D R A F T

FOR DISCUSSION ONLY

RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAW

For February 15-16, 2013 Drafting Committee Meeting – Redline Draft

Without Prefatory Note and With Reporter's Drafting Comments

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

February 4, 2013

DRAFTING COMMITTEE ON RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

WILLIAM R. BREETZ, JR., Connecticut Urban Legal Initiative, Inc., University of Connecticut School of Law, Knight Hall Room 202, 35 Elizabeth St., Hartford, CT 06105, *Chair*

THOMAS J. BUITEWEG, 4215 Westbrook Dr., Ann Arbor, MI 48108

BRUCE A. COGGESHALL, Merrill's Wharf, 254 Commercial St., Portland, ME 04101-4664

MICHAEL A. FERRY, 200 N. Broadway, Suite 950, St. Louis, MO 63102

DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712

MELISSA HORTMAN, Minnesota House of Representatives, State Office Bldg., Room 377, 100 Dr. Rev. MLK Jr. Blvd., St. Paul, MN 55155

RUSTY N. LAFORGE, 6301 Waterford Blvd., Suite 407, Oklahoma City, OK 73118

CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402

FRED H. MILLER, 80 S. 8th St., 500 IDS Center, Minneapolis, MN 55402-3796

CARLYLE C. RING, 1401 H St. NW, Suite 500, Washington, DC 20005

MICHAEL H. RUBIN, 301 Main St., One American Pl., 14th Floor, Baton Rouge, LA 70825

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563

LEE YEAKEL, United States Courthouse, P.O. Box 164196, Austin, TX 78716-4196

JAMES C. SMITH, University of Georgia School of Law, 225 Herty Dr., Athens, GA 30602, *Co-Reporter*

ALAN M. WHITE, CUNY School of Law, 2 Court Sq., Long Island City, NY 11101-4356, *Co-Reporter*

EX OFFICIO

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE 19899, *President*

BARRY C. HAWKINS, 300 Atlantic St., Stamford, CT 06901, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

BARRY B. NEKRITZ, 233 S. Wacker Dr., 7800 Willis Tower, Chicago, IL 60606, *ABA Advisor*

NEIL S. KESSLER, 1001 Haxall Point, 15th Floor, Richmond, VA 23219-3944, *ABA Section Advisor*

NEIL J. RUBENSTEIN, 55 2nd St., Suite 1700, San Francisco, CA 94105-3493, *ABA Section Advisor*

AMERICAN LAW INSTITUTE ADVISOR

TERESA WILTON HARMON, 1 S. Dearborn St., Chicago, IL 60603, *ALI Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

~~0~~2-04 -2013 – WRB FIFTH DRAFT FOR 02-15/16~~/17~~-2013 MEETING

UNIFORM ~~RESIDENTIAL REAL ESTATE MORTGAGE~~HOME FORECLOSURE ~~PROCESS AND PROTECTIONS~~PROCEDURES ACT

TABLE OF CONTENTS

PART 1- TITLE AND DEFINITIONS

SECTION 101 SHORT TITLE This [act] may be cited as the ~~Uniform Real Estate Mortgage~~ Home Foreclosure ~~Process and Protections~~ Procedures Act.

> ~~**NOTE – The ABA advisor, Committee Chair and Reporters unanimously suggest an alternative name for the Act, such as the Uniform Residential Mortgage Foreclosure Act.**~~

SECTION 102 DEFINITIONS In this [act]:

(1) "Abandoned property" means mortgaged property with respect to which the borrower and persons claiming through the borrower, including tenants, have relinquished possession. Abandoned property does not include (i) a dwelling unit the initial construction of which is not complete or (ii) a dwelling unit used or held for use by the borrower as a vacation home or seasonal home.

(2) "Borrower" means a person ~~that owns~~owning an interest in the mortgaged property ~~or owes payment or~~ , other ~~performance of an obligation, whether absolute or conditional, secured under~~than a mortgage. ~~The term includes secondary obligors~~, lien, servitude, or leasehold, whether or not the person is an obligor.

> DRAFTER'S NOTES – (1) The Committee should compare the new definition of 'Obligor'. (2) We need to consider to whom the Act requires 'notice' to be provided to a 'borrower' v. an 'obligor' and how the creditor is able to identify each; see the proposed amendments to Sec. 401. (3) At the November meeting, there were suggestions from several persons for more expansive comments; to the extent these notes are inadequate, please let the Reporters know of any desired additional comments.

(~~2~~3) "Common interest community" means real property with respect to which a person, by virtue of ownership of a unit, is obligated to pay for real property taxes, insurance premiums,

maintenance, or improvement of other real property ,or services described in a declaration or other governing documents, however denominated. A common interest community includes properties held by a cooperative housing corporation. In this paragraph, "ownership" includes a leasehold interest if the period of the lease is at least [20] years, including renewal options.

(~~3~~4) "Creditor" means a ~~person in whose favor a mortgage is created or provided for or the creditor's agents, loan servicers, successors, or assigns~~ lender or other person who owns or has the right to enforce an obligation~~-~~. [The term does not include a person who extends no more than two mortgage loans in the same calendar year as the mortgage at issue.]

DRAFTER'S NOTES

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

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

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

4. The Reporters, Chair and ABA Advisor believe- subject to contrary thoughts from the Committee – that we do not need to define the term 'servicer'. That word is not used in any statutory text or comments; it appears only in the discussion of facilitation standards and objectives.

(~~4~~5) "Expenses of foreclosure" means the lesser of the reasonable expenses incurred by a foreclosing creditor or the maximum amounts permitted by other law of this State for expenses in connection with a foreclosure. These expenses include costs of transmission of notices,

advertising, title searches, inspections and examinations of the mortgaged property , management and securing of the mortgaged property, insurance, filing and recording fees, attorney's fees and litigation expenses incurred to the extent provided in the mortgage or authorized by law, appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction, fees of court-appointed receivers, and other expenses reasonably necessary to the foreclosure.

(x) "Facilitation" means the assistance of a third-party neutral at an in-person meeting or meetings between the parties with the objective of achieving a commercially reasonable alternative to foreclosure, resulting in sustainable outcomes for the creditor and borrower.

BARRY NOTE – does this preclude telephone conferences, and to whom does 'in-person' apply?

(~~5~~6) "Foreclosure" means any process, proceeding or other action by a creditor to terminate the borrower's interest in the mortgaged property or to obtain possession of the mortgaged property for the creditor~~, including judicial and nonjudicial procedures~~. ~~Foreclosure includes any action to terminate a land installment sale contract.~~ [Foreclosure does not include a voluntary transfer by the borrower and does not include an action to recover possession of the property after a completed foreclosure sale.]

(x) "Good Faith" – In November, Commissioner Ring recommended that we consider defining 'good faith' in this Act; the Reporters, Chair and ABA Advisor, after discussion, concluded that this should not be done.

(~~6~~7) "Individual" means a natural person.

~~(78) "Interest holder" means a person that holds a legally recognized interest in real or personal property that is subordinate in priority to a mortgage foreclosed under this [act].~~

DRAFTER'S NOTE – this definition was used only in section 503; that section has been amended to avoid the need for the definition.

(~~8~~9) "Instrument" means a negotiable instrument as defined in [U.C.C. § 3-104].

(~~9~~10) "Loss mitigation" means any program that the creditor offers to borrowers in default or facing imminent default, as an alternative to a foreclosure sale~~, including a repayment plan, forbearance agreement, loan modification, short sale, partial mortgage insurance claim, negotiated transfer and deed in lieu of foreclosure~~.

DRAFTER'S 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.

(~~10~~11) "~~Mediation~~ Facilitation agency" means [the administrative or judicial agency designated by the state to supervise foreclosure ~~mediation~~ facilitation.]

~~(17) "Mortgage" means a mortgage, deed of trust, security deed, contract for deed, land sale installment contract, lease, or other document that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property. A document is a mortgage even if it also creates or provides for a security interest in personal property. If a mortgage provides that a default under any other agreement is a default under the mortgage, the mortgage includes the other agreement. The term includes a modification or amendment of a mortgage and a document creating a lien on real property to secure an obligation owed by an owner of the real~~

~~property to an association in a common interest community or under covenants running with the real property.~~

(~~11~~12) "Mortgage" means a consensual interest in residential property that secures payment of an obligation, created by a mortgage agreement.

DRAFTER'S NOTE – The Committee should determine whether it wishes to address the status of land installment contracts within the act and if so, how.

(13) "Mortgage agreement" means a mortgage instrument, deed of trust, security deed, or other record that creates or provides for a mortgage.

DRAFTER'S NOTE– The Reporters acknowledge the circular nature of the definitions of 'Mortgage' and 'Mortgage Agreement' and welcome further discussion.

(14) "Mortgaged property" means residential ~~real~~ property, together with any personal property held or used in connection with the real property, which is subject to a mortgage.

(~~12~~15) "Obligor" means a person that, with respect to an obligation secured by a mortgage, (i) owes payment of the obligation, (ii) has provided property other than the mortgaged property to secure payment of the obligation, or (iii) is otherwise accountable in whole or in part for payment of the obligation.

(16) "Obligation" means a debt or other liability that is secured by a mortgage.

~~(13~~(17) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

~~(14) "Real property" means any estate or interest in, over, or under land, including minerals, structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether or not described or mentioned in the contract of sale or instrument of conveyance. The term includes the interest of a landlord or tenant and, unless the interest is personal property under the law of the state in which the property is located, an interest in a common interest community.~~

DRAFTER'S NOTE – The Reporters, Chair and ABA Advisor believe that the definition of 'real property' is unnecessary and, by deleting it, we avoid several issues which were debated in November.

~~(15)~~ (18 "Record", used as a noun, means information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form.

(~~16~~19) "Residential ~~real~~ property" means real property ~~that, when a mortgage is entered into with respect to the property, is used or is intended by its owner to be used primarily for the personal, family, or household purposes of its owner and is~~ improved~~, or is intended by its owner to be improved, by~~ with, one~~-~~ to ~~[~~four~~]~~ ~~-~~dwelling units, including structures ancillary to such dwelling units and including attached single-family dwelling units and single-family manufactured housing units placed upon permanent foundations. Residential ~~real~~ property includes single-family units in a common interest community.

~~(18~~(20) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Reporters' Drafting Notes

1. Many of the definitions are taken from the Uniform Non-Judicial Foreclosure Act, while the drafters have also added several new definitions, including 'Borrower', 'Lender', 'Loss Mitigation' and '~~Mediation~~Facilitation Agency'.

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

3. Whether mortgaged property is "abandoned property" is determined by the facts of each case. The factors listed in Section 505(a) are not exclusive. The core question is whether the borrower is presently in possession of the property. The question must be answered by evaluating the facts related to the borrower's use of the property. The subjective intention of the borrower to maintain or continue ownership of the property, whether or not communicated to the creditor, is irrelevant.

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

SECTION 103 [Alternative #1] SCOPE This Act applies to the foreclosure of every mortgage on residential ~~real~~ property that commences on or after the effective date of this [act], even if the mortgage was created before the [act] takes effect.

DRAFTER'S NOTE – From a style perspective, it may be that all the language after 'real property' should be deleted and the issue of which foreclosure actions are governed by the act would be dealt with at the end of the act in an 'Effective Date' section.

SECTION 103 [Alternative #2] SCOPE This Act applies to the foreclosure of every mortgage on residential property occupied by the borrower for personal, family, or household purposes at the time the mortgage is granted or when the creditor commences a foreclosure

proceeding ~~after the effective date of this Act, even if the mortgage was created before this Act takes effect~~.

Reporters' Drafting Notes

1. This Act applies whenever a creditor forecloses on a mortgage on residential ~~real~~ property, whether by judicial process or by non-judicial measures. The definition~~s~~ of "foreclosure" ~~and "residential real property"~~ in Section 1-102 must be consulted to determine which actions taken by creditors have the legal effect of making the Act applicable to the parties to a mortgage.

2. The Reporters, Chair and ABA Advisor believe t~~T~~his Act applies to the foreclosure of mortgages created before the effective date of this Act, unless the creditor has taken action to foreclose before the effective date; the Style issue is whether to state that outcome in the 'Scope' section or the 'Effective Date' section

3. Under Alternative #1 this Act applies whenever a mortgage covers one-to-four dwelling units, regardless of whether the borrower occupies or intends to occupy one or more of the units as a principal residence or other residence. Alternative #2 limits the scope of the Act to owner-occupied residential property. In both cases, the Act does not apply if the mortgage covers five or more dwelling units, even if the borrower personally occupies one or more of those units.

4. The Drafting Committee may well wish to expand the 'scope' section to address the question of how this Act is to be blended with existing state law.

ARTICLE 2 – NOTICES, RIGHT TO CURE

SECTION 201 PRE-FORECLOSURE ~~NOTICES REQUIRED~~NOTICE Before any creditor may commence foreclosure ~~or any other legal action to enforce the obligation~~, the creditor shall give ~~the~~ each borrower [and obligor?] both a notice of default, intent to accelerate and the right to cure pursuant to Section 202 and a notice of ~~mediation~~ facilitation pursuant to Section 301.

Reporters' Drafting Notes

1. We debated a threshold policy issue raised by these notice provisions [201 and 202] and by the mandatory provisions of Article 3 on ~~– mediation~~ facilitation. That issue is whether this act should apply ~~– as it is presently drafted – to 'any…legal action~~ to enforce the obligation' (that is, to any creditor action seeking recovery of the debt) or~~-~~, as it is presently drafted, only to actions that would have the effect of depriving the borrower of the right to occupy the home – primarily, a foreclosure. The issue is posed most directly in those cases where the creditor may choose to sue, either first or exclusively - on the note rather than to foreclose the mortgage.

2. As drafted, the notices and mandatory ~~mediation~~ facilitation would apply only to foreclosure ~~both~~ and not to other actions that a lender might theoretically take, such as seeking a receivership in the case of, for example, an owner-occupied 3 family house. Those advocating for a narrower rule would argue that the primary purpose of this act is to keep the borrower in the house and a suit on the note is no different than a suit by any other unsecured creditor.

The matter becomes even more complicated when one considers those states that have a 'one action' rule, where a suit on the note would have the effect of barring a subsequent action to foreclose on the mortgage.

3. The notices required by this section are separate and distinct from the notice of foreclosure sale required by Section 405. The notices need be sent by only one of the persons or entities defined as "creditor," but must be separately sent to all persons who come within the definition of "borrower." Compliance with notice requirements by the servicing agent, for example, will suffice as notice by the owner of the mortgage.

4. In November, Commissioner Rubin noted the need to be clear regarding the questions of who must give, and who must receive, the notices required by this Act. We have attempted to address those questions in our revisions to these and other sections and in the comments; see, for example, the new comment immediately above this Note, in the amendments to Section 401 and in new Section 205.

SECTION 202 NOTICE OF DEFAULT, INTENT TO ACCELERATE AND RIGHT TO CURE

A creditor may not commence foreclosure ~~or other legal action to enforce the obligation~~ until 30 days after it has ~~delivered~~ sent to ~~the~~ each borrower [and obligor?] the notice of default, intent to accelerate and right to cure described in Section 201. The notice shall state:

(a) the nature of the default including an ~~detailed~~ itemization of all past due payments, fees and other charges as of the date of the notice,

(b) the specific action(s) the borrower must take to cure the default, as described in Section 204 (b), including the exact amounts that must be paid.

(c) the date by which the borrower must cure the default, which shall be no sooner than one day prior to the first scheduled foreclosure sale,

(d) the fact that if the borrower does not cure, the creditor may demand payment of the full amount due, not just past due payments, and may foreclose and sell the property,

(e) the effect of curing the default, including the right to have the terms of the note and mortgage remain in effect,

(f) a statement of why the borrower is receiving the notice and what the borrower's rights are, including the borrower's right to dispute the default or raise any other defenses to foreclosure and how that right may be exercised,

(g) the specific basis for asserting that the foreclosing ~~party~~ creditor has the right to foreclose and, if the creditor is acting as agent for the owner of the obligation, the identity of the owner,

(h) the borrower's right to request a copy of the borrower's mortgage note and copies of any assignments of mortgage or deed of trust required to demonstrate the right to foreclose on the mortgage, and

(i) a reference to the fact that the borrower will receive separate notices of available foreclosure alternatives and ~~mediation~~facilitation.

Reporters' Drafting Notes

1. The mortgage obligation may be accelerated by filing a complaint, scheduling a sale, or by separate notice of acceleration – the notice of intent to accelerate does not by itself accelerate the debt. The notice need not refer to acceleration if the creditor does not intend to accelerate the obligation, for example if it is fully matured. The phrase "other legal action" includes other legal methods that may be used to terminate the borrower's interest in the mortgaged property, such as a quiet title or ejectment action in the case of an installment land sale contract. Purchasers of foreclosed properties are protected from assertions that the sale was invalid because the chain of loan ownership described in the pre-foreclosure notice was incorrect; the borrower must raise challenges to the notice and other defenses before the sale, pursuant to Section 4-107.

2. Items (a) through (f) are the elements of notice in the standard Fannie/Freddie mortgage instrument. Item (c) adds a specific deadline to cure the default. Items (g) and (h) are the ownership statement required by the national servicing settlement, and call for the servicer to identify its basis for standing at the outset of foreclosure proceedings, so that any disputes can be resolved promptly. Including this information complements Section 4-107, providing conclusive effect to a completed foreclosure sale. This notice would not displace all state-specific aid program and counseling notices which necessarily will depend on state funding – for example, Pennsylvania requires a separate 30-day notice of how to apply for its Homeowner's Emergency Mortgage Assistance Program.

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

acceleration if the creditor does not intend to accelerate the obligation, for example if it is fully matured. Purchasers of foreclosed properties are protected from assertions that the sale was invalid because the chain of loan ownership described in the pre-foreclosure notice was incorrect; the borrower must raise challenges to the notice and other defenses before the sale, pursuant to Section 4-107.

4. In Subsection (a), the itemization of amounts owed should be as of the date of the notice, and should not include amounts that have not yet come due. The notice may refer to the fact that additional sums will come due after the date of the notice. Fees and charges imposed by the creditor or the creditor's attorney should be ascertained and included.

The Committee should determine whether a "good faith estimate" approach would be sufficient in the case of fees and charges that are imposed by third parties and that have been incurred, but the amount of which are not known, at the time of the notice.

5. In subsection (b), the actions the borrower needs to take in order to cure the default are governed by § 204.

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

SECTION 203 MANNER OF NOTICE DELIVERY. Both notices required by Section 201 must be sent by first class mail to ~~the~~ each borrower's last known address, and to the mortgaged property address. If a ~~the~~ borrower or borrower's representative has requested to receive notices by electronic mail and has provided an electronic mail address to the creditor, both notices must also be sent by electronic mail to the borrower's electronic mail address. The notices may be sent at the same time, [but may not be combined with each other, or with any other notices, or with the [complaint, in a judicial state or] Notice of Sale.]

Reporters' Drafting Notes

1. We bracket the language concerning 'combined', in order to highlight an issue requiring further refinement. The drafters agree that by 'combined', we mean at least that each of the mandated notices must be on a separate piece of paper, or in a separate paragraph of an emailed notice. We did not discuss whether 'combined' precluded the mailing of multiple notices in a single envelope, or in a single email.

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

SECTION 204 RIGHT TO CURE DEFAULT

(a) A borrower may cure a default by tendering the amount or performance specified in subsection (b) at any time until ~~one day~~ 24 hours before the [first] scheduled foreclosure sale. The right to cure may not be exercised more than three times in a calendar year.

(b) To cure a default under this section, a borrower must:

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

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

(3) Tender all reasonable costs and attorney fees of proceeding to foreclosure that are (A) specified in writing by the creditor and (B) actually incurred prior to the date of tender.

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

(c) Cure of a default pursuant to this section restores the residential mortgage debtor to the same position under the mortgage and the obligation it secures as if the default had not occurred.

Reporters' Drafting NotesComment

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

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

3. This language is adapted from Pennsylvania's statute, 41 Pa. Stat. §404. Using the sale date as the deadline for a cure provides an appropriate balance between rights of creditors and borrowers.

4. In a subsequent draft, we should insert reference to any relevant state law permitting or restricting late fees.

5. The comments should discuss what is meant by the 'first' scheduled foreclosure date. Presumably, this means the date on which the court - or the foreclosing creditor in a non-judicial foreclosure state - first notifies the borrower that title will pass, or the date on which a foreclosure sale will occur or, under Connecticut's strict foreclosure procedure, the borrower's law date, that being the date on which the borrower will lose its equity of redemption. Postponement of any of those dates, for whatever reason, should not extend the date by which the borrower may cure.

SECTION 205 [NEW] UNKNOWN BORROWER OR OBLIGOR

A creditor does not owe a duty to notify a person under Sections 201 through 203 based on its status as creditor to a person that is a borrower or obligor, unless the creditor knows all of the following:

(1) That the person is a borrower or obligor
(2) The identity of the person and
(3) How to communicate with the person.

Reporters' Drafting Note

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

ARTICLE 3 ~~MEDIATION~~ **FACILITATION**

PREAMBLE TO ARTICLE 3 – FACILITATION – FOR THE FEBRUARY 15-16, 2013 DRAFTING COMMITTEE MEETING

The Drafting Committee spent considerable time at both its June and November 2012 meetings discussing the subject of mediation; a number of members on the Committee believe that a successful process that screens potential workout alternatives to foreclosure offers the single best hope for borrowers in the continuing foreclosure crisis. Commissioner Walters stated this view succinctly in a November email to the Committee Chair when she wrote: "Mediation is key to the success of this act. It is the main thing if not the only thing that we can give borrowers…."

The Committee will recall our June meeting when a panel consisting of Attorney Heather Scheiwe Kulp, then of Chicago, and four judges and mediators from the states of Connecticut, Pennsylvania, the District of Columbia and Nevada described their programs and what they believed were the essential elements of a successful mediation program.

In an effort to provide a concrete example of an existing state statute that had allegedly been adopted by consensus among lender and borrower representatives, and which hopefully held promise of considerable success, the first draft of this Act included (and still includes) Section 303, which was based largely on legislation adopted in 2011 and 2012 in the State of Washington.

The text of Section 301 and all of Article 3 was discussed in some detail in November; much of that discussion focused on the challenges posed by any single mediation program. Among other issues, we discussed the differences that rural and urban communities posed in terms of appropriate facilitation procedures, the relative costs and resources required by an 'opt-in' versus an 'opt-out' system, the cost-benefit analysis of programs with state-funded full time mediators, and the concerns expressed by the lending community generally that, in their view,

mediation or facilitation often led to nothing other than extended delay in foreclosure and resultant greater economic losses to creditors whose loans were already underwater.

In the Chair's view, the discussion demonstrated that widespread enactment of a 'one size fits all' mediation statute might prove elusive.

The Chair's concerns regarding the success of the Washington statute and its utility as our sole model were heightened in mid-December after receiving these observations from one of the principal advocates of the Washington State legislation, who also spends much of his day-to-day practice working with the Washington statute on behalf of borrowers:

> "I do have to say, now that we are into the second year of the FFA, that there just isn't any way around that the foreclosure dynamic is almost incapable of thoughtful resolution. The mediations here are adversarial. The amount of money at stake is tremendous. The business models of the foreclosure industry, including the attorneys for the foreclosure mills, often preclude reasonable resolution. So coming to a "fair" resolution by legislation is very, very difficult. I am not sure we succeeded yet."

In discussions after the November meeting, Alfred Pollard, General Counsel of FHFA, had suggested that it might be useful to convene a small group to consider an alternative approach to the existing mediation draft; his proposal – that we try and identify a set of standards for mediation that would work for both lenders and borrowers - was consistent with the recommendations of Attorney Scheiwe Kulp and the panel of mediators, who had suggested a 'best practices' approach to mediation.

Pollard's suggestion tracked the June recommendations of the mediation panel; it also offered a potential response to the concerns about the limitations of the Washington State statute, and the enactment concerns posed by promulgation of a single substantive statute that might not be widely accepted.

Accordingly, on December 17, 2012, a small group convened in Washington DC at the offices of Commissioner Ring's law firm, Ober / Kaler. In the morning, the group included your Committee Chair, our two Reporters, Attorney Heather Scheiwe Kulp, Professor Judith Fox from Notre Dame Law School, and Attorney Jacqueline Hagerott, manager of the Dispute Resolution program conducted by the Ohio Supreme Court. The group spent the morning developing a set of principles that a state might employ in developing a facilitation program best suited to that State.

In the afternoon we were joined by Vicky Vidal, a senior representative of the National Mortgage Bankers' Association who had been present at the June meeting, and by Alfred Pollard of FHFA. These eight rigorously discussed the principles developed in the morning and significantly amended them.

What emerged was the following set of principles that might form the basis for further discussion at the February 2013 meeting. The text presented below includes editing from Professor Fox regarding what she recalled as comments from Attorney Pollard and Ms. Vidal; it was further edited by Reporter White in his effort to more clearly frame the issues that persisted at the end of our day long discussion and then finally edited by the Chair for inclusion in this draft of the Act.

It would be a substantial overstatement to suggest that these principles enjoyed the unanimous support of all eight participants on December 17. However, it is also fair to say that, from the Chair's perspective, these principles enjoyed a far greater sense of support during our meeting than the Chair has sensed in any of our discussions at prior committee meetings.

FACILITATION OF ALTERNATIVES TO FORECLOSURE

Preamble: Facilitation – Objectives, Standards, and Issues for Resolution

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

2. ISSUE – lenders/servicers object to facilitation that is imposed uniformly without regard to the fact that some or many homeowners have been fully evaluated for foreclosure alternatives before any process begins.

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

4. The process of bringing the parties together to achieve an alternative to foreclosure is facilitation, not mediation, because some of the standards typically followed by mediators are not appropriate. Facilitation is not merely a requirement that parties "meet and confer, " i.e. a mandate merely for two-party settlement negotiations.

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

6. ISSUE: The initial draft provides for an opt-out process, i.e. automatic scheduling of a facilitation meeting, with a process that goes forward unless the homeowner does not participate. The other alternative is an 'opt-in' approach, which requires the homeowner to respond to a notice by requesting a meeting; in the absence of a request, there is no facilitation process scheduled.

7. ISSUES: TIMING – In an opt-in system, the borrower would have [30] days to respond to the opportunity for facilitation (either by opting in or failing to opt out) after the notice of right to

facilitation is sent to the borrower, unless this time period conflicts with local rules of procedure, in which case they need to be reconciled. The [30] day period begins when notice is sent (either by service of process in judicial foreclosure or in a notice sent by the facilitation agency in non-judicial foreclosure). The lender or servicer should receive notice that a request is made in an opt-in facilitation system.

8. If the borrower makes a timely request for facilitation, the relevant agency must initiate the facilitation process within 14 days [for example, by a referral order or other local protocol.]

9. ISSUE: Dual Track: Lenders would prefer to be able to proceed with facilitation voluntarily, before or during foreclosure, without delaying the foreclosure. Homeowner advocates call for facilitation to proceed to conclusion before any steps can be taken to move foreclosure forward.

10. Documentation information exchange.

> a. The servicer must specify whatever documents it requires from the borrower within [5] days after initiation of the facilitation process.
>
> b. The borrower must provide the income and other documents required by the servicer listed in (a) above to the servicer and the facilitator not less than [30] days before the scheduled first facilitation session. If the borrower fails to substantially provide the documents specified by the servicer within the time frame required by this paragraph, the facilitation process terminates.
>
> c. The servicer must provide to the borrower and the facilitation agency: (i) the borrower's payment history from the date of default; (ii) itemized amounts due on the loan, including all fees.
>
> d. The servicer should provide the facilitator its decision, including the inputs and results of any net present value calculations it relies on in deciding not to offer any particular loss mitigation alternative.

11. ISSUE – lenders/servicers would exclude fees accrued but not yet billed]; and (iii) investor restrictions leading to denial of loss mitigation.

12. ISSUE: lenders prefer to limit this to "non-public" investor restrictions, presumably because some investor restrictions are available in securities filings, or perhaps GSE handbooks].

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

14. ISSUE- [Lenders advocate a time limit to terminate the facilitation process. Mediators experienced with existing programs point out that 90 days, for example, would in most cases be inadequate to obtain complete documentation from a borrower and allow a servicer to review and

make a determination on appropriate loss mitigation options.] The facilitation process terminates [XX] days after initiation of the facilitation process unless the XX-day period is extended by the parties' agreement or for good cause.

15. ISSUE: Dual Track – lenders/servicers advocate that foreclosure be permitted to move forward, with only a stay of the final foreclosure sale, while borrowers and mediators advocate halting all steps in the foreclosure process while facilitation runs its course. Lenders also wish to be able to request a termination of any stay for good cause at any point.

16. Participation – servicer must have lawyer and servicer representative present in person or by telephone or teleconference, servicer must evaluate loss mitigation and make decision as required by CFPB rule.

17. ISSUE – ELIGIBILITY Lenders/servicers advocate limiting facilitation to owner-occupants, barring investors, and requiring owner to demonstrate occupancy for period of time prior to foreclosure.

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

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

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

21. All agreements for foreclosure alternatives should be memorialized in writing and signed by both parties to minimize later disputes.

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

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

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

Reporters' Drafting Notes

1. A persistent issue raised by several commentators, including the ABA advisor, is the absence in the current draft of any remedy for a servicer's failure to comply with the document exchange exchange requirements or other failure to participate in the facilitation process.

2. The current text of these principles in paragraphs 9 and 15 both address the issue of dual tracking, but in different ways.

THE BALANCE OF THE TEXT IN ARTICLE 3 IS MUCH OF THE MATERIAL AS IS APPEARED IN THE NOVEMBER TEXT, INCLUDING ALL OF SECTIONS 301 THROUGH 304.

2. What policy choices are embedded in this particular version of the 'mediation' process? What are some of the implications of this set of choices? Our basic set of choices here involves these discrete elements:

First, by mandating 'mediation' before foreclosure may commence, we eliminate the so-called 'dual tracking' problem, where borrowers find themselves simultaneously in a mortgage modification discussion and a defendant in a foreclosure action.

Second, by creating an 'opt-out' rather than an 'opt-in' system, we are creating a system that will surely serve more borrowers' interests, but will create potentially serious financial cost issues in the states, for which we have no ready answer. Given our time constraints, we did not draft alternatives.

Third, we were torn between the June discussion suggesting that the Act incorporate 'best practices' for 'mediation' and the more substantive provisions for mediation found in the laws of some states. For purposes of this draft, we chose to incorporate some of the new mandated documentation of 'net present value' in the State of Washington, as detailed in the current text of Section 303 (b).

The Chair's memorandum accompanying this draft includes explanatory materials describing the NPV process and the negotiation process by which both lender and borrower representatives in that State apparently reached an agreement to support this process in Washington.

To refresh the Committee's recollection,[1] the fundamental concept here is that the lender, using either the Treasury's 'Mod In a Box' calculator or its own

[1] 1 FHFA has published a document entitled '**Review of Options Available for Underwater**

proprietary formula, is expected to gather the borrower's income and expense information, together with its own calculations of the mortgaged property's likely sales value in foreclosure plus the costs of foreclosure. Simultaneously, the lender is expected, at least under federal HAMP standards, to determine whether a loan modification that reduces the borrower's monthly payment to a sum which is no greater than 31% of the borrower's net monthly income, has, on a Net Present Value basis, a greater value to the investor than would the value the investor would receive after foreclosure of the mortgaged property and its subsequent sale. The detailed explanation offered by the United States Treasury Department, entitled ***Home Affordable Modification Program, Base Net Present Value (NPV) Model V5.0, Model Documentation,*** Effective: June 1, 2012, can be found at this link: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvmodeldocumentationv50.pdf.

The drafters acknowledge that most states' current statutes differ dramatically from the approach taken by the State of Washington and broadly reflected in Section 303 of this Act. For that reason, in the absence of a mandate

---

Borrowers and Principal Forgiveness, which was released on July 31, 2012. At page 8, the document describes the HAMP program in generally understandable 'lay' terms:

"1. For HAMP, an affordable payment is achieved by taking specified sequential steps (called the waterfall), as needed, in order to bring a troubled borrower's monthly payment down to 31 percent of their gross monthly income. Specifically, servicers:
- Capitalize the arrearages, including accrued interest and escrow advances.
- Reduce the interest rate in increments of 1/8 to get as close as possible to 31 percent of the homeowners gross monthly income with the lowest possible interest rate set at 2 percent.
- If reducing the interest rate does not achieve an affordable monthly payment, servicers then extend the term and re-amortize the mortgage by up to 480 months (40 years).
- If reducing the interest rate *and* extending the term does not achieve an affordable monthly payment, servicers then provide principal forbearance down to 115 percent of the property's current market value or as much as 30 percent of the unpaid principal, whichever is greater.

2 If a borrower does not qualify for HAMP, the Enterprises' then look to employ a proprietary modification, sometimes referred to as a "standard modification." The features of a proprietary modification are also applied sequentially to a loan's mark-to-market LTV and include:
- Capitalizing the arrearage, including accrued interest and escrow advances.
- Providing principal forbearance down to 115 percent of the property's current value or as much as 30 percent of the unpaid principal balance, whichever is less.
- Setting the interest rate to a fixed-rate mortgage, currently at 4.625 percent.
- Extending the term to 480 months (40 years).

After calculating the modified payment terms, the mortgage loan must result in at least a 10 percent reduction in the homeowner's principal and interest payment."

imposed at the federal level, we acknowledge that it would be difficult conceptually to mandate that each state engage the services of a third party 'mediator' intended to independently review the servicers' determination of net present value, as they are now required to do under FHFA regulations, the law of states such as Washington and the Attorney Generals' Servicer settlement.

At the same time, in the absence of some means of ensuring that the borrowers' interests are being properly calculated by servicers who, by many accounts, have an economic interest in preferring foreclosure to loan modification, it is not realistic to assume that borrowers will have the independent capacity to consider the accuracy of that calculation.

SECTION 301 NOTICE OF ~~MEDIATION~~ FACILITATION.

(a) Before any creditor may commence foreclosure ~~or any other legal action to enforce the obligation~~, the creditor must give the borrower notice of ~~mediation~~facilitation.

(b) If the ~~mediation~~facilitation agency, by rule, establishes a procedure for the ~~mediation~~facilitation agency to send notice of ~~mediation~~facilitation to borrowers, the creditor must request that a notice of ~~mediation~~facilitation be sent by the ~~mediation~~facilitation agency to the creditor and the borrower. If the ~~mediation~~facilitation agency does not send the notice, the creditor shall send the notice.

(c) The notice of ~~mediation~~facilitation must include the following:

_____ (1) The names, addresses and telephone numbers of the housing counseling agencies, lawyer referral services and legal aid agencies serving the borrower's geographic area that are designated from time to time by the ~~mediation~~facilitation agency.

_____ (2) The name, address, telephone number and e-mail address of the person designated by the creditor as the borrower's single point of contact, if a person has been so designated.

(3) The location, date and time at which the borrower may appear for an in-person ~~mediation~~facilitation session with the creditor, under the supervision of the ~~mediation~~facilitation agency, together with instructions on how to reschedule the in-person ~~mediation~~facilitation.

(4) A description of all documents the borrower should bring to the ~~mediation~~facilitation session, in accordance with rules promulgated by the ~~mediation~~facilitation agency.

Reporters' Drafting Notes

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

Automatic scheduling of ~~mediation~~facilitation meetings is the opt-out approach now used in Connecticut, Philadelphia County and a number of counties in Indiana, among others. The opt-in alternative used in other jurisdictions calls for the notice to inform the borrowers that they have a right to request a ~~mediation~~facilitation~~-~~ conference within a designated period, and the specific means for requesting the conference, by telephone, internet or other suitable means established by the ~~mediation~~facilitation agency. Experience has shown that the opt-out approach, with automatic scheduling of foreclosure ~~mediation~~facilitation, results in much higher rates of homeowner response, and ultimately higher success rates in preventing foreclosure sales and maximizing creditor recoveries.

SECTION 302 DUTY TO PARTICIPATE IN ~~MEDIATION~~FACILITATION AND NEGOTIATE IN GOOD FAITH.

Both parties must negotiate in good faith to seek a resolution other than a foreclosure sale. The creditor shall inform the borrower of the loss mitigation options that are available to the borrower. The borrower shall provide reasonably available financial and other information to permit the creditor to evaluate any loss mitigation option. The creditor shall notify the borrower and the mediator, facilitator or ~~mediation~~facilitation agency of its willingness or refusal to offer any loss mitigation option requested by the borrower, and of the reasons for any refusal and the information on which the refusal is based. The creditor may not charge the borrower any fees for the ~~mediation~~facilitation process. The parties shall comply with any scheduling order established by the ~~mediation~~facilitation agency.

Reporters' Draffting Notes

As provided in Section 303, the ~~mediation~~facilitation agency may impose additional requirements on the parties, for example requiring the creditor or its agent to appear in person or to have a person with authority to approve loss mitigation alternatives available by telephone at the time of the ~~mediation~~facilitation session, to perform a net present value analysis, to disclose the assumptions on which the analysis is based, or requiring borrowers to meet with a housing counselor to qualify for ~~mediation~~facilitation. The agency will also regulate procedural matters, such as time limits for exchanging documents, scheduling and concluding ~~mediation~~facilitation meetings, reports by mediators or facilitators, and the like. States should continue to have flexibility in the design and implementation of ~~mediation~~facilitation programs.

SECTION 303 STANDARDS FOR CONDUCT OF ~~MEDIATION~~ FACILITATION.

(a) The ~~mediation~~facilitation agency shall adopt regulations pursuant to [insert reference to State Administrative Procedures Act or, if the ~~mediation~~facilitation agency is the judicial system, to the rules of court] describing the facilitation process.

(b) In addition to other regulations that the agency may adopt, in order to assist the

parties in addressing issues of foreclosure, the ~~mediator~~facilitator must require the participants to consider the following:

(1) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

(2) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

(3) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not required, then the creditor must use the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide.

Chair's Note

Sub-section (b) is excerpted from a statute enacted earlier this year in the State of Washington; See RCW 61.24.163(7). As reported by Attorney Bruce Neas, who was involved in the ultimate legislative negotiations:

> "In the negotiations leading up to the compromise bill, an operating premise was that in order to make mediation effective for borrowers, there would have to be a series of specific requirements and some standards to apply at the mediation. Merely having an opportunity to discuss the issues leading up to a foreclosure

would be meaningless. That had already been proven by the Legislature's adoption of a "meet and confer" requirement as a condition precedent to a foreclosure. I should add that Washington being a non-judicial foreclosure state makes the necessity for a third party intervention acute.

Primarily, the NPV test is a disclosure mechanism for the facilitation of a productive mediation. Under RCW 61.24.163(7), 'The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator must require the participants to consider' the information described in the statute."

Attorney Neas further informed the Chair that the lending community signed off on the compromise language; I have no knowledge of the political environment in which such cooperation was offered.

SECTION 304 NO FORECLOSURE DURING ~~MEDIATION~~FACILITATION.

(a) After the ~~mediation~~facilitation process has begun, the creditor may not commence foreclosure [or other legal action] to enforce the obligation unless:

(1) the borrower does not respond to the ~~mediation~~facilitation notice, by either appearing at the scheduled ~~mediation~~facilitation session or by sending a written request for loss mitigation to the creditor within 60 days of the ~~mediation~~facilitation notice~~,~~; or

(2) The ~~mediation~~facilitation agency provides the creditor with a notice that the parties have negotiated in good faith and reached an impasse, or that the borrower has failed to participate or provide required information after a reasonable opportunity.

(b) Notwithstanding the limitations in subsection (a), the creditor may proceed to enforce its mortgage ~~if [~~90 days] after the ~~Drafting Committee should discuss any time or other~~

~~limitations on~~notice required by Section 301 is sent, unless the ~~mediation~~parties agree to continue the facilitation process.~~]~~ or the [facilitation agency][Court] directs the parties to continue the facilitation process for good cause shown.

Reporters' Drafting Notes

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

2. The Committee should consider the bracketed text in subsection (a) concerning the ability of the lender to take 'other action' during the facilitation process.

ARTICLE 4 – RIGHT TO FORECLOSE, EFFECTS OF FORECLOSURE

SECTION 401 [Alternative #1] RIGHT TO FORECLOSE.

[This alternative designates the person with the right to enforce the instrument

under UCC Article 3 as the person with the right to foreclose the mortgage when the obligation is set forth in a negotiable instrument.]

(a) Only a creditor who has the right to foreclose may commence a ~~judicial~~ foreclosure ~~proceeding or a nonjudicial foreclosure proceeding~~.

(b) A creditor has a right to foreclose its mortgage after default in the obligation if all conditions required by the mortgage agreement as prerequisites to foreclosure are satisfied and one of the following conditions is met:

(1) If the obligation is evidenced by an instrument, the person is

(A) the holder ~~of the instrument~~,

(B) a nonholder in possession of the instrument who has the rights of a holder, or

(C) a person not in possession of the instrument who establishes the right to enforce that instrument due to its loss or destruction by meeting the requirements of Section 4-104.

(2) If the obligation is not evidenced by an instrument, the person is the owner of the obligation.

(c) In a judicial foreclosure proceeding, the plaintiff must allege and prove facts demonstrating that it ~~holds~~ has the right to foreclose under subsection (b). If the plaintiff relies upon an instrument, the complaint must include a copy or image of the instrument and an allegation that the original is either: (i) in the possession of the plaintiff; (ii) in the possession of the plaintiff's principal; or (iii) lost [or destroyed], in which case the complaint must also include a lost instrument affidavit that complies with [insert UCC reference].

(d) In a nonjudicial foreclosing proceeding, the creditor must prepare an affidavit

attesting to facts demonstrating that it ~~holds~~ has the right to foreclose under subsection (b), which affidavit shall be included with the notice of foreclosure required by section 202.

(e) In a judicial or nonjudicial foreclosing proceeding, a person who ~~holds~~ has the right to foreclose may exercise that right by authorizing an agent to foreclose in an authenticated record. In that event, the complaint or affidavit described in subsection (c) or (d) shall name the principal and the agent.

Reporters' Drafting Notes

1. Section 4-101(b)(1) follows the language of UCC § 3-301, which defines who is "person entitled to enforce" an instrument. When the payee of the negotiable instrument has retained possession of the instrument, that person has the right to foreclose. When the payee has transferred possession of the negotiable instrument to another person, the facts must be examined to determine who has the right to enforce the note. The subsequent possessor may become a holder under UCC Article 3 by obtaining a special endorsement or blank endorsement, but this section does not require that a subsequent possessor become a holder in order to acquire the right to foreclose. Such a subsequent possessor may be entitled to enforce the note, but will have to allege and prove facts that are sufficient to establish the right to enforce.

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

3. In judicial foreclosure, under existing law the creditor generally must confirm possession or account for possession of the original note at the time of filing or prior to the foreclosure sale. In some nonjudicial foreclosure states, the law appears not to require confirmation of possession of the original note prior to commencement of foreclosure proceedings or the sale. This section requires that

the foreclosing person have possession of the instrument prior to the commencement of foreclosure, whether the proceeding is judicial or nonjudicial, unless that person prepares a lost note affidavit meeting the requirements of Section 4-103.

4. This section does not state a separate rule for determining when a creditor who holds a security interest in a note has the right to foreclose. UCC Article 9 covers both sales of instruments and assignments of instruments that secure an obligation of the assignor. A creditor who takes possession of a negotiable instrument will acquire the right to foreclose. A creditor who takes possession of an instrument that is not negotiable ordinarily will not acquire the right to foreclose; the issue turns on whether the rights granted to the creditor are sufficient to make the creditor the "owner" of the obligation (in other words, a "buyer" of the payment rights).

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

6. If it is unclear whether the secured obligation is evidenced by a negotiable instrument or by an instrument that is not negotiable, the creditor may choose to proceed by complying with both subsections (b)(1) and (b)(2). The creditor should state whether it is relying on subsection (b)(1), (b)(2), or both in the alternative.

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

8. 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.

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

SECTION 401 [New Alternative #2] RIGHT TO FORECLOSE.

[This alternative provides that only the person who owns the obligation secured by the mortgage has the right to foreclose that mortgage.]

(a) Only a creditor who has the right to foreclose may commence a foreclosure.

(b) A creditor has a right to foreclose its mortgage after default in the obligation if:

(1) the creditor is the owner of the obligation;

(2) all the conditions required by the mortgage agreement as prerequisites to foreclosure are satisfied; and

(3) if the obligation is evidenced by an instrument, the creditor has possession of the instrument or establishes the right to enforce that instrument due to its loss or destruction by meeting the requirements of Section 4-104.

(c) In a judicial foreclosure proceeding, the plaintiff must allege and prove facts demonstrating that it has the right to foreclose under subsection (b). If the plaintiff relies upon an instrument, the complaint must include a copy or image of the instrument and an allegation

that the original is either (i) in the possession of the plaintiff or (ii) lost [or destroyed], in which case the complaint must also include a lost instrument affidavit that complies with [insert UCC reference].

(d) In a nonjudicial foreclosing proceeding, the creditor must prepare an affidavit attesting to facts demonstrating that it has the right to foreclose under subsection (b), which affidavit shall be included with the notice of foreclosure required by section 202.

Reporters' Drafting Notes

1. Section 4-101(b) requires that the person foreclosing the mortgage own the obligation secured by that mortgage. When the original mortgagee has assigned beneficial ownership of the obligation to another person, the assignee is the only person who has the right to foreclose.

2. This Section does not allow an agent of the owner to foreclose in the name of the agent. This Section, however, is not intended to change the current practice in some nonjudicial foreclosure states, in which a third party such a trustee initiates foreclosure proceedings for the benefit of the creditor. In such states the record prepared by the trustee or other third party must disclose the owner of the obligation.

SECTION 402 TRANSFER OF MORTGAGE

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

DRAFTER'S NOTE – Sections 401 and 402 must both be consulted to determine whether a particular transferee is a person who is entitled to foreclose. After the Drafting Committee makes choices as to the alternatives stated in both sections, as a matter of style it may be expeditious to consolidate the two sections.

~~(b) [**ALT. # 1** – A person who has the right to enforce the obligation under Section 401 may foreclose without obtaining or recording a writing that evidences an assignment of the mortgage.~~

~~(b) [**ALT. # 2** - A person who has the right to enforce the obligation under Section 401 may not foreclose without obtaining and recording a writing that evidences an assignment of the mortgage.~~

(b) **[Alternative #1]** If the transfer is accomplished by assignment, the assignment may be recorded in the office in which mortgages are recorded, but recordation is not required for the new creditor to foreclose the mortgage pursuant to Section 401.

(b) **[Alternative #2]** If the transfer is accomplished by assignment, the assignment may be recorded in the office in which mortgages are recorded. After the transfer of an obligation to a new owner, the new creditor may foreclose the mortgage only after recordation of the assignment or other appropriate document in the office in which mortgages are recorded.

Reporters' Drafting Notes

~~1. Subsection (b) starkly poses the fundamental question of whether a creditor may foreclose a mortgage in the absence of a writing, whether or not recorded on the land records, demonstrating that the mortgage has been assigned to the foreclosing creditor.~~

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

Subsection (a) is broader than § 9-203(g); it applies regardless of whether the transferee obtains an attached Article 9 security interest. It also encompasses involuntary transfers such as inheritance and judicial sales. Restatement (Third) of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: "A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Under the Restatement rule, parties to the transfer

may agree otherwise, but this section does not permit severance of the obligation from the mortgage, following UCC § 9-203(g) and common-law authorities in a number of states.

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

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

3. The two alternatives in subsection (b) provide different answers to the fundamental question of whether a creditor may foreclose a mortgage in the absence of a recorded chain of title in the land records demonstrating that the creditor owns the mortgage.

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

4. In contrast, Alternative # 2 in subsection (b) confirms the rule in many states~~-~~ – a rule which is intended to protect the interests of borrowers and subsequent purchasers – that a written assignment in favor of the foreclosing creditor is a necessary pre-condition to instituting a foreclosure. Because note transfers are not generally recorded, advocates for mandating this outcome believe that recording of mortgage assignments is necessary to provide a complete public record of land title transfers, to protect borrowers from double liability, and to prevent post-sale title challenges.

Under Alternative #2, a transfer of the note without an accompanying express assignment of the note does not deprive the assignee of the ability to foreclose. The principle that "the mortgage follows the note", e.g., Restatement of Property §5.4(a), means that the current holder or owner of the mortgage obligation has an equitable right to obtain and record an assignment of the mortgage or deed of trust from any prior record mortgagee, mortgage assignee or beneficial owner, unless the parties intended otherwise.

~~In rare cases, the debt obligation may be transferred without the mortgage: for example, when a mortgage on multiple parcels is released as to one parcel. Because note transfers are not generally recorded, advocates for mandating this outcome believe that recording of mortgage assignments is necessary to provide a complete public record of land title transfers, to protect borrowers from double liability, and to prevent post-sale title challenges.~~

Under the second alternative, the complaint or affidavit required by Section 401 must identify and describe all necessary assignments and substitutions. Recordation of a separate assignment, or endorsement on the mortgage itself, provides record notice of the chain of mortgage ownership, and insulates the foreclosure sale purchaser from attacks on title based on transfer defects. The mortgage transfer should be described in the complaint in a judicial proceeding or the affidavit in a nonjudicial proceeding and appear of record prior to the recording of the foreclosure sale deed. It is sufficient to record an assignment to the foreclosing person's agent, so long as the agency is described in the complaint or affidavit. When the mortgage is in the form of a deed of trust, transfer is generally effected by recording a substitution of trustee. The recorded substitution of trustee must describe any transfers of beneficial ownership.

SECTION 403 LOST INSTRUMENT; AFFIDAVIT

(a) **[Alternative #1]** If an instrument secured by a mortgage has been lost [or destroyed], the ~~owner of~~ creditor may foreclose the ~~instrument may enforce the instrument by satisfying the requirements of [UCC § 3-309] and by making~~ mortgage only if the creditor makes an affidavit attesting to the facts stated in [UCC § 3-309(a)(1) through (a)(3)].

(a) **[Alternative #2]** If an instrument secured by a mortgage has been lost [or destroyed], the creditor may foreclose the mortgage only if the creditor was entitled to enforce the instrument when loss of possession occurred and makes an affidavit attesting to the facts stated in [UCC § 3-309(a)].

(b) If the creditor makes an affidavit pursuant to subsection (a), the obligor is entitled to adequate protection against loss that might occur by reason of a claim by another person to enforce the instrument, and the affidavit shall include a written indemnity from the creditor against loss by the obligor. Whether adequate protection requires more than the indemnity is determined by the facts of each case. Upon motion by the obligor, the court may also require that additional a~~A~~dequate protection ~~may~~ be provided by any reasonable means. ~~The affidavit shall include a written indemnity from the creditor against loss.~~

(c) In a judicial foreclosure proceeding, the affidavit described in subsection (a) shall be filed with the complaint.

(~~c~~d) In a nonjudicial foreclosing proceeding, the creditor shall include the affidavit described in subsection (a) with the notice of foreclosure required by Section 2-103 together with a statement that the borrower has the right to petition the [name of appropriate court] where the property is located for an order requiring the creditor to provide adequate protection against a claim by another person.

Reporters' Drafting Notes

1. The policy choice facing the Drafting Committee, of course, is the extent to which this Act should give license to foreclosing creditors who sign "lost" or "destroyed" note affidavits without ever having possessed either the original or a certified copy of the note, and without any evidence of a written

assignment of the underlying mortgage to that creditor. For comparison purposes, even under the "business records" exception to conventional hearsay rules, it is not clear that unsigned contracts would be admissible evidence that the parties named in the contract would be entitled to enforce it. Further, if one is to speak of "moral hazard," there is little doubt that a liberal "lost note" affidavit policy offers a powerful incentive to the first note holder intentionally to discard the original note and thereby avoid the cost and uncertainty of maintaining thousands of original paper notes. It would be useful for the Drafting Committee to discuss this subject, in light of the potential for fraud against a borrower.

2. Subsection (a) offers two alternatives to deal with the problem of lost or destroyed promissory notes, both of which interface with the UCC Article 3 treatment of lost or destroyed negotiable instruments. The first alternative is compatible with the 2002 amendments to Article 3. In specifying when a creditor is entitled to enforce a negotiable instrument secured by 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~~(b) requires adequate protection for the obligor from~~ makes it clear that the ~~risk that at some point in~~person who lost possession may be a predecessor of the ~~future~~creditor who seeks to enforce the instrument~~ will surface and its possessor will assert the right to be paid. ~~.

3. Alternative #2 to subsection (a) is consistent with the text of UCC § 3-309 prior to the 2002 amendments. Most states have not yet adopted the 2002 amendments. Most of these states follow the 1990 Official Text of Article 3. In these states there are a few cases holding that the affidavit must be signed by the person who lost the note. See, e.g., Atlantic Nat. Trust, LLC v. McNamee, 984 So. 2d 375 (Ala. 2007) (examining prior cases; holding that assignee of promissory note that was not in possession when lost may enforce the note). Alternative #2 requires the creditor who forecloses be the person who lost or destroyed the note and who executes the affidavit.

4. In some states, the circumstances in which a creditor is allowed to enforce an unavailable instrument are broader than under ~~§ 3-309.~~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 § 7-105.1 (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.").

~~2. 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. In other states that still have the 1990 Official Text of Article 3 there are a few cases holding that the affidavit must be signed by the person who lost the note. 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).~~

~~3.~~ 5. When the loan documents executed by the parties did not include a negotiable instrument, the creditor seeking to foreclose may or may not possess an original writing or record (including a counterpart) that evidences the obligation. This section does not require an affidavit for a creditor who lacks possession of such an original record. Some states require "lost note affidavits" under these circumstances. E.g., Va. Code § 8.01-32 ("any past-due lost bond, note, contract, open account agreement, or other written evidence of debt"); Va. Code § 55-59.1(B) ("note or other evidence of indebtedness").

~~4~~6. This section does not discuss the evidentiary effect of the affidavit in judicial proceedings. Some states have statutory law on point. For example, an Alabama statute provides that a lost note affidavit "must be received as presumptive evidence both of the contents and loss or destruction of such instrument, unless the defendant by answer, verified by affidavit, denies the execution of such bond, note or bill or the endorsement, acceptance, or the contents thereof, in which case proof of such execution, endorsement, acceptance, or contents must be made by the plaintiff." Ala. Code § 6-5-284.

~~5.~~7. Some statutes dealing with lost note affidavits appear to require an affidavit only if the creditor is unable to produce the original *or a copy* of the instrument.

8. Subsection (b) follows UCC § 3-309(b), which requires adequate protection for the obligor from the risk that at some point in the future the instrument will surface and its possessor will assert the right to be paid. (UCC § 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b) requires that the affidavit include a written indemnity, binding the creditor, to protect all obligors against the risk that a person other than the creditor will seek to enforce the instrument. This indemnity serves to reinforce the rights that the

obligor already has under principles of restitution and unjust enrichment. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011): "*Payment Of Money Not Due*. Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due." In appropriate cases, a court may require a bond in addition to a written indemnity.

~~6. The policy choice facing the Drafting Committee, of course, is the extent to which this Act should give license to foreclosing creditors who sign 'lost' or 'destroyed' note affidavits without ever having possessed either the original or a certified copy of the note, and without any evidence of a written assignment of the underlying mortgage to that creditor. For comparison purposes, even under the 'business records' exception to conventional hearsay rules, it is not clear that unsigned contracts would be admissible evidence that the parties named in the contract would be entitled to enforce it. Further, if one is to speak of 'moral hazard', there is little doubt that a liberal 'lost note' affidavit policy offers a powerful incentive to the first note holder to intentionally discard the original note and thereby avoid the cost and uncertainty of maintaining thousands of original paper notes. It would be useful for the Drafting Committee to discuss this subject, in light of the potential for fraud against a borrower.~~

SECTION 404 PUBLIC ADVERTISEMENT OF FORECLOSURE SALE

(a) ~~A creditor may sell or cause the sale of the mortgaged~~Mortgaged property may be sold at a public sale only after giving a commercially reasonable public advertisement of the sale. If the sale is postponed, a commercially reasonable notice of postponement must be given.

(b) A public advertisement of the sale must indicate:

(1) the name of the borrower ~~who signed the mortgage~~ and, if not the same, the name of the ~~present owner of the mortgaged property~~ person who signed the mortgage agreement;

(2) the name of the creditor or other person who will conduct the sale;

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

(4) the street address or, if there is no street address, other information identifying

where the mortgaged property -is located;

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

(6) the amount of the debt, including costs, to be satisfied by proceeds of the sale;

(7) whether the mortgaged property- is to be sold subject to senior indebtedness;

(8) the material terms of the sale, including payment terms to be required for the successful bidder at the completion of the auction;

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

(10) a telephone number and email address from which a person may obtain additional information concerning the mortgaged property and the sale.

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

(d) The ~~creditor may post the~~ public advertisement, or other information pertaining to the sale, may be posted at the location of the mortgaged property.

(e) Except as otherwise provided in subsections (e)(1), (e)(2), (e)(3), and (e)(~~3~~4), whether the method and timing of publication of the public advertisement is commercially reasonable is a question of fact.

(1) The method of publication is commercially reasonable if published ~~either~~both in a newspaper having general circulation in the [county] where the mortgaged property is located ~~or~~and in an Internet website that is reasonably expected to be viewed by persons having an interest in purchasing the mortgaged property.

(2) For a newspaper advertisement, the timing of publication is commercially

reasonable if published once per week for three consecutive weeks before the sale, with the first publication ~~nor~~not more than 30 days before the sale.

(3) For an Internet website, the timing of publication is commercially reasonable if published at least 21 days before the sale and the Internet posting remains regularly available between the time of posting and the time of sale.

(4) Notice of postponement is commercially reasonable if published in the same outlets as the original notice for at least 7 days before the postponed sale.

(f) ~~The creditor shall send a~~A copy of the public advertisement shall be sent to the borrower and to any ~~other person who is obligated to pay or perform the obligation~~obligor. The notice of public advertisement may be sent with the notice of commencement of foreclosure or may be sent separately.

Reporters' Drafting Notes

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

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

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

4. Subsection (b) states minimum requirements for the public advertisement. An advertisement that lacks any of the information set forth in

subsection (b) is insufficient as a matter of law. An advertisement may contain additional information about the mortgaged property or the sale.

~~3~~5. Traditionally the law required the advertisement of foreclosure sales in local newspapers. This section allows the creditor to continue that practice, but no longer specifies newspaper advertisement as required or sufficient in all cases. Whether a newspaper advertisement alone is sufficient depends upon whether it is commercially reasonable under the facts, which must be determined based upon the nature of the property, the newspaper, and other local circumstances. Similarly, whether it is commercially reasonable for a creditor *not* to publish a newspaper advertisement, relying instead on other outlets, depends upon the facts. In many communities, newspaper advertisements are no longer an effective means of informing the public about upcoming foreclosure sales. Under these circumstances, a creditor's decision not to publish in a newspaper benefits both the creditor and the borrower by saving the expense.

~~4~~6. Subsection (c) adopts a bright-line rule with respect to legal descriptions of the real property and recording information. The failure to include such information does not make the public advertisement insufficient. This information is seldom of importance to a person who reads a foreclosure advertisement for the purpose of deciding whether the person has potential interest. Anyone who develops a potential interest is highly likely to investigate further before appearing at the sale to bid. That investigation may include title information, which will disclose the legal description and recording references for the mortgage and other recorded instruments in the chain of title, and typically will include other information as well bearing on the property.

~~5~~7. Subsection (d) authorizes the creditor to post the public advertisement or a sign on the property, regardless of whether that right is reserved in the mortgage. [*Note:* Is this appropriate? Do foreclosure signs including "bank sale" signs have negative consequences for the neighborhoods? What about zoning and HOA covenants that may restrict or limit signs?]

~~6~~8. Subsection (e) creates ~~three~~four safe harbors. First, the method of publication is commercially reasonable if the creditor publishes the public advertisement both in a local newspaper and with an appropriate Internet website. The Internet site may be one operated by the newspaper or by any other person, whether or not located in the jurisdiction where the mortgaged property ~~–~~is located. The Internet site, however, must be one that has characteristics suggesting that interested members of the public are likely to find and to read the posting. There are two safe harbors with respect to timing for newspaper advertisements and Internet advertisements, which seek to ensure public access to

the advertisement for approximately one month preceding the date of sale. Last, a safe harbor for postponed sales allows a shorter length of time than required for the safe harbor for the original notice because members of the public with potential interest in the property had the opportunity to read the original notice.

SECTION 405 NOTICE OF SALE

The creditor shall give the borrower written notice of the date, time and place of the scheduled foreclosure sale. If the sale is postponed, the creditor shall give the borrower a new written notice of the date, time and place of the sale. Notice of sale, including postponed sales, shall be delivered by first class mail to the borrower's last known address, and by personal delivery to the property address. Notice of sale shall be delivered at least 30 days prior to the sale date, or the postponed sale date.

DRAFTER'S NOTES to the alternatives presented in Sections 406 and 407: These alternatives comprise what the drafters believe to be a rational range of options on the question of whether confirmation of a foreclosure sale is appropriate.

Alternative 1, set forth in sections 406 below, requires confirmation of the sale at the conclusion of a judicial foreclosure action. This conforms to present law in most judicial foreclosure states. As drafted, it requires a court to confirm the sale absent evidence of procedural irregularity or unconscionabilty; ample case law in several states supports both exceptions to judicial confirmation.

Alternative 1 is continued in Section 407 of this draft, and addresses the need for a confirmation hearing in a non-judicial foreclosure state. It requires judicial confirmation of the sale after a nonjudicial sale if the creditor desires to obtain a deficiency judgment against an obligor.

The Reporters are not aware of any nonjudicial foreclosure state that requires judicial confirmation of a foreclosure sale as a general matter. North Carolina requires a lender who sells property pursuant to a power of sale to file with the

clerk of the superior court "a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale." N.C. Gen. Stat. § 45-21.33. The lender also must file copies of notices, and the clerk is required to audit and record the account of sale. The North Carolina statute, however, does not require confirmation of the sale.

A number of nonjudicial foreclosure states require confirmation of the foreclosure sale if the creditor wishes to obtain a deficiency judgment. Two examples are Georgia and Texas. See Ga. Code § 44-14-161; Tex. Property Code § 51.003. Georgia requires a report of the sale to the superior court within 30 days of the sale, followed by a confirmation hearing and the issuance of a confirmation order if the court finds the property sold for "its true market value." Under a Texas statute adopted in 1991, an action to recover a deficiency must be brought within two years of the sale. If requested by the borrower, the court determines the fair market value. If the fair market value exceeds the foreclosure sale price, that value is used instead of the sale price to calculate the deficiency.

Alternative 2, set forth below, is presented in a newly drafted provision granting the lender an optional right to seek judicial confirmation in order to establish the conclusive effect of a sale and thereby promote the certainty of title which subsequent purchasers may require. This alternative does not mandate judicial confirmation of the sale for either judicial or nonjudicial foreclosures~~,~~

Further, the drafters are aware of the proposal from Commissioner Walters that Section 406 should track the requirement in Section 408 for a final and non-appealable order, and have addressed that issue in revised Section 406(e) in bracketed text. The Reporters and Chair are uncertain when this outcome - which would substantially delay passage of title following an auction – is a desirable result or tracks the intention of the proposer.

SECTION 406 [Alternative #1]

CONFIRMATION OF SALE PURSUANT TO JUDGMENT

(a) ~~[In the case of a judicial sale,] within _____ days of the~~After an auction sale of the mortgaged property pursuant to an order or judgment of a court, the person conducting the sale shall file a report of sale with the court, which must name the purchaser and describe the property, the amount bid, the amount paid to date, the expenses of the sale, and any other material terms.

(b) After notice and a hearing, the court shall grant an order confirming the sale unless it

finds:

(1) there was a material procedural irregularity such as the failure to give required notices to parties,

(2) the terms of sale were unconscionable,

(3) the sale was conducted fraudulently, or

(4) justice was otherwise not done.

(c) If the court fails to confirm the sale, it may order a resale of the property on such terms as are just.

(d) ~~If the court confirms~~An order confirming the sale~~,~~ shall also confirm the expenses of the sale [and shall indicate whether the borrower or an obligor who is party to the action has any remaining liability on the obligation secured by the mortgaged property.]

(e) Upon confirmation of the sale [and when the confirmation has become final and non-appealable] title to the property shall pass to the purchaser ~~will receive a~~named in the order without the necessity of any further proceedings or instruments. A certificate of sale ~~[in recordable form]~~shall be recorded within _____ days after the later of the order of confirmation or payment in full of the price.

Reporters' Drafting Notes

~~1. As originally drafted by the Reporter, this Section was intended to apply to both a judicially supervised sale and to a nonjudical foreclosure sale. During the drafters' discussions, the drafters generally concluded that in the case of a judicial foreclosure, this section was not essential because it was possible to determine from the court records, regardless of the propriety of the sale itself, whether the sale satisfied the minimal standards necessary to convey good title. Therefore, it seemed to the drafters that the standards set by this section were especially important to justify the 'conclusive effect' granted to a sale in the nonjudical context described in the following section.~~

~~2. However, the drafters are equally concerned as to the enactability of a requirement for judicial review in the case of nonjudicial foreclosures. On the one hand, it is clear to the drafters that at least a theoretical risk of unmarketable title exists in the absence of some independent review of self-serving recorded documents stating that the affiant has complied with the statute. On the other hand, in those several states where self-serving recording is the custom today, we think the likely response of the lending community will be 'too much cost, too much delay.'~~

1. In many states the court has substantial discretion with respect to confirmation of auction sales, consistent with traditional doctrine that foreclosure is an action in equity. Case law often provides guidance and sets parameters on the court's exercise of equitable discretion. The standard for confirmation set forth in subsection (b) is modeled upon 735 Ill. Comp. Stat. 5/15-1508. In some states, the statutory standard is briefer. Minnesota, for example, requires the entry of a confirmation order unless "it appears upon due examination that justice has not been done." Minn. St. § 581.08.

~~4~~2. Subsection (b) does not require the court to make an express finding with respect to the value of the property in all cases. When a party, however, has made an objection to the report of the sale based on the amount of the bid, evidence of value is relevant. It is well established that a low price by itself is not grounds for rejecting the sale. A number of states express the rule as calling for rejection when the bid is "grossly inadequate" or "shocks the conscience." *E.g.*, Intervest Nat. Bank v. Ashburton 70, LLC, 928 N.Y.S.2d 475 (App. Div. 2011) (price "was not so low as to shock the conscience of the court"); Irwin Union Nat. Bank and Trust Co. v. Famous, 4 A.3d 1099 (Pa. Super. Ct. 2010) (to set aside sale the price must be "grossly inadequate"). Subsection (b) does not adopt either of those formulations, but allows the court to refuse confirmation when the price is "unconscionable."

~~5.~~3 When the court finds there is a reason not to confirm the sale, ordinarily a resale of the property is appropriate. Subsection (c), however, makes a resale permissive rather than mandatory. Depending upon the nature of the flaw, it may be appropriate for the court to approve the sale if the purchaser agrees to a modification of the terms of the sale.

4. The report of the sale filed with the court should include a list of all expenses incurred in connection with the sale. Subsection (d) provides that if the

court confirms the sale, the confirmation order should state the expenses approved by the court.

5. There is substantial variation among the states as to whether the creditor may obtain a deficiency judgment after a judicial foreclosure sale, and if so, what procedures are necessary to obtain a deficiency judgment. Subsection (d) accommodates existing state law on deficiency judgments, but provides, in the bracketed language, that the confirmation order should indicate the amount of any deficiency judgment liability in a case in which the judgment has made one or more persons personally liable on the obligation. This raises a separate policy issue which the Committee should discuss, namely, whether a separate hearing should be held regarding the deficiency in order to expedite confirmation of the sale.

6. This section does not set forth details with respect to the procedures for confirmation or contractual obligations. Notice and opportunity to be heard are fundamental and are expressly required by subsection (b), but specific parameters are not stated. If no objections are made to the report of sale, the hearing does not necessarily have to consist of an in-court proceeding with counsel present. *See* U.S. Bank Nat. Ass'n v. Bjeljac, 43 So. 3d 851 (Fla. Dist. Ct. App. 2010) (hearing is required when creditor timely files objection based upon low price and creditor's failure to attend sale was due to mistake).

7. Ordinarily a confirmation of sale is a final judgment, having the legal effect of final judgments in general, including immunity from ~~mortgaged property~~collateral attack. The purchaser does not have enforceable contract rights prior to confirmation of the sale by the court. Whether the purchaser is allowed to rescind his offer to purchase prior to confirmation depends upon other law.

SECTION 407 [continuation of Alternative #1] CONFIRMATION OF SALE PURSUANT TO [POWER OF SALE]; DEFICIENCY JUDGMENT

(a) If the price at which the mortgaged property is sold at an auction sale, without legal process, pursuant to a power contained in a mortgage agreement, is less than the obligation, resulting in a deficiency, any action to recover the deficiency must be brought within [60 days] after the sale.

(b) No deficiency judgment shall be granted unless the court, after notice and a hearing, grants an order confirming the sale. The court shall grant a confirmation order unless it finds:

(1) there was a material procedural irregularity such as the failure to give required notices to parties,

(2) the sale was conducted fraudulently, or

(3) the property sold at a price less than its fair market value as of the date of the foreclosure sale.

(c) The fair market value referred to in subsection (b)(3) shall be determined by the finder of fact based upon competent evidence of value, which may include, but is not limited to, the following:

(1) expert opinion testimony;

(2) comparable sales;

(3) anticipated marketing time and holding costs; and

(4) cost of sale.

Reporters' Drafting Notes

1. This Section conforms to existing law by not requiring that a court confirm the sale conducted in a nonjudicial foreclosure as a general matter. However, confirmation is required if the creditor wishes to obtain a deficiency judgment. A number of states follow this approach. See, e.g., Ga. Code § 44-14-161; Tex. Property Code § 51.003.

SECTION 406-407 [Alternative #2] OPTIONAL CONFIRMATION OF SALE

(a) The foreclosing creditor may file a motion in the [specify court] for confirmation of a foreclosure sale within 60 days of the auction sale of the mortgaged property. The motion shall be served on the person conducting the sale, who shall file a report of the sale with the court.

The report must name the purchaser and describe the property, the amount bid, the amount paid to date, and any other material terms.

(b) The court shall grant an order confirming the sale unless it finds:

(1) there was a material procedural irregularity such as the failure to give required notices to parties;

(2) the terms of sale were unconscionable;

(3) the sale was conducted fraudulently; or

(4) justice was otherwise not done.

(c) If the court fails to confirm the sale, it may order a resale of the property on such terms as are just.

(d) If the court confirms the sale, the purchaser may record the confirmation order.

Reporters' Drafting Notes

1. Comments at the November 2012 meeting highlighted the conflict between mandating judicial confirmation of sales in nonjudicial foreclosure states where it is not presently required, on one hand, and the need for a mechanism to establish the conclusive effect of a sale on the other. This draft attempts to resolve the conflict by providing for an optional, rather than mandatory, sale confirmation process. Confirmation is a prerequisite for the conclusive effect of the sale for the benefit of bona fide purchasers. In a nonjudicial foreclosure state, the creditor (or title insurer) seeking to prevent possible claims of a defective foreclosure process can opt for judicial confirmation, or can choose not to obtain confirmation if it is confident that there were no defects in the foreclosure process. The addition of an optional confirmation process in states without one should prove less controversial than mandating judicial confirmation. For judicial foreclosure states, while the foreclosure judgment is conclusive as to the basic prerequisites to foreclosure, such as the existence of a default, an optional sale confirmation can add some protection against challenges to defects in post-judgment procedures, such as the notice of sale.

SECTION 408 CONCLUSIVE EFFECT OF FORECLOSURE SALE

A final and non-appealable court order confirming the sale pursuant to Section 406 conclusively

establishes compliance with this Act in favor of purchasers of the mortgaged property in good faith for value. [For purposes of this section, the foreclosing creditor is not a good faith purchaser for value.]

Reporters' Drafting Notes

1. ~~If the judicial confirmation approach is not adopted, the alternative solution the drafters considered adopting is to follow Section 605 of the Uniform Non-Judicial Act (2002). That section provides:~~ At the November 2012 meeting there was disagreement regarding whether the foreclosing creditor should benefit from the conclusive effect of the confirmation of a foreclosure sale. The language remains bracketed for further discussion.

~~**SECTION 605. COMPLETION OF FORECLOSURE; DEED TO SUCCESSFUL BIDDER; AFFIDAVIT; TIME OF FORECLOSURE.**~~

~~(a) To complete a foreclosure by auction pursuant to [Article] 3, a foreclosure by negotiated sale pursuant to [Article] 4, or a foreclosure by appraisal pursuant to [Article] 5, the foreclosing creditor shall:~~

~~(1) execute, deliver, and record in [the office of the county recorder] a deed without warranty of title, execute and deliver a bill of sale or other appropriate document of transfer with respect to personal property, if applicable, and execute and deliver any other documents that are necessary in order for the deed to be recorded, transferring the collateral:~~

~~(A) to or as directed by the successful bidder in the case of a foreclosure by auction;~~

~~(B) to or as directed by the contract purchaser in the case of a foreclosure by negotiated sale; or~~

~~(C) to the foreclosing creditor in its own capacity or to its nominee, in the case of a foreclosure by appraisal.~~

~~(2) execute and record in [the office of the county recorder] an affidavit containing:~~

~~(A) the recording data for the security instrument;~~

~~(B) identification of the foreclosing creditor and the debtor;~~

~~(C) a legally sufficient description of the real property collateral;~~

~~(D) the recording data for the notice of foreclosure;~~

(E) identification of the persons to which notice of foreclosure was given and the recording data for documents reflecting their interests in the collateral;

(F) the method of foreclosure employed and, if the foreclosure was by negotiated sale or by appraisal, a statement that no person entitled to object to the foreclosure made a timely objection, or identifying any person that made a timely objection and stating whether the person's interest was discharged by the secured creditor or was preserved from the effect of the foreclosure by the giving of a notice of preservation under Section 210;

(G) identification of any additional persons to which notices of preservation under Section 210 were given;

(H) a statement that the foreclosing creditor has complied with all provisions of this [Act] for a valid foreclosure; and

(I) identification of the person acquiring title to the collateral by virtue of the foreclosure.

(b) The time of recording of the deed is the time of foreclosure.

2. In any event, after the foreclosure sale has occurred, the powers of a court to change the result are limited. Damages may be assessed against a foreclosing creditor or trustee that has failed to comply with the Act or other legal or equitable duties in carrying out the foreclosure. For example, if there is proof that notices were not properly given, the court might award damages against the foreclosing creditor or trustee to the debtor or to third parties whose interests were terminated by the foreclosure without notice.

However, the court must recognize that if the proper documents have been recorded, or a judicial sale has been confirmed, compliance with the Act is conclusive in favor of a bona fide purchaser (BFP) of the mortgaged property . For example, if the mortgaged property has passed into the hands of a BFP, the court would not be authorized to issue an order taking the mortgaged property out of the BFP's hands in order to order a re-foreclosure on account of failure to give proper notices, but could nonetheless grant an award of damages.

3. As drafted, this conclusive effect of a nonjudicial foreclosure sale under the Act depends on the recording, at a minimum, of two documents: the notice of foreclosure, and the affidavit. Thus, at a minimum, anyone relying on the title derived from a foreclosure under the Act must verify that these documents are recorded. In a judicial foreclosure, the court order confirming the sale serves the same function as the notice and affidavit in a nonjudicial foreclosure.

~~4. Courts should employ their powers to grant damage awards or to set aside foreclosure sales only in cases in which the violation of the Act or the principles of law and equity are sufficiently serious that it is likely that they had a substantial detrimental impact on the foreclosure sale amount or the borrower's ability to redeem. No remedy should be awarded for minor violations that had no significant effect on the outcome of the foreclosure.~~

~~5. This section makes a foreclosure sale under the Act conclusive only with respect to compliance with the provisions of the Act itself. It does not ensure that there are no defects in the mortgage or the creditor's right to foreclose. For example, if the mortgage is a forgery or was procured by fraud in the execution, the courts typically hold that any foreclosure under it will be void. This section does not change that result. Similarly, if the secured obligation was not in default, or had been fully paid, the secured creditor would have had no right to foreclose. In that case, the conclusive effect of this section will not validate the foreclosure.~~

~~6. This provision and comment are edited from the uniform nonjudicial foreclosure act. In lieu of the recorded notice and affidavit called for in the nonjudicial foreclosure act, this provision relies on the entry of an order confirming the sale. In the event that the judicial confirmation of all foreclosure sales is not adopted, there would be a need for a recorded affidavit or other publicly filed document to establish that the procedures of the statute have been properly followed. The notice of foreclosure is presumably the second notice, i.e. a notice of an actual sale, rather than the preliminary notices of acceleration and the right to mediation. Reference to a trustee is needed for states in which deed of trust sales are used, in order for the statute to function in states with various foreclosure sale methods.~~

~~7. The brackets around the last sentence of the section reflect an unresolved discussion among the drafters as the effect — and intended effect — of the language.~~

ARTICLE 5 – OTHER PROVISIONS

SECTION 501 NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN SATISFACTION OF OBLIGATION

(a) A borrower may transfer ~~the~~ mortgaged property to a creditor in full satisfaction of the borrower's obligation to that creditor secured by that property if:

(1) The borrower and the creditor agree to the transfer in a record authenticated by both parties after the borrower's default; and

~~(2) The borrower receives at least the consideration described in subsection (b); and~~

~~(3)~~(2) An authenticated notification of objection to the proposed transfer is not received from any person entitled to notice under section 502 within 20 days after notification was sent to that person.

(b) ~~In exchange for the borrower's performance of an agreement to transfer the mortgaged property in satisfaction of the obligation,~~ If the borrower ~~shall receive as consideration either:~~

~~(1) The right to continue to occupy the mortgaged property for a period of not less than ____[days, weeks, months] after the date the parties agree to the transfer in an authenticated record;~~

~~(2) A cash payment of not less than __ percent of the principal amount of the obligation secured by the mortgaged property on the date the parties agree to the transfer in an authenticated record;~~ or

~~(3) Both a right to continue to occupy the mortgaged property for a fixed period of time and a cash payment, which combined have a value of not less than the consideration described in subparagraph (1) or (2).~~

~~(c) Notwithstanding subsection (a)(2), if neither the borrower nor~~ a person claiming under the borrower is in possession of the mortgaged property, the ~~borrower and~~ agreement must specify the date and time when the borrower is to surrender possession to the creditor ~~may agree~~

~~to a transfer of the mortgaged property~~. If there is any person entitled to notice under ~~this~~ section ~~without~~502, the ~~borrower's receipt of at least~~ borrower is not obligated to surrender possession before the ~~consideration~~ 20-day period described in subsection (~~b).~~a)(2) has elapsed.

Reporters' Drafting Notes

1. The Section authorizes a transfer from the borrower to the creditor in full satisfaction of the debt or other obligation. In so doing, it provides a framework for existing workout arrangements such as cash-for-keys agreements and deed-in-lieu of foreclosure transactions. This Section and the following two sections provide for a safe harbor by specifying the effect of a transfer that meets the requirements of ~~paragraphs (1) through (3) of subsection (a).~~this Section. This Section is based in part on UCC § 9-620, which provides for the acceptance of personal property mortgaged property by a secured party in full or partial satisfaction of a secured obligation. ~~.~~ The important innovation here is to discharge junior liens on the property without the need for a foreclosure sale.

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

3. As suggested in the prior paragraph, the Reporters, Chair and ABA advisor note that the consensus of the discussion at the November meeting appeared to be that there was no apparent justification for mandating that a 'negotiated transfer' under this section include any statutory minimum consideration to be paid to the borrower; this draft accordingly deletes reference to that original requirement in this section.

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

SECTION 502 NOTICE OF NEGOTIATED TRANSFER

~~(a) If no proceeding to foreclose on the mortgaged property is pending at the time a borrower and creditor negotiate a proposed transfer under Section 501, the creditor shall send a notice by first class mail to every person holding a mortgage on the mortgaged property ,~~

~~(b~~(a) If a negotiated transfer pursuant to Section 501 is proposed at a time when a judicial foreclosure proceeding is pending with respect to the mortgaged property, the court must send notice of the proposed negotiated transfer to all parties, except for the borrower and the creditor that is foreclosing.

(~~c~~b) If a negotiated transfer pursuant to Section 501 is proposed at a time when a ~~nonjudicial~~judicial foreclosure proceeding is not pending with respect to the mortgaged property, the creditor must send notice of the proposed negotiated transfer to:

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

(2) any ~~other creditor or lienholder~~person that, 10 days before the borrower and the creditor agreed to the proposed transfer, held ~~a mortgage or other lien on~~an interest in the mortgaged property, perfected by a filing in the public records, that is subordinate to the mortgage that is the subject of the proposed transfer.

Reporters' Drafting Notes

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

2. Subsection (a) provides for the court to notify parties to the foreclosure proceeding of an agreement proposed by the borrower and creditor for a transfer in full satisfaction of the debt or other obligation. If there are no parties to the

action, other than the borrower and the creditor, then there is no one to notify. Holders of subordinate interests in the mortgaged property should have been joined ~~an~~as necessary parties to the foreclosure action.

3~~2~~. Subsection (b) ~~closely follows UCC § 9-621, which~~ provides for ~~a notification procedure for an acceptance of personal property or~~ the creditor to notify persons who have subordinate interests in the mortgaged property of an agreement proposed by ~~a secured party~~the borrower and creditor for a transfer in full ~~or partial~~ satisfaction of ~~a secured~~ the obligation. Such subordinate interest holders may have their rights terminated by the negotiated transfer, and therefore they have the right to request protection pursuant to Section 503.

SECTION 503 HEARING ON OBJECTIONS TO NEGOTIATED TRANSFER

(a) If the court receives an effective notification of objection from any person holding an interest in the mortgaged property that would be affected by the negotiated transfer, the court shall promptly schedule a hearing regarding that objection.

(b) If, at the hearing, the creditor who is a party to the proposed transfer demonstrates by appraisal or otherwise that that there is no equity in the mortgaged property available to satisfy the interests of the objecting interest holder, the court shall overrule the objection and approve the negotiated transfer.

(c) If, at the hearing, the objecting party demonstrates by appraisal or otherwise that there is equity in the mortgaged property available to satisfy the interests of the objecting interest holder, the court shall set a date not later than [30] days after the date of the hearing by which the objecting party shall be entitled to tender to the creditor who is a party to the proposed transfer a sum equal to the obligation owed to the proposing creditor, including interest and court costs. If the objecting party tenders that sum to the creditor within the time set by the court, the objecting

party shall be entitled to the benefit of the proposed negotiated transfer. Otherwise, the rights of the objecting party under this section shall be extinguished.

(d) If a creditor who has sent a notice under Section 502(b) receives an effective notification of objection from any person holding an interest in the mortgaged property that would be affected by the negotiated transfer, the negotiated transfer shall not proceed unless the creditor initiates a judicial proceeding for the purpose of holding a hearing pursuant to the rules set forth in subsections (b) and (c).

SECTION 504 EFFECT OF NEGOTIATED TRANSFER

(a) A borrower's transfer of the mortgaged property pursuant to Section 501 to a creditor in full satisfaction of the obligation to that creditor it secures:

(1) discharges the obligation in full;

(2) transfers to the creditor all of the borrower's rights in the mortgaged property , except for any right of the borrower to continue to occupy the mortgaged property pursuant to ~~the~~ an agreement between the borrower and the creditor which is incorporated into the negotiated transfer agreement;

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

(4) terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a), even in the event of noncompliance with the requirements of this Act; provided, that a creditor who fails to

comply with the requirements of this Act is liable for damages in the amount of any loss caused by its failure to comply.

(c) If the borrower and creditor have agreed that the borrower has the right to continue to occupy the mortgaged property for a fixed period of time, that agreement creates a license unless the parties have expressly agreed to enter into a landlord-tenant relationship.

(d) A transfer of the mortgaged property waives all rights of the creditor to obtain a personal judgment for the obligation, including costs and expenses, against the borrower or any other person liable for the obligation secured by the mortgaged property.

(e) A transfer of the mortgaged property waives all rights of the borrower to redeem the mortgaged property.

(f) ~~Except in the case of vacant property as provided in subsection (c) of Section 501, a borrower may not transfer the mortgaged property to a creditor pursuant to Sections 501 through 504 in partial satisfaction of the obligation it secures.~~ [Nothing in Sections 501 through 504 prevents a borrower ~~from offering a deed in lieu of foreclosure to a creditor or a borrower~~ and creditor from entering into any other form of agreement on mutually agreeable terms, but ~~except in the case of vacant property as provided in subsection (c) of Section 501,~~ the effects of a negotiated transfer described in these sections do not apply to an agreement that fails to ~~provide a borrower with at least the consideration described in subsection (b) of~~ state that the agreement is made pursuant to section 501.]

(g) Nothing in this article affects the rights of any creditor holding an interest in the mortgaged property which is senior to the interests of the creditor that takes title to the mortgaged property pursuant to this section.

Reporters' Drafting Notes

1. This section is based upon UCC § 9-622, which specifies the effect of acceptance of personal property mortgaged property by a secured party in full or partial satisfaction of a secured obligation. Subsection (a) specifies the effect of a transfer of the mortgaged property in full satisfaction of the secured obligation. The transfer to which it refers is one that results from performance of the agreement made by the borrower and the creditor. If a timely objection is received by the court or by the creditor from a person entitled to notification, then neither this subsection nor subsection (b) applies. Paragraph (1) expresses the fundamental consequence of accepting the mortgaged property in full satisfaction of the secured obligation—the obligation is discharged.

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

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

4. The last sentence of subsection (f) is bracketed to reflect at least one policy choice that the Reporters, Chair and the ABA Advisor believe should be made by the Committee.

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

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

> "I believe the better policy is to displace existing state laws on "deed in lieu" transactions within the scope of this act. Among other problems, if we keep both, there will be transactions in which the lender has not clearly

documented whether the intent to proceed under this act or under other law."

SECTION 505 ABANDONED PROPERTY

(a) ~~"Abandoned property" means mortgaged property with respect to which the borrower and persons claiming through the borrower, including tenants, have relinquished possession.~~

~~(b)~~ A government agency's determination, finding, or order that mortgaged property is abandoned or vacant, or the presence of ~~one or more~~ not less than [three] of the following conditions, constitutes prima facie evidence that the mortgaged property is abandoned property:

~~(1) A government agency has issued a determination, finding, or order that the mortgaged property is abandoned or vacant~~.

(1) Windows or entrances to the mortgaged property are boarded up or closed off.

(2~~3~~) Multiple window panes on the mortgaged property are broken and unrepaired.

(3~~4~~) One or more doors to the mortgaged property are smashed through, broken off, unhinged, or continuously unlocked.

(4~~5~~) Gas service, electric service, water service, or other utility service to the mortgaged property has been terminated; or utility consumption is extremely low so as to indicate that the property is not regularly occupied.

(5~~6~~) Rubbish, trash, or debris has accumulated on the mortgaged property.

(6~~7~~) The mortgaged property is deteriorating and is either below or in imminent danger of falling below minimum community standards for public safety and sanitation.

(78) The creditor has changed the locks on the mortgaged property and for at least ~~fifteen~~30 days after the changing of the locks the borrower has not requested entrance to the mortgaged property.

(89) There exist one or more written statements, including documents of conveyance, signed by the borrower that indicate a clear intent to abandon the~~.~~ mortgaged property.

(910) The police or sheriff's office has received at least two reports of trespassers on the mortgaged property or of vandalism or other illegal acts being committed on the mortgaged property.

(10 ~~11~~) The borrower has died and there is no evidence that a survivor of the borrower is in actual possession of the mortgaged property.

(~~c~~b) In a judicial foreclosure proceeding, the plaintiff may petition the court for a determination that the mortgaged property is abandoned property. The city or other governmental entity in which the mortgaged property is located shall have the right to intervene in the proceeding. After notice and a hearing, the court may issue an order finding that the mortgaged property is abandoned property.

(~~d~~c) In a nonjudicial foreclosure proceeding, the creditor may seek a determination that the mortgaged property is abandoned property by submitting a request accompanied by an affidavit to [name of official]. The creditor must send a copy of the request and affidavit to the borrower and other persons entitled to notice under Section 201. After personal inspection of the mortgaged property, which shall include entry into the dwelling unit, the [name of official] may issue a written determination finding that the mortgaged property is abandoned property. The

[name of official] shall send the written determination to the creditor, the borrower, and other persons entitled to notice under Section 201. The written determination, or the refusal of the [name of official] to issue a written determination, shall be subject to judicial review de novo in an appropriate court.

Reporters' Drafting Notes

1. This Act authorizes an expedited foreclosure procedure for abandoned properties for both judicial foreclosure and for nonjudicial foreclosures.[2] An expedited procedure is appropriate for two reasons. First, the borrower is no longer making a valuable economic use of the property to provide shelter for the borrower or the borrower's family or someone claiming under the borrower, such as a tenant. A foreclosure sale will not result in a possessor being forced to relocate to other housing. Second, properties that are facing foreclosure and that are vacant have significant negative impacts on neighborhoods and the surrounding communities. Vacancies reduce the market values of neighboring properties. Neighborhood crime increases. The vacant properties tend to suffer from lack of repair and maintenance, creating public health risks, including infestations by vermin, mosquitoes, and other insects. There are fiscal impacts on local governments, who find property taxes on vacant properties often become delinquent; yet the governments are faced with added expenses to provide essential services to blighted neighborhoods, such as police and fire protection. By providing for an expedited foreclosure procedure, this Act seeks to return abandoned properties to the stock of occupied, well-maintained housing as soon as reasonably possible.

2. The conditions giving rise to prima facie evidence of abandonment set forth in Subsection (~~b~~a)(1) through (~~b)(8~~a)(9) closely track the criteria set forth in Ind. Code § 32-30-10.6-5(a)(~~2~~1) through (9) (effective March 16, 2012). The presence of one or more of the statutory conditions is prima facie evidence, giving rise to a presumption of abandonment. Such conditions are not conclusive on the issue of abandonment. If the borrower or another person holding under the borrower is in actual possession of the mortgage property, the property is not abandoned notwithstanding the existence of such conditions. Likewise,

[2] Defer for later discussion by the Committee maintenance and repair obligations of borrowers and creditors with respect to abandoned property.

mortgaged property may be abandoned under this Section notwithstanding the absence of any of the statutory conditions.

3. Mortgaged property often becomes vacant, both under standard mortgage and reverse mortgage transactions, when the borrower dies. Under Subsection (~~b)(10~~a)(11) proof of death of the borrower constitutes prima facie evidence that the mortgaged property is abandoned, provided that there is no evidence that an heir or other beneficiary of the borrower's estate is in actual possession. Of course if there are multiple borrowers, this condition is met only if all the borrowers have died.

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

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

SECTION 506 FORECLOSURE OF ABANDONED PROPERTY

(a) If the court issues an order finding that the mortgaged property is abandoned property pursuant to Section ~~504(c~~505(b), at the same time the court shall order an expedited sale of the property. The order shall call for public sale of the property ~~shall take place~~ no sooner than [30] days and no later than [60] days after entry of the order.

(b) In a nonjudicial foreclosure proceeding, upon the issuance of a written determination that the mortgaged property is abandoned property pursuant to Section ~~504(d~~505(c), the creditor may conduct an expedited sale of the property. A public sale of the property may take place ~~any time after the expiration of~~ no sooner than [30] days and no later than 60 days after the issuance of the written determination~~.~~, unless judicial review of the determination is commenced. The

creditor shall comply with the notice requirements of Section 405, except that [15] days advance notice of the sale is sufficient.

(c) After a judicial order or a written determination finding that the mortgaged property is abandoned property, the creditor shall take necessary and appropriate action to cause the foreclosure sale to be completed within a reasonable time unless the creditor releases its mortgage and files that release on the land records. The creditor shall not have the right to dismiss, terminate, or suspend foreclosure proceedings, and thereby end its obligations to maintain the abandoned property under Section 507.

[(d) The completion of a foreclosure sale pursuant to subsection (a) or (b) shall have the effect of terminating the rights of the borrower or any other person to redeem the property after the sale under Code Section __.]

Reporters' Drafting Notes

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

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

3. Once a creditor decides to take advantage of the expedited foreclosure procedure allowed by this Section, there is a public interest in ensuring that the property becomes occupied as soon as reasonably possible. For this reason

subsection (c) does not allow the creditor to suspend indefinitely its efforts to consummate the foreclosure. There may be exceptional circumstances in which it is not feasible to hold the foreclosure sale within 60 days of the judicial order or written determination finding the property to be abandoned, as required by subsection (a) and (b). In that event, subsection (c) provides an outside limit of [four months] to complete the sale.

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

On the other hand, the consequences of a creditor's failure to either commence and complete a foreclosure action or to release its mortgage, on other stakeholders in the abandoned property – including the fee owner, the municipality and neighbors in which the abandoned property is located, and where appropriate, a homeowners association - are very real. We believe this is a subject deserving of substantial discussion during the February meeting.

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

SECTION 507 MAINTENANCE OF ABANDONED PROPERTY

(a) In a judicial foreclosure proceeding, a creditor shall maintain abandoned property from the time the court issues an order finding that the mortgaged property is abandoned property pursuant to Section ~~504(c~~505(b).

(b) In a nonjudicial foreclosure proceeding, a creditor shall maintain abandoned property from the time of issuance of a written determination that the mortgaged property is abandoned property pursuant to Section ~~504(d~~505(c).

(c) In the absence of a judicial order under subsection (a) or a written determination under subsection (b), a creditor who has commenced foreclosure proceedings shall maintain the mortgaged property if a governmental entity issues a citation finding that the mortgaged property is abandoned property in a condition that poses a threat to public safety or health.

(d) The creditor's obligation to maintain abandoned property shall continue until the conveyance of the property through foreclosure to a purchaser other than the creditor.

(e) For purposes of this section, "failure to maintain" means (i) failure to care for the exterior of the property, including, but not limited to, permitting excessive foliage growth that diminishes the value of surrounding properties; (ii) failing to take action to prevent trespassers or squatters from remaining on the property; (iii) failing to take action to prevent mosquito larvae from growing in standing water; or (iv) other conditions that create a public or private nuisance.

(f) A creditor who has the obligation to maintain abandoned property shall have the right peaceably to enter the property, or to cause others peaceably to enter the property, for the limited purposes of inspection, repair, and maintenance as required by this section. All reasonable expenses incurred by the creditor pursuant to this section shall be an obligation of the borrower and shall be secured by the mortgage.

(g) No person who enters the abandoned property for the purposes described in subsection (f) shall have any liability to the borrower for trespass or for damage to the property.

(h) The following persons shall have the right to enforce the obligations created by this section in any appropriate action or proceeding:

(1) The city or other governmental entity in which the mortgaged property is located.

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

~~(h) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.~~

(i) The obligations of the creditor to maintain abandoned property are limited to those stated in the Section; provided, that if the creditor becomes the owner of the abandoned property, its obligations with respect to the property shall be determined by other law. The creditor shall not become a mortgagee in possession of the property by virtue of its performance of the obligations stated in this Section.

Reporters' Drafting Notes

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

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

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

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

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

SECTION 508 LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT

PREAMBLE TO REVISED SECTION 508

The Committee will recall that Section 3-116 of the Uniform Common Interest Ownership Act provides the unit owners association a super priority – that is, priority over first mortgages - for six months of regular common expense assessments, plus court costs and legal fees, when those common charges are unpaid.

The November draft presented 4 alternatives to address the issues that home owner associations for condominiums, cooperatives and planned communities face in collecting those common charges. The problem is made considerably more complex by the extended delays in finalizing foreclosures now being experienced in some states. The arguments favoring enhanced priority for CIC assessment liens were presented at the November meeting by representatives of the Community Association Institute.

Of those four original alternatives, the first provided super priority for all regular periodic common charges plus interest – compared to the existing six months - , but did not give super priority for any association's legal fees, for special assessments or for other charges.

The second alternative proposed a limitation on the priority claim of the association's legal fees, but was otherwise identical to alternative 1.

Alternative # 3 proposed an automatic increase in the super priority lien for all delayed foreclosures, while Alternative 4 provided the association a right to accelerate its own foreclosure actions for non-payment of common charges, as well as to seek acceleration of a foreclosure of the first mortgage, in order to minimize the association's own lost common charges which would be wiped out by the foreclosure.

Upon consideration, it may simplify consideration of this issue by the Drafting Committee to consider only a single proposed section. In drafting that section, we sought to take into account much of the discussion at the November meeting, as well as the thoughts of association advocates and other views expressed by lenders.

Finally, and separate from consideration of this section, it may be appropriate for the Drafting Committee to consider the utility of authorizing creditors who provide mortgage financing to purchasers of dwelling units in common interest communities to, first, require those purchasers to escrow funds for common charges as well as real estate taxes and casualty insurance; and, second, to require that home owner associations accept periodic payments of common charges from lenders –say, quarterly instead of monthly – rather than directly from the unit owner, in order to minimize the lenders' risk of failed common charge payments.

SECTION 508 [NEW] LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT

DRAFTER'S NOTE: Other than necessary style matters, this section incorporates all the relevant language of Sec. 3-116 of the Uniform Common Interest Ownership Act, with two exceptions:

FIRST, the highlighted text in subsection (c) limits the association's legal fees in an uncontested matter to a sum equal to 3 months of the association's common charges;

SECOND, the highlighted text in subsection (d) provides that if a mortgage foreclosure is not completed in 12 months, then, in addition to the existing 6 month priority granted to associations, the association would thereafter begin to add a month's priority for every additional month, beginning in month 13.

(a) The association has a statutory lien on a dwelling unit for any assessment attributable to that unit based on the periodic budget adopted by the association pursuant to the declaration and the statutes of this state authorizing creation of the common interest community in which the dwelling unit is located~~;~~ ~~–~~and fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorneys' fees and costs, other fees, charges, late charges, fines and interest charged pursuant to other law and any other sums due to the association under the declaration or as a result of an administrative, arbitration, mediation or judicial decision, are enforceable in the same manner as unpaid assessments under this section. If an assessment described in this section is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a dwelling unit in a common interest community except (1) liens and encumbrances recorded before the recordation of the declaration, (2) a first mortgage on the dwelling unit recorded before the date on which the assessment or other charge sought to be enforced became delinquent, and (3) liens for real estate taxes and other governmental assessments or charges against the dwelling unit.

(c) A lien under this section is also prior to first mortgages described in subdivision (2) of subsection (b) to the extent of (1) the "priority amount," that is, an amount equal to the common

expense assessments based on the periodic budget adopted by the association pursuant the declaration and the statutes of this state authorizing creation of the common interest community in which the unit is located which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a mortgage described in subdivision (2) of subsection (b); and (2) the association's costs and attorney's fees in enforcing its lien. ***However, if (i) an action to enforce the association's lien is uncontested or (ii) no defense to the association's priority is raised in a creditor's action to foreclose a first mortgage on a dwelling unit, the amount of the association's attorney's fee for which this subsection grants a priority over a first mortgage may not exceed a sum equal to [three] months of the common expense assessment due from that dwelling unit based on the periodic budget adopted by the association.***

(d) In addition to the priority amount over a first mortgage as described in subsection (c), if a creditor commences a civil action to foreclose a first mortgage described in subsection (b)(2) against a dwelling unit in a common interest community and if [twelve] months passes after the date the action is commenced without judgment having entered in that action and title to the dwelling unit having passed pursuant to that judgment, the amount of the association's lien which has priority over the first mortgage shall thereafter automatically increase by an additional month of common expense assessment based on the periodic budget adopted by the association on that dwelling unit for each additional month or part thereof that subsequently passes until judgment enters and title passes to the creditor or the purchaser of that dwelling unit.

(e) This section does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association. A lien under this section is not

subject to [insert appropriate reference to state homestead, dower and curtesy, or other exceptions]**.**

(f) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property under this section, those liens have equal priority.

(g) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(h) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due.

(i) This section does not prohibit actions against unit owners to recover sums for which subsection (a) of this section creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(j) Unless the declaration provides for a lesser interest rate, a statutory lien under this section shall accrue interest at the rate of one percent per month.

ARTICLE 6 - REMEDIES

SECTION 601. BORROWER REMEDIES.

(a) A borrower may assert any material violation of this statute as a defense in a judicial foreclosure, or seek injunctive relief against any nonjudicial foreclosure sale based on any material violation of this statute, prior to the confirmation of the sale pursuant to Section 406.

(b) A borrower injured by any violation of this statute may bring an action in [specify

court] for damages against the foreclosing creditor before or after confirmation of the foreclosure sale. The court shall award reasonable attorney's fees and costs to a borrower who prevails in an action under this Section.

[(b)(ALT) A violation of this statute that causes injury to a borrower is also a violation of [state consumer protection or unfair and deceptive practices statute] and entitles the borrower to all remedies provided for under [relevant section of CP or UDAP statute]].

Reporters' Drafting Notes

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