D R A F T

FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

Comment [A1]: [TH] These comments include UCC-related issues and my personal comments on the text in general. Some comments result from PEB member feedback. As a general matter, these comments should not be attributed to the ALI, my firm or my clients.

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAW

FINAL MEETING DRAFT

Without Prefatory Note and with Reporter's Drafting Comments

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

June 3, 2013

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CHAIR'S NOTE

The extensive side comments in this draft have been prepared by several persons. I have tried to attribute the comments to the author, as follows:

NBC – Neil B. Cohen, Member of the PEB on the UCC
SW – Steven Weise, Member of the PEB on the UCC
TB or Tom – Tom Buiteweg, Division Chair, member of the PEB/UCC
TH – Teresa Harmon, ALI advisor, member of the PEB/ UCC
White – Alan White, Reporter
Bill – your Chair

HOME FORECLOSURE PROCEDURES

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~~**ASSOCIATION LIENS IN COMMON INTEREST COMMUNITIES**~~

HOME FORECLOSURE PROCEDURES ACT

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [act]:

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

(A) undergoing construction, renovation, or rehabilitation that is proceeding ~~diligently~~ with reasonable diligence to completion; [or]

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

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

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

(3) "Creditor" means a person that owns or has the right to enforce an obligation a person that owns or has the right to enforce an obligation. [NC Comment - The term does not include a person that owns or has the right to enforce ~~no more than~~ five or fewer mortgage loans at the

Comment [A2]: [TH] Please clarify. Is the requirement A or (B+C) or is the requirement (A or B)+C.

Comment [WB3]: •[SW] "Creditor": the reference to "owns or has a right to enforce" is not quite right – "owns" applies only to non-negotiable instruments and "right to enforce" is meant to apply to negotiable instruments (although that person may well also be the owner); the second sentence refers only to "own" and should pick up a "right to enforce" person

Comment [NBC4]: So, when the PETE is different than the person who owns the note and mortgage, they are *both* creditors? Does this work in all places in which the term "creditor" is used?

time the notice required by Section 201 is sent.[.]

Comment [NBC5]: Several points. First, this sounds like an exclusion of enforcement of these mortgages from the scope of the entire Act. Is that what is intended? If so, it is probably better to put this in the scope section of the Act. (Or does the Act apply when there is a "servicer" even though the party seeking enforcement has five or fewer loans?) Second, does this mean that creditors can avoid application of the Act by creating a series of separate entities, each of which holds five mortgages? Third, this sentence refers to ownership rather than the right to enforce. Intentional? Fourth, am I correct in assuming that "mortgage loans" is a colloquial shorthand for "obligations secured by a mortgage."

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.

(5) "Facilitation" means the assistance of a third-party neutral at an in-person meeting between the parties with the objective of reaching an agreement between the creditor and the homeowner for a commercially reasonable alternative to foreclosure.

Comment [A6]: [TH] Consider what is meant by "communicate." [WRB- this term appears in the comments.] Does a real time electronic text/chat room with only typing and no voices satisfy this requirement? Telephone/ Video conference?

Drafters' Note

The definition of 'Facilitation' requires at least one 'in-person' meeting between the parties and a third-party neutral. The requirement of an 'in-person' meeting contemplates the continuation of the practice in many jurisdictions that, as an alternative to a 'face-to-face' meeting, the parties may meet by telephone or other electronic means so long as all the parties and the neutral are able to simultaneously hear or communicate with one another.

Comment [TB7]: [Tom] How do we get from "in-person" to telephone meetings? This seems like tortured interpretation of the term. I think we should expressly embrace the alternatives described in the comments.

Comment [A8]: [TH] Clarify this in statute: too contradictory of words in text to leave to a comment. See above.

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

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

Comment [NBC9]: As I understand this definition, 'foreclosure' includes only dispossession of the homeowner but does not include disposition of the mortgaged property. Is that correct? Or does "terminat[ing] a homeowner's interest in mortgaged property" include disposition of the property?

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

Comment [A10]: [TH] If you have not done so, please review use of term in Act to confirm honesty is the sole appropriate standard for consumers. Good faith often encompasses concepts of diligence and fair dealing as well.

(9) "Holder" means the person in possession of a negotiable instrument that is payable

either to bearer or to an identified person that is the person in possession of a negotiable instrument.

Drafters' Note

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

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

Comment [A11]: [TH] Should this also exclude license interests?

Drafters' Notes

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

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

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

Drafters' Note

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

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

Comment [A12]: [TH] Tracks UCC Article 9.

Comment [TB13]: [Tom] This definition appears to include a security agreement covering fixtures. Thus, we need to consider if coverage under this Act conflicts with UCC Article 9 provisions governing fixtures.

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

Drafters' Note

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

(14) "Mortgage registry" means an electronic registry of holders of the right to enforce mortgages and obligations secured by mortgages, operated [under] federal statutes or regulations, which maintains the records of such mortgage loans] pursuant to standards designed to ensure that the record of each mortgage and obligation is unique, identifiable, and unalterable.

(15) "Mortgaged property" means residential property that is subject to a mortgage, ~~together with~~ [NCohen comment - and any personal property held or used in connection with the residential property~~, which~~ that is subject to ~~a~~ the mortgage.].

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

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

Drafters' Note

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

(18) "Obligation" means a debt or other duty or liability[that is secured by a mortgage].

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

(A) owes [payment] of the obligation; or

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

Comment [TB14]: [Tom] I am not sure that "operated" limits this definition as we would like. MERS is in some ways "operated" under ESIGN, a federal statute.

Comment [A15]: [TH] Needs a stronger link to government; "operated under" could be construed as meaning "operated in compliance with." Consider "designated by the federal government as a national electronic mortgage registry" or "created pursuant to federal legislation or regulation".

Comment [A16]: [TH] Not the right phrase. Try: "mortgages and obligations secured by mortgages"

Comment [TB17]: [Tom] We need to think about consistency with Article 9 and treatment of fixtures.

Comment [NBC18]: Subsection (12) states that a mortgage is an interest in *residential property* and that term is defined in subsection (22) as real property. So, how can personal property be subject to the mortgage. Do you mean "in which a security interest is granted under the mortgage agreement"? If there is associated personal property, UCC § 9-604(a) gives the secured party the option of proceeding under Article 9 for the personal property and real estate law with respect to enforcement of the mortgage on the real estate or proceeding against both the real and personal property under real estate law.

Comment [NBC19]: Isn't this circular with the definition of "mortgage" in subsection (12)? "Mortgage is defined as an interest that secures an *obligation*, so in order to determine whether there is a mortgage one must first ...

Comment [A20]: [TH] Circular definition. It's not an obligation unless it is secured by a mortgage but it's not a mortgage unless it secures an obligation.

Comment [WB21]: •[SW]"Obligor": this term is used dozens of times in the blackletter; every time except one (§ 201(b)(10)) it is used wth "homeowner" – why not fold the concept of "homeowner" ...

Comment [A22]: [TH] As text becomes final, let's review use in Act and see how many times we really distinguish between homeowner and obligor; my gut is that we need the distinction less than originally ...

Comment [A23]: [TH] Might this law cover mortgages securing non-payment obligations?

Comment [NBC24]: Subsection (18) seems to say that "obligation" includes non-monetary duties. If that is correct, shouldn't this be "payment or performance"? The same issue is present in subsections (19)(B) and (19)(C).

the obligation; or

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

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

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

(22) "Residential property" means real property improved with not more than four dwelling units, including structures ancillary to a unit. The term includes an attached single-family unit, a single-family manufactured-housing unit treated as real property under [insert reference to applicable state statute], real property on which construction of not more than four dwelling units has commenced, and a single-family unit in a common-interest community.

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

(24) "Servicing" means:

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

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

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

Comment [A25]: [TH] How does a common law trust holding real property for an individual fit into this?

Comment [NBC26]: This definition reflects a policy choice that a landlord who owns several thousand rental buildings with four or fewer rental units is entitled to the protection of this Act. Intentional, right?

Comment [WB27]: [JOHN MANNING] As a farm lender who never makes consumer purpose loans, Rabo Agrifinance, Inc. reminds the committee that this *[i.e., anything with a home on it is truly residential property]* is not true everywhere in the country. *** there are properties with overwhelming commercial usage that happen to have a home on them. (After all: the cows need to be milked three times day so, someone needs to live there. But, it is a working commercial dairy.) Imposing rules intended to protect consumers on these essentially commercial properties would have the effect of chilling the abilities of farmers to have equal access to business credit with other businesses. Remember, it is usually not an option to "carve out" the house from the rest of the property because of large minimum lot sizes in rural areas.

*** The Federal SAFE Mortgage Act provides an excellent definition of a residential mortgage loan that correctly identifies true residential properties without burdening the access to business credit for farmers. It does so by focusing on whether the loan is made for a consumer or business purpose rather than simply counting the number of homes on the real estate.

Comment [WB28]: • [SW] "Servicer": should it include a person entitled to enforce who is collecting (as it already includes for example the owner)?

Comment [A29]: [TH] I understand this is from RESPA, but it seems too broad; could include a lockbox bank or collecting bank that merely takes in cash.

Comment [A30]: [TH] Not sure why this is servicing for purposes of this Act.

Drafters' Note

The definitions of 'Servicer' and 'Servicing' are adapted from the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq* ("RESPA"), 24 C.F.R. § 3500.2 (b).

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

Drafters' Notes

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

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

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

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

Drafters' Notes

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

2. The term "residential property" is defined in Section 1-103 as real property improved with one-to-four dwelling units. Thus, this Act applies to the

process]; foreclosure of a mortgage on any one to four family property used for residential purposes, regardless of whether the homeowner occupies or intends to occupy one or more of the units as a principal residence or other residence. This means that this Act covers all rental properties of this type. The Act, however, does not apply if the mortgage covers five or more dwelling units, even if the homeowner personally occupies one or more of those units.

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

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

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

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

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

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

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

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

(C) the homeowner or obligor is not eligible for loss-mitigation options when the

Comment [A31]: [TH] What is "the foreclosure process?" Is the word "process" important? Clearly, loss mitigation and facilitation cannot be part of the foreclosure process.

Comment [TB32]: [Tom] Would this include an accurate statement that the homeowner does not qualify for any available loss mitigation alternatives? I think we need to revise it to make it clear that it does not.

Comment [NBC33]: "Foreclosure" is defined as, *inter alia*, a process. What is the difference between "foreclosure" and "foreclosure process"?

Comment [A34]: [TH] What is "the foreclosure process?" Is the word "process" important? Clearly, loss mitigation and facilitation cannot be part of the foreclosure process.

creditor, servicer, or agent of either has not evaluated those options ~~have not yet been evaluated~~.

SECTION 106. LOCAL REGULATION OF FORECLOSURE PROCESS. [Notwithstanding (insert reference to any applicable Home Rule' provisions under the law of this state)] No municipality, county or other political subdivision in this state may adopt any ordinance or regulation that purports to regulate, restrict or limit the process by which mortgages on residential property are foreclosed unless expressly authorized by legislation of this state.

[ARTICLE] 2

NOTICES; RIGHT TO CURE

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

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

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

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

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

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

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

Comment [AW35]: [White] Several commissioners at annual meeting recommended that we draft a safe harbor notice form…

Comment [TB36]: [Tom] I agree that we should draft a safe harbor form or safe harbor provisions for meeting the individual requirements.

Comment [WB37]: [**CHASE BANK**] We would prefer to be required to send the notice to the obligors and "mortgagors", not the "homeowners". Lenders do not generally have updated title information in their systems until closer to the referral date. If lenders are required to send the notice to the homeowner, then it places a burden on lenders to have to complete a title search prior to sending the letter. This particular letter is largely automated so the event of pulling title, putting the new information in the system, and then re-programming the letter to pick up that information would cause a large amount of delays. Lenders would have to obtain an updated title search every time the letter was generated. This type of letter could be generated multiple times prior to referral to foreclosure. It would give borrowers one additional item to challenge which would delay foreclosures and increase costs to defend claims of an invalid foreclosure.

Comment [NBC38]: Not a defined term. Is this left to the parties to define, as in Article 9, or do you have an implicit definition in mind?

Comment [WB39]: [**CHASE BANK**] We would prefer to model this language after what is required by the standard Fannie/Freddie security instrument. It does not require a specific itemization and a breakdown of all amounts. We don't object to providing general categories of the amounts that are due but prefer not list of a full running total of all past due amounts. This would require lenders to have to re-program current letters and would cause the letter to be several pages long. The other required disclosures in the letter may get overshadowed by the pages of itemized past due amounts and fees. If the borrower wants an itemization, they should be able to receive it on request. We also do not want to include estimated amounts on the notice of intent letter. The purpose of this letter is to put the borrower on notice of the past due amounts that are owed and have not been paid. If you include estimates and they are paid by the borrower, lenders would have the burden of …

Comment [NBC40]: If "creditor" is defined to include an owner of the obligation who is not a PETE, this doesn't work, right?

mortgaged property;

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

(6) that the homeowner or obligor may dispute the default or [NCohen comment- raise any other defense to foreclosure]and how to exercise [NCohen Comment - that right;]

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

(8) that the homeowner or obligor may request a copy of the homeowner's mortgage note or other evidence of the obligation and a copy of any record required to demonstrate the right to foreclose as provided in Section 401;

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

(10) if sent to an obligor [NC – suggest you add 'other than the homeowner'], that the notice is being sent to the homeowner as well as any other obligor regardless of whether the obligor has an interest in the mortgaged property.

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

Drafters' Notes

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

2. The mortgage obligation may be accelerated by filing a complaint, scheduling a sale, or by separate notice of acceleration – the notice of intent to foreclose does not by itself accelerate the debt. The notice need not refer to

Comment [TB41]: [Tom] What else do we expect the notice to say on this point? The requirement is pretty vague and should be further explained.

Comment [NBC42]: Does this mean only defenses to the remedy of foreclosure instituted to enforce a mortgage, or does it include defenses on the payment obligation, too?

Comment [NBC43]: Which right? The right to dispute, the right to raise defenses, or both?

Comment [TB44]: [Tom] Do foreclosure statutes commonly state a specific right to dispute the default and a method of doing so (other than the basic court process for judicial foreclosure)? Otherwise, what is intended here?

Comment [TB45]: [Tom] What do we expect the creditor to say? The requirement is pretty vague and should be further explained.

Comment [WB46]: [CHASE BANK]: We are already required to state the nature of the default. We should not have to state the specific basis of the creditor's right to foreclose. This information is already detailed in other required notices. By requiring it in the notice of intent, the borrower would have an additional ground to dispute the foreclosure. We would also prefer not to identify the owner of the loan because it could be interpreted to require that lenders complete the chain of title prior to the letter being sent. This letter is sent relatively early in the default and would be delayed if lenders have to complete the chain of title prior to sending the letter. This would give borrowers additional grounds to challenge the foreclosure which would delay the process and cost money to defend.

Comment [WB47]: [CHASE BANK] We would prefer not to require this information in the notice of intent letter. By putting the requirement in this type of notice, it could be viewed as a pre-condition to foreclosure. In the event that a lender failed to provide the ...

Comment [WB48]: [CHASE BANK] Lenders should be separately required to send certain loss mitigation notices prior to referral but it should not be a requirement in the notice of intent letter for the same reasons addressed ...

Comment [NBC49]: As defined, the homeowner will also be an obligor.

Comment [WB50]: [CHASE BANK] We should be required to send the notice to "mortgagors", not "homeowners" as discussed in the initial comments.

acceleration if the creditor does not intend to accelerate the obligation, for example if it is fully matured. The definition of "foreclosure" in section 102 includes other legal methods that may be used to terminate the homeowner's interest in the mortgaged property, such as a quiet title or ejectment action in the case of an installment land sale contract.

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

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

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

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

SECTION 202. MANNER OF NOTICE DELIVERY. A notice required by Section 201 or Section 302 must be sent by first-class mail to the last known address of each homeowner and obligor~~'s last known address~~ and to the address of the mortgaged property. At least one mailed notice must be addressed to the homeowner or to "occupant.". If the [homeowner or obligor or the homeowner or obligor's representative[has [NCohen 50-requested] to receive notice by electronic mail [and has provided an electronic-mail] address to the creditor or servicer, the notice also must be sent by electronic mail to the electronic-mail address.

Comment [TB51]: [Tom] We need to coordinate this statement with the limit to 3 cures in the section 203.

Comment [NBC52]: Hand delivery is not allowed? What if the homeowner actually receives the hand delivery. Still a violation?

Comment [NBC53]: Last known, or last address of which the mortgagee has notice?

Comment [TB54]: [Tom] What does this mean? Is this in addition to the one sent in the name of the individual homeowners or are we saying that one of the notices should be sent to "John Smith or occupant" and that one counts as the notice to John Smith and the occupant?

Comment [NBC55]: [Making Tom's point, I think-WRB] Compliance with the previous sentence will comply with this requirement, won't it? Or are you saying that there must be a notice, in addition to the others, that lists "or occupant" on the addressee line? If so, do you want this sent to the mortgaged premises?

Comment [A56]: [TH] Homeowner, obligor, homeowner's representative or obligor's representative.

Comment [NBC57]: If the mortgage provides for notice by e-mail, does that constitute a "request?"

Comment [TB58]: [Tom] I think we need to tighten up what is meant by a "request to receive notice." Does it include an election to receive communications electronically made before default? It seems like a bad idea to assume that such a request suggests that the homeowner wants to receive default communications through insecure email channels.

Comment [A59]: [TH] Global search e-mail, email, electronic mail and electronic-mail. Conform.

Drafters' Notes

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

~~1.~~2. Notice must be sent by ordinary first class mail. First class mail has the characteristic that it will be delivered to the last known address whether or not the recipient accepts delivery in person. The creditor or servicer may supplement first class mail with certified mail or overnight delivery but may not rely solely on methods that require the recipient to accept delivery in person.

SECTION 203. RIGHT TO CURE DEFAULT.

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

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

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

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

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

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

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

Comment [NBC60]: Does this right exist even if the landlord is not seeking to foreclose (but, perhaps, is seeking to accelerate the due date of the debt)?

Comment [A61]: [TH] Consider a definition of tender. Does immediately available funds include a cashier's check? Personal check? Delivered to creditor? Unconditional?

Comment [NBC62]: Presumably, this is a record sent by the creditor to the homeowner. Right?

Comment [NBC63]: Are there any expenses that are "accrued" but not "actually accrued"?

Comment [NBC64]: What about late fees in the note?

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

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

Comment [A65]: [TH] Consider whether a homeowner should be able to waive right to cure for other consideration.

Comment [WB66]: [Bill] Not certain where the text 'prior to default' came into THarmon's draft.

Comment [NBC67]: This seems like a rule that makes a lot of sense to protect homeowners who live in the mortgaged premises but it seems questionable whether it should also apply to land barons who own several hundred buildings with four or fewer units. Do they need to be protected against cutting a deal that is good for them if one of the elements of the deal is waiving the right to cure a default?

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..

Comment [A68]: [TH] Is the pre-default status quo restored in all respects? If there was a default or facilitation fee, does it need to be refunded? Might the terms of the mortgage provide for increased fees or capitalized missed interest during the default period and, if so, are those undone on cure?

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;

(2) The identity of the person; and

(3) where to send the notice.

Comment [NBC69]: Isn't this obviated by subsection (b)?

.

, (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.

Drafters' Notes

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

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

[ARTICLE] 3

FACILITATION

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

SECTION 301. FACILITATION PROGRAM ESTABLISHED. [Name of court or agency serving as facilitation agency] is designated as the facilitation agency**.** The facilitation agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if the facilitation agency is the judicial system, to the rules of court] establishing procedures and standards for the facilitation process.

Drafters' Notes

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

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

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

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

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

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

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

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

f. Facilitation should not unnecessarily delay the foreclosure process, but

should provide adequate time for full consideration of alternatives to foreclosure.

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

h. Documentation information exchange.

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

ii. The homeowner must provide the income and other documents required by the servicer listed in (a) above to the servicer and the facilitator not less than [30] days before the scheduled first facilitation session. If the homeowner fails to substantially provide the documents specified by the creditor or servicer within the time frame required by this paragraph, the facilitation process terminates.

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

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

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

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

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

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

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

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

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

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

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

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

Drafters' Note

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

SECTION 302. NOTICE OF FACILITATION.

(a) Before a creditor or servicer may request entry of a default or foreclosure judgment or issue a notice of a judicial or nonjudicial-foreclosure sale, the creditor or servicer must send each homeowner and obligor a notice of facilitation.

Comment [A70]: [TH] Give?

(b) If the facilitation agency establishes a procedure [for the agency to send] of facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to

Comment [A71]: [TH] Can agency send instead of creditor/servicer? If so, adjust (a) above.

the creditor or servicer and to each homeowner and obligor. If there is no procedure for the agency to send notice, the creditor or servicer shall send a notice of facilitation to each homeowner and obligor, in the same manner as required for the notice under Section 201.

(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.

Comment [A72]: [TH] Is this word supposed to tie into the possibility of requesting the facilitation agency to send in (b)? If so, tie together.

(d) The notice of facilitation under subsection (a) 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].

Comment [A73]: [TH] Is a "single point of contact" already an established procedure? If required by statute, be more clear. If there is no "single" point of contact, is contact information for the creditor/servicer required? Note also that "person" is defined to include entities.

(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.

Comment [AW74]: [White] - in compliance with? to satisfy?

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 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.

Comment [A75]: [TH] How much detail does the creditor have to give when declining to offer loss mitigation?

Comment [A76]: [TH] May the facilitation agency charge the obligor?

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

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

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

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

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

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

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

(6) on the part of a creditor or servicer to advise the homeowner, obligor and

facilitator of any loss-mitigation option that is available to the homeowner or obligor and failure to consider the homeowner or obligor for the loss-mitigation option before or during facilitation.

Comment [A77]: [TH] 303(b) does not require notice to facilitators.

Comment [A78]: [TH] What does "available" mean? Fact specific or generic?

Drafters' Notes

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

2. Facilitation cannot succeed in reaching a resolution other than a foreclosure sale unless both parties participate in good faith. This requires not only the participation of a person representing the creditor or servicer who has the authority to enter into a settlement agreement, but also the participation of necessary persons on the borrower's side - those who own the home and those who are liable on the mortgage debt. In simplest case, in which one person is both the homeowner and the obligor, obviously there is no difficulty in determining who must participate on the borrower's side. In the common situation in which married spouses both own the home and are liable on the debt, significant problems will be infrequent. Both spouses have the right to participate in facilitation under this Act. If only one chooses to attend a facilitation meeting, that ordinarily would not present a problem with respect to negotiation of a settlement acceptable to both homeowners/obligors. However, when the "homeowner" and "obligor" are not the same person or persons, care must be taken to involve both the homeowner and the obligor. Their interests might be compatible, but they might diverge in some circumstances. For example, pursuant to a divorce settlement an ex-wife may own the home, with the ex-husband having sole personal liability on the mortgage debt. The participation of both in facilitation ordinarily will be necessary for a loan modification that to avoid foreclosure. The homeowner's primary objective may be retaining the right to possess the home, while the obligor's primary objective may be minimizing financial liability on the debt.

SECTION 304. NO FORECLOSURE DURING FACILITATION.

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

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

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

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

Comment [A79]: [TH] Can a notice of intent to foreclose be sent?

Comment [A80]: [TH] What if homeowner immediately states he/she is not interested in facilitation?

Comment [AW81]: [White] One comm'r at annual meeting suggested need for emergency request to proceed if after facilitation starts property faces catastrophic deterioration…

Drafters' Note

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.

One Commissioner at the annual meeting suggested a need for emergency request to proceed if after facilitation starts property faces catastrophic deterioration.

[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 [NCohen comment 78- default in the obligation] and satisfaction of all conditions required by the mortgage agreement and law of this state other than this [act]. [].

Alternative A

(b) The only person with the right to foreclose is:

(1) except as otherwise provided in paragraph (3), if the obligation is evidenced by a negotiable instrument, [a] [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 or destruction, that person must meet the requirements of Section 403.

Alternative B

(b) The only person[] with the right to foreclose is:

(1) except as otherwise provided in paragraph (3), if the obligation is evidenced

Comment [A82]: [TH] Several PEB members suggested that, if the policy decision was to follow existing and future law on who can enforce note, the clearer drafting fix is to just state "the party with the right to enforce the underlying obligation has the right to foreclose." If more detail than this is desired, consider adding it to a comment. PEB discussion continues on whether current law is clear that the "owner" has the right to enforce a non-negotiable promissory note.

Comment [TB83]: [Tom] Ed Smith observed at the October 2013 PEB meeting that it appeared our policy choice was to link the right to foreclosure to the right to enforce the obligation secured by the mortgage in question. I think that description is correct.

He suggested that if that is our policy objective that we seriously reconsider the current approach of attempting to restate the law regarding who can enforce the obligation. He does not believe we have it right yet and that the task may prove to be too difficult. ...

Comment [A84]: [TH] If the drafting decision is made to specifically list who can enforce/foreclose, must reflect other parties entitled to enforce/foreclose under current la ...

Comment [NBC85]: Not a defined concept. What if a note is silent as to what constitutes "default" – is dishonor of the note default?

Comment [TB86]: [Tom] What about compliance with this act? We have a cure right and facilitations provisions, both of which prohibit foreclosure in some cases un ...

Comment [A87]: [TH] Must also comply with this Act.

Comment [NBC88]: Do you mean power? After all, if someone else has the power to foreclose, but not the right to do so, the foreclosure may occur but the person ...

Comment [NBC89]: In the lost note scenario, more than one person can be a PETE – (i) a person who files a lost note affidavit, and (ii) someone who (notwithstanding the ...

Comment [WB90]: [Bill] the draft refers to 'the'- not certain where 'a' came from.

Comment [NBC91]: Intentionally narrower than UCC § 3-309? For example, what about theft of the note?

Comment [WB92]: [Bill] But see Comment 7

Comment [A93]: [TH] If read literally, could be viewed as precluding enforcement by agents. Consider agency throughout this section.

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 3-301~~Article 3], or

(C) a person not in possession of the negotiable instrument due to its loss 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 foreclose when the obligation is evidenced by a negotiable instrument. 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.

(2) except as otherwise provided in paragraph (3), if the obligation is not evidenced by a negotiable instrument, ~~except as otherwise provided in subsection (d),~~ the [NCohen Comment 90 –owner] of the obligation~~; or~~.

(3) W~~w~~hether or not the obligation is evidenced by a negotiable instrument, if ~~after the registration of~~ the obligation is registered in a mortgage registry, the only person with the right to foreclose is the person identified ~~shown~~ as entitled to enforce the obligation and the mortgage on a certificate issued by a mortgage registry as of the time the foreclosure is commenced.

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

Comment [NBC94]: See comment in Alternative A

Comment [A95]: **[TH]** Too limiting. See comment below and compare to UCC Article 3 lost note affidavit.

Comment [TB96]: **[Tom]** We have left the holder of a transferable record under UETA and ESIGN out in the cold, unless they also happen to be the owner. This defeats the purpose of UETA section 16, which is to give the holder of a transferable record all the rights of a holder of a negotiable instrument under UCC Article 3. ESIGN § 201 handles the issue in substantially the same way. The registery idea does not really capture transferable records, because no registry is required to have a transferable record.

Comment [NBC97]: Perhaps better to say "the person entitled to enforce the obligation under applicable law." I say this because your use of "owner" assumes that the person entitled to enforce a non-negotiable note will always be the owner. But this is not always the case. While UCC § 9-607(a)(3) gives the buyer of a note the right *as against the seller of the note* to enforce the note and go after collateral for it, UCC § 9-607(e) makes it clear that subsection (a)(3) does not create an obligation on the part of the obligor to pay the buyer. Rather, that is determined by other law. See Comment 6 to UCC § 9-607 (especially the italicized language in the comment). Similarly, UCC § 9-406(a) (which deals with enforcement rights of assignees) does not apply to obligations on non-negotiable notes. Since UCC Article 3 does not govern non-negotiable notes either, this issue is left to the common law of contracts (or to that law, as modified in a particular jurisdiction, by common law principles about non-negotiable notes, if there is a difference). There are at least two situations in which the owner of a non-negotiable note cannot enforce it against the maker or other obligor. First, consider a …

Comment [TB98]: **[Tom]** This leaves a secured party who has a perfected security interest in the a non-negotiable mortgage note taken as security for an obligation out in the cold generally. That might be what we want, but we should at least consider it.

Comment [NBC99]: Will the envisioned mortgage registry really certify a legal conclusion (who is entitled to enforce) as opposed to a factual conclusion (who deposited the note in the registry and what the note says)?

Comment [NBC100]: Same as the person entitled to commence foreclosure under subsection (a)?

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

(1~~2~~) a statement indicating who is in possession of the negotiable instrument; or

(2) a statement that the negotiable instrument ~~has~~ has been lost ~~or~~, destroyed, or stolen, [ ]in which case the [complaint]]] must include a lost-negotiable-instrument affidavit that complies with [UCC Section 3-309].

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

(d) In a nonjudicial-foreclosure proceeding, the creditor or servicer must attest by affidavit to facts demonstrating that the creditor or servicer has the right to foreclose under subsection (b). The affidavit must be included with the notice of foreclosure required by Section 201.

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

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

Drafters' Notes

1. The General Counsel's office of the Federal Reserve Bank of New York has recommended in its letter dated March 6, 2013 that the Act contemplate the

Comment [TB101]: [Tom] This needs to be open to other forms of proof. What if the note was lost or destroyed and there is no copy that complies with this requirement?

Comment [A102]: [TH] Impossible to provide copy of note in present condition if destroyed; impossible to be certain copy is in current form if note is lost. Best evidence rule.

Comment [NBC103]: Yellowed and dog-eared? Or do you mean something else?

Comment [NBC104]: See previous comments on this point

Comment [TB105]: [Tom] Could this requirement work any mischief? These terms are used in the title of 9-309, but not the text. In particular, could "stolen" be given a different meaning than it has under UCC Article 3?

Comment [A106]: [TH] Note may be unavailable for several reasons: Lost, stolen, destroyed, wrongful possession of someone else. Focus on "not in possession of note".

Comment [NBC107]: UCC § 3-309 does not have any rules for "lost note affidavits." Affidavits are a customary way to demonstrate that one is entitled to enforce under § 3-309, but there is no standard for affidavits in that section that must be complied with.

Comment [TB108]: [Tom] Shouldn't this be "records?"

Comment [TB109]: [Tom] I don't think this works for the SP who took the note to secure an obligation.

Comment [NBC110]: If the non-negotiable note has been sold, "the record" evidencing the obligation is likely to be a different record than the record evidencing the plaintiff's ownership.

Comment [NBC111]: "Foreclose" may include a lengthy process involving many actions, including starting a legal proceeding, evicting the homeowner, and selling the property. Presumably, an authorization can be partial, for only one of those aspects of foreclosure – right? Or is the intent here only to allow the person with the right to foreclose to authorize someone else to commence the proceeding?

Comment [NBC112]: In situations in which the PETE is not the owner (presumably because there has been a sale of the note but it has not been delivered to the buyer), as a practical matter how often with the PETE, who has no economic stake in the note, institute foreclosure from which it will not benefit, unless it is acting as agent for the owner (in which case it is probably also possessing the ...

possibility of an electronic recording system where all notes are electronically generated and where, as a consequence, there is no paper note which might be 'possessed' in order to satisfy the holder in due course requirements of UCC Article 3. This approach has been endorsed by the Federal Housing Finance Agency, by Prof. Dale Whitman and by others.

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

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

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

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

4. In judicial foreclosure, under existing law the creditor generally must confirm possession or account for possession of the original note at the time of filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the

law appears not to require confirmation of possession of the original note prior to commencement of foreclosure proceedings or the sale. This section requires that the foreclosing person have possession of the negotiable instrument prior to the commencement of foreclosure, whether the proceeding is judicial or nonjudicial, unless that person prepares a lost note affidavit meeting the requirements of Section 4-103.

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

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

The two-tiered system makes it necessary to determine whether a promissory note is negotiable for some cases. Uncertainty as to whether the note is negotiable creates cost. If a single person both possesses the note and owns the obligation, the problem is not major. If it is unclear whether the secured obligation is evidenced by a negotiable instrument or by an instrument that is not negotiable, the creditor may choose to proceed by complying with both subsections (b)(1) and (b)(2). If, however, different persons possess the note and own the obligation, the problem is harder. For example, consider a promissory note secured by a mortgage and payable to the order of Creditor. Creditor enters into a signed contract with Assignee pursuant to which Creditor sells the promissory note to Assignee. Assignee pays Creditor, but Creditor retains possession of the promissory note (and is not possessing the note as agent for Assignee). If the promissory note is a negotiable instrument under UCC Article 3, Creditor can commence a foreclosure under this Section, but Assignee cannot (because Creditor is the holder of the note). If the promissory note is not a negotiable instrument, however, Assignee is its owner and can commence a foreclosure, but Creditor cannot. If Creditor and Assignee cannot reliably

determine, before foreclosure, whether the promissory note meets the standards for negotiability, neither one will hold a clear right to foreclose. The uncertainty can be cleared up only by litigation or their agreement to make a further transfer (Creditor delivers the note to Assignee, or Assignee resells the note to Creditor).

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

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

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

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

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

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

SECTION 402. TRANSFER OF RIGHT TO ENFORCE MORTGAGE..

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

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

Comment [A113]: [TH] PEB members noted the concern previously expressed in Drafting Committee meetings that county recorders may not like this approach. A question was raised as to whether title companies supported this approach; the view was that yes, title companies would support this approach.

Comment [NBC114]: These edits change what you have written from a loose aphorism to a more precise statement of current law. See UCC § 9-203(g). Note, in particular, that it is the transfer of the property right in the obligation that is accompanied by a transfer of the corresponding right in the mortgage – not a transfer of the "right to enforce." See UCC § 9-203(g).

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.

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

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

Alternative A

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

Alternative B

(a) If a negotiable instrument secured by a mortgage has been lost or destroyed

Comment [NBC115]: What about other situations in which the note is unavailable, such as theft? UCC § 3-309, for example, covers situations in which a person "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."

Comment [A116]: [TH] PEB members discussed a broad set of issues, including the potential impact of intentional destruction of note, the interplay with old and new Article 3, and 3-604 on cancellation of obligations.

Comment [TB117]: [Tom] Could this phrase work any mischief? These terms are used in the title of 9-309, but not the text. In particular, could "stolen" be given a different meaning than it has under UCC Article 3?

Comment [A118]: [TH] Too limiting.

and the obligation is not registered in a mortgage registry, the creditor or servicer may foreclose the mortgage only if the creditor or servicer ~~was entitled to enforce the negotiable instrument when loss of possession occurred and~~ makes an affidavit attesting to the following facts ~~stated in UCC Section 3-309(a) (1) through (3).~~:

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

(2) the loss of possession was not the result of a transfer by the creditor or servicer 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.

Comment [A119]: [TH] Need for alternatives and proper interpretation of old Article 3 subject to discussion.

(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~~.

(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 holders 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

Comment [A120]: [TH] Appropriate form of protection requires further discussion. Will an indemnity always be available, or are some securitization trusts precluded by their organization and documents from indemnifying? Can a bond, affiliate indemnity, servicer indemnity or third party indemnity satisfy (b) if the creditor is not giving its own indemnity?

Comment [A121]: [TH] Holders or owners?

Comment [A122]: [TH] Party enforcing may not have the ability to force a search of the records of all prior holders.

Comment [TB123]: [Tom] We should consider whether these additional items conflict with 3-309 or are appropriate additions given this relates to foreclosure of the real property and not just enforcement of the debt. I think this needs to be justified in terms related to the collateral, which might be difficult given that this all relates to the note itself. Would this be more palatable if it were a separate affidavit?

In addition, each of these new requirements poses potential issues that should be discussed.

Comment [TB124]: [Tom] This might be difficult given the situation-specific information required in proposed (e).

CHASE BANK COMMENTS ON SECTION 403(e)

Comment [WB125]: [CHASE BANK]
Section 403(e) provides that in addition to the facts stated in subsection (a), the affidavit must, among other things, identify *the owner of the negotiable instrument* and state from whom and the date on which the owner acquired ownership. This section works when the creditor or servicer acquired possession of the note and subsequently lost it (in that situation I think the creditor or servicer can reasonably say that the creditor owned the note) but it does not work in situations where the creditor or servicer never obtained possession of the note. If the creditor or servicer never obtained possession of the note, how can the creditor or servicer state that it is the owner of the note or from whom and on what date it acquired ownership of the note? In other words, I think it's problematic for party to certify ownership of a Note if that party never possessed the Note.

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

1~~2~~. Subsection (a) ~~offers two alternatives to~~ deals with the problem of lost or destroyed promissory notes by requiring the preparation of an affidavit.~~,~~ ~~both of which interface with the UCC Article 3 treatment of lost or destroyed negotiable instruments.~~ The ~~first alternative is compatible with the~~ substance of this requirement follows the 2002 amendments to Article 3. In specifying when a creditor is entitled to enforce a negotiable instrument secured by a mortgage notwithstanding its inability to confirm possession of the instrument, subsection (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted the 2002 amendments to Article 3, Section 3-309 makes it clear that the person who lost possession may be a predecessor of the creditor who seeks to enforce the instrument.

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

4. In some states, the circumstances in which a creditor is allowed to

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

5. When the loan documents executed by the parties did not include a negotiable instrument, the creditor seeking to foreclose may or may not possess 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:

(1) if published both in ~~a newspaper having general circulation~~ a newspaper having general circulation in the [county] where the mortgaged property is located and on an Internet website that is reasonably expected to be viewed by persons having an interest in purchasing the mortgaged property;

(2) for a newspaper advertisement, if published once per week for three consecutive weeks before the sale, with the first publication not more than 30 days before the sale; and

(3) for an Internet website, if published 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;

Comment [NBC126]: Why is this aspect of foreclosure singled out for special treatment in this act (rather than leaving it to general mortgage law)? Why mention commercially reasonable advertising but not a requirement that all aspects of the disposition be commercially reasonable?

Comment [NBC127]: Is the intent here to cover only print publications. What about the increasing number of cities in which the newspaper is published electronically every day but in print only a few times per week. Must the advertisement be in the print edition?

Comment [TB128]: [Tom] Should this be "or?" Are these intended to be individual safe harbors or do items 2 and 3 define item 1?

Comment [NBC129]: Does this mean "posted on the website"?

Comment [NBC130]: Only the newspaper version in subsection (a) uses the word "advertisement." Does this rule apply to the web postings as well? (I assume that the answer is yes.)

Comment [NBC131]: A creditor can choose to dispose of personal property via the Article 9 rules. See UCC § 9-604(a). It should be made clear that this section does not override that option.

(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.

Comment [A132]: [TH] Of the creditor or someone acting for the creditor?

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

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

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

Comment [A133]: [TH] If sent separately, when and to what address?

Drafters' Notes

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

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

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

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

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

Subsection (a) also creates three safe harbors regarding circumstances when an advertisement would be commercially reasonable. First, the method of publication is commercially reasonable if the creditor publishes the public advertisement both in a local newspaper and with an appropriate Internet website. The Internet site may be one operated by the newspaper or by any other person, whether or not located in the jurisdiction where the mortgaged property is located. The Internet site, however, must be one that has characteristics suggesting that interested members of the public are likely to find and to read the posting. There are two safe harbors with respect to timing for newspaper advertisements and Internet advertisements, which seek to ensure public access to the advertisement for approximately one month preceding the date of sale.

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

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

SECTION 405. NOTICE OF FORECLOSURE SALE. A creditor or servicer shall give each homeowner and obligor written notice of the date, time, and place of a scheduled foreclosure sale. Notice of sale must be sent by first-class mail to the last-known address [addresses?] of each homeowner and obligor and be personally delivered to the property address. Notice of sale must be mailed or delivered at least 30 days before the sale date.

Comment [NBC134]: Just one address per person, right?

Comment [NBC135]: Which one?

Drafters' Note

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

SECTION 406. POSTPONEMENT OR CANCELLATION OF SALE.

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

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

(c) If a foreclosure sale is cancelled, the creditor promptly shall notify each homeowner and obligor ~~by first-class mail~~ in the manner provided in Section 405. The notice must include a telephone number and electronic mail address from which a person

may obtain additional information concerning the creditor's plan with respect to the mortgaged property, including any new sale date.

Drafters' Note

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

[ARTICLE] 5

ACCELERATED DISPOSITIONS~~;~~
~~ASSOCATION LIENS IN COMMON INTEREST COMMUNITIES~~

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

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

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

(2) notice is sent to the persons entitled to notice under Section 502;; and

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

(b) If the homeowner or a person claiming under the homeowner is in possession of the

Comment [NBC136]: Based on section 504, it appears that the procedure in this Article applies only to "total satisfaction" agreements. What happens if the homeowner and creditor would like to agree, say, that the homeowner will surrender his/her interest in the property in exchange for a $250,000 credit against the mortgage obligation? You might not want to facilitate this for owner-occupiers, but the scope of this act includes professional landlords who would be able to enter into such "partial strict foreclosure" agreements in Article 9.

Comment [TB137]: [Tom] Do we intent to permit partial satisfactions?

Comment [A138]: [TH] Use obligation, not homeowner's obligation.

Comment [A139]: [TH] Obligor is the proper term for the party who owes the obligation.

Comment [NBC140]: Notice of intent to engage in a negotiated transfer and its terms?

Comment [NBC141]: When? How many days before the transfer must this notice be sent/received?

Comment [A142]: [TH] Specify content of notice.

Comment [NBC143]: In a record, or is oral good enough?

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

Drafters' Notes

1. This section authorizes a transfer from the homeowner to the creditor in satisfaction of the debt or other obligation. In so doing, it provides a framework for existing workout arrangements such as cash-for-keys agreements and deed-in-lieu of foreclosure transactions. This section and the following two sections provide for a safe harbor by specifying the effect of a transfer that meets the requirements of this section. This section is based in part on UCC § 9-620, which provides for the acceptance of personal property mortgaged property by a secured party in full or partial satisfaction of a secured obligation. The important innovations here are, first, to provide an expedited procedure to discharge junior liens on the property without the need for a foreclosure sale; and second, to resolve a number of collateral issues that flow from the expedited procedure, as detailed in Section 504.

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

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

SECTION 502. NOTICE OF NEGOTIATED TRANSFER.

(a) If a negotiated transfer pursuant to Section 501 is proposed when a judicial-foreclosure proceeding is pending with respect to the mortgaged property, the court must send notice of the proposed negotiated transfer to all parties, except for the homeowner and the

creditor that is foreclosing.

(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 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 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 [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

Comment [A144]: [TH] How does court get information?

Comment [A145]: [TH] The UCC 10 day rule is based on expected lead times for ordering/receiving lien searches in secretary of State UCC records. Mortgage/county recorder searches may take longer.

Comment [A146]: [TH] Be more specific; what does "perfected interest" mean? Is there a requirement to search a specific set of mortgage/UCC/tax/judgment lien records? Does "interest" mean more than a mortgage or security interest?

Comment [A147]: [TH] How will searcher know which interests are subordinate? Priority is not always evident from lien search results, particularly where there may be intercreditor arrangements.

Comment [A148]: [TH] Not clear in Act whether partial strict f/c is permitted.

Comment [A149]: [TH] Question of whether senior interest holders should receive notice/could block negotiated transfer needs to be considered further.

Comment [NBC150]: Only subordinate interests? After all, senior interests survive. Or, because a first mortgagee may claim that it is adversely affected by the transfer because it will now have to deal with someone else, can the holder of a senior interest object and thereby stop the negotiated transfer?

which would be affected by a negotiated transfer under Section 504, the court ~~promptly~~ shall schedule a prompt hearing on the objection.

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

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

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

SECTION 504. EFFECT OF NEGOTIATED TRANSFER.

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

(1) discharges the obligation in full;;

(2) transfers to the creditor or servicer all of the homeowner's rights in the

Comment [A151]: [TH] What might this be?

Comment [A152]: [TH] Consider whether this should refer to equity overall or to value in excess of the mortgage being foreclosed.

Comment [A153]: [TH] Subsection (c) needs work; as drafted objecting party could be a senior creditor; senior creditor should not have to pay other creditors and should not have its claim extinguished.

Comment [A154]: [TH] Does this mean no partial strict f/c?

Comment [NBC155]: Why would this happen?

mortgaged property except for any right of the homeowner to continue to occupy the mortgaged property pursuant to an agreement between the homeowner and the creditor which is incorporated into the negotiated transfer agreement;

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

(4) terminates any other subordinate interest.

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

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

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

(e) A transfer of the mortgaged property pursuant to Section 501 waives all rights of the homeowner[or other person?] to redeem the property.

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

Comment [A156]: [TH] Is a lease a subordinate interest?

Comment [A157]: [TH] This section poses a policy issue requiring more attention. What are "subordinate interests" in this context? Could any of them be held by the sorts of individuals/consumers this act is intended to protect? If so, perhaps failure to notify should have stronger consequences.

Comment [A158]: [TH] For (d) and (e), consider drafting as affirmative rules rather than waivers.

Comment [A159]: [TH] §506 talks in terms of rights of homeowner or other person to redeem.

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

Comment [A160]: [TH] There is a problem with this subsection: senior creditor's mortgaged property has been sold without notice to senior creditor. Senior creditor no longer knows who owns the mortgaged property, no longer has the same contractual protections vis a vis the property owner – thou shalt not sell, thou shalt not grant other liens, thou shalt maintain. Negotiated transferee may have other creditors who take liens on the mortgaged property. Failure to notify seniors is problematic, even if (g) technically preserves their lien.

Drafters' Notes

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

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

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

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

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

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

"I believe the better policy is to displace existing state laws on "deed in

lieu" transactions within the scope of this act. Among other problems, if we keep both, there will be transactions in which the lender has not clearly documented whether the intent to proceed under this act or under other law."

SECTION 505. ABANDONED PROPERTY.

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

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

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

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

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

(5) A creditor has changed the locks on the property and, for at least 30 days after the changing of the locks, the homeowner has not requested entrance to the property.

Comment [A161]: [TH] From whom would the homeowner have to request entrance?

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

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

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

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

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

(d) In a non judicial-foreclosure proceeding, a creditor or servicer or a governmental subdivision in which the mortgaged property is located may seek a determination that the property is abandoned property by submitting a request accompanied by an affidavit from the party seeking a determination to [government official]. In addition:

Comment [A162]: [TH] To whom?

Comment [A163]: [TH] Saying what?

(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 [government official] may issue a determination in a record that the property is abandoned property. The [government official] shall send the determination to the creditor, the homeowner, and any other person entitled to notice under Section 201.

Comment [A164]: [TH] Why is this required for non-judicial but not judicial?

(3) The determination or the refusal of the [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.

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

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

3. Mortgaged property often becomes vacant, both under standard mortgage and reverse mortgage transactions, when the homeowner dies. Under Subsection (a)(8) proof of death of the homeowner constitutes prima facie evidence that the mortgaged property is abandoned, provided that there is no evidence that an heir or other beneficiary of the homeowner's estate is in actual possession. Of course if there are multiple homeowners, this condition is met only if all the homeowners have died.

4. In a nonjudicial foreclosure proceeding, the creditor may treat the

mortgaged property as abandoned only by submitting evidence of abandonment to an independent third party. Subsection (c) provides for the submission of evidence to a person, who as part of the decision making process must personally visit the property and enter the dwelling unit. Normally jurisdictions enacting this Act will designate an employee of local government, such as a building inspector, who is responsible for evaluating the physical condition of dwelling units.

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

SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.

(a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c) finding that mortgaged property is abandoned property and the court has previously rendered or at the same time renders a judgment of foreclosure, the court shall order a public sale of the abandoned property not earlier than [30] days but not later than [60] days after entry of the order.

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

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

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

Drafters' Notes

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

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

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

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

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

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

SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.

(a) In this Section, "maintain" means to:

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

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

(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) In a judicial-foreclosure proceeding, [a 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) In a nonjudicial-foreclosure proceeding, a [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(d~~e~~) 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 a governmental entity issues 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

Comment [A165]: [TH] This is a very unusual list; consider scope.

Comment [A166]: [TH] How does this work is there are multiple creditors?

Comment [A167]: [TH] Same question.

Comment [A168]: [TH] How does the creditor know that a governmental entity has obtained an abandonment order?

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 purpose~~s~~ described in subsection (f) is not liable to the homeowner for trespass or for damage to the property resulting from causes other than the person's negligence or willful misconduct.

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

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

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

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

Drafters' Notes

1. This Section requires creditors to maintain abandoned properties under certain circumstances. The obligation may arise based upon action of the creditor or action of the municipality or other governmental entity where the property is located. The creditor does not become obligated to maintain merely by

commencing foreclosure proceedings at a time when the dwelling unit is vacant. Rather, the obligation arises when the creditor seeks to use the expedited foreclosure procedure authorized by Section 505 and obtains either a judicial order or official determination that the property is abandoned. Under subsection (c) the obligation may also arise any time after the creditor has commenced foreclosure proceedings if the municipality or other local governmental entity cites the property as both abandoned and presenting a threat to public safety or health.

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

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

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

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

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

THIS SECTION HAS BEEN DELETED

[ARTICLE] 6

REMEDIES

Comment [A169]: [TH] Remedies provisions subject to continuing discussions.

SECTION 601. EFFECT OF VIOLATION.

(a) In a judicial foreclosure proceeding, if the court determines that a creditor or servicer ~~is shown to have~~ has committed a material violation of this [act], the court shall dismiss the 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 homeowner or obligor may initiate an action to enjoin or restrain the foreclosure. The court may allow foreclosure to continue after the violation is cured, unless the court determines that the continuation of foreclosure would unfairly burden the homeowner due to a creditor's repeated violations or other aggravating circumstances.

Comment [A170]: [TH] How would this showing take place?

Comment [A171]: [TH] Where the creditor has misbehaved, is the ban on foreclosure forever, even if the obligor never makes another payment?

(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.

Comment [A172]: [TH] Could this ever be a too-material penalty?

(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.

Comment [A173]: [TH] Is this intended to create employer and employee liability at servicers and creditors?

Comment [NBC174]: Each lawsuit, or each violation?

Comment [A175]: [TH] Same comment

Comment [A176]: [TH] Materiality threshold?

(e) In addition to damages recoverable under subsection (d), a homeowner or obligor may recover $[200] in each case from the person] violating this [act].

Comment [WB177]: [CHASE BANK] The borrower should be able to recover actual damages, attorney's fees, and other amounts as the court may aware subject to certain restrictions. We do not need to include an additional $200 per violation.

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

obligor [NCohen draft rewrite- Comment 169: "may recover, as the court may allow, punitive damages not exceeding $[15,000] per obligor and homeowner. In determining the amount of recovery."] [Existing text - may recover additional damages as the court may allow, but not exceeding $[15,000] per obligor and homeowner. In determining the amount of liability] under this subsection, the court shall consider, among other relevant factors:

(1) the frequency and persistence of noncompliance by the creditor, servicer, or agent;;

(2) the nature of the noncompliance, and

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

(g) An action brought under this section must be commenced not later than one year after the violation on which it is based. In mitigation of damages established by the obligor or homeowner, the creditor, servicer or its agent may show that:

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

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

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

Drafters' Notes

1. Actual damages may include damages for emotional distress.

2. Prior to confirmation of the foreclosure sale, the homeowner may raise a material violation of the statute, for example a materially inaccurate notice of the amounts needed to cure a default, to prevent the foreclosure sale (or confirmation), until the violation has been corrected and remedied. After a foreclosure sale the homeowner's remedy for violations of the statute is to seek damages from the foreclosing creditor, and a bona fide sale purchaser is entitled to rely on the conclusive effect under Section 407. If a violation by the creditor can be cured timely so that full compliance is achieved, the foreclosure may

Comment [NBC178]: Does the edited version accurately reflect your intent? I suggest a rewrite along these lines because "damages," except when modified by "punitive" or "exemplary" or something like that, usually refers to actual damages.

Comment [NBC179]: With respect to this homeowner, or with respect to all of the homeowners with whom the creditor deals?

Comment [A180]: [TH] Overall approach to agency needs further focus. Agency has not been discussed in this section until here.

Comment [NBC181]: Clauses (1) and (2) do not refer to mitigation as that term is used in contract damages law. Is the intent to make sure that actual damages are calculated correctly, or to provide "mitigating factors" that argue against the imposition of punitive damages?

proceed.

SECTION 602. DEFENSE OR REMEDY UNDER OTHER LAW. Nothing in this [act] displaces any defense or remedy a homeowner or obligor may have under law other than this [act].

Drafter's Note

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

SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL FORECLOSURE.

(a) A homeowner or obligor may bring an action against a creditor or its agents asserting a defense to a nonjudicial foreclosure.

(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

Comment [A182]: [TH] PEB members did not reach a conclusion on what should be done in connection with HDC. Members expressed a desire for additional information, including
-- which specific defenses would now be available that are not available today;
-- what is the likelihood those defenses would be raised;
-- what is the litigation burden of those defenses and would a heightened pleading/evidentiary standard or TILA-style due diligence defense alleviate concerns; and
-- how does abrogation for home mortgages compare to the FTC Rule for other consumer obligations and commercial mortgage backed securitization.

Comment [NBC183]: Is the servicer included here?

Comment [NBC184]: I'm not sure what this section 603 means. Is the intent to say that the homeowner can run to court if the creditor is proceeding in violation of the rules of this Act, or to say that the homeowner can assert that it is not in default on the obligation secured by the mortgage (either because the homeowner satisfied the obligation already or because the homeowner has defenses to that obligation that make the obligation not due)? If the intent is to cover the "no default" situations, shouldn't the foreclosure *always* be stopped if the court determines the defenses exist?

Also, can the court stop the foreclosure temporarily if the homeowner alleges facts that would constitute a defense, along with a reasonable probability of success in proving them, to give the homeowner the chance to convince the court that the "defense … exists"?

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 homeowner or obligor may assert any claim or defense that the debtor could assert against NCohen Comment # 184: the original creditor of the mortgage. Any recovery by the homeowner or obligor shall not exceed a recoupment or set-off against the total outstanding balance due on the mortgage obligation plus amounts paid by the homeowner or obligor to the creditor or servicer bringing the foreclosure action.

Comment [WB185]: [CHASE BANK] We should remove this section. The AG already has enforcement power under existing governing authority. We do not need to reiterate or separately highlight that authority in this document.

Comment [NBC186]: Better title needed inasmuch as this also protects homeowners even when there is not a holder in due course

Comment [TB187]: [Tom] We should discuss other approaches to the "middle ground." For example, we could construct an elevated pleading and proof standard for defenses that could not normally be asserted against an HDC to try to preserve the creditors ability to get a summary judgment on the issue in the absence of clear proof of a meritorious defense.

In summary, a little brain-storming as a group on this issue might be worthwhile.

Comment [A188]: [TH] Whether to abrogate HDC, and if so how to draft, open for continuing discussion. Note that as drafted all three of these provisions overrides/impacts a significant concept of settled UCC law and warrants cooperation of the UCC and ALI-PEB.

Comment [NBC189]: Otherwise the rule will be avoided by the use of waiver of defense clauses (which waive defenses as against assignees of the original obligor), which are common in some contexts

Comment [TB190]: [Tom] UCC § 3-305, itself defers to other law that establishes a different rule for consumers.

Comment [A191]: [TH] All-out abrogation is inconsistent with the motion on ULC floor this summer. Here, even if all-out abrogation is desired, note that only actions by first creditor, not intermediate transferees, are provided for.

Comment [NBC192]: Defenses are asserted against the payee or its successors rather than the owners of the obligation. By way of contrast, in alternative #2, you refer to "the original creditor of the mortgage." Is that intended to refer to the same person as this ...

Comment [NBC193]: See comment in Alternative #1

Comment [NBC194]: Original creditor of the obligation secured by the mortgage?

Comment [AW195]: [White] This would be roughly parallel to the limitation in the FTC Preservation of Claims Rule.

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

Comment [A196]: [TH] This draft does not include several concepts suggested in the subcommittee's write-up to ameliorate the potential negative market impact of expanding transferee liability, including limiting the featuring to newly created notes to avoid takings/contracts clause problems, a much shorter statute of limitations, and more restrictive liability caps. Future discussion should not be limited to these three options, as they are not reflective of the scope or sense of committee discussions so far.

Chairman's Note

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

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

- abolish the Doctrine as it applies to residential loans;
- keep it unchanged; or
- propose some undefined middle position

The Drafting Committee discussed but did not take a position on these alternatives. In order to further the discussion, the Chair of the committee then appointed a subcommittee composed of Commissioners Walters, Miller and Lisman; their charge was to study the matter further and present a report for the annual meeting to consider.

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

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

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

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. PRE-EFFECTIVE DATE TRANSACTIONS.

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

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

Drafters' Note

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

SECTION 702. REPEALER.

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

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

(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.

.

Comment [NBC197]: Awfully broad, isn't it? Since no other act will be inconsistent with this act in its entirety, how does one know when this act entirely repeals another act and when it repeals only a part of another act? (Is the determination similar to preemption?)

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

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