

DRAFT
FOR DISCUSSION ONLY

HOME FORECLOSURE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

January 31 – February 2, 2014 Committee Meeting

Without Prefatory Note and with Reporters' Drafting Notes

Final Meeting Draft

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ON UNIFORM STATE LAWS

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January 17, 2014

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HOME FORECLOSURE PROCEDURES

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1 **HOME FORECLOSURE PROCEDURES ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

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

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

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

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

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

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

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

2 **Drafters' Notes**

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

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

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

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

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

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

25 **Drafters' Note**

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

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

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

4 **Drafters' Note**

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

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

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

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

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

26 (8) **RING PROPOSAL** (Pure 'UCC') "Good faith" means honesty in fact and the
27 observance of reasonable commercial standards of fair dealing. [

28 (8) **MILLER PROPOSAL** "Good faith" means: (i) in the case of a creditor or servicer,
29 honesty in fact and the observance of reasonable commercial standards of fair dealing and (ii) in
30 the case of a homeowner or obligor, honesty in fact and the observance of generally accepted

standards of fair dealing.

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

SEE ISSUES MEMORANDUM, SECTION 102(10), ‘HOMEOWNER’

(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 an obligor.

Drafters’ Notes

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

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

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 which secures an obligation. The term does not include a lien that secures an obligation owed to a homeowner’s association in a common interest community.

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

1 **Drafters' Note**

2
3 In this Act the term “mortgage” refers to the lien held by the creditor, which
4 secures payment of the obligation, whereas the term “mortgage agreement” refers
5 to the writing or other record that memorializes the parties’ agreement and creates
6 the mortgage. Depending upon local usage and custom, the mortgage agreement
7 may be denominated as a mortgage, deed of trust, trustee deed, security deed,
8 deed to secure debt, or the like.
9

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

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

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

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

21 **Drafters' Note**

22
23 In states that allow one or more types of nonjudicial foreclosure of residential
24 mortgages, the drafter should insert a reference to the relevant statute or statutes
25 here. In states that do not allow nonjudicial foreclosure, this definition should be
26 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.
27

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

29 **Drafters' Note**

30
31 The definition of an obligation includes a non-recourse debt, whether the debt is
32 non-recourse due to the application of anti-deficiency judgment legislation,
33 agreement of the parties or for other reasons.
34

1
2 (19) “Obligor” means a person that, with respect to an obligation:

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

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

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

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

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

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

13 **SEE ISSUES MEMORANDUM,**
14 **SECTION 102(22), ‘RESIDENTIAL PROPERTY’**
15

16 (22) “Residential property” means real property improved with not more than four
17 dwelling units with respect to which, when a mortgage is created, a property owner occupies or
18 intends to occupy at least one unit for personal, family, or household purposes. The term
19 includes an attached single-family unit, a single-family manufactured-housing unit treated as real
20 property under law of this state, a time share in residential property if that time share is treated as
21 real property under law of this state, real property on which construction of not more than four
22 dwelling units has commenced, and a single-family unit in a common-interest community. The
23 term does not include a parcel of real property used primarily for non-residential purposes such
24 as farming, commercial, or industrial uses when a mortgage is created.

1 **Drafters' Note**

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

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

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

16 (24) “Servicing” means:

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

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

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

24 **Comment**

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

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

Drafters' Notes

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

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

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

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

Drafters' Notes

22
23
24 1. This Act applies whenever a creditor forecloses on a mortgage on
25 residential property, whether by judicial process or by non-judicial measures. The
26 definition of "foreclosure" in Section 1-103 must be consulted to determine which
27 actions taken by creditors have the legal effect of making the Act applicable to the
28 parties to a mortgage.
29

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

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

1 is within the scope of this Act.

2
3 3. However, the Act also makes clear that while this Act would apply to
4 the foreclosure of mortgages created before the effective date of this Act, it would
5 not apply to a foreclosure action that the creditor had commenced before the
6 effective date of the Act; this is made clear in Section 701, describing the
7 'Effective Date' of the Act.

8
9 **SECTION 104. DUTY OF GOOD FAITH.** A creditor, servicer, obligor, or
10 homeowner shall comply in good faith with the requirements of this [act].

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

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

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

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

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

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

23 **SEE ISSUES MEMORANDUM,**

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

25
26 **SECTION 106. APPLICATION OF LOCAL REGULATIONS.**

27 (a) Notwithstanding (insert reference to any applicable Home Rule' provisions under the
28 law of this state)] No ordinance or regulation of a municipality, county or other political
29 subdivision in this state may (i) regulate, restrict or limit the process by which mortgages on

1 residential property are foreclosed, or (ii) impose any obligation on a person holding an interest
2 in a mortgage or deed of trust on residential property which is not imposed on all owners of real
3 property in that political subdivision, unless expressly authorized by legislation of this state.]

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

7 **Comment**

8
9 This section generally tracks the prohibition on local regulation of condominium
10 conversions contained in Section 1-106 of the Uniform Common Interest
11 Ownership Act and is intended to insure that foreclosure will be governed by a
12 single uniform standard throughout the state.

13
14 Otherwise, under subsection (b), however, municipal ordinances generally
15 applicable to real estate in a municipality would not be affected by this act,
16 regardless of who owns the property, and therefore will apply with equal force to
17 real estate owned by homeowners or lenders.

18
19 Accordingly, for example, a local ordinance mandating the maintenance of yards
20 and blighted property would apply with equal force to a blighted property whether
21 or not owned by a homeowner or lender, and an ordinance enabling a
22 municipality to repair blighted property and lien the property for the costs of the
23 work, if it were otherwise lawful under applicable state law, would not be barred
24 by subsection (a).

25
26
27 **SEE ISSUES MEMORANDUM.**

28 **MILLER PROPOSAL RE ADDITIONAL GENERAL PROVISIONS**

29 **[ARTICLE] 2**

30 **NOTICES; RIGHT TO CURE**

31
32 **SEE ISSUES MEMORANDUM.**

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

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

35
36 (a) A creditor or servicer may not commence foreclosure until 30 days after the creditor
37

1 or servicer sends separately to each [homeowner and] obligor a notice of intent to foreclose and
2 right to cure.

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

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

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

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

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

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

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

17 (7) the person entitled to foreclose under Section 401; and if the creditor or
18 servicer is acting on behalf of the owner of the obligation, the identity of the owner;

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

22 (9) if sent to an obligor other than the homeowner, that the notice is being sent to
23 the homeowner as well as any other obligor regardless of whether the obligor has an interest in

1 the mortgaged property.

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

3 **Drafters' Notes**

4
5 1. The itemization of the amount due as of the notice date is a critical
6 piece of information for the homeowner or obligor and should be stated as exactly
7 as possible. The amount included for attorneys' fees should be limited to those
8 accrued prior to the date of the notice, and thus should not include retainers or
9 advances to attorneys that would be refunded in the event of a prompt cure.
10 Amounts chargeable to the homeowner or obligor for services by third parties
11 such as title examiners should only be estimated if the exact amount is not readily
12 ascertainable when the notice is prepared.

13
14 2. The mortgage obligation may be accelerated by filing a complaint,
15 scheduling a sale, or by separate notice of acceleration – the notice of intent to
16 foreclose does not by itself accelerate the debt. The notice need not refer to
17 acceleration if the creditor does not intend to accelerate the obligation, for
18 example if it is fully matured. The definition of “foreclosure” in section 102
19 includes other legal methods that may be used to terminate the homeowner's
20 interest in the mortgaged property, such as a quiet title or ejectment action in the
21 case of an installment land sale contract.

22
23 3. Items (1) through (6) are adapted from the elements of notice in the
24 standard Fannie/Freddie mortgage negotiable instrument. Item (3) adds a specific
25 deadline to cure the default. Items (7) and (8) are the ownership statement
26 required by the national servicing settlement, and call for the servicer to identify
27 its basis for standing at the outset of foreclosure proceedings, so that any disputes
28 can be resolved promptly. This notice would not displace all state-specific aid
29 programs and counseling notices which necessarily will depend on state funding –
30 for example, Pennsylvania requires a separate 30-day notice of how to apply for
31 its Homeowner's Emergency Mortgage Assistance Program.

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

34
35 5. In subsection (b)(7), the basis on which a particular creditor may assert
36 the right to foreclose is specified in §401. The notice may, but is not required to,
37 explain that the agent has full authority on behalf of the owner to negotiate with
38 the homeowner.

39
40 6. If a homeowner or obligor has cured a default, any subsequent
41 foreclosure based on a later default must be preceded by a new notice, subject to
42 the limitations on repeated defaults contained in Section 203. This is because a
43 cure restores the homeowner to the same legal position as if no default had

1 occurred. If, on the other hand, as a result of facilitation or otherwise, the
2 homeowner has tendered payments under a forbearance plan or other workout but
3 has not fully cured the default that was the subject of the notice, no new notice is
4 required in the event the workout fails and the creditor chooses to proceed with
5 foreclosure.
6

7 **SECTION 202. MANNER OF NOTICE DELIVERY.** A notice required by Section
8 201 or Section 302 must be sent by first-class mail to the last known address of each homeowner
9 and obligor. At least one mailed notice must also be addressed to the homeowner or to
10 “occupant” at the address of the mortgaged property. If the homeowner or obligor or the
11 homeowner’s or obligor’s representative has requested to receive notice by electronic mail and
12 has provided an electronic-mail address to the creditor or servicer, the notice also must be sent
13 by electronic mail to the electronic-mail address.

14 **Drafters’ Notes**
15

- 16 1. The complaint in a judicial foreclosure state, or notice of sale in a nonjudicial
17 foreclosure state, must be delivered according to existing law, usually by
18 personal service. The requirement for additional electronic mail notice does
19 not displace the paper notices required by this act or other law. The creditor
20 may, but is not required to, send the notice by certified mail as well as by
21 ordinary first class mail.
22
- 23 2. Notice must be sent by ordinary first class mail. First class mail has the
24 characteristic that it will be delivered to the last known address whether or not
25 the recipient accepts delivery in person. The creditor or servicer may
26 supplement first class mail with certified mail or overnight delivery but may
27 not rely solely on methods that require the recipient to accept delivery in
28 person.
29

30 **SECTION 203. RIGHT TO CURE DEFAULT.**

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

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

1 calendar year.

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

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

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

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

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

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

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

15 **Drafters' Notes**

16
17 1. The right of a homeowner or obligor to cure a default has the effect of
18 de-accelerating the payments due after acceleration, but before a completed
19 foreclosure sale. Once a sale is completed, the interests of potential purchasers
20 militate against further extending the possibility of cure. The homeowner and
21 obligor receive notice detailing the amounts needed to cure the default pursuant to
22 Section 202, and identifying any nonpayment defaults, such as failure to maintain
23 insurance. The right to cure is independent of any right to redeem.
24

25 2. This section does not alter contractual rights to cure that are stronger,
26 but the statutory right to cure may not be waived by contract. In the event of a
27 dispute between the creditor and a homeowner or obligor concerning the amounts
28 needed to cure, or any nonmonetary performance that may be claimed as due,
29 either party may seek declaratory relief from an appropriate court, and if
30 appropriate, a temporary stay of any foreclosure sale to resolve the cure dispute.
31

32 3. If a default is cured, restoring the homeowner and obligor to the same

1 position as if no default occurred means that if there is a later default, new notices
2 must be sent prior to foreclosure. Conversely, if as a result of facilitation under
3 Article 3 or otherwise, a settlement is reached but the homeowner or obligor does
4 not fully cure the default, new notices are not required. However, nothing in this
5 [act] requires a lender who properly assessed late fees or default interest following
6 a default to disgorge those fees if the default is subsequently cured.
7

8 **SECTION 204. UNKNOWN HOMEOWNER OR OBLIGOR.**

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

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

12 (2) the identity of the person.

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

16 **Drafters' Notes**

17 1. Section 205 is based on UCC § 9-605. Its purpose is to relieve the
18 creditor from duties owed to a homeowner or obligor if the creditor or servicer
19 does not know about that person. This may be the case, for example, when an
20 original homeowner has sold the property to a purchaser, or when the original
21 homeowner has died and his or her interest has passed to an heir or devisee.
22

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

1 [ARTICLE] 3

2 FACILITATION

3
4 **SEE ISSUES MEMORANDUM, ARTICLE 3- FACILITATION-INTRODUCTION**
5 **AND HIGER PROPOSAL TO**
6 **SEPARATE FACILITATION ARTICLE AS OPTIONAL**
7

8 INTRODUCTION AND CHAIRMAN'S NOTE

9
10 What follows are excerpts from a longer Note which appears in the Issues Memorandum.

11
12 At the November Drafting Committee meeting, Commissioner Elizabeth Kent led a
13 discussion which in some ways advocated an alternative approach to the existing draft's 'best
14 practices.'

15
16 Following that meeting and at my request, Commissioner Kent undertook to review
17 several of the 'best practices' contained in the prior draft, and convert certain of those practices
18 into proposed draft rules that the facilitation agency in an enacting state might adopt.

19
20 In the course of her efforts, Commissioner Kent sought and received assistance from
21 former Dean (and former ULC Commissioner) Nancy Rogers; Professor Rogers was, among
22 other things, the Reporter for the Uniform Mediation Act (already adopted in 12 states).
23 Her initial drafts both of suggested rules and revised 'best practices,' appear in the Issues
24 Memorandum at Article 3, together with the current draft of the 'Best Practices' which were
25 originally in the November Draft.

26
27 In the course of discussions about this drafting effort, however, it became clear that there
28 are important differences of opinion on how best to approach this subject in the statute itself.

29
30 Rather than spending time in San Diego reviewing Commissioner Kent's work on draft
31 rules and a revised set of best practices - important though her work is - I propose to use our time
32 to consider the broader issues that exist in the field of foreclosure dispute resolution. If the
33 Drafting Committee is able to resolve those policy questions – also contained in the Issues
34 Memorandum - I believe we will be able to provide direction to the Reporters and those tasked
35 with drafting the best practices and proposed rules.

36
37 **SECTION 301. FACILITATION PROGRAM ESTABLISHED.** [Name of court or
38 agency serving as facilitation agency] is designated as the facilitation agency. The facilitation
39 agency shall adopt rules pursuant to [insert reference to state administrative procedures act or, if
40 the facilitation agency is the judicial system, to the rules of court] establishing procedures and
41 standards for the facilitation process.

1 **Drafters' Notes**

2 1. The Drafting Committee has spent considerable time discussing the
3 subject of mediation – now called facilitation; a number of members on the
4 Committee believe that a successful process that screens potential workout
5 alternatives to foreclosure offers the single best hope for homeowners in the
6 continuing foreclosure crisis.
7

8 2. Facilitation is defined in Section 102 as the assistance of a third-party
9 neutral at an in-person meeting between the parties with the objective of
10 achieving a commercially reasonable alternative to foreclosure, resulting in an
11 agreement between the creditor and homeowner.
12

13 Between 2007 and 2012 eighteen states adopted statewide foreclosure
14 diversion or mediation programs, and local jurisdictions in at least eight additional
15 states have established similar programs. The programs vary greatly in their
16 timing and design, and exist in both judicial and nonjudicial foreclosure states.
17 Most programs in judicial foreclosure states call for intervention after a
18 foreclosure complaint is filed. While most stakeholders recognize that starting
19 mediation or facilitation earlier in the process would increase the chances of
20 success and reduce costs, most existing state laws do not provide a means to
21 initiate facilitation before the judicial process begins. Pre-foreclosure facilitation
22 permits early sorting of foreclosure cases, into those where the homeowner wants
23 to find a solution other than foreclosure, and those cases that are uncontested or
24 where there is no realistic alternative to foreclosure.
25

26 3 The Act does not prescribe standards or procedures for the state
27 facilitation program. Rather, the following best practices are recognized by lender
28 and consumer advocates as well as mediation and facilitation program participants
29 as necessary elements of a successful facilitation program.
30

31 As indicated above, the initial draft of ‘best practices’, together with
32 Commissioner Kent’s revisions and her draft of new proposed rules, are now
33 contained in the Issues Memorandum for the January meeting.
34

35 Consideration of the original best practices, the revised best practices and
36 the draft rules will be deferred until the Drafting Committee has resolved the
37 several policy issues posed by the questions appearing in the Issues
38 Memorandum.
39

40 **SECTION 302. NOTICE OF FACILITATION.**

41 (a) Not later than 30 days after a creditor or servicer has sent the notice of intent to
42 foreclose required by Section 201, the creditor or servicer must send to the homeowner and

1 obligor a notice of their right to participate in facilitation.

2 (b) If the facilitation agency establishes a procedure for the agency to send notice of
3 facilitation to homeowners, a creditor or servicer shall request the agency to send the notice to
4 the creditor or servicer and to each homeowner and obligor. Subject to the agency's rules, the
5 notice may be sent before or after commencement of a foreclosure action, but must be sent
6 before a creditor or servicer may request entry of a default or foreclosure judgment or give a
7 notice of a judicial or nonjudicial-foreclosure sale.

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

12 (d) The notice of facilitation under subsection (c) or (c) must include the following:

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

16 (2) The name, address, telephone number, and e-mail address of the appropriate
17 contact person or group assigned by the creditor or servicer to the homeowner or obligor
18 pursuant to rules of the federal Consumer Finance Protection Bureau.

19 (3) The fact that the homeowner or obligor may request a facilitation meeting and
20 the instructions to request facilitation under the facilitation agency rules.

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

1 **SECTION 303. DUTY TO PARTICIPATE IN FACILITATION.**

2 (a) If a homeowner makes a request for facilitation that complies with the facilitation
3 agency rules, the agency shall schedule a meeting in accordance with its rules. The parties shall
4 comply with agency rules and any scheduling or other order established by the facilitator or the
5 facilitation agency.

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

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

15 (d) Failure to comply with subsection (a) includes failing:

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

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

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

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

22 (5) on the part of a creditor or servicer, to advise the homeowner, obligor and
23 facilitator of any loss-mitigation option that is available to the homeowner or obligor or to

1 consider the homeowner or obligor for the loss-mitigation option before or during facilitation.

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

4 **Drafters' Notes**

5
6 1. As provided in Section 301, the facilitation agency rules and orders
7 may impose additional requirements on the parties, for example requiring the
8 creditor, servicer or its agent to appear in person or to have a person with
9 authority to approve loss mitigation alternatives available by telephone at the time
10 of the facilitation session, to perform a net present value analysis, to disclose the
11 assumptions on which the analysis is based, or requiring homeowners to meet
12 with a housing counselor to qualify for facilitation. The agency will also regulate
13 procedural matters, such as time limits for exchanging documents, scheduling and
14 concluding facilitation meetings, reports by facilitators, and the like. States should
15 continue to have flexibility in the design and implementation of facilitation
16 programs, but should establish and publish the standards as required by section
17 301. The model rules and best practices principles of facilitation set forth
18 following Section 304 should aid state facilitation agencies in designing their
19 programs.

20
21 Facilitation cannot succeed in reaching a resolution other than a
22 foreclosure sale unless both parties participate in the manner contemplated
23 by the facilitation agency's rules. This requires not only the participation
24 of a person representing the creditor or servicer who has the authority to
25 enter into a settlement agreement, but also the participation of necessary
26 persons on the borrower's side - those who own the home and those who
27 are liable on the mortgage debt.

28 **SEE ISSUES MEMORANDUM.**

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

30 **SECTION 304. FORECLOSURE ACTIONS DURING FACILITATION.**

31
32 (a) After a notice of facilitation has been sent to a homeowner or obligor, a creditor or
33 servicer may, subject to other law, commence a foreclosure, but may not file a default or
34 dispositive motion in a foreclosure action, or schedule or cause to be scheduled a foreclosure sale
35 unless:
36

37 (1) the homeowner or obligor does not respond to the facilitation notice, by either

1 sending a written request for loss mitigation to the creditor or servicer not later than 60 days after
2 sending the facilitation notice or by appearing at the scheduled facilitation session;

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

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

9 (b) Notwithstanding subsection (a), a creditor or servicer may proceed to enforce the
10 mortgage [90] days after sending the notice under Section 302, unless the parties agree to
11 continue the facilitation process or the facilitation agency or court directs the parties to continue
12 the facilitation process. [The facilitation agency or court may, if it extends the facilitation period,
13 impose appropriate conditions, including the tender of periodic payments by the homeowner.]

14 **Drafters' Notes**

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

1 foreclosure allows necessary foreclosures to go forward promptly and efficiently
2 after cases suitable for other resolutions are identified and resolved.
3

4 2. Subsection (a)(3) contemplates a variety of situations where,
5 notwithstanding the 90 day waiting period before foreclosure may be commenced
6 under subsection (b), either the court or facilitation agency may enter an order
7 permitting foreclosure to proceed in less than 90 days. Examples of particular
8 situations that might warrant such an order may include a case where the
9 homeowner has already agreed to vacate the property, or has unequivocally
10 declined to participate in facilitation, or if emergency conditions short of
11 abandonment would justify an accelerated foreclosure.
12

13 3. Subsection (b) contemplates a variety of situations where the 90 day
14 waiting period before foreclosure may be finalized should be extended. Examples
15 of particular situations that might warrant such an order include cases where the
16 servicer has failed to evaluate a homeowner's completed request for loss
17 mitigation in a timely manner, has failed to comply with material aspects of
18 federal servicing regulations, 12 CFR §1024.41, or has requested additional
19 documents from the homeowner late in the facilitation process.
20

21 [ARTICLE] 4

22 RIGHT TO FORECLOSE; SALE PROCEDURES

23 SEE ISSUES MEMORANDUM, 24 SECTION 401, 'RIGHT TO FORECLOSE'

25 SECTION 401. RIGHT TO FORECLOSE.

26
27
28
29 (a) A person described in subsection (b) may commence a foreclosure only after default
30 in the obligation and satisfaction of all conditions required by the mortgage agreement and law
31 of this state.

32 Drafters' Notes

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

36 2. In subsection (a), the phrase 'law of this state' includes this act as
37 well as all other law of this state
38

39 3. The conditions referred to in this subsection are those indicated in
40 the mortgage agreement or under other law as necessary to accomplish before the
41 commencement of foreclosure.

1 **Alternative A**

2 (b)(1) Except as otherwise provided in paragraph (2), the only person who may
3 commence a foreclosure is a person entitled to enforce” the obligation secured by the mortgage,
4 determined by law of this state other than this [act].

5 **Drafters’ Notes**

6 1. Alternative A for subsection (b)(1) resolves the problem of who has
7 standing to foreclose by designating the person who is entitled to enforce the
8 obligation, to be determined under other law. When the obligation is evidenced
9 by a negotiable instrument, Article 3 of the Uniform Commercial Code provides
10 the governing rules. When the obligation is not evidenced by a negotiable
11 instrument, law other than the Uniform Commercial Code will determine who is
12 entitled to enforce the obligation. One example of other law is the Uniform
13 Electronic Transactions Act (UETA), which grants to a person having control of a
14 “transferable record” the rights to enforce a promissory note evidenced by an
15 “electronic record,” as those terms are defined in that act.
16

17 **Alternative B**

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

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

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

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

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

5 (b)(2) If the obligation is registered in a mortgage registry, the only person who may
6 commence a foreclosure is the person identified as entitled to enforce the obligation on a record
7 issued by a mortgage registry as of the time the foreclosure is commenced.

8 **End of Alternatives**

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

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

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

17 If the obligation is not evidenced by a negotiable instrument under subsection, the [complaint]
18 must include a copy of the records evidencing the obligation and the plaintiff's right to enforce
19 the obligation.

20 (d) In a nonjudicial-foreclosure proceeding, the creditor or servicer must attest by
21 affidavit to facts demonstrating that the creditor or servicer has the right to foreclose under
22 subsection (b). The affidavit must be included with the notice of foreclosure required by Section
23 201.

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

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

8 **Drafters' Notes**

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

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

24 The draft also makes conforming changes in subsections 401(a), 401 (b),
25 401(c) and 401(d) by making, in each case, appropriate references to subsection
26 (g).
27

28 2. This section designates the "person entitled to enforce" a negotiable
29 instrument under revised UCC Article 3 as the person with the right to foreclose
30 the mortgage. Section 401(b)(1) follows the language of UCC § 3-301, which
31 defines who is "person entitled to enforce" a negotiable instrument. When the
32 payee of the negotiable instrument has retained possession of the instrument, that
33 person has the right to foreclose. When the payee has transferred possession of
34 the negotiable instrument to another person, the facts must be examined to
35 determine who has the right to enforce the note. The subsequent possessor may
36 become a holder under UCC Article 3 by obtaining a special endorsement or

1 blank endorsement, but this section does not require that a subsequent possessor
2 become a holder in order to acquire the right to foreclose. Such a subsequent
3 possessor may be entitled to enforce the note, but will have to allege and prove
4 facts that are sufficient to establish the right to enforce.

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

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

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

39 Although this distinction seems beneficial, the two-tier system does have
40 some costs, including but not limited to complexity. By authorizing the holder of
41 a negotiable instrument to foreclose, sometimes the power is conferred upon a
42 person who has no economic stake in the obligation or the collateral. The holder,
43 however, will usually have an obligation, created by contract or other law, to the
44 owner who does have an economic stake, giving it some incentive to behave
45 properly.
46

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

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

35 7. Multiple persons may hold the right to foreclose a mortgage. Other law,
36 including UCC Article 3 and the law of agency, determines whether the right to
37 foreclose may be exercised by fewer than all such persons.
38

39 8. When the obligation is owned by a trust, the owner of the obligation for
40 purposes of this Section is the trustee, not the beneficial owner or owners of the
41 trust property.
42

43 9. Under subsection (c) the creditor's production of the original negotiable
44 instrument is not necessary at the time of the filing of a complaint in a judicial
45 foreclosure. Production of the original would later become appropriate if, during
46 the course of the proceedings, the homeowner or obligor seeks further

1 demonstration of the copy's authenticity or the whereabouts of the original.
2 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial
3 proceedings, a court may decide to order production of the original instrument if
4 necessary to resolve a particular issue.
5

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.

6
7 11. Section 401 as drafted, allowing an agent or representative to
8 foreclose, is consistent with the standing decision in *Sprint Communications Co.*
9 *v. APCC Services, Inc.*, 554 U.S. 269 (2008). There, payphone operators had
10 assigned claims for compensation from long-distance carriers to collection firms.
11 In *Sprint* the Court permitted an assignee of a legal claim for money to pursue that
12 claim in federal court, even when the assignee had promised to remit the proceeds
13 of the litigation to the assignor.
14

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

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

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

22 **Drafters' Notes**

23 1. Subsection (a) restates the principle stated in UCC § 9-203(g), which
24 provides that an Article 9 transfer of a negotiable instrument also transfers the
25 mortgage (more formally, § 9-203(g) provides that attachment of a security
26 interest in a right to payment or performance secured by personal or real property

1 automatically transfers the security interest to the secured party). Section 9-
2 203(g) covers sales of negotiable instruments, other instruments, and payment
3 intangibles, as well as lending transactions in which those rights serve as
4 collateral to secure an obligation of the transferor.

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

14
15 2. When the foreclosing party is not the originating creditor there is
16 conflicting state law, both in judicial foreclosure and nonjudicial foreclosure
17 states, as to (1) whether the foreclosing party must have an express assignment of
18 the mortgage, or a chain of assignments running back to the original mortgagee,
19 and (2) whether that assignment or the chain of assignments must be recorded in
20 the county land records.

21
22 In some states, a statute explicitly requires a recorded assignment. E.g.,
23 Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the
24 secured creditor with title to the security instrument shall be filed prior to the time
25 of sale in the [county land records].” In many states, judicial decisions going in
26 both directions interpret statutes that do not on their face provide immediately
27 obvious answers to these questions. E.g, In re Vasquez, 266 P.3d 1053 (Ariz.
28 2011) (recording assignments of deeds of trust is not required, although trustee
29 must record notice of trustee’s sale); U.S. Bank Nat. Ass’n v. Ibanez, 941 N.E.2d
30 40 (Mass. 2011) (requiring written chain of assignments).

31
32 Subsection (b) adopts the position that an express assignment is
33 unnecessary; note that subsection (a) implies an assignment upon a transfer of the
34 obligation. In addition, subsection (b) adopts the position that recordation of an
35 assignment (or notice of an implied assignment) is not a prerequisite for
36 foreclosure.

37
38 3. By allowing foreclosure by an assignee or transferee who qualifies as
39 the person to foreclose under Section 401, without a requirement of recording any
40 documents in the real property records, this Act makes it unnecessary to follow
41 the procedure authorized by UCC § 9-607(b), which grants a secured party the
42 right to record a copy of the security agreement and an affidavit in the real
43 property records. Compliance with the requirements of Section 401 is sufficient.

1 **SECTION 403. LOST, DESTROYED, OR STOLEN NEGOTIABLE**
2 **INSTRUMENT; AFFIDAVIT.**

3 (a) If a negotiable instrument secured by a mortgage has been lost, destroyed, or stolen
4 and the obligation is not registered in a mortgage registry, the creditor or servicer may foreclose
5 the mortgage only if:

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

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

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

16 ***Revised Legislative Note:*** *This subsection incorporates the language of Section 3-309 of Revised*
17 *UCC Article 3 (2002). This language is recommended both for States that have adopted Revised*
18 *Article 3 and those that have adopted a prior version of UCC Article 3.*
19

20 (b) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis
21 for its right to foreclose, the notice of intent to foreclose sent under Section 201 must state that
22 the instrument is unavailable and set forth information establishing the creditor's right to
23 foreclose under subsection (a). In a nonjudicial-foreclosure proceeding, the notice must further
24 (1) advise the homeowner or obligor that there may be a risk that a person other than the creditor
25 will seek to enforce the instrument and that the homeowner or obligor has the right to petition the

1 [name of appropriate court] where the mortgaged property is located for an order requiring the
2 creditor to provide adequate protection against a claim by another person and (2) include the
3 indemnity described in subsection (c).

4 **Drafters' Notes**

5 1. This lost-note disclosure is compatible with the Settlement Term Sheet
6 of the National Servicer Settlement, which requires for all states that the Servicer
7 send, "no later than 14 days prior to referral to foreclosure attorney or foreclosure
8 trustee," "a statement setting forth facts supporting Servicer's or holder's right to
9 foreclose." A single notice may satisfy both this subsection and the National
10 Settlement. The Settlement Term Sheet requires the following for lost notes
11 (Section II C 4):
12

13 If the original note is lost or otherwise unavailable, Servicer shall comply
14 with applicable law in an attempt to establish ownership of the note and
15 the right to enforcement. Servicer shall ensure good faith efforts to
16 obtain or locate a note lost while in the possession of Servicer or
17 Servicer's agent and shall ensure that Servicer and Servicer's agents who
18 are expected to have possession of notes or assignments of mortgage on
19 behalf of Servicer adopt procedures that are designed to provide
20 assurance that the Servicer or Servicer's agent would locate a note or
21 assignment of mortgage if it is in the possession or control of the
22 Servicer or Servicer's agent, as the case may be. In the event that
23 Servicer prepares or causes to be prepared a lost note or lost assignment
24 affidavit with respect to an original note or assignment lost while in
25 Servicer's control, Servicer shall use good faith efforts to obtain or locate
26 the note or assignment in accordance with its procedures. In the affidavit,
27 sworn statement or other filing documenting the lost note or assignment,
28 Servicer shall recite that Servicer has made a good faith effort in
29 accordance with its procedures for locating the lost note or assignment.
30

31 2. In a non-judicial foreclosure proceeding, the additional content for the
32 notice is required because the homeowner or obligor is unlikely to appreciate the
33 risk associated with lost instruments, and it is unlikely that a court will consider
34 the issue unless the homeowner or obligor initiates consideration.
35

36 (c) If a creditor relies upon a lost, destroyed, or stolen negotiable instrument as the basis
37 for its right to foreclose, the homeowner or obligor is entitled to adequate protection against loss
38 that might occur by reason of a claim by another person to enforce the negotiable instrument.
39 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. In a judicial-foreclosure proceeding, the court may require additional protection on motion by the homeowner or obligor or on its own motion. In a nonjudicial-foreclosure proceeding, 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.

Drafters' Note

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

(d) In a judicial-foreclosure proceeding, the creditor or servicer shall file an affidavit attesting to facts that establish the creditor's right to foreclose under subsection (a) with the [complaint]. The creditor shall provide the indemnity described in subsection (c) no later than [confirmation of the foreclosure sale.]

Drafter's Note

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

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

INSERT SAFE HARBOR LOST NOTE AFFIDAVIT HERE

Drafters' Notes

1. Subsection (a) deals with the problem of lost or destroyed promissory notes by requiring the preparation of an affidavit. 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.

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). 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).

2. 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.”).

3. 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”).

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

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

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

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

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

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

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

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

1 sale.

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

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

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

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

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

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

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

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

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

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

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

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

1 **Drafters' Note**

2
3 The bracketed alternatives represent a drafting suggestion from the Style
4 Committee that is appropriate for the entire Committee to address.
5

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

9 **Drafters' Notes**

10 1. This section allows a public sale of the mortgaged property only if the
11 creditor first gives a commercially reasonable public advertisement. The purpose
12 is to ensure that the public has a meaningful opportunity to learn of the proposed
13 sale in order to appear and engage in competitive bidding. This section supersedes
14 existing state laws covering advertisements for public sales for all foreclosures
15 that are within the scope of this act.
16

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

21 3. This act does not require the accomplishment of foreclosure by a public
22 auction sale. If other state law allows alternative methods of foreclosure, such
23 methods remain permissible. For example, Connecticut law allows strict
24 foreclosure without a sale of the property.
25

26 4. Subsection (b) states minimum requirements for the public
27 advertisement. An advertisement that lacks any of the information set forth in
28 subsection (b) is insufficient as a matter of law. An advertisement may contain
29 additional information about the mortgaged property or the sale.
30

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

1 the creditor and the homeowner and any obligors by saving the expense.

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

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

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

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

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

35 **Drafters' Note**

36 This section requires that the creditor notify the homeowner and any obligors of
37 the date, time, and place of the foreclosure sale. The section requires a 30-day
38 notice of the originally scheduled sale. One notice must be mailed, and a second
39 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 promptly shall 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 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.

1 [ARTICLE] 5

2 ACCELERATED DISPOSITIONS

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

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

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

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

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

14 (b) If the homeowner or a person claiming under the homeowner is in possession of the
15 mortgaged property, the agreement must specify the date and time when the homeowner is to
16 surrender possession to the creditor. If there is any person entitled to notice under section 502,
17 then, regardless of the terms of the proposed transfer, the homeowner is not obligated to
18 surrender possession before the 20-day period described in subsection (a)(3) has elapsed.

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

21 **Drafters' Notes**

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

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

9
10 2. This section does not specify a minimum consideration to be received
11 by the homeowner in exchange for the homeowner's agreement to transfer the
12 mortgaged property in satisfaction of the obligation. The sole exception is that if
13 the homeowner is in possession and there are third parties entitled to notification
14 of the proposed transfer, the agreement may not require the homeowner to vacate
15 possession prior to the expiration of the period for notified persons to submit an
16 objection.

17
18 As a consequence, this section as now drafted confers a substantial benefit
19 on mortgage creditors in the form of a new mechanism for converting every 'deed
20 in lieu' transaction into an accelerated means of clearing title of junior
21 encumbrancers without the need for a more traditional judicial foreclosure. In
22 doing so, the section does not require any minimum benefit on homeowners, other
23 than the general statement of effects of such an agreement contained in Section
24 504 and the rights of possession noted in paragraph 2 above,

25
26 **Drafters' Note:**

27
28 The second sentence of Section 501(b) contemplates a circumstance
29 where, for example, the lender and homeowner had agreed, in a common 'cash for
30 keys' agreement, that the homeowner would move within a short period in return
31 for a sum of money. If there are junior lienholders, however, the possibility exists
32 that there may be an objection to the proposed transfer, that the agreement would
33 not be approved, and that the benefits contemplated by a homeowner under
34 Section 504 from an early move-out would not be realized. This sentence makes
35 certain that the homeowner need not be displaced, even voluntarily, until the
36 parties knew whether there would be objection from a junior lienholder.

37
38 In those cases where there are no junior lienholders or other holders of
39 subordinate interests, it is likely that the parties would often choose to use a
40 traditional deed in lieu of foreclosure to accomplish their agreement, instead of
41 following this statutory negotiated transfer procedure; *see* section 504(f).

42
43 **Drafters' Notes**

44
45 The comments will make clear that in the case of multiple owners of
46 residential property, all the owners need to consent to a negotiated transfer; the act

1 does not authorize a forced transfer outside of foreclosure for a non-consenting
2 co-owner.

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

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

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

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

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

18 **Drafters' Notes**

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

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

30
31 3. Subsection (b) provides for the creditor to notify persons who have
32 subordinate interests in the mortgaged property of an agreement proposed by the

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

5
6 **SECTION 503. HEARING ON OBJECTION TO NEGOTIATED TRANSFER.**
7

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

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

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

23 (d) If a hearing is held under subsection (a) and if the court finds, based on an appraisal
24 or other evidence, that there is equity in the mortgaged property available to satisfy the interest
25 of the objecting interest holder, the court shall set a date not later than [30] days after the date of
26 the hearing by which the objecting party may tender to the creditor that is a party to the proposed
27 transfer a sum equal to the obligation owed to the creditor. If the objecting party tenders that

1 sum to the creditor within the time set by the court, the objecting party is entitled to the benefit of
2 the proposed negotiated transfer, and all interests junior to the interest of the objecting creditor
3 are extinguished effective on the date of tender. Otherwise, the rights of the objecting party and
4 all other interests junior to the interest of the creditor that is a party to the proposed transfer
5 under this section are extinguished, effective on the date set by the court by which the tender
6 could have been made.

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

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

10 (1) discharges the obligation in full;

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

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

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

19 **Drafter's Notes**

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

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

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

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

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

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

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

21 **Drafters' Notes**

22
23 1. This section is based in part on UCC § 9-622, which specifies the effect
24 of acceptance of personal property by a secured party in full or partial satisfaction
25 of a secured obligation.
26

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

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

19 3. Subsection (c) specifies that the status of the homeowner who continues
20 to occupy the property after entering into an agreement to transfer the property to
21 the creditor in full satisfaction of the obligation is that of a licensee. The parties’
22 agreement and other state law determine the rights and obligations of the parties
23 as licensor and licensee.
24

25 4. As drafted, the sentence authorizes homeowners and creditors to enter
26 into any other type of agreement that they might desire, but no such agreement –
27 presumably including a traditional ‘deed in lieu’ arrangement – would confer the
28 benefits of Section 504 unless the agreement expressly provided that it was made
29 pursuant to Section 501.
30

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

33 “I believe the better policy is to displace existing state laws on “deed in
34 lieu” transactions within the scope of this act. Among other problems, if
35 we keep both, there will be transactions in which the lender has not clearly
36 documented whether the intent to proceed under this act or under other
37 law.”
38

39 5. The act as drafted does not require notice of the proposed negotiated
40 transfer to a senior creditor because the interest of the senior creditor will not be
41 affected by that transfer. It may well be that a negotiated transfer would result in
42 a violation of a ‘due on sale’ clause in the senior mortgage, but whether or not
43 such a violation results would not be affected by notice to a senior creditor, and
44 the act should not suggest a contrary result.
45

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

SEE ISSUES MEMORANDUM,
SECTIONS 505-507, 'ABANDONED PROPERTY'

SECTION 505. ABANDONED PROPERTY.

(a) A governmental agency's determination, finding, or order that mortgaged property is abandoned, or the presence of not fewer 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 contacted the creditor to request entrance to the property.

(6) One or more written statements signed by the homeowner indicate a clear

1 intent to abandon the property.

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

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

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

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

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

19 (e) At the hearing on the order to show cause, if evidence is presented supporting the
20 allegations in the motion and no appearance is made to oppose the relief sought, the court shall
21 enter an order finding that the mortgaged property is abandoned property.

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

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

5 **Drafters' Notes**

6 Subsections (d) through (g) are based in substantial part on Minn. Stat. §
7 582.032, which provides for expedited foreclosure for abandoned homes.
8 Minnesota generally provides a statutory right of redemption (post-foreclosure-
9 sale) of six months or one year, which is reduced to five weeks when the lender
10 uses the statutory procedure for abandoned property; this section does not include
11 a comparable right of redemption.
12

13 (h) In a non judicial-foreclosure proceeding, a creditor or servicer or a governmental
14 subdivision in which the mortgaged property is located may seek a determination that the
15 property is abandoned property by submitting a request accompanied by an affidavit attesting to
16 facts indicating abandonment to [government official]. In addition:

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

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

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

3 **Drafters' Notes**

4
5 1. This Act authorizes an expedited foreclosure procedure for abandoned
6 properties for both judicial foreclosure and for nonjudicial foreclosures. An
7 expedited procedure is appropriate for two reasons. First, the homeowner is no
8 longer making a valuable economic use of the property to provide shelter for the
9 homeowner or the homeowner's family or someone claiming under the
10 homeowner, such as a tenant. A foreclosure sale will not result in a possessor
11 being forced to relocate to other housing. Second, properties that are facing
12 foreclosure and that are vacant have significant negative impacts on
13 neighborhoods and the surrounding communities. Vacancies reduce the market
14 values of neighboring properties. Neighborhood crime increases. The vacant
15 properties tend to suffer from lack of repair and maintenance, creating public
16 health risks, including infestations by vermin, mosquitoes, and other insects.
17 There are fiscal impacts on local governments, who find property taxes on vacant
18 properties often become delinquent; yet the governments are faced with added
19 expenses to provide essential services to blighted neighborhoods, such as police
20 and fire protection. By providing for an expedited foreclosure procedure, this Act
21 seeks to return abandoned properties to the stock of occupied, well-maintained
22 housing as soon as reasonably possible.

23
24 2. The conditions giving rise to prima facie evidence of abandonment set
25 forth in Subsection (a) through (a) closely track the criteria set forth in Ind. Code
26 § 32-30-10.6-5(a) (effective March 16, 2012). A government agency's issuance
27 of a determination that the mortgaged property is abandoned by itself constitutes
28 prima facie evidence of abandonment. In some localities, after such a
29 determination the government will mark the property as abandoned. The
30 government's determination, finding, or order might not use the word
31 "abandoned"; it might, for example, refer to the property as vacant. Of course, the
32 homeowner or another person has the right to challenge the correctness of the
33 governmental determination.

34
35 With respect to the statutory conditions listed in Subsection (a)(1) through
36 (a)(8), the presence of [three] or more of such conditions constitutes prima facie
37 evidence, giving rise to a presumption of abandonment. Such conditions are not
38 conclusive on the issue of abandonment. Many residential properties will exhibit
39 at least one such condition, when the homeowner is still in possession of the
40 property. If the homeowner or another person holding under the homeowner is in
41 actual possession of the mortgage property, the property is not abandoned
42 notwithstanding the existence of such conditions. Likewise, mortgaged property
43 may be abandoned under this Section notwithstanding the absence of any of the
44 statutory conditions.

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

9 4. In a nonjudicial foreclosure proceeding, the creditor may treat the
10 mortgaged property as abandoned only by submitting evidence of abandonment to
11 an independent third party. Subsection (c) provides for the submission of evidence
12 to a person, who as part of the decision making process must personally visit the
13 property. Normally jurisdictions enacting this Act will designate an employee of
14 local government, such as a building inspector, who is responsible for evaluating
15 the physical condition of dwelling units.
16

17 Judicial review of the decision is available to any interested person.
18 Subsection (c) does not specify the nature of that action, which in many
19 jurisdictions will be a mandamus action.
20

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

22 (a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(c)
23 finding that mortgaged property is abandoned property and the court has previously rendered or
24 at the same time renders a judgment of foreclosure, the court shall either (i) order a public sale of
25 the abandoned property not earlier than [30] days but not later than [60] days after entry of the
26 order or, (ii) upon a motion of the creditor, if the court, based on an appraisal or other evidence,
27 finds that there is no equity in the mortgaged property available to satisfy the interests of junior
28 creditors, the court shall order a transfer of the abandoned property directly to the creditor
29 without public sale and, upon the transfer, the rights of all interests junior to the interest of the
30 plaintiff are extinguished.

31 **Drafters' Notes**

32
33 The alternative of a direct transfer to the creditor is one of the components
34 set forth in an Ohio bill that would provide expedited foreclosure procedures for
35 abandoned property. Obviously if the Committee decides that this alternative has
36 merit, further provisions are necessary dealing with matters such as the

1 termination of junior interests and the payment of expenses by the creditor. The
2 Ohio bill requires that a creditor who chooses a direct transfer pay any unpaid
3 taxes and assessments on the property.
4

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

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

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

20 **Drafters' Notes**

21
22 1. This Section provides for an expedited public sale of the mortgaged
23 property after a determination that the mortgaged property is abandoned. In a
24 judicial foreclosure, the court must order the sale to take place no longer than ____
25 days after the court enters its order finding the property to be abandoned, unless
26 the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor
27 may select the date, provided it is no sooner than [____] days after the written
28 determination of abandonment.
29

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

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

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

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

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

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

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

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

- 37 (1) care for the yard and exterior of any building on the property, including
38 removing excessive foliage growth that diminishes the value of surrounding properties;
39 (2) prevent trespassers or squatters from remaining on the property;
40 (3) prevent mosquito larvae from growing in standing water; and

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

3 (b) If a creditor is the plaintiff in a judicial-foreclosure proceeding, that creditor is
4 obligated to maintain the property beginning when the court renders an order finding that the
5 mortgaged property is abandoned property pursuant to Section 505(c).

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

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

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

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

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

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

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

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

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

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

12 **Drafters' Notes**

13
14 1. This Section requires creditors to maintain abandoned properties under
15 certain circumstances. The obligation may arise based upon action of the creditor
16 or action of the municipality or other governmental entity where the property is
17 located. The creditor does not become obligated to maintain merely by
18 commencing foreclosure proceedings at a time when the dwelling unit is vacant.
19 Rather, the obligation arises when the creditor seeks to use the expedited
20 foreclosure procedure authorized by Section 505 and obtains either a judicial
21 order or official determination that the property is abandoned. Under subsection
22 (c) the obligation may also arise any time after the creditor has commenced
23 foreclosure proceedings if the municipality or other local governmental entity
24 cites the property as both abandoned and presenting a threat to public safety or
25 health.

26
27 2. Subsection (e) defines the scope of the creditor's obligation to maintain
28 abandoned property. The focus is on the outward appearance of the property,
29 including yards and other exterior spaces, and other conditions that are likely to
30 have significant impacts on the neighborhood, such as interior spaces frequented
31 by squatters or persons engaged in criminal activities. This subsection is modeled
32 closely on Cal. Civ. § 2929.3(b), enacted in 2008.

33
34 3. Subsection (f) grants a license to the creditor and to its agents or
35 contractors to enter abandoned property for the purpose of inspection, repair, and

1 maintenance, regardless of whether that right is reserved in the mortgage.
2 Similarly, this subsection authorizes the addition of the creditor's reasonable
3 maintenance expenses under this section to the debt secured by the mortgage,
4 regardless of whether the mortgage contains a provision to that effect.
5

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

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

25 **[ARTICLE] 6**

26 **REMEDIES**

27 **SECTION 601. EFFECT OF VIOLATION.**

28 (a) In a judicial foreclosure proceeding, if a creditor or servicer is shown to have
29 committed a material violation of this [act], the court may dismiss the action, stay the action on
30 appropriate terms and conditions or impose other appropriate sanctions until the violation is
31 cured. Dismissal must be without prejudice unless the court determines that a new foreclosure
32 action would unfairly burden the homeowner.

33 (b) In a non judicial-foreclosure proceeding, a homeowner or obligor may initiate an
34 action to enjoin or restrain the foreclosure on the grounds that a creditor or servicer committed a
35 material violation of this Act. If the court finds that a material violation of this [act] occurred, the

1 court shall nevertheless allow foreclosure to continue after the violation is cured, unless the court
2 determines that continuation of the foreclosure action would unfairly burden the homeowner.

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

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

9 (e) In addition to the damages recoverable under subsections (d), a homeowner or obligor
10 may recover, as the court may allow, statutory damages not exceeding \$[15,000] in the case of a
11 pattern or practice of noncompliance. In determining whether to award statutory damages and the
12 amount of statutory damages under this subsection, the court shall consider, among other
13 relevant factors:

14 (1) the frequency and persistence of noncompliance [in dealing with the
15 homeowner][in its business practices] by the creditor or servicer;

16 (2) the nature of the noncompliance, and

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

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

20 (g) In opposing the imposition or amount of statutory damages for violations of the act
21 established by the obligor or homeowner, the creditor, servicer or its agent may show that:

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

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

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

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

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

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

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than \$1,000 for each member of the class, except that

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

(i) \$500,000; or

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

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

End of Alternatives

Drafters' Notes

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

1 references to “punitive” damages.

2
3 2. The statutory damages for individuals under subsection (e) (former
4 subsection (f)) have been amended to require a pattern or practice of
5 noncompliance, similar to the RESPA provision for statutory damages.
6

7 3. The comments should be expanded to discuss the circumstances under
8 which a permanent bar to foreclosure under either subsections (a) or (b) would be
9 appropriate and cite cases where that extraordinary relief has been granted.
10 Examples would include cases where the creditor or servicer has repeatedly
11 violated this act or other law, or other aggravating circumstances.
12

13 4. Actual damages incurred by a homeowner or obligor under this section
14 may include damages for emotional distress. Whether or not the homeowner may
15 claim that damages caused by a servicer are chargeable to the creditor who
16 retained the servicer under theories of agency or employer/employee law is not
17 determined by this act but by other law.
18

19 5. Under subsection (a), before confirmation of the foreclosure sale, the
20 homeowner may raise a material violation of the statute - for example, a
21 materially inaccurate notice of the amounts needed to cure a default – as a basis
22 for asking the court to prevent the foreclosure sale (or confirmation), until the
23 violation has been corrected and remedied. If the creditor can cure the violation
24 in a timely way so that full compliance is achieved, it would then be appropriate
25 under this section for the foreclosure may proceed.
26

27 However, after a foreclosure sale, under established principles of real
28 estate law, unless the homeowner under state law has an independent right of
29 redemption, a bona fide sale purchaser is entitled to rely on the conclusive effect
30 of the sale, and the homeowner’s only remedy for violations of the statute would
31 be to seek damages from the foreclosing creditor or any other remedy allowed
32 under state or federal law; *see* Section 602.
33

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

35 [act] displaces any defense or remedy a homeowner or obligor may have under federal law or
36 law of this state other than this [act].

37 **Drafter’s Note**

38 This act preserves rights and defenses available to homeowners and obligors
39 under other state statutes, regulations, common law, and federal law. In many
40 states, such rights and defenses include payment or tender of payment; discharge;
41 contract law defenses, including forgery, lack of capacity, duress, absence or
42 failure of consideration, fraud, misrepresentation, unconscionability, failure of a

1 condition precedent; equitable defenses such as estoppel, laches, or unclean
2 hands; release by cancellation of debt; a violation by a creditor, servicer, their
3 predecessors in interest, or their agents of unfair and deceptive trade practices
4 statutes and other consumer protection statutes; a defect in a mortgage resulting
5 from a failure to comply with statutory requirements for the execution of
6 mortgages; a determination that the creditor or its predecessor in interest was not
7 licensed under state mortgagee licensing statutes or was not legally authorized to
8 make the loan under federal law; and breach of the duty of good faith and fair
9 dealing.

10
11 **SECTION 603. PROCEDURE FOR ASSERTING DEFENSE IN NONJUDICIAL**
12 **FORECLOSURE.**

13 (a) A homeowner or obligor may bring an action against a creditor or servicer asserting a
14 defense to a nonjudicial foreclosure. [An action to enjoin a foreclosure sale must be brought
15 before the sale.]

16 **Drafter's Note**

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

19
20 (b) In an action under this section, if the court determines that a defense to the nonjudicial
21 foreclosure exists, the court may render an order that is just and equitable under the
22 circumstances, including an award of any remedy provided in Section 601.

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

27 **SECTION 605. ENFORCEMENT BY [ATTORNEY GENERAL].** In addition to
28 enforcing any remedies available under other law, the [attorney general or other state official or
29 agency] may bring an action to enjoin a pattern of violating this [act]. In such an action the court
30 may issue an injunction or order against a creditor, servicer, their agents, or any other person

1 violating this [act], which may include requiring steps to be taken to remedy violations or the
2 payment of damages to aggrieved homeowners. In such an action, the court may assess a civil
3 penalty of not less than \$[_____] nor more than \$[_____].

4 **SEE ISSUES MEMORANDUM.**
5 **SECTION 606, HOLDER IN DUE COURSE**
6

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

9 (a) Notwithstanding [insert reference to State UCC §3-305], and any agreement by the
10 homeowner or obligor, when a party with the right to foreclose under Section 401 initiates
11 foreclosure, the homeowner or obligor may assert any claim or defense that the debtor could
12 assert against the original creditor of the obligation secured by the mortgage. If the party
13 initiating the foreclosure is not the original creditor of the obligation or its agent, any recovery by
14 the homeowner or obligor shall not exceed a recoupment or set-off against the total outstanding
15 balance due on the mortgage obligation.

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

20 (c) This section only applies to obligations secured by mortgages on residential property
21 in this state which are incurred after the date this [act] becomes effective in this state.

22 **[ARTICLE] 7**

23 **MISCELLANEOUS PROVISIONS**

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

25 (a) Except as otherwise provided in this Section, this [act] applies to the foreclosure of a

1 mortgage within its scope, even if the mortgage was created before this [act] takes effect.

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

3 **Drafters' Note**

4
5 This Act applies to the foreclosure of mortgages created before the effective date
6 of this Act, unless the creditor has taken action to foreclose before the effective
7 date.

8
9 **SECTION 702. REPEALER.**

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

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

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

14 **Drafters' Notes**

15
16 1. Subsection (a) of this section should be separately prepared for each
17 state. In each state it is necessary to pay careful attention to how this Act is to be
18 blended with existing state law. The statutes to be specifically repealed will
19 include statutes relating to notices of default, intent to accelerate, and the right to
20 cure to be sent to homeowners; notices and standards for mediation and other
21 types of facilitation; determination of who has the right to commence foreclosure;
22 and advertisement and notices of foreclosure sales; confirmation of sales. Given
23 the scope of this Act, which is limited to residential foreclosures, care should be
24 taken not to repeal statutes to the extent they should continue to apply to non-
25 residential foreclosures. In some instances, instead of repeal it may be useful to
26 amend other state statutes to limit their scope to foreclosures that are not within
27 the scope of this Act.

28
29 2. At the same time, this Act was drafted with the expectation that existing
30 state foreclosure procedures would remain in place. This Act is not intended to
31 displace all existing foreclosure laws in each state, but rather to be an overlay on
32 existing law. For example, and most fundamentally, the Act does not anticipate
33 or provide that a state employ a judicial foreclosure process when the customary
34 practice is to foreclose under a power of sale procedure, nor does the Act
35 contemplate that a state should enact a non-judicial foreclosure process in the
36 absence of existing state laws. It is for that reason that the legislative drafters in
37 each state should carefully consider how best to integrate the provisions of the
38 Act with existing state laws governing the foreclosure process.

1 3. In addition to the listed specific sections repealed by this Act,
2 subsection (b) provides for the repeal of all other legislation in this state which is
3 inconsistent with this Act. This provision is necessary to resolve those matters
4 that may ultimately be presented to a court in construing the Act in cases where
5 the specific repealer in subsection (a) fails to note an existing state statute which
6 the court concludes is inconsistent with a provision of this Act.
7

8 **SECTION 703. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

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

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