. The definitions of “mortgage” and “obligor” refer to the payment of an
26 obligation, and do not use the phrasing found in UCC Article 9 definitions that
27 includes “payment or other performance” of obligations. Almost always the basis
28 for a residential mortgage foreclosure is the failure to pay a monetary obligation.

29
30 **SECTION 103. SCOPE.** This [act] applies to the foreclosure of a mortgage on
31 residential property in this state.

32 **Drafters’ Notes**

33
34 1. This Act applies whenever a creditor forecloses on a mortgage on
35 residential property, whether by judicial process or by non-judicial measures. The
36 definition of “foreclosure” in Section 1-103 must be consulted to determine which
37 actions taken by creditors have the legal effect of making the Act applicable to the
38 parties to a mortgage.

1 2. The term “residential property” is defined in Section 1-103 as real
2 property improved with one-to-four dwelling units. Thus, this Act applies to the
3 ~~process~~ foreclosure of a mortgage on any one to four family property used for
4 residential purposes, regardless of whether the homeowner occupies or intends to
5 occupy one or more of the units as a principal residence or other residence. This
6 means that this Act covers all rental properties of this type. The Act, however,
7 does not apply if the mortgage covers five or more dwelling units, even if the
8 homeowner personally occupies one or more of those units.
9

10 **Example:** Buyer purchases a residential condominium unit, financing the
11 purchase with a mortgage. A foreclosure of the mortgage is within the scope of
12 this Act, regardless of Buyer’s intended use or actual use of the property.
13 Similarly, if Buyer purchases five units in the same condominium community,
14 each financed with a separate mortgage, a foreclosure of any of those mortgages
15 is within the scope of this Act.
16

17 3. However, the Act also makes clear that while this Act would apply to
18 the foreclosure of mortgages created before the effective date of this Act, it would
19 not apply to a foreclosure action that the creditor had commenced before the
20 effective date of the Act; this is made clear in Section 701, describing the
21 ‘Effective Date’ of the Act.
22

23 **SECTION 104. DUTY OF GOOD FAITH.** A creditor, servicer, obligor, or

24 homeowner shall comply in good faith with the requirements of this [act].

25 **SECTION 105. CERTAIN ACTS PROHIBITED.** A creditor, servicer, or an agent of

26 either, may not:

27 (1) Make ~~an~~ a misleading oral or written statement to a homeowner or obligor that would
28 discourage a reasonable person from participating in loss mitigation or facilitation; ~~and~~ or

29 (2) Misrepresent any aspect of a foreclosure ~~process~~, including informing the homeowner
30 or obligor that:

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

33 (B) the foreclosure has been stayed due to loss mitigation or facilitation and at
34 the same time continuing with the foreclosure ~~process~~; or

1 (C) the homeowner or obligor is not eligible for loss-mitigation options when the
2 creditor, servicer, or agent of either has not evaluated those options ~~have not yet been~~
3 ~~evaluated~~.

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

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

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

13 **COMMENT**

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

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

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

1 [ARTICLE] 2

2 NOTICES; RIGHT TO CURE

3 SECTION 201. NOTICE OF INTENT TO FORECLOSE AND RIGHT TO CURE.

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

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

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

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

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

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

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

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

21 (7) the specific basis for the right of the creditor or servicer to foreclose and, if the
22 creditor or servicer is acting on behalf 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;

3 (9) that the homeowner or obligor will receive a separate notice of available
4 foreclosure alternatives and facilitation; and

5 (10) if sent to an obligor other than the homeowner, that the notice is being sent to
6 the homeowner as well as any other obligor regardless of whether the obligor has an interest in
7 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.

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

3
4 5. In subsection (b)(7), the basis on which a particular creditor may assert
5 the right to foreclose is specified in §401. The notice may, but is not required to,
6 explain that the agent has full authority on behalf of the owner to negotiate with
7 the homeowner.

8
9 6. If a homeowner or obligor has cured a default, any subsequent
10 foreclosure based on a later default must be preceded by a new notice, subject to
11 the limitations on repeated defaults contained in Section 203. This is because a
12 cure restores the homeowner to the same legal position as if no default had
13 occurred. If, on the other hand, as a result of facilitation or otherwise, the
14 homeowner has tendered payments under a forbearance plan or other workout but
15 has not fully cured the default that was the subject of the notice, no new notice is
16 required in the event the workout fails and the creditor chooses to proceed with
17 foreclosure.

18
19 **SECTION 202. MANNER OF NOTICE DELIVERY.** A notice required by Section

20 201 or Section 302 must be sent by first-class mail to the last known address of each homeowner
21 and obligor~~'s last known address and to the address of the mortgaged property~~. At least one
22 mailed notice must also be addressed to the homeowner or to “occupant-” at the address of the
23 mortgaged property. If the [homeowner or obligor or the homeowner’s or obligor’s
24 representative] has requested to receive notice by electronic mail and has provided an electronic-
25 mail address to the creditor or servicer, the notice also must be sent by electronic mail to the
26 electronic-mail address.

27 | **Drafters’ Notes**

28
29 | 1. The complaint in a judicial foreclosure state, or notice of sale in a nonjudicial
30 foreclosure state, must be delivered according to existing law, usually by
31 personal service. The requirement for additional electronic mail notice does
32 not displace the paper notices required by this act or other law. The creditor
33 may, but is not required to, send the notice by certified mail as well as by
34 ordinary first class mail.

35
36 | 2. Notice must be sent by ordinary first class mail. First class mail has the
37 characteristic that it will be delivered to the last known address whether or not
38 the recipient accepts delivery in person. The creditor or servicer may

1 supplement first class mail with certified mail or overnight delivery but may
2 not rely solely on methods that require the recipient to accept delivery in
3 person.

4
5 **SECTION 203. RIGHT TO CURE DEFAULT.**

6 (a) A homeowner or obligor may cure a default -by tendering in cash or immediately
7 available funds the amount or performance specified in subsection (c) at any time ~~until 24 hours~~
8 before a scheduled or postponed foreclosure sale.

9 (b) ~~The A homeowner or obligor does not have the~~ right to cure ~~may not be exercised~~
10 more than three times in a calendar year.

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

12 (1) tender ~~in cash or immediately available funds~~ all sums that would have been
13 due at the time of tender in the absence of acceleration;

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

16 (3) tender ~~in cash or immediately available funds~~ all expenses of foreclosure that
17 are specified in a record provided by the creditor and ~~actually that~~ accrued ~~prior to the date of~~
18 before tender; and

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

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

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

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.

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

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

(2) The identity of the person; ~~and~~

~~(3) where to send the notice.~~

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

1 **Drafters' Notes**

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

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

14 **[ARTICLE] 3**

15 **FACILITATION**

16
17 Chair's Notes: Following the annual meeting, Commissioner Elizabeth Kent of Hawaii –now a
18 member of the Drafting Committee - prepared a detailed memorandum concerning this Article,
19 based on her experience as a foreclosure mediator in Hawaii. Her memorandum will be
20 distributed to the entire Drafting Committee, together with comments on the Annual meeting
21 draft prepared by Heather Schweibe Kulp, for consideration at the November meeting.
22

23 **SECTION 301. FACILITATION PROGRAM ESTABLISHED.** [Name of court or

24 agency serving as facilitation agency] is designated as the facilitation agency. The facilitation
25 agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if
26 the facilitation agency is the judicial system, to the rules of court] establishing procedures and
27 standards for the facilitation process.

28 **Drafters' Notes**

29 1. Facilitation is defined in Section 102 as the assistance of a third-party
30 neutral at an in-person meeting between the parties with the objective of
31 achieving a commercially reasonable alternative to foreclosure, resulting in an
32 agreement between the creditor and homeowner.
33

34 Between 2007 and 2012 eighteen states adopted statewide foreclosure
35 diversion or mediation programs, and local jurisdictions in at least eight additional
36 states have established similar programs. The programs vary greatly in their
37 timing and design, and exist in both judicial and nonjudicial foreclosure states.
38 Most programs in judicial foreclosure states call for intervention after a

1 foreclosure complaint is filed. While most stakeholders recognize that starting
2 mediation or facilitation earlier in the process would increase the chances of
3 success and reduce costs, most existing state laws do not provide a means to
4 initiate facilitation before the judicial process begins. Pre-foreclosure facilitation
5 permits early sorting of foreclosure cases, into those where the homeowner wants
6 to find a solution other than foreclosure, and those cases that are uncontested or
7 where there is no realistic alternative to foreclosure.

8
9 2 The Act does not prescribe standards or procedures for the state
10 facilitation program. Rather, the following best practices are recognized by lender
11 and consumer advocates as well as mediation and facilitation program participants
12 as necessary elements of a successful facilitation program.

13
14 a. The goal of facilitation is to create commercially reasonable alternatives
15 to foreclosure which achieve sustainable outcomes, including "graceful exits."

16
17 b. The homeowner should have access to a housing counselor (or a
18 lawyer) to assist in the facilitation process.

19
20 c. The process of bringing the parties together to achieve an alternative to
21 foreclosure is better understood as facilitation, not mediation, because some of the
22 standards typically followed by mediators are not appropriate.

23
24 d. Facilitation is not merely a requirement that parties "meet and confer, "
25 i.e. a mandate merely for two-party settlement negotiations. The involvement of a
26 neutral third party is critical to success.

27
28 e. The neutral facilitator should disclose any conflicts of interest. A
29 lawyer serving as a facilitator must inform unrepresented homeowners that the
30 lawyer is not representing them.

31
32 f. Facilitation should not unnecessarily delay the foreclosure process, but
33 should provide adequate time for full consideration of alternatives to foreclosure.

34
35 g. If the homeowner makes a timely request for facilitation, or in an opt-
36 out system, when the lender initiates foreclosure, the relevant agency must initiate
37 the facilitation process within 14 days.

38
39 h. Documentation information exchange.

40
41 i. The creditor or servicer must specify whatever documents it
42 requires from the homeowner within [5] days after initiation of the facilitation
43 process.

44
45 ii. The homeowner must provide the income and other documents
46 required by the servicer listed in (a) above to the servicer and the facilitator not

1 less than [30] days before the scheduled first facilitation session. If the
2 homeowner fails to substantially provide the documents specified by the creditor
3 or servicer within the time frame required by this paragraph, the facilitation
4 process terminates.

5
6 iii. The creditor or servicer must provide to the homeowner and the
7 facilitation agency: (i) the homeowner's payment history from the date of default;
8 (ii) itemized amounts due on the loan, including all fees.

9
10 iv. The creditor or servicer should provide the facilitator its
11 decision, including the inputs and results of any net present value
12 calculations it relies on in deciding not to offer any particular loss
13 mitigation alternative.

14
15 i. The first facilitation session must take place within [XX] days after
16 initiation of the facilitation process.

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

21
22 k. The facilitation agency should clearly identify any eligibility restrictions
23 for its program, such as property occupancy.

24
25 l. Standards of practice for facilitators: There is consensus that facilitator
26 conflicts of interest should be avoided or disclosed. Traditional mediator
27 standards are problematic in some cases. For example, mediators traditionally do
28 not disclose anything that takes place during facilitation or report to a court on the
29 parties' conduct, whereas a facilitator may need to report on either party's
30 conduct so that a court can decide whether to permit foreclosure to proceed, or to
31 impose sanctions.

32
33 m. Proceedings should be confidential, with appropriate exceptions to
34 permit reporting outcomes and/or noncompliance with rules to the court or
35 supervising agency.

36
37 n. States should establish programs to provide appropriate training and
38 continuing education of facilitators.

39
40 o. All agreements for foreclosure alternatives should be memorialized in
41 writing and signed by both parties to minimize later disputes. The neutral
42 (facilitator) should prepare a final written report for the facilitation agency
43 indicating what agreements were reached, and indicating whether any party failed
44 to comply with the rules, scheduling orders or information requests from the
45 neutral.

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

3
4 q. States should provide adequate funding to train and provide facilitators
5 and for the associated agency or court supervision.

6
7 r. Original copies of documents (as opposed to true copies) should not be
8 needed during facilitation. Issues about authenticity and possession should be
9 resolved separately in litigation if need be.

10 11 **Drafters' Note**

12
13 The Drafting Committee has spent considerable time discussing the subject of
14 mediation – now called facilitation; a number of members on the Committee
15 believe that a successful process that screens potential workout alternatives to
16 foreclosure offers the single best hope for homeowners in the continuing
17 foreclosure crisis.

18 **SECTION 302. NOTICE OF FACILITATION.**

19 (a) If the facilitation agency establishes a procedure for the agency to send notice of
20 facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to
21 the creditor or servicer and to each homeowner and obligor. ~~Before a creditor or servicer may~~
22 ~~request entry of a default or foreclosure judgment or~~ issue ~~give~~ a notice of a judicial or
23 nonjudicial-foreclosure sale, ~~the creditor or servicer must send each homeowner and obligor a~~
24 ~~notice of facilitation.~~

25 (b) ~~If the facilitation agency establishes a procedure [for the agency to send] of~~
26 ~~facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to~~
27 ~~the creditor or servicer and to each homeowner and obligor.~~ If there is no procedure for the
28 agency to send notice, the creditor or servicer shall send a notice of facilitation to each
29 homeowner and obligor, in the same manner as required for the notice under Section 201 before
30 a creditor or servicer may request entry of a default or foreclosure judgment or give a notice of a
31 judicial or nonjudicial-foreclosure sale.”

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

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

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

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

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

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

SECTION 303. DUTY TO PARTICIPATE IN FACILITATION IN GOOD

FAITH.

(a) Each party to a facilitation must participate in facilitation in good faith ~~to seek a resolution other than a foreclosure sale~~. The parties shall comply with any scheduling order established by the facilitator or the facilitation agency.

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

1 (c) A homeowner or obligor that elects to participate in facilitation shall provide

2 reasonably available financial and other information to permit the creditor to evaluate any loss-
3 mitigation options.

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

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

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

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

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

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

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

15 **Drafters' Notes**

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

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

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

21
22 3. The Chair, ABA Advisor and Reporters contemplate that the facilitation
23 agency would be authorized to charge a fee to the borrower for the facilitation.

24
25 4. The Chair, ABA Advisor and Reporters have also discussed - but have not
26 agreed on any - proposed additional limitations on the facilitation process in
27 an effort to make the process workable while at the same time (i) encouraging
28 more lender support for the process, and (ii) not losing the support of our
29 borrower advocates. Among the ideas we have discussed are these:

30
31 a. Encourage the Consumer Financial Protection Bureau to amend its regulations
32 to provide that if those states that adopt HFPA, a lender may commence
33 foreclosure without first sending two offers to modify mortgages for
34 defaulting borrowers.

35
36 b. If a lender complies with the CFPB rules by sending two offers to modify
37 mortgages for defaulting borrowers, it need not participate in the Article 3
38 facilitation process.

39
40 c. In order for a borrower to invoke Article 3, the borrower would have to
41 initially pay 'X' percent [10% /25% /50%] of her monthly mortgage payment
42 either to the lender or into a fund maintained by the facilitation agency, and
43 thereafter pay a similar sum each month during the mediation process.

44
45 d. Impose a sunset provision for facilitation in each state, tied either to a calendar
46 date or to some index reflecting the severity of foreclosures in that state.

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

3
4 f. Impose a shorter 'hard stop' time frame for the facilitation process [absent a
5 finding of lender's failure to abide by the facilitation process] measured from
6 the date the lender triggers the process by sending a notice to the defaulting
7 borrower – note: we already have a 90 day 'hard stop' in Section 304(b).
8

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

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

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

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

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

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

Drafters' NoteComments

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

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

[ARTICLE] 4

RIGHT TO FORECLOSE; SALE PROCEDURES.

SECTION 401. RIGHT TO FORECLOSE.

(a) A person described in subsection (b) may commence a foreclosure only after default in the obligation- and satisfaction of all conditions required by the mortgage agreement and law of this state ~~other than this [act]~~.

Drafters' Notes

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

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

Alternative A

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

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

Alternative B

(b) The only person ~~with the right to foreclose~~ who may commence a foreclosure is:

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

(A) the holder of the negotiable instrument;

(B) a ~~nonholder person~~ in possession of the negotiable instrument that ~~has the rights of~~ is not the a-holder but has the right to enforce the instrument under [U.C.C. ~~Section 3-304~~ Article 3], or

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

End of Alternatives

Legislative Note

This Act contains two alternatives to designate the person with the right to

1 foreclose when the obligation is evidenced by a negotiable instrument. A State
2 should enact Alternative A if it has adopted Revised UCC Article 3 (2002) and
3 should enact Alternative B if it has adopted a prior version of UCC Article 3.
4

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

8 (3) Whether or not the obligation is evidenced by a negotiable instrument, if
9 ~~after the registration of~~ the obligation is registered in a mortgage registry, the only person with
10 the right to foreclose is the person identified ~~shown~~ as entitled to enforce the obligation and the
11 mortgage on a [certificate – NCohen issue] issued by a mortgage registry as of the time the
12 foreclosure is commenced.

13 (c) In a judicial-foreclosure proceeding, the plaintiff must prove that it has the right to
14 foreclose under subsection (b). If the plaintiff relies on a negotiable instrument under subsection
15 (b)(1), the [complaint] must include:

16 ~~(1)~~ a copy of the negotiable instrument in its present condition including any
17 endorsement or allonge; and either

18 ~~(12)~~ a statement indicating who is in possession of the negotiable instrument; or

19 ~~(2)~~ a statement that the negotiable instrument ~~has been lost,~~ stolen or destroyed,

20 in which case the [complaint] must include a lost-negotiable-instrument affidavit that

21 complies with ~~UCC~~ Section 403.

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

25 (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 ~~exercise~~
5 ~~that right by authorizing, in an authenticated in a~~ record, authorize another person to foreclose.

6 The [complaint] described in subsection (c) or the affidavit described in subsection (d) must
7 disclose the name of each such person.

8 (f) If an obligation is evidenced by a negotiable instrument and a person with the right to
9 foreclose under subsection (b)(1) does not own the obligation, the [complaint] described in
10 subsection (c) or the affidavit described in subsection (d) must disclose the name of the owner of
11 the obligation.

12 **Drafters' Notes**

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

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

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

31 2. This section designates the "person entitled to enforce" a negotiable
32

1 instrument under revised UCC Article 3 as the person with the right to foreclose
2 the mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which
3 defines who is “person entitled to enforce” a negotiable instrument. When the
4 payee of the negotiable instrument has retained possession of the instrument, that
5 person has the right to foreclose. When the payee has transferred possession of
6 the negotiable instrument to another person, the facts must be examined to
7 determine who has the right to enforce the note. The subsequent possessor may
8 become a holder under UCC Article 3 by obtaining a special endorsement or
9 blank endorsement, but this section does not require that a subsequent possessor
10 become a holder in order to acquire the right to foreclose. Such a subsequent
11 possessor may be entitled to enforce the note, but will have to allege and prove
12 facts that are sufficient to establish the right to enforce.
13

14 3. Subsection (b)(2) includes situations in which the secured obligation is
15 evidenced by an instrument that is not negotiable and situations in which the
16 obligation is not evidenced by any type of instrument authenticated by the debtor.
17 As an example of the former, an owner may sign a promissory note that has terms
18 that makes the note nonnegotiable. As an example of the latter, under the law of
19 some states an installment land contract creates a mortgage relationship between
20 the parties, in which the vendee’s obligation to pay the price usually is not
21 reflected in a negotiable instrument. In all such cases, the owner of the obligation
22 who has the right to foreclose will be either the original obligee or an assignee.
23

24 4. In judicial foreclosure, under existing law the creditor generally must
25 confirm possession or account for possession of the original note at the time of
26 filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the
27 law appears not to require confirmation of possession of the original note prior to
28 commencement of foreclosure proceedings or the sale. This section requires that
29 the foreclosing person have possession of the negotiable instrument prior to the
30 commencement of foreclosure, whether the proceeding is judicial or nonjudicial,
31 unless that person prepares a lost note affidavit meeting the requirements of
32 Section 4-103.
33

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

1 Although this distinction seems beneficial, the two-tier system does have
2 some costs, including but not limited to complexity. By authorizing the holder of
3 a negotiable instrument to foreclose, sometimes the power is conferred upon a
4 person who has no economic stake in the obligation or the collateral. The holder,
5 however, will usually have an obligation, created by contract or other law, to the
6 owner who does have an economic stake, giving it some incentive to behave
7 properly.
8

9 The two-tiered system makes it necessary to determine whether a
10 promissory note is negotiable for some cases. Uncertainty as to whether the note
11 is negotiable creates cost. If a single person both possesses the note and owns the
12 obligation, the problem is not major. If it is unclear whether the secured
13 obligation is evidenced by a negotiable instrument or by an instrument that is not
14 negotiable, the creditor may choose to proceed by complying with both
15 subsections (b)(1) and (b)(2). If, however, different persons possess the note and
16 own the obligation, the problem is harder. For example, consider a promissory
17 note secured by a mortgage and payable to the order of Creditor. Creditor enters
18 into a signed contract with Assignee pursuant to which Creditor sells the
19 promissory note to Assignee. Assignee pays Creditor, but Creditor retains
20 possession of the promissory note (and is not possessing the note as agent for
21 Assignee). If the promissory note is a negotiable instrument under UCC Article 3,
22 Creditor can commence a foreclosure under this Section, but Assignee cannot
23 (because Creditor is the holder of the note). If the promissory note is not a
24 negotiable instrument, however, Assignee is its owner and can commence a
25 foreclosure, but Creditor cannot. If Creditor and Assignee cannot reliably
26 determine, before foreclosure, whether the promissory note meets the standards
27 for negotiability, neither one will hold a clear right to foreclose. The uncertainty
28 can be cleared up only by litigation or their agreement to make a further transfer
29 (Creditor delivers the note to Assignee, or Assignee resells the note to Creditor).
30

31 6. This section does not state a separate rule for determining when a
32 creditor who holds a security interest in a note to secure an obligation owed to the
33 creditor has the right to foreclose. UCC Article 9 covers both sales of instruments
34 and assignments of instruments that secure an obligation of the assignor. A
35 creditor who takes possession of a negotiable instrument will acquire the right to
36 foreclose. Other law determines when a creditor who takes possession of an
37 instrument that is not negotiable to secure an obligation owed to the creditor
38 acquires the right to foreclose. For example, UCC § 9-607(a) and (b) provide
39 rules indicating when a secured party has the right to collect on collateral and to
40 enforce the debtor's rights with respect to property that secures obligation owed to
41 the debtor (i.e., the obligation to pay the mortgage loan to the debtor).
42

43 7. Multiple persons may hold the right to foreclose a mortgage. Other law,
44 including UCC Article 3 and the law of agency, determines whether the right to
45 foreclose may be exercised by fewer than all such persons.
46

1 8. When the obligation is owned by a trust, the owner of the obligation for
2 purposes of this Section is the trustee, not the beneficial owner or owners of the
3 trust property.
4

5 9. Under subsection (c) the creditor's production of the original negotiable
6 instrument is not necessary at the time of the filing of a complaint in a judicial
7 foreclosure. Production of the original would later become appropriate if, during
8 the course of the proceedings, the homeowner or obligor seeks further
9 demonstration of the copy's authenticity or the whereabouts of the original.
10 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial
11 proceedings, a court may decide to order production of the original instrument if
12 necessary to resolve a particular issue.
13

14 10. Subsection (e) authorizes the person who has the right to foreclose to
15 exercise that right through an agent. By requiring a description of the agency it
16 does not permit the principal to remain undisclosed. An agent authorized to
17 foreclose may be a loan servicer who has a pre-existing contractual relationship
18 with the creditor, or any other person appointed at any time. If the secured
19 obligation is evidenced by a negotiable instrument, the agent or the principal (the
20 person entitled to enforce the note) may hold and retain possession of the note.
21 Subsection (e) is not intended to change existing laws that authorize a third
22 person, such as a trustee under a deed of trust, to foreclose in nonjudicial
23 proceedings. In such circumstances, subsection (e) allows the beneficiary to
24 appoint an agent, but does not speak to the procedure for appointing a substitute
25 trustee.
26

27 11. Section 401 as drafted, allowing an agent or representative to
28 foreclose, is consistent with the standing decision in *Sprint Communications Co.*
29 *v. APCC Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had
30 assigned claims for compensation from long-distance carriers to collection firms.
31 In *Sprint* the Court permitted an assignee of a legal claim for money to pursue that
32 claim in federal court, even when the assignee had promised to remit the proceeds
33 of the litigation to the assignor.
34

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

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

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

to Section 401.

Drafters' Notes

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

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

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

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

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

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

7
8 **SECTION 403. LOST, STOLEN OR, DESTROYED NEGOTIABLE**

9 **INSTRUMENT; AFFIDAVIT.**

10 **Alternative A**

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

15 **Alternative B**

16 (a) If a negotiable instrument secured by a mortgage has been lost or destroyed
17 and the obligation is not registered in a mortgage registry, the creditor or servicer may
18 foreclose the mortgage only if the creditor or servicer ~~was entitled to enforce the~~
19 ~~negotiable instrument when loss of possession occurred and~~ makes an affidavit attesting
20 to the following facts ~~stated in UCC Section 3-309(a)(1) through (3):~~

21 (1) either (A) the creditor was entitled to enforce the instrument when loss of
22 possession occurred, or (B) the creditor has directly or indirectly acquired ownership of
23 the instrument from a person who was entitled to enforce the instrument when loss of
24 possession occurred;

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

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

End of Alternatives

Legislative Note

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

(b) If a creditor or servicer makes an affidavit pursuant to subsection (a), the homeowner or obligor is entitled to adequate protection against loss that might occur by reason of a claim by another person to enforce the negotiable instrument. The creditor must provide in a record an indemnity against loss by the homeowner or obligor. Whether adequate protection requires more than the indemnity is determined by the facts of each case. On motion by the homeowner or obligor, a court may require ~~that additional adequate protection be provided by any reasonable means.~~

Drafters' Notes

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

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

(d) In a nonjudicial-foreclosure proceeding, the creditor or servicer shall include with the

notice of foreclosure required by Section 201:

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

(ii) the ~~notice of foreclosure required by Section 201~~indemnity described in subsection (b); and

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

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

(1) identify the owner of the negotiable instrument;

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

(3) state that the negotiable instrument was not located after thorough and diligent efforts to search the records of the creditor and any prior holders¹ or owners of the negotiable

instrument and their agents; and

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

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

INSERT SAFE HARBOR LOST NOTE AFFIDAVIT HERE

Drafters' Notes

~~1. The policy choice facing the Drafting Committee, of course, is the extent to which this Act should give license to foreclosing creditors who sign "lost" or "destroyed" note affidavits without ever having possessed either the original or a certified copy of the note, and without any evidence of a written assignment of the underlying mortgage to that creditor. For comparison purposes, even under the "business records" exception to conventional hearsay rules, it is not clear that unsigned contracts would be admissible evidence that the parties named in the contract would be entitled to enforce it. Further, if one is to speak of "moral hazard," there is little doubt that a liberal "lost note" affidavit policy offers~~

1 a powerful incentive to the first note holder intentionally to discard the original
2 note and thereby avoid the cost and uncertainty of maintaining thousands of
3 original paper notes. It would be useful for the Drafting Committee to discuss
4 this subject, in light of the potential for fraud against an obligor.
5

6 12. Subsection (a) ~~offers two alternatives to deal~~ with the problem of lost
7 or destroyed promissory notes by requiring the preparation of an affidavit, both
8 ~~of which interface with the UCC Article 3 treatment of lost or destroyed~~
9 ~~negotiable instruments. The first alternative is compatible with the substance of~~
10 this requirement follows the 2002 amendments to Article 3. In specifying when a
11 creditor is entitled to enforce a negotiable instrument secured by a mortgage
12 notwithstanding its inability to confirm possession of the instrument, subsection
13 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted
14 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person
15 who lost possession may be a predecessor of the creditor who seeks to enforce the
16 instrument.
17

18 ~~3. Alternative # 2 to subsection (a) is consistent with the text of UCC § 3-~~
19 ~~309 prior to the 2002 amendments.~~ Most states have not yet adopted the 2002
20 amendments. Most of these states follow the 1990 Official Text of Article 3. In
21 these states there are a few cases holding that the affidavit must be signed by the
22 person who lost the note. Other cases, however, interpret that version of Article 3
23 to allow enforcement by a successor. See, e.g., *Atlantic Nat. Trust, LLC v.*
24 *McNamee*, 984 So. 2d 375 (Ala. 2007) (examining prior cases; holding that
25 assignee of promissory note that was not in possession when lost may enforce the
26 note). ~~Alternative #2 requires the creditor who forecloses be the person who lost~~
27 ~~or destroyed the note and who executes the affidavit. This subsection rejects the~~
28 ~~cases holding that the affidavit must be signed by the person who lost the note,~~
29 adopting the position expressly taken in Revised Article 3, but does require that
30 the affiant state certain facts on which the affidavit is made; see subsection (e).

31 4. In some states, the circumstances in which a creditor is allowed to
32 enforce an unavailable negotiable instrument are broader than under either the
33 2002 version or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B)
34 (“[i]f a note or other evidence of indebtedness secured by a deed of trust is lost or
35 for any reason cannot be produced”). In some states, the circumstances are more
36 restricted because the creditor’s affidavit must attest to additional facts. E.g., Md.
37 Code, Real Prop. § 7-105.1(f) (affidavit not sufficient unless it “(1) Identifies the
38 owner of the debt instrument and states from whom and the date on which the
39 owner acquired ownership; (2) States why a copy of the debt instrument cannot be
40 produced; and (3) Describes the good faith efforts made to produce a copy of the
41 debt instrument.”).
42

43 5. When the loan documents executed by the parties did not include a
44 negotiable instrument, the creditor seeking to foreclose may or may not possess
45 an original writing or record (including a counterpart) that evidences the

obligation. This section does not require an affidavit for a creditor who lacks possession of such an original record. Some states require “lost note affidavits” under these circumstances. E.g., Va. Code § 8.01-32 (“any past-due lost bond, note, contract, open account agreement, or other written evidence of debt”); Va. Code § 55-59.1(B) (“note or other evidence of indebtedness”).

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

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

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

SECTION 404. PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.

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

(+) if both:

(i) published ~~both in a newspaper having general circulation and a newspaper having~~

general circulation in the [county] where the mortgaged property is located once per week for three consecutive weeks before the sale, with the first publication not more than 30 days before the sale and

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

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

- (1) the name of the homeowner and, if not the same, the name of the person that signed the mortgage agreement;
- (2) the name of the person that will conduct the sale;
- (3) the date, time, and place of the sale;
- (4) the street address or, if there is no street address, other information identifying where the mortgaged property is located;
- (5) any improvements and personal property that are included in the sale, if that information is readily discernable by the creditor;
- (6) whether the mortgaged property is to be sold subject to senior indebtedness;
- (7) the material terms of the sale, including payment terms required of the successful bidder at the completion of the auction;
- (8) whether access to the mortgaged property for the purpose of inspection is available to prospective bidders before the sale; and
- (9) a telephone number and electronic address from which a person may obtain additional information concerning the mortgaged property and the sale.

(c) The public advertisement under subsection (a) need not contain a legal description of

1 the mortgaged property or recording information for the mortgage or other instruments of record.

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

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

7 **Drafters' Notes**

8 1. This section allows a public sale of the mortgaged property only if the
9 creditor first gives a commercially reasonable public advertisement. The purpose
10 is to ensure that the public has a meaningful opportunity to learn of the proposed
11 sale in order to appear and engage in competitive bidding. This section supersedes
12 existing state laws covering advertisements for public sales for all foreclosures
13 that are within the scope of this act.
14

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

19 3. This act does not require the accomplishment of foreclosure by a public
20 auction sale. If other state law allows alternative methods of foreclosure, such
21 methods remain permissible. For example, Connecticut law allows strict
22 foreclosure without a sale of the property.
23

24 4. Subsection (b) states minimum requirements for the public
25 advertisement. An advertisement that lacks any of the information set forth in
26 subsection (b) is insufficient as a matter of law. An advertisement may contain
27 additional information about the mortgaged property or the sale.
28

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

1 circumstances, a creditor's decision not to publish in a newspaper benefits both
2 the creditor and the homeowner and any obligors by saving the expense.

3 Subsection (a) also creates ~~three-a~~ safe harbors regarding circumstances when
4 an advertisement would be commercially reasonable. ~~First, Specifically,~~ the
5 method of publication is commercially reasonable if the creditor publishes the
6 public advertisement both in a local newspaper and with an appropriate Internet
7 website. The Internet site may be one operated by the newspaper or by any other
8 person, whether or not located in the jurisdiction where the mortgaged property is
9 located. The Internet site, however, must be one that has characteristics
10 suggesting that interested members of the public are likely to find and to read the
11 posting. ~~There are two-The safe harbors exists, however, only if -with respect to~~
12 ~~period of time timing~~ for newspaper ~~advertisements~~ and Internet advertisements,
13 ~~satisfies the standards in the act,~~ which seek to ensure public access to the
14 advertisement for approximately one month preceding the date of sale.

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

26
27 7. Subsection (d) authorizes the creditor to post the public advertisement
28 or a sign on the property, regardless of whether that right is reserved in the
29 mortgage.

30
31 **SECTION 405. NOTICE OF FORECLOSURE SALE.** A creditor ~~or servicer~~

32 shall give each homeowner and obligor written notice of the date, time, and place of a
33 scheduled foreclosure sale. Notice of sale must be sent by first-class mail to the last-
34 known ~~address addresses~~ of each homeowner and obligor and be personally delivered to
35 the property address. Notice of sale must be mailed or delivered at least 30 days before
36 the sale date.

37 **Drafters' Note**

38 This section requires that the creditor notify the homeowner and any obligors of

1 the date, time, and place of the foreclosure sale. The section requires a 30-day
2 notice of the originally scheduled sale. One notice must be mailed, and a second
3 copy of the notice must be personally delivered to the residence.
4

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

6 (a) A person conducting a foreclosure sale may postpone or cancel the sale for
7 any reason. Announcement of a postponement must include the date, time, and place of
8 the rescheduled sale. If oral announcement of the postponement is made at the date, time,
9 and place advertised for the sale, a new public advertisement is not required under
10 Section 404 unless the sale is postponed for longer than 30 days from the date originally
11 advertised.

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

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

20 **Drafters' Note**

21 Once a foreclosure sale is scheduled, the creditor may elect to postpone or cancel
22 the sale for any reason the person considers appropriate. A postponement might
23 also take place for other reasons, such as a judicial order or an automatic stay in
24 bankruptcy. Homeowners and obligors should receive prompt notice of any
25 postponement or cancellation. The rules of Section 405 do not apply to notices of
26 postponement or cancellation. Subsection (b) covers notices of postponement and
27 cancellation, requiring that the notice be commercially reasonable under the facts
28 and circumstances. A postponement may be as short as one day. An oral
29 announcement of the postponement, made at the time and place of the originally
30 scheduled sale, would suffice if the homeowner and any obligor were present, in

1 which event no written or additional notice would be necessary.

2
3 **[ARTICLE] 5**

4
5 **ACCELERATED DISPOSITIONS;**
6 **~~ASSOCIATION LIENS IN COMMON INTEREST COMMUNITIES~~**

7
8 **SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN**

9 **SATISFACTION OF OBLIGATION.**

10 (a) A homeowner and creditor may negotiate a transfer of mortgaged property to the
11 creditor in satisfaction of the ~~homeowner's~~ obligation to the creditor secured by the mortgaged
12 property if:

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

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

17 (3) the person who sent the notice under Section 502 does not receive an
18 objection to the proposed transfer in a record from any person entitled to notice under Section
19 502 within 20 days after notice was sent to the person.

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

25 **Drafters' Notes**

26
27 1. This section authorizes a transfer from the homeowner to the creditor in
28 satisfaction of the debt or other obligation. In so doing, it provides a framework
29 for existing workout arrangements such as cash-for-keys agreements and deed-in-

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

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

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

26
27 Drafters' Notes

28
29 The comments will make clear that in the case of multiple owners of residential
30 property, all the owners need to consent to a negotiated transfer; the act does not
31 authorize a forced transfer outside of foreclosure for a non-consenting co-owner.

32
33 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

34 (a) If a negotiated transfer pursuant to Section 501 is proposed when a judicial-

35 foreclosure proceeding is pending with respect to the mortgaged property, the homeowner and
36 creditor must request that the court ~~must~~ send notice of the proposed negotiated transfer to all
37 parties except for the homeowner and the creditor that is foreclosing and the court shall promptly
38 do so.

39 (b) If a negotiated transfer pursuant to Section 501 is proposed when a judicial

foreclosure proceeding is not pending with respect to the mortgaged property, the creditor must send notice of the proposed transfer to:

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

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

Drafters' Notes

1. This section is based in part on UCC § 9-621, which provides for a notification procedure for an acceptance of personal property by a secured party in ~~full or [partial]~~ satisfaction] of a secured obligation.

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

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

SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.

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

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

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

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

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

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

20 (1) discharges the obligation in full;

21 (2) transfers to the creditor all of the homeowner's rights in the mortgaged
22 property except for any right of the homeowner to continue to occupy the mortgaged property
23 pursuant to an agreement between the homeowner and the creditor which is incorporated into the

1 negotiated transfer agreement;

2 (3) discharges the mortgage held by the creditor and any mortgage or other lien

3 ~~which that~~ is junior in priority to the mortgage held by the creditor; and

4 (4) terminates any ~~other~~-subordinate interest that is not insulated from termination
5 under other law.

6 Drafter's Notes

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

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

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

23 (d) A transfer of the mortgaged property pursuant to Section 501 ~~waives-terminates~~ all
24 rights of the creditor to obtain a personal judgment for the obligation, including attorneys' fees,
25 costs, and other expenses, against the homeowner and any other person liable for the obligation
26 secured by the property..

27 (e) A transfer of the mortgaged property pursuant to Section 501 ~~waives-terminates~~ all
28 rights of the homeowner or other person to redeem the property.

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

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

8 **Drafters' Notes**

9
10 1. This section is based in part on UCC § 9-622, which specifies the effect
11 of acceptance of personal property by a secured party in full or partial satisfaction
12 of a secured obligation.
13

14 Subsection (a) specifies that the effect of a transfer of the mortgaged
15 property is full satisfaction of the secured obligation. The transfer to which it
16 refers is one that results from performance of the agreement made by the
17 homeowner and the creditor. If a timely objection is received by the court or by
18 the creditor from a person entitled to notification, then neither this subsection nor
19 subsection (b) applies. Paragraph (1) expresses the fundamental consequence of
20 accepting the mortgaged property in full satisfaction of the secured obligation—
21 the obligation is discharged.
22

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

32 3. Subsection (c) specifies that the status of the homeowner who continues
33 to occupy the property after entering into an agreement to transfer the property to
34 the creditor in full satisfaction of the obligation is that of a licensee. The parties’
35 agreement and other state law determine the rights and obligations of the parties
36 as licensor and licensee.
37

38 4. As drafted, the sentence authorizes homeowners and creditors to enter
39 into any other type of agreement that they might desire, but no such agreement –

1 presumably including a traditional 'deed in lieu' arrangement – would confer the
2 benefits of Section 504 unless the agreement expressly provided that it was made
3 pursuant to Section 501.

4
5 The converse of the policy is reflected in this observation from Reporter
6 Smith:

7 "I believe the better policy is to displace existing state laws on "deed in
8 lieu" transactions within the scope of this act. Among other problems, if
9 we keep both, there will be transactions in which the lender has not clearly
10 documented whether the intent to proceed under this act or under other
11 law."

12
13 5. The act as drafted does not require notice of the proposed negotiated transfer
14 to a senior creditor because the interest of the senior creditor will not be
15 affected by that transfer. It may well be that a negotiated transfer would result
16 in a violation of a 'due on sale' clause in the senior mortgage, but whether or
17 not such a violation results would not be affected by notice to a senior
18 creditor, and the act should not suggest a contrary result.

19
20 Moreover, a practical concern for the junior creditor and borrower may be that
21 after receiving notice, the senior creditor may intervene in the hearing and seek to
22 impose a charging order on any consideration offered by the junior creditor in
23 connection with the negotiated transfer, a tactic that might jeopardize the entire
24 transfer. A junior creditor may well be willing to satisfy the senior debt but more
25 eager to quickly clear subordinate liens; no valid purpose would be served by
26 requiring more notice to senior lien holders than would be required in a
27 conventional foreclosure.

28 29 **SECTION 505. ABANDONED PROPERTY.**

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

33 (1) One or more doors to the property are boarded up, closed off, smashed

34 through, broken off, unhinged, or continuously unlocked, or multiple windows are boarded up or
35 closed off; or multiple window panes are broken.

36 (2) Gas service, electric service, water service, or other utility service to the

37 property has been terminated or utility consumption is extremely low so as to indicate that the

1 property is not regularly occupied.

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

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

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

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

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

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

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

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

20 (d) In a non judicial-foreclosure proceeding, a creditor or servicer or a governmental
21 subdivision in which the mortgaged property is located may seek a determination that the
22 property is abandoned property by submitting a request accompanied by an affidavit attesting to
23 facts indicating abandonment ~~from the party seeking a determination to~~ [insert name of

appropriate government official]. In addition:

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

(2) After personal inspection of the property, ~~which must include entry into any dwelling unit on the property,~~ the [insert name of appropriate government official] may issue a determination in a record that the property is abandoned property. The [insert name of appropriate government official] shall send the determination to the creditor, the homeowner, and any other person entitled to notice under Section 201.

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

Drafters' Notes

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

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

10 With respect to the statutory conditions listed in Subsection (a)(1) through
11 (a)(8), the presence of [three] or more of such conditions constitutes prima facie
12 evidence, giving rise to a presumption of abandonment. Such conditions are not
13 conclusive on the issue of abandonment. Many residential properties will exhibit
14 at least one such condition, when the homeowner is still in possession of the
15 property. If the homeowner or another person holding under the homeowner is in
16 actual possession of the mortgage property, the property is not abandoned
17 notwithstanding the existence of such conditions. Likewise, mortgaged property
18 may be abandoned under this Section notwithstanding the absence of any of the
19 statutory conditions.
20

21 3. Mortgaged property often becomes vacant, both under standard
22 mortgage and reverse mortgage transactions, when the homeowner dies. Under
23 Subsection (a)(8) proof of death of the homeowner ~~constitutes prima facie~~
24 ~~evidence is one of the conditions that may give rise to a presumption~~ that the
25 mortgaged property is abandoned, provided that there is no evidence that an heir
26 or other beneficiary of the homeowner's estate is in actual possession. Of course
27 if there are multiple homeowners, this condition is met only if all the homeowners
28 have died.
29

30 4. In a nonjudicial foreclosure proceeding, the creditor may treat the
31 mortgaged property as abandoned only by submitting evidence of abandonment to
32 an independent third party. Subsection (c) provides for the submission of evidence
33 to a person, who as part of the decision making process must personally visit the
34 property ~~and enter the dwelling unit~~. Normally jurisdictions enacting this Act will
35 designate an employee of local government, such as a building inspector, who is
36 responsible for evaluating the physical condition of dwelling units.
37

38 Judicial review of the decision is available to any interested person.
39 Subsection (c) does not specify the nature of that action, which in many
40 jurisdictions will be a mandamus action.
41

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

43 (a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c)
44 finding that mortgaged property is abandoned property and the court has previously rendered or

1 at the same time renders a judgment of foreclosure, the court shall order a public sale of the
2 abandoned property not earlier than [30] days but not later than [60] days after entry of the order.

3 (b) In a non judicial-foreclosure proceeding, on the issuance of a determination under
4 Section 505(d) that the mortgaged property is abandoned property, a creditor, servicer or trustee
5 may conduct an expedited public sale of the property. The sale may take place not earlier than
6 [30] days but not later than [60] days after the issuance of the determination, unless judicial
7 review of the determination is commenced. The creditor or servicer shall comply with the notice
8 requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

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

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

18 **Drafters' Notes**

19
20 1. This Section provides for an expedited public sale of the mortgaged
21 property after a determination that the mortgaged property is abandoned. In a
22 judicial foreclosure, the court must order the sale to take place no longer than ____
23 days after the court enters its order finding the property to be abandoned, unless
24 the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor
25 may select the date, provided it is no sooner than [____] days after the written
26 determination of abandonment.

27
28 2. This Section does not authorize a disposition of abandoned property
29 other than public sale, but other dispositions are available under other sections of

1 this Act. For example, the homeowner and creditor may agree to a negotiated
2 transfer to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash
3 for keys agreement].
4

5 3. Once a creditor decides to take advantage of the expedited foreclosure
6 procedure allowed by this Section, there is a public interest in ensuring that the
7 property becomes occupied as soon as reasonably possible. For this reason
8 subsection (c) does not allow the creditor to suspend indefinitely its efforts to
9 consummate the foreclosure. There may be exceptional circumstances in which it
10 is not feasible to hold the foreclosure sale within 60 days of the judicial order or
11 written determination finding the property to be abandoned, as required by
12 subsection (a) and (b). ~~In that event, subsection (c) provides an outside limit of~~
13 ~~four months to complete the sale.~~
14

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

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

32 4. In states that afford the homeowner and other persons a statutory right of
33 redemption after completion of a foreclosure sale, subsection (d) serves to
34 terminate those redemption rights.
35

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

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

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

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

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

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

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

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

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

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

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

(g) A person that enters abandoned property for a purposes described in subsection (f) is not liable to the homeowner for trespass or for damage to the property resulting from causes

1 other than the person's negligence or willful misconduct.

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

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

5 ~~and~~

6 (2) a homeowners association, condominium association, or cooperative
7 association, if the property is subject to the rules of the association-; or

8 (3) a community development corporation serving the area where the mortgage
9 property is located.

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

15 **Drafters' Notes**

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

29
30 2. Subsection (e) defines the scope of the creditor's obligation to maintain
31 abandoned property. The focus is on the outward appearance of the property,
32 including yards and other exterior spaces, and other conditions that are likely to

1 have significant impacts on the neighborhood, such as interior spaces frequented
2 by squatters or persons engaged in criminal activities. This subsection is modeled
3 closely on Cal. Civ. § 2929.3(b), enacted in 2008.
4

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

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

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

31 ~~SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.~~

32 ~~THIS SECTION HAS BEEN DELETED~~

33
34 [ARTICLE] 6

35 REMEDIES

36 SECTION 601. EFFECT OF VIOLATION.

37 (a) In a judicial foreclosure proceeding, if the court determines that a creditor or servicer
38 ~~is shown to have~~ has committed a material violation of this [act], the court shall dismiss the
39 action or stay the action on appropriate terms and conditions until the violation is cured.

Dismissal must be without prejudice unless the court determines that a new foreclosure action would unfairly burden the homeowner due to a creditor's repeated violations or other aggravating circumstances.

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

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Drafter's Notes

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

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

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

Drafters' Notes

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

(e) In addition to damages recoverable under subsection (d), a homeowner or obligor may

1 recover \$[200] ~~in each case for each violation~~ from the person violating this [act].

2 Drafters' Notes

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

7
8 (f) In addition to the damages recoverable under subsections (d) and (e), a homeowner or

9 obligor may recover, ~~[NCohen draft rewrite:- as the court may allow, punitive damages not~~

10 ~~exceeding \$[15,000] per obligor and homeowner. In determining the amount of recovery]~~

11 ~~additional damages as the court may allow, but not exceeding \$[15,000] per obligor and~~

12 ~~homeowner. In determining the amount of liability~~ under this subsection, the court shall

13 consider, among other relevant factors:

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

15 homeowner][in its business practices] by the creditor, ~~or~~ servicer, ~~or agent~~;

16 (2) the nature of the noncompliance, and

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

18 (g) An action brought under this section must be commenced not later than one year after

19 the violation on which it is based. In ~~mitigation opposing the imposition~~ of punitive damages for

20 violations of the act established by the obligor or homeowner, the creditor, servicer or its agent

21 may show that:

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

23 notwithstanding reasonable procedures established to preclude such mistakes, or

24 (2) before the action was brought the violation was discovered by the creditor,

25 servicer, or its agent, and cured.

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

1 **Drafters' Notes**

2

3 1. Actual damages may include damages for emotional distress.

4 2. Prior to confirmation of the foreclosure sale, the homeowner may raise

5 a material violation of the statute, for example a materially inaccurate notice of

6 the amounts needed to cure a default, to prevent the foreclosure sale (or

7 confirmation), until the violation has been corrected and remedied. After a

8 foreclosure sale the homeowner's remedy for violations of the statute is to seek

9 damages from the foreclosing creditor, and a bona fide sale purchaser is entitled

10 to rely on the conclusive effect under Section 407. If a violation by the creditor

11 can be cured timely so that full compliance is achieved, the foreclosure may

12 proceed.

13

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

15 [act] displaces any defense or remedy a homeowner or obligor may have under law other than

16 this [act].

17 **Drafter's Note**

18 This act preserves rights and defenses available to homeowners and obligors

19 under other state statutes, regulations, common law, and federal law. In many

20 states, such rights and defenses include payment or tender of payment; discharge;

21 contract law defenses, including forgery, lack of capacity, duress, absence or

22 failure of consideration, fraud, misrepresentation, unconscionability, failure of a

23 condition precedent; equitable defenses such as estoppel, laches, or unclean

24 hands; release by cancellation of debt; a violation by a creditor, servicer, their

25 predecessors in interest, or their agents of unfair and deceptive trade practices

26 statutes and other consumer protection statutes; a defect in a mortgage resulting

27 from a failure to comply with statutory requirements for the execution of

28 mortgages; a determination that the creditor or its predecessor in interest was not

29 licensed under state mortgagee licensing statutes or was not legally authorized to

30 make the loan under federal law; and breach of the duty of good faith and fair

31 dealing.

32

33 **SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL**

34 **FORECLOSURE.**

35 (a) A homeowner or obligor may bring an action against a creditor or ~~its agents~~ servicer

36 asserting a defense to a nonjudicial foreclosure.

37 (b) In an action under this section, if the court determines that a defense to the nonjudicial

foreclosure exists, the court may render an order that is just and equitable under the circumstances.

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

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

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

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

[Alternative # 2 – limited abrogation similar to FTC Rule] (a) Notwithstanding [insert reference to State UCC §3-305], [NCohen # 183: and any agreement by the homeowner or obligor], when a party with the right to foreclose under Section 401 initiates foreclosure, the

1 homeowner or obligor may assert any claim or defense that the debtor could assert against the
2 original creditor of the obligation secured by the mortgage. Any recovery by the homeowner or
3 obligor shall not exceed a recoupment or set-off against the total outstanding balance due on the
4 mortgage obligation plus amounts paid by the homeowner or obligor to the creditor or servicer
5 bringing the foreclosure action.

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

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

Chairman's Note

17
18
19 The Drafting Committee for the Home Foreclosure Procedures Act has
20 discussed but has not taken a position on the proper role, if any, of the Holder in
21 Due Course rule, as articulated in Article 3 of the Uniform Commercial Code,
22 with respect to residential real estate loans.

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

- 26
- 27 ▶ abolish the Doctrine as it applies to residential loans;
- 28 ▶ keep it unchanged; or
- 29 ▶ propose some undefined middle position

30 The Drafting Committee discussed but did not take a position on these

1 alternatives. In order to further the discussion, the Chair of the committee then
2 appointed a subcommittee composed of Commissioners Walters, Miller and
3 Lisman; their charge was to study the matter further and present a report for the
4 annual meeting to consider.

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

8
9 To assist the Commissioners with respect to the issues surrounding the
10 Holder In Due Course doctrine, Professor James Charles Smith, one of the
11 Drafting Committee's co-Reporters, has prepared a memorandum summarizing
12 several aspects of the doctrine; it is attached to the sub-committee's Report in the
13 Policy paper.

14
15 In addition, those seeking additional information concerning this subject
16 and the policy positions surrounding it will find a range of thoughtful comments
17 provided by various stakeholders – consumer representatives, regulators,
18 academic writers and the securitization industry – on the ULC website for the
19 Drafting Committee.

20 [ARTICLE] 7

21 MISCELLANEOUS PROVISIONS

22 SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.

23
24 (a) Except as otherwise provided in this Section, this [aAct] applies to the foreclosure of a
25 mortgage within its scope, even if the mortgage was created before this [act] takes effect.

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

27 Drafters' Note

28
29 This Act applies to the foreclosure of mortgages created before the effective date
30 of this Act, unless the creditor has taken action to foreclose before the effective
31 date.

32 SECTION 702. REPEALER.

33
34 (a) The following acts and parts of acts are hereby repealed:

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

36 (b) In addition to the statutes specifically repealed under subsection (a), all other acts and

parts of acts inconsistent with this Act are hereby repealed.

Drafters' Notes

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

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

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

SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

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

SECTION 704. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the

Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but

1 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
2 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
3 U.S.C. Section 7003(b).

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