

| APRIL 5, 2013 FINAL DRAFT -REDLINED- 3/25/2013

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~~ April 5-6, 2013 Drafting Committee Meeting

Without Prefatory Note and With Reporter's Drafting Comments

Copyright 82012
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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.

**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

RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS

TABLE OF CONTENTS

ARTICLE 1#

TITLE AND DEFINITIONS#

SECTION 101. SHORT TITLE	1#
SECTION 102. DEFINITIONS.....	1#
SECTION 103. [Alternative #1] SCOPE.....	8
<u>SECTION 104 DUTY OF GOOD FAITH</u>	

ARTICLE 2#

NOTICES, RIGHT TO CURE#

SECTION 201. PRE FORECLOSURE NOTICE	66#
SECTION 201 2 . NOTICE OF DEFAULT , INTENT TO ACCELERATE FORECLOSE AND RIGHT TO CURE.	Error! Bookmark not defined.#
<u>SECTION 202. PARTIES TO SEND AND RECEIVE NOTICE</u>	
SECTION 203. MANNER OF NOTICE DELIVERY.....	Error! Bookmark not defined.#
SECTION 204. RIGHT TO CURE DEFAULT.	Error! Bookmark not defined.#
SECTION 205. [NEW] UNKNOWN BORROWER <u>HOMEOWNER</u> OR OBLIGOR.	Error! Bookmark not defined.#

ARTICLE 3#

FACILITATION#

PREAMBLE TO ARTICLE 3	8#
PREAMBLE: FACILITATION – OBJECTIVES, STANDARDS, AND ISSUES FOR RESOLUTION	Error! Bookmark not defined.#
SECTION 301. NOTICE OF FACILITATION.	14#
SECTION 302. DUTY TO PARTICIPATE IN FACILITATION AND NEGOTIATE IN GOOD FAITH.....	15#
SECTION 303. STANDARDS FOR CONDUCT OF FACILITATION.....	17#
SECTION 304. NO FORECLOSURE DURING FACILITATION.	18#

ARTICLE 4#

RIGHT TO FORECLOSE, EFFECTS OF FORECLOSURE#

SECTION 401. [Alternative #1] RIGHT TO FORECLOSE.....	Error! Bookmark not defined.#
<u>SECTION 401. [New Alternative #2] RIGHT TO FORECLOSE</u>	Error! Bookmark not defined.#
SECTION 402. TRANSFER OF MORTGAGE.	Error! Bookmark not defined.#
SECTION 403. LOST INSTRUMENT; AFFIDAVIT.....	Error! Bookmark not defined.#
SECTION 404 . PUBLIC ADVERTISEMENT OF FORECLOSURE SALE.	Error! Bookmark not defined.#

SECTION 405. NOTICE OF SALE, <u>POSTPONEMENT OF SALE AND CANCELLATION OF SALE</u>	Error! Bookmark not defined. #
SECTION 406. [Alternative #1] <u>OPTIONAL</u> CONFIRMATION OF SALE <u>AFTER NONJUDICIAL FORECLOSURE ; DEFICIENCY JUDGMENT PURSUANT TO JUDGMENT</u>	Error! Bookmark not defined. #
SECTION 407. [Continuation of Alternative #1] <u>OPTIONAL</u> CONFIRMATION OF SALE <u>PURSUANT TO [POWER OF SALE]; DEFICIENCY JUDGMENT. IN JUDICIAL FORECLOSURE</u>	Error! Bookmark not defined. #
SECTION 406-407. [Alternative #2] <u>OPTIONAL CONFIRMATION OF SALE</u>	Error! Bookmark not defined. #
SECTION 408. CONCLUSIVE EFFECT OF FORECLOSURE SALE. ..	Error! Bookmark not defined. #

ARTICLE 5#

OTHER PROVISIONS#

SECTION 501. NEGOTIATED TRANSFER OF MORTGAGED PROPERTY IN SATISFACTION OF OBLIGATION.	40#
SECTION 502. NOTICE OF NEGOTIATED TRANSFER.	41#
SECTION 504. EFFECT OF NEGOTIATED TRANSFER.	43#
SECTION 505. ABANDONED PROPERTY.....	46#
SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.	49#
SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.	56#
PREAMBLE TO REVISED SECTION 508.	56#

ARTICLE 6#

REMEDIES#

SECTION 601. <u>BORROWER/HOMEOWNER</u> REMEDIES.....	60
<u>SECTION 602 ADDITIONAL DEFENSES TO FORECLOSURE</u>	
<u>SECTION 603 PROCEDURE FOR ASSERTING DEFENSES IN A NON-JUDICIAL FORECLOSURE</u>	
<u>SECTION 604 ENFORCEMENT BY ATTORNEY GENERAL</u>	
<u>SECTION 605 CERTAIN ACTS PROHIBITED</u>	
<u>SECTION 606 CIVIL LIABILITY</u>	
<u>SECTION 607 ABROGATION OF THE HOLDER IN DUE COURSE RULE IN FORECLOSURES</u>	

ARTICLE 7

EFFECTIVE DATE AND REPEALER

<u>SECTION 701 EFFECTIVE DATE</u>	
---	--

SECTION 702 PRE-EFFECTIVE DATE TRANSACTIONS.....	
SECTION 703 SPECIFIC REPEALER.....	
SECTION 704 GENERAL REPEALER	

RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS ACT

ARTICLE 1

TITLE AND DEFINITIONS

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

Chair’s Note- The Executive Committee has been asked for authority to change the title of the Act to the ‘Uniform Home Foreclosure Procedures Act.’ I also have a note from someone who has suggested the title “Uniform Residential Property Foreclosure Practices Act.’

SECTION 102. DEFINITIONS. In this [act]:

(1) “Abandoned property” means mortgaged property with respect to which the ~~borrower~~homeowner and persons claiming through the ~~borrower~~homeowner, 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~~homeowner as a vacation home or seasonal home unoccupied residential property that is (i) undergoing construction, renovation, or rehabilitation that is proceeding diligently to completion; or (ii) used or held for use by the homeowner as a vacation home or seasonal home and is secure and in substantial compliance with all applicable ordinances, codes, regulations, and laws.

~~(2) "Borrower" means a person owning an interest in the mortgaged property, other than a mortgage, 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’.~~

1
2 ~~2. We need to consider to whom the Act requires ‘notice’ to be provided~~
3 ~~to a ‘borrower’ v. an ‘obligor’ and how the creditor is able to identify each; see~~
4 ~~the proposed amendments to Sec. 401.~~

5
6 ~~3. At the November meeting, there were suggestions from several persons~~
7 ~~for more expansive comments; to the extent these notes are inadequate, please let~~
8 ~~the Reporters know of any desired additional comments.~~

9
10 (2) “Common interest community” means real property with respect to which a person,
11 by virtue of ownership of a unit, is obligated to pay for real property taxes, insurance premiums,
12 maintenance, or improvement of other real property ,or services described in a declaration or
13 other governing documents, however denominated. A common interest community includes
14 properties held by a cooperative housing corporation. In this paragraph, “ownership” includes a
15 leasehold interest if the period of the lease is at least [20] years, including renewal options.

16 (3) “Creditor” means a ~~lender or other~~ person who owns or has the right to enforce an
17 obligation. ~~[The term does not include a person who extends owns no more than two-five~~
18 ~~mortgage loans in the same calendar year as the mortgage at issue.]~~

19 **Drafter’s Notes**

20
21 1. The last sentence of the definition of ‘creditor’ is an attempt to address
22 Dale Whitman’s and other comments to exclude ‘mom & pop’ lenders or one-off
23 seller financing.

24
25 2. The alternative (i.e., the "or has the right to enforce" clause) is useful
26 for the time being due to the alternatives for section 401. We could define creditor
27 as a person who has commenced foreclosure, but that doesn't work because we
28 are imposing some duties on lenders before commencing foreclosure. We dropped
29 the language referring to agents, services, and assigns: It is now "buried" in "other
30 person"; to the extent we need to address issues involving services, agents, and
31 assigns, we think it belongs elsewhere.

32
33 3. We should consider the status of mortgage insurers, and other cases;
34 perhaps we can define guarantors separately and then include them in substantive
35 provisions only when appropriate.

36
37 4. The Reporters, Chair and ABA Advisor believe- subject to contrary

1 thoughts from the Committee – that we do not need to define the term ‘servicer’.
2 That word is not used in any statutory text or comments; it appears only in the
3 discussion of facilitation standards and objectives.
4

5 (4) “Expenses of foreclosure” means the lesser of the reasonable expenses incurred by a
6 foreclosing creditor or the maximum amounts permitted by other law of this State for expenses
7 in connection with a foreclosure. These expenses include costs of ~~transmission of sending~~
8 notices, advertising, title searches, inspections and examinations of the mortgaged property ,
9 management and securing of the mortgaged property, insurance, filing and recording fees,
10 attorney’s fees and litigation expenses incurred to the extent provided in the mortgage or
11 authorized by other law, appraisal fees, the fee of the person conducting the sale in the case of a
12 foreclosure by auction, fees of court-appointed receivers, and other expenses reasonably
13 necessary to the foreclosure.

14 (5) “Facilitation” means the assistance of a third-party neutral at an in-person meeting or
15 meetings between the parties with the objective of achieving a commercially reasonable
16 alternative to foreclosure, resulting in sustainable outcomes for the creditor and
17 ~~borrower~~homeowner.

18 **~~Barry’s Note:~~** ~~Does this preclude telephone conferences, and to whom does ‘in-~~
19 ~~person’ apply?~~

20 **Reporter’s Drafting Note**

21
22 The definition of ‘Facilitation’ requires at least one ‘in-person’ meeting between
23 the parties and a third-party neutral. The requirement of an ‘in-person’ meeting
24 contemplates the continuation in many jurisdictions that as an alternative to a
25 ‘face-to-face’ meeting, the parties may meet by telephone or other electronic
26 means so long as all the parties and the neutral are able to simultaneously hear or
27 communicate with one another.

28
29 (6) “Facilitation agency” means [the administrative or judicial agency designated by the
30 state to supervise foreclosure facilitation.]

31 (76) “Foreclosure” means any process, proceeding or other action by a creditor to

1 terminate the ~~borrower~~homeowner's interest in the mortgaged property or to obtain possession of
2 the mortgaged property for the creditor. [Foreclosure does not include a voluntary transfer by
3 the ~~borrower~~homeowner and does not include an action to recover possession of the property
4 after a completed foreclosure sale.]

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

8 (8) "Holder" means the person in possession of an instrument that is payable either to
9 bearer or to an identified person that is the person in possession.

10 Drafter's Note

11
12 This definition is taken from revised Article 1: UCC § 1-201(b). The definition in
13 unrevised Article 1 has slightly different language, but is the same in substance.

14
15 (9) "BorrowerHomeowner" means a person owning an interest in the mortgaged property,
16 other than a mortgage, lien, servitude, or leasehold, whether or not the person is an obligor.

17 Drafter's Notes

18
19 1. The Committee should compare the new definition of 'Obligor'.

20
21 2. We need to consider to whom the Act requires 'notice' to be provided
22 to a 'homeowner' v. an 'obligor' and how the creditor is able to identify each; see
23 the proposed amendments to Sec. 401.

24
25 3. At the November meeting, there were suggestions from several persons
26 for more expansive comments; to the extent these notes are inadequate, please let
27 the Reporters know of any desired additional comments.
28

29 (10) "Individual" means a natural person.

30 Drafter's Note

31
32 This definition was used only in section 503; that section has been amended to
33 avoid the need for the definition.

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

(12) "Loss mitigation" means any program that the creditor offers to ~~borrowers~~
homeowners in default or facing imminent default, as an alternative to ~~a foreclosure sale~~.

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.

~~(13) "Facilitation agency" means [the administrative or judicial agency designated by the state to supervise foreclosure facilitation.]~~

(14) "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.

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

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

1 mortgage.

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

4 **Drafter’s Note**

5
6 In states that allow one or more types of nonjudicial foreclosure of residential
7 mortgages, the drafter should insert a reference to the relevant statute or statutes
8 here. In states that do not allow nonjudicial foreclosure, this definition should be
9 deleted, along with references to “nonjudicial foreclosure” elsewhere in this Act.
10

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

15 (19) “Obligation” means a debt or other duty or liability that is secured by a mortgage.

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

19 **Drafter’s Note**

20
21 The Reporters, Chair and ABA Advisor believe that the definition of ‘real
22 property’ is unnecessary and, by deleting it, we avoid several issues which were
23 debated in November.
24

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

27 (22) "Residential property" means real property improved with, one- to four-dwelling
28 units, including structures ancillary to such dwelling units and including attached single-family
29 dwelling units and single-family manufactured housing units placed upon permanent

1 foundations. Residential property includes single-family units in a common interest community.

2 (23) “Servicer” means the person responsible for the servicing of a mortgage loan
3 (including the person who makes or holds a mortgage loan if such person also services the
4 mortgage loan). “Servicing” means receiving any scheduled periodic payments from a borrower
5 pursuant to the terms of any mortgage loan, including amounts for escrow accounts and making
6 the payments to the owner of the loan or other third parties of principal and interest and such
7 other payments with respect to the amounts received from the borrower as may be required
8 pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case
9 of a home equity conversion mortgage or reverse mortgage as referenced in this section,
10 servicing includes making payments to the borrower.

11 Reporters’ Drafting Notes

12 The definitions of ‘Servicer’ and ‘Servicing’ are taken from the Real Estate Settlement
13 Procedures Act of 1974, 12 U.S.C. 2601 *et seq* (“RESPA”), 24 C.F.R. § 3500.2 (b).
14
15

16
17 (24) “State” means a State of the United States, the District of Columbia, Puerto Rico, the
18 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
19 the United States.

20 **Reporters’ Drafting Notes**

21
22 ~~1. Many of the definitions are taken from the Uniform Non-Judicial~~
23 ~~Foreclosure Act, while the drafters have also added several new definitions,~~
24 ~~including ‘Borrower’, ‘Lender’, ‘Loss Mitigation’ and ‘Facilitation Agency’.~~
25

26 2. In some states, a land sale installment contract does not constitute a
27 ‘mortgage’, with all the attendant consequences for ~~borrower~~homeowners and
28 creditors, until a specified percentage of the original principal amount has been
29 paid to the creditor. In Illinois, for example, that percentage is 50% of the
30 original principal amount. In those States where the issue arises, statutory drafters

1 should make appropriate amendments to this act to track existing practice in that
2 state.
3

4 3. Whether mortgaged property is “abandoned property” is determined by
5 the facts of each case. The factors listed in Section 505(a) are not exclusive. The
6 core question is whether the borrower/homeowner is presently in possession of the
7 property. The question must be answered by evaluating the facts related to the
8 borrower/homeowner’s use of the property. ~~The subjective intention of the~~
9 ~~borrower/homeowner to maintain or continue ownership of the property, whether~~
10 ~~or not communicated to the creditor, is irrelevant.~~
11

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

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

21 **~~Drafter’s Note~~**

22 ~~From a style perspective, it may be that all the language after ‘real property’ should be deleted~~
23 ~~and the issue of which foreclosure actions are governed by the act would be dealt with at the end~~
24 ~~of the act in an ‘Effective Date’ section.~~

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

29 **Reporters’ Drafting Notes**
30

31 1. This Act applies whenever a creditor forecloses on a mortgage on
32 residential property, whether by judicial process or by non-judicial measures. The
33 definition of “foreclosure” in Section 1-~~402-103~~ must be consulted to determine
34 which actions taken by creditors have the legal effect of making the Act
35 applicable to the parties to a mortgage.
36

1 ~~2. The Reporters, Chair and ABA Advisor believe this Act applies to the~~
2 ~~foreclosure of mortgages created before the effective date of this Act, unless the~~
3 ~~creditor has taken action to foreclose before the effective date; the Style issue is~~
4 ~~whether to state that outcome in the ‘Scope’ section or the ‘Effective Date’~~
5 ~~section~~

6
7 ~~32. Under Alternative #1 this Act applies~~The term “residential property” is
8 ~~defined in Section 1-103 as real property improved with~~ whenever a mortgage
9 ~~covers~~ one-to-four dwelling units. Thus, this Act applies to the foreclosure of a
10 mortgage on any one to four family property used for residential purposes,
11 regardless of whether the ~~borrower-homeowner~~ occupies or intends to occupy one
12 or more of the units as a principal residence or other residence. This means that
13 this Act covers all rental properties of this type. Alternative #2 limits the scope of
14 the Act to owner-occupied residential property. In both cases, the ~~The Act,~~
15 however, ~~does not apply if the mortgage covers five or more dwelling units, even~~
16 ~~if the~~ borrower-homeowner personally occupies one or more of those units.

17
18 **Example:** Buyer purchases a residential condominium unit, financing the
19 purchase with a mortgage. A foreclosure of the mortgage is within the
20 scope of this Act, regardless of Buyer’s intended use or actual use of the
21 property. Similarly, if Buyer purchases five units in the same
22 condominium community, each financed with a separate mortgage, a
23 foreclosure of any of those mortgages is within the scope of this Act.

24
25 ~~4. The Drafting Committee may well wish to expand the ‘scope’ section to~~
26 ~~address the question of how this Act is to be blended with existing state law.~~

27
28 3. However, the Act also makes clear that while this Act would apply to
29 the foreclosure of mortgages created before the effective date of this Act, it would
30 not apply to a foreclosure action that the creditor had commenced before the
31 effective date of the Act; this is made clear in Section ____, describing the
32 ‘Effective Date’ of the Act.

33
34
35 **SECTION 104 DUTY OF GOOD FAITH A creditor, servicer, obligor**
36 or home owner shall comply with the requirements of this Act in good faith. For purposes of this
37 [Act] [Section], ‘Good faith’ means honesty in fact and the observance of reasonable standards
38 of fair dealing in the mortgage industry.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

ARTICLE 2

NOTICES, RIGHT TO CURE

~~SECTION 201. PRE FORECLOSURE NOTICE. Before any creditor may commence foreclosure, the creditor shall give 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 facilitation pursuant to Section 301.~~

SECTION 20~~1~~¹². NOTICE OF **DEFAULT**, INTENT TO **ACCELERATE**
FORECLOSE AND RIGHT TO CURE. A creditor may not commence foreclosure until 30 days after it has sent to each ~~borrower~~ homeowner [and obligor?] ~~at~~ 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 itemization of all past due payments, fees and other charges as of the date of the notice. The itemization of amounts owed must be as of the date of the notice, and may 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 must be ascertained and included; other amounts already accrued but unknown in amount may be estimated.

(b) The specific action(s) the ~~borrower~~ homeowner 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 must be cured in accordance with Section 204 ~~which shall be no sooner than one day prior to the first scheduled foreclosure sale.~~

(d) The fact that if the ~~borrower~~ homeowner does not cure, the creditor may demand

1 payment of the full amount due, not just past due payments, and may foreclose and sell the
2 property.

3 (e) The effect of curing the default, including the right to have the terms of the ~~note~~
4 obligation and mortgage remain in effect.

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

8 (g) The specific basis for asserting that the foreclosing creditor or servicer has the right to
9 foreclose and, if the creditor or servicer is acting ~~as agent for~~ on behalf of the owner of the
10 obligation, the identity of the owner.

11 (h) The ~~borrower~~homeowner's right to request a copy of the ~~borrower~~homeowner's
12 mortgage note or other evidence of the obligation and copies of any assignments of mortgage or
13 deed of trust required to demonstrate the right to foreclose on the mortgage.~~and~~

14 (i) A reference to the fact that the ~~borrower~~homeowner will receive separate notices of
15 available foreclosure alternatives and facilitation.

16 (j) A notification to any obligors receiving the notice explaining that the notice is being
17 sent to the homeowner as well as all other obligors whether they have an interest in the property
18 or not.

19 Reporters' Drafting Notes

20
21 1. At the February 2013 meeting a motion was made to require notice of
22 intent to foreclose to go to all homeowners and obligors. The motion was tabled,
23 and some participants felt that non-obligor owners should not get the detailed debt
24 information in the notice. This issue remains open for further discussion. This
25 draft adopts the simple approach of requiring a single notice for all homeowners
26 and obligors.

27
28 24. The mortgage obligation may be accelerated by filing a complaint,

1 scheduling a sale, or by separate notice of acceleration – the notice of intent to
2 accelerate does not by itself accelerate the debt. The notice need not refer to
3 acceleration if the creditor does not intend to accelerate the obligation, for
4 example if it is fully matured. The definition of The phrase “foreclosure” in
5 section 102 “other legal action” includes other legal methods that may be used to
6 terminate the borrower/homeowner’s interest in the mortgaged property, such as a
7 quiet title or ejectment action in the case of an installment land sale contract.
8 ~~Purchasers of foreclosed properties are protected from assertions that the sale was~~
9 ~~invalid because the chain of loan ownership described in the pre-foreclosure~~
10 ~~notice was incorrect; the borrower must raise challenges to the notice and other~~
11 ~~defenses before the sale, pursuant to Section 4-107.~~

12
13 32. Items (a) through (f) are the elements of notice in the standard
14 Fannie/Freddie mortgage instrument. Item (c) adds a specific deadline to cure the
15 default. Items (g) and (h) are the ownership statement required by the national
16 servicing settlement, and call for the servicer to identify its basis for standing at
17 the outset of foreclosure proceedings, so that any disputes can be resolved
18 promptly. Including this information complements Section 4-107, providing
19 conclusive effect to a completed foreclosure sale. This notice would not displace
20 all state-specific aid program and counseling notices which necessarily will
21 depend on state funding – for example, Pennsylvania requires a separate 30-day
22 notice of how to apply for its Homeowner’s Emergency Mortgage Assistance
23 Program.

24
25 ~~3. The mortgage obligation may be accelerated by filing a complaint, scheduling a~~
26 ~~sale, or by separate notice of acceleration – the notice of intent to accelerate does~~
27 ~~not by itself accelerate the debt. The notice need not refer to acceleration if the~~
28 ~~creditor does not intend to accelerate the obligation, for example if it is fully~~
29 ~~matured. Purchasers of foreclosed properties are protected from assertions that the~~
30 ~~sale was invalid because the chain of loan ownership described in the pre-~~
31 ~~foreclosure notice was incorrect; the borrower must raise challenges to the notice~~
32 ~~and other defenses before the sale, pursuant to Section 4-107.~~

33
34 ~~4. In Subsection (a), the itemization of amounts owed should be as of the date of~~
35 ~~the notice, and should not include amounts that have not yet come due. The~~
36 ~~notice may refer to the fact that additional sums will come due after the date of~~
37 ~~the notice. Fees and charges imposed by the creditor or the creditor’s attorney~~
38 ~~should be ascertained and included.~~

39
40 ~~The Committee should determine whether a “good faith estimate” approach~~
41 ~~would be sufficient in the case of fees and charges that are imposed by third~~
42 ~~parties and that have been incurred, but the amount of which are not known, at the~~
43 ~~time of the notice.~~

44
45 45. In subsection (b), the actions the borrower/homeowner needs to take in
46 order to cure the default are governed by § 204.

1
2 56. In subsection (g), the basis on which a particular creditor may assert
3 the right to foreclose is specified in §401. The notice may, but is not required to,
4 explain that the agent has full authority on behalf of the owner to negotiate with
5 the ~~borrower~~ homeowner.

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

16 **SECTION 202. PARTIES TO SEND AND RECEIVE NOTICE** The notice
17 required by Section 201 may be sent by any creditor or servicer, but must be separately sent to
18 all each ~~borrowers~~ homeowner and obligors.

19 **SECTION 203. MANNER OF NOTICE DELIVERY.** ~~Both~~ The notices required by
20 Section 201 and Section 301 must be sent by first class mail to each ~~borrower~~ homeowner's and
21 obligor's last known address, and to the mortgaged property address. At least one mailed notice
22 shall be addressed to the ~~borrower~~ homeowner "or occupant." If a ~~borrower~~ homeowner or
23 obligor or ~~borrower~~ a homeowner's or obligor's representative has requested to receive notices by
24 electronic mail and has provided an electronic mail address to the creditor, ~~the both~~ notices must
25 also be sent by electronic mail to the ~~borrower~~ homeowner's or obligor's electronic mail address.
26 ~~The notices may be sent at the same time, [but may not be combined with each other, or with any~~
27 ~~other notices, or with the [complaint, in a judicial state or] Notice of Sale.]~~

28 SOMEONE WAS TO CHECK NOTICE UNDER 3-121 OF UCIOA AND NON-JUDICAL

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

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

13
14 2. For comparison purposes, consider the notice provisions contained in §
15 3-121 of the Common Interest Ownership Act:

16
17 UCIOA SECTION 3-121. NOTICE TO UNIT OWNERS.

18 (a) An association shall deliver any notice required to be given by the
19 association under this [act] to any mailing or electronic mail address a unit owner
20 designates. Otherwise, the association may deliver notices by:

21 (1) hand delivery to each unit owner;

22 (2) hand delivery, United States mail postage paid, or commercially
23 reasonable delivery service to the mailing address of each unit;

24 (3) electronic means, if the unit owner has given the association an
25 electronic address; or

26 (4) any other method reasonably calculated to provide notice to the unit
27 owner.

28 (b) The ineffectiveness of a good faith effort to deliver notice by an
29 authorized means does not invalidate action taken at or without a meeting.

30 **SECTION 204. RIGHT-TO CURE DEFAULT.**

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

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

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

(4) Tender any 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~~ homeowner to the same position under the mortgage and the obligation it secures as if the default had not occurred.

(d) The right to cure may not be waived.

Reporters' Drafting Notes

1. The right of a ~~residential mortgage borrower~~ homeowner 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~~ homeowner cure. The ~~borrower~~ homeowner 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~~ homeowner concerning the amounts needed to cure, or any nonmonetary performance that may be claimed as due, either party may seek declaratory relief from an appropriate court, and if appropriate, a temporary stay of any foreclosure sale to resolve the cure dispute.

3.- If a default is cured, restoring the **homeowner** to the same position as if no default occurred means that if there is a later default, new notices must be sent prior to foreclosure. Conversely, if as a result of facilitation under Article 3 or otherwise, a settlement is reached but the **homeowner** does not fully cure the default, new notices are not required. ~~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. UNKNOWN **BORROWER-HOMEOWNER OR OBLIGOR.**

A creditor does not owe a duty to notify a person under Sections 201 through 203 or 301 based on its status as creditor to a person that is a **borrower-homeowner** or obligor, unless the creditor knows all of the following:

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

Reporters' Drafting Notes

1. 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.

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

ARTICLE 3

FACILITATION

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

With Additional Comments for the April 2013 meeting

The Drafting Committee has 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 homeowners 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) the~~ now deleted 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 following deleted provisions were our first attempt to provide a statement of 'best practices' that might be incorporated into the statute:

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~~

1 regard to the fact that some or many homeowners have been fully evaluated for foreclosure
2 alternatives before any process begins.

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

6
7 ~~———4. The process of bringing the parties together to achieve an alternative to foreclosure is~~
8 ~~facilitation, not mediation, because some of the standards typically followed by mediators are not~~
9 ~~appropriate. Facilitation is not merely a requirement that parties "meet and confer," i.e. a~~
10 ~~mandate merely for two-party settlement negotiations.~~

11
12 ~~———5. The neutral facilitator should disclose any conflicts of interest. A lawyer serving as a~~
13 ~~facilitator must inform unrepresented borrowers that the lawyer is not representing them.~~

14
15 ~~———6. ISSUE: The initial draft provides for an opt-out process, i.e. automatic scheduling of a~~
16 ~~facilitation meeting, with a process that goes forward unless the homeowner does not participate.~~
17 ~~The other alternative is an 'opt-in' approach, which requires the homeowner to respond to a~~
18 ~~notice by requesting a meeting; in the absence of a request, there is no facilitation process~~
19 ~~scheduled.~~

20
21 ~~———7. ISSUES: TIMING—In an opt-in system, the borrower would have [30] days to~~
22 ~~respond to the opportunity for facilitation (either by opting in or failing to opt out) after the~~
23 ~~notice of right to facilitation is sent to the borrower, unless this time period conflicts with local~~
24 ~~rules of procedure, in which case they need to be reconciled. The [30] day period begins when~~
25 ~~notice is sent (either by service of process in judicial foreclosure or in a notice sent by the~~
26 ~~facilitation agency in non-judicial foreclosure). The lender or servicer should receive notice that~~
27 ~~a request is made in an opt-in facilitation system.~~

28
29 ~~———8. If the borrower makes a timely request for facilitation, the relevant agency must~~
30 ~~initiate the facilitation process within 14 days [for example, by a referral order or other local~~
31 ~~protocol.]~~

32
33 ~~———9. ISSUE: Dual Track: Lenders would prefer to be able to proceed with facilitation~~
34 ~~voluntarily, before or during foreclosure, without delaying the foreclosure. Homeowner~~
35 ~~advocates call for facilitation to proceed to conclusion before any steps can be taken to move~~
36 ~~foreclosure forward.~~

37
38 ~~———10. Documentation information exchange.~~

39 ~~———a. The servicer must specify whatever documents it requires from the borrower~~
40 ~~within [5] days after initiation of the facilitation process.~~

41
42 ~~———b. The borrower must provide the income and other documents required by the~~
43 ~~servicer listed in (a) above to the servicer and the facilitator not less than [30] days before the~~
44 ~~scheduled first facilitation session. If the borrower fails to substantially provide the documents~~
45 ~~specified by the servicer within the time frame required by this paragraph, the facilitation process~~
46 ~~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~~

1 education of facilitators.

2
3 ~~21. All agreements for foreclosure alternatives should be memorialized in writing and~~
4 ~~signed by both parties to minimize later disputes.~~

5
6 ~~22. Facilitation agencies should collect enough data to determine the outcomes of~~
7 ~~facilitation and whether it is achieving its objectives.~~

8
9 ~~23. States should provide adequate funding to train and provide facilitators and for the~~
10 ~~associated agency or court supervision.~~

11
12 ~~24. Original copies of documents (as opposed to true copies) should not be needed during~~
13 ~~facilitation. Issues about authenticity and possession should be resolved separately in litigation if~~
14 ~~need be.~~

15
16 Reporter White has restated those original best practices for the April meeting as follows:

17 18 **PRINCIPLES OF FACILITATION**

19
20 The following principles are recognized by lender and consumer advocates as well as
21 mediation and facilitation program participants as necessary elements of a successful facilitation
22 program.

23
24 1. The goal of facilitation is to create commercially reasonable alternatives to foreclosure,
25 which achieve sustainable outcomes, including "graceful exits."

26
27 2. The borrower should have access to a housing counselor (or a lawyer) to assist in the
28 facilitation process.

29
30 3. The process of bringing the parties together to achieve an alternative to foreclosure is
31 better understood as facilitation, not mediation, because some of the standards typically followed
32 by mediators are not appropriate.

33
34 4. Facilitation is not merely a requirement that parties "meet and confer," i.e. a mandate
35 merely for two-party settlement negotiations. The involvement of a neutral third party is critical
36 to success.

37
38 5. The neutral facilitator should disclose any conflicts of interest. A lawyer serving as a
39 facilitator must inform unrepresented borrowers that the lawyer is not representing them.

40
41 6. Facilitation should not unnecessarily delay the foreclosure process, but should provide
42 adequate time for full consideration of alternatives to foreclosure.

43
44 7. If the borrower makes a timely request for facilitation, or in an opt-out system, when
45 the lender initiates foreclosure, the relevant agency must initiate the facilitation process within 14
46 days.

1
2 9. Documentation information exchange.

3 a. The servicer must specify whatever documents it requires from the borrower
4 within [5] days after initiation of the facilitation process.
5

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

11 c. The servicer must provide to the borrower and the facilitation agency: (i) the
12 borrower's payment history from the date of default; (ii) itemized amounts due on the loan,
13 including all fees.

14 d. The servicer should provide the facilitator its decision, including the inputs and
15 results of any net present value calculations it relies on in deciding not to offer any
16 particular loss mitigation alternative.
17

18 10. The first facilitation session must take place within [XX] days after initiation of the
19 facilitation process.
20

21 11. Participation – the servicer must have a lawyer and servicer representative present in
22 person or by telephone or teleconference; the servicer must evaluate loss mitigation and make
23 decision as required by the RESPA regulations of the Consumer Financial Protection Bureau.
24

25 12. The facilitation agency should clearly identify any eligibility restrictions for its
26 program, such as property occupancy.
27

28 13. Standards of practice for facilitators: There is consensus that facilitator conflicts of
29 interest should be avoided or disclosed. Traditional mediator standards are problematic in some
30 cases. For example, mediators traditionally do not disclose anything that takes place during
31 facilitation or report to a court on the parties' conduct, whereas a facilitator may need to report
32 on either party's conduct so that a court can decide whether to permit foreclosure to proceed, or
33 to impose sanctions.
34

35 14. Proceedings should be confidential, with appropriate exceptions to permit reporting
36 outcomes and/or noncompliance with rules to the court or supervising agency.
37

38 15. States should establish programs to provide appropriate training and continuing
39 education of facilitators.
40

41 16. All agreements for foreclosure alternatives should be memorialized in writing and
42 signed by both parties to minimize later disputes.
43

44 17. Facilitation agencies should collect enough data to determine the outcomes of
45 facilitation and whether it is achieving its objectives.
46

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

3
4 19. Original copies of documents (as opposed to true copies) should not be needed during
5 facilitation. Issues about authenticity and possession should be resolved separately in litigation if
6 need be.

7 8 **Reporters' Drafting Notes**

9
10 The Drafting Committee, Advisors and Observers may recall that earlier drafts of the Act
11 included a considerable commentary, including footnotes, that sought to describe the
12 policy choices embedded in a 'best practices' approach to mediation versus adoption of a
13 single statutory mediation solution. It seems to us that these excerpts from our earlier
14 commentary remain valid:

15
16 1. A persistent issue raised by several commentators, including the ABA advisor, is the
17 absence in the current draft of any remedy for a servicer's failure to comply with the document
18 exchange requirements or other failure to participate in the facilitation process.

19
20 2. The current text of these principles ***-both address the issue of dual tracking, but in
21 different ways.

22
23 3. What policy choices are embedded in this particular version of the 'mediation'
24 process? What are some of the implications of this set of choices? Our basic set of choices here
25 involves these discrete elements:

26
27 First, by mandating 'mediation' before foreclosure may commence, we eliminate the so-
28 called 'dual tracking' problem, where borrowerhomeowners find themselves simultaneously in a
29 mortgage modification discussion and a defendant in a foreclosure action.

30
31 Second, by creating an 'opt-out' rather than an 'opt-in' system, we are creating a system
32 that will surely serve more borrowerhomeowners' interests, but will create potentially serious
33 financial cost issues in the states, for which we have no ready answer. Given our time
34 constraints, we did not draft alternatives.

35
36 Third, we were torn between the June discussion suggesting that the Act incorporate 'best
37 practices' for 'mediation' and the more substantive provisions for mediation found in the laws of
38 some states. For purposes of this draft, we chose to incorporate some of the new mandated
39 documentation of 'net present value' in the State of Washington, as detailed in the current text of
40 Section 303 (b).

41
42 ****

43 The drafters acknowledge that most states' current statutes differ dramatically from the
44 approach taken by the State of Washington and broadly reflected in [the now deleted] Section
45 303 of this Act. For that reason, in the absence of a mandate imposed at the federal level, we
46 acknowledge that it would be difficult conceptually to mandate that each state engage the

1 services of a third party ‘mediator’ intended to independently review the servicers’ determination
2 of net present value, as they are now required to do under FHFA regulations, the law of states
3 such as Washington and the Attorney Generals’ Servicer settlement.
4

5 At the same time, in the absence of some means of ensuring that the homeowners’
6 interests are being properly calculated by servicers who, by many accounts, have an economic
7 interest in preferring foreclosure to loan modification, it is not realistic to assume that
8 homeowners will have the independent capacity to consider the accuracy of that calculation.
9

10 At this point, the April 2013 draft shows the proposed changes to Article 3 in redlines:

11 **SECTION 301. NOTICE OF FACILITATION.**

12 (a) Before any creditor or servicer [may commence foreclosure][may request entry of a
13 foreclosure judgment] the creditor or servicer must give ~~the each borrower~~ homeowner and
14 obligor notice of facilitation.

15 (b) [If the facilitation agency, by rule, establishes a procedure for the facilitation agency
16 to send notice of facilitation to ~~borrowers~~ homeowners,] the creditor must request that a notice of
17 facilitation be sent by the facilitation agency to the creditor and to the each borrower homeowner
18 and obligor. [If there is no procedure for the facilitation agency ~~does not to~~ send the notice] the
19 creditor or service shall send the notice to each homeowner and obligor, in the same manner as
20 required for the notice required by Section 201.

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

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

25 (2) The name, address, telephone number and e-mail address of the person
26 designated by the creditor as the ~~borrower~~ homeowner’s single point of contact, if a person has
27 been so designated.

28 (3) [Opt-out alternative:] The location, date and time at which the ~~borrower~~

1 | [homeowner](#) may appear for an in-person facilitation session with the creditor, under the
2 | supervision of the facilitation agency, together with instructions on how to reschedule the in-
3 | person facilitation.][*Opt-in alternative: The fact that the homeowner or obligor may request*
4 | *facilitation and the identity and contact information for the person or agency to contact to request*
5 | *facilitation.*]

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

8 | **Reporters' Drafting Notes**

9 |
10 | 1. Between 2007 and 2012 eighteen states adopted statewide foreclosure diversion or
11 | mediation programs, and local jurisdictions in at least eight additional states have established
12 | similar programs. The programs vary greatly in their timing and design, and exist in both
13 | judicial and nonjudicial foreclosure states. Most programs in judicial foreclosure states call for
14 | intervention after a foreclosure complaint is filed. While most stakeholders recognize that
15 | starting mediation or facilitation earlier in the process would increase the chances of success and
16 | reduce costs, most existing state laws do not provide a means to initiate facilitation before the
17 | judicial process begins. Pre-foreclosure facilitation permits early sorting of foreclosure cases,
18 | into those where the ~~borrower~~[homeowner](#) wants to find a solution other than foreclosure, and
19 | those cases that are uncontested or where there is no realistic alternative to foreclosure.

20 |
21 | 2. Automatic scheduling of facilitation meetings is the opt-out approach now used in
22 | Connecticut, Philadelphia County and a number of counties in Indiana, among others. The opt-
23 | in alternative used in other jurisdictions calls for the notice to inform the ~~borrower~~[homeowners](#)
24 | that they have a right to request a facilitation conference within a designated period, and the
25 | specific means for requesting the conference, by telephone, internet or other suitable means
26 | established by the facilitation agency. Experience has shown that the opt-out approach, with
27 | automatic scheduling of foreclosure facilitation, results in much higher rates of homeowner
28 | response, and ultimately higher success rates in preventing foreclosure sales and maximizing
29 | creditor recoveries.

30 |
31 | 3. The April 2013 amendments to this Section allow for continued variations to exist
32 | among state facilitation, mediation and loss mitigation programs, including whether the process
33 | is opt-in or opt-out for homeowners, whether notice is sent to homeowners by the state agency or
34 | the creditor/servicer, and whether the process takes place before or after judicial involvement in
35 | the foreclosure.

36 |
37 |
38 | **SECTION 302. DUTY TO PARTICIPATE IN FACILITATION AND**
39 | **NEGOTIATE IN GOOD FAITH.**

1
2 (a) Both parties must negotiate in good faith to seek a resolution other than a
3 foreclosure sale. The creditor or servicer shall inform the ~~borrower~~homeowner of the loss
4 mitigation options that are available to the ~~borrower~~ homeowner. The ~~borrower~~ homeowner
5 shall provide reasonably available financial and other information to permit the creditor to
6 evaluate any loss mitigation option. The creditor or servicer shall notify the
7 ~~borrower~~homeowner and the mediator, facilitator or facilitation agency of its willingness or
8 refusal to offer any loss mitigation option requested by the ~~borrower~~homeowner, and of the
9 reasons for any refusal and the information on which the refusal is based. The creditor or servicer
10 may not charge the ~~borrower~~homeowner any fees for the facilitation process. The parties shall
11 comply with any scheduling order established by the facilitation agency.

12 (b) For purposes of this section, failure to negotiate in good faith includes:

- 13 1) failing to timely participate in meetings without good cause;
- 14 2) failing without good cause to provide documents and information required by
15 facilitation agency rules or reasonably requested by the facilitator to the
16 facilitator and other party prior to a scheduled meeting or conference;
- 17 3) failing to designate a representative with adequate authority to reach a
18 settlement agreement;
- 19 4) failure without good cause to pay any required facilitation fee;
- 20 5) failure to implement or comply with a settlement agreement in connection
21 with foreclosure or facilitation; or
- 22 6) failure on the part of a creditor or servicer to advise the homeowner and
23 facilitator of any loss mitigation options that are in fact available to the
24 homeowner and to fully consider the homeowner for the loss mitigation

options before or during facilitation.

Reporters' Drafting Notes

As provided in Section 303, the 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 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 facilitation. The agency will also regulate procedural matters, such as time limits for exchanging documents, scheduling and concluding facilitation meetings, reports by mediators or facilitators, and the like. States should continue to have flexibility in the design and implementation of facilitation programs, but should establish and publish the standards as required by section 303. The principles of facilitation set forth following Section 304 should aid state facilitation agencies in designing their programs.

SECTION 303. STANDARDS FOR CONDUCT OF FACILITATION.

~~(a)~~ The facilitation agency shall adopt regulations pursuant to [insert reference to State Administrative Procedures Act or, if the 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 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~~

1 ~~enterprise and nongovernment sponsored enterprise loans and any HAMP related~~
2 ~~modification program applicable to loans insured by the federal housing administration,~~
3 ~~the veterans administration, and the rural housing service. If such a calculation is not~~
4 ~~required, then the creditor must use the current calculations, assumptions, and forms that~~
5 ~~are established by the federal deposit insurance corporation and published in the federal~~
6 ~~deposit insurance corporation loan modification program guide.~~

7 8 **SECTION 304. NO FORECLOSURE DURING FACILITATION.**

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

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

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

17 (b) Notwithstanding the limitations in subsection (a), the creditor or servicer may
18 proceed to enforce ~~its the~~ mortgage [90 days] after the notice required by Section 301 is sent,
19 unless the parties agree to continue the facilitation process or the [facilitation agency][Court]
20 directs the parties to continue the facilitation process for good cause shown.

21 **Reporters' Drafting Notes**

22
23 1. Numerous states have recently enacted mandatory facilitation or loss
24 mitigation laws whose object is to delay or prevent foreclosure until the
25 ~~borrower~~homeowner has had the opportunity to request loss mitigation or
26 facilitation: Arkansas Act 885 (2011) Sec 3, Ark Code 18-50-104 (beneficiary
27 must certify to selling attorney or trustee that it has notified ~~borrower~~homeowner

1 of ineligibility for loss mitigation options before nonjudicial sale); California
2 Assembly Bill 278 (enacted July 11, 2012, prohibits foreclosure when loan
3 modification request is pending); Idaho Code 45-1506, HB 331 Idaho now
4 requires notice of right to apply for loan modification and bars nonjudicial sale
5 until creditor responds to borrower/homeowner's request); Indiana Act 170 of
6 2011 (same; also prohibits servicer or attorney fees for facilitation or loss
7 mitigation); Massachusetts Chapter 194 of Acts of 2012 (creditor must offer
8 mortgage modification prior to foreclosing, if modification would maximize value
9 for mortgagee); Michigan Compiled Laws §3205a (amended Act 302 of 2011);
10 Nevada Rev. Stat. §107.086; Washington Chapter 58 Laws of 2011, amending
11 RCW 61.24 (delays foreclosure 90 days if borrower/homeowner requests meeting
12 with creditor to request loss mitigation, and for cases referred by housing
13 counselor to facilitation, until the parties comply with duty to mediate in good
14 faith). Requiring a complete facilitation process prior to initiation of foreclosure
15 allows necessary foreclosures to go forward promptly and efficiently after cases
16 suitable for other resolutions are identified and resolved.

17
18 2. The Committee should consider the bracketed text in subsection (a)
19 concerning the ability of the lender to take 'other action' during the facilitation
20 process.

21 22 **ARTICLE 4** 23 **RIGHT TO FORECLOSE, EFFECTS OF FORECLOSURE**

24
25 **SECTION 401. [~~Alternative #1~~]-RIGHT TO FORECLOSE. [~~This alternative~~**
26 ~~designates the person with the right to enforce the instrument under UCC Article 3 as the person~~
27 ~~with the right to foreclose the mortgage when the obligation is set forth in a negotiable~~
28 ~~instrument.]~~

29 (a) Only a creditor-person who has the right to foreclose under subsection (b) or
30 subsection (g) may commence a foreclosure.

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

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

35 (A) the holder,

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

3 (C) a person not in possession of the instrument who establishes the right
4 to enforce that instrument due to its loss or destruction by meeting the requirements of Section ~~4-~~
5 ~~104403~~ or subsection (g) of this section.

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

8 (c) In a judicial foreclosure proceeding, the plaintiff must ~~allege and prove facts~~
9 ~~demonstrating~~ that it has the right to foreclose under subsection (b) or subsection (g). If the
10 plaintiff relies upon an instrument, the complaint must include:

11 (1) -a copy or image of the instrument, in its present condition including any
12 endorsements or allonges, and

13 (2) an allegation that the original is either: (i) in the possession of the plaintiff; (ii)
14 in the possession of the plaintiff's principal; or (iii) lost [or destroyed], in which case the
15 complaint must also include a lost instrument affidavit that complies with [insert UCC reference]
16 .

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

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

1 principal and the agent.

2 (f) If the obligation is evidenced by an instrument and the person with the right to
3 foreclose under subsection (b) does not own the obligation, the complaint described in subsection
4 (c) or the affidavit described in subsection (d) shall disclose the name of the owner of the
5 obligation.

6 (g) If the obligation is registered with an organization that is authorized by a statute or
7 regulation of the United States to maintain electronic records of obligations pursuant to standards
8 designed to ensure that the record of each obligation is unique, identifiable, and unalterable, then
9 a certificate or record issued by the organization that names a person as the owner of an
10 obligation or the holder or an instrument is sufficient to allow that person to foreclose in a
11 judicial or nonjudicial foreclosure proceeding.

12 Drafter's Notes

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

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

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

Reporters' Drafting Notes

1. This section designates the “person entitled to enforce” an instrument under revised UCC Article 3 as the person with the right to foreclose the mortgage. Section ~~4-101~~401(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

1 possession of an instrument that is not negotiable ordinarily will not acquire the
2 right to foreclose; the issue turns on whether the rights granted to the creditor are
3 sufficient to make the creditor the “owner” of the obligation (in other words, a
4 “buyer” of the payment rights).

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

9
10 6. If it is unclear whether the secured obligation is evidenced by a
11 negotiable instrument or by an instrument that is not negotiable, the creditor may
12 choose to proceed by complying with both subsections (b)(1) and (b)(2). The
13 creditor should state whether it is relying on subsection (b)(1), (b)(2), or both in
14 the alternative.

15
16 7. Under subsection (c) the creditor’s production of the original negotiable
17 instrument is not necessary at the time of the filing of a complaint in a judicial
18 foreclosure. Production of the original would later become appropriate if, during
19 the course of the proceedings, the borrower-homeowner or obligor seeks further
20 demonstration of the copy’s authenticity or the whereabouts of the original.
21 Similarly, in a nonjudicial foreclosure, if there are subsequent judicial
22 proceedings, a court may decide to order production of the original instrument if
23 necessary to resolve a particular issue.

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

37
38 9. Section 401 as drafted, allowing an agent to foreclose, is consistent
39 with the standing decision in *Sprint Communications Co. v. APCC Services, Inc.*,
40 554 U.S. 269 (2008). There, payphone operators had assigned claims for
41 compensation from long-distance carriers to collection firms. In *Sprint* the Court
42 permitted an assignee of a legal claim for money to pursue that claim in federal
43 court, even when the assignee had promised to remit the proceeds of the litigation
44 to the assignor.

45
46 | ~~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

1
2 Sections 401 and 402 must both be consulted to determine whether a particular
3 transferee is a person who is entitled to foreclose. After the Drafting Committee
4 makes choices as to the alternatives stated in both sections, as a matter of style it
5 may be expeditious to consolidate the two sections.
6

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

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

14 Reporters' Drafting Notes

15
16 1. Subsection (a) adopts the principle stated in UCC § 9-203(g), which
17 provides that an Article 9 transfer of a instrument also transfers the mortgage
18 (more formally, § 9-203(g) provides that attachment of a security interest in a
19 right to payment or performance secured by personal or real property
20 automatically transfers the security interest to the secured party). Section 9-
21 203(g) covers sales of negotiable instruments, other instruments, and payment
22 intangibles, as well as lending transactions in which those rights serve as
23 collateral to secure an obligation of the transferor.
24

25 _____ Subsection (a) is broader than § 9-203(g); it applies regardless of whether
26 the transferee obtains an attached Article 9 security interest. It also encompasses
27 involuntary transfers such as inheritance and judicial sales. Restatement (Third)
28 of Property (Mortgages) § 5.4(a) (1997) proposes a similar rule: "A transfer of an
29 obligation secured by a mortgage also transfers the mortgage unless the parties to
30 the transfer agree otherwise." Under the Restatement rule, parties to the transfer
31 may agree otherwise, but this section does not permit severance of the obligation
32 from the mortgage, following UCC § 9-203(g) and common-law authorities in a
33 number of states.
34

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

1 the county land records.

2
3 In some states, a statute explicitly requires a recorded assignment. E.g.,
4 Ga. Code § 44-14-162: “The security instrument or assignment thereof vesting the
5 secured creditor with title to the security instrument shall be filed prior to the time
6 of sale in the [county land records].” In many states, judicial decisions going in
7 both directions interpret statutes that do not on their face provide immediately
8 obvious answers to these questions. E.g, In re Vasquez, 266 P.3d 1053 (Ariz.
9 2011) (recording assignments of deeds of trust is not required, although trustee
10 must record notice of trustee’s sale); U.S. Bank Nat. Ass’n v. Ibanez, 941 N.E.2d
11 40 (Mass. 2011) (requiring written chain of assignments).

12
13 3. The two alternatives in subsection (b) provide different answers to the
14 fundamental question of whether a creditor may foreclose a mortgage in the
15 absence of a recorded chain of title in the land records demonstrating that the
16 creditor owns the mortgage.

17
18 The first alternative in this subsection adopts the position that an express
19 assignment is unnecessary; note that subsection (a) implies an assignment upon a
20 transfer of the obligation. In addition, this alternative for subsection (b) adopts
21 the position that recordation of an assignment (or notice of an implied
22 assignment) is not a prerequisite for foreclosure.

23
24 4. In contrast, Alternative # 2 in subsection (b) confirms the rule in many
25 states – a rule which is intended to protect the interests of borrower/homeowners
26 and subsequent purchasers – that a written assignment in favor of the foreclosing
27 creditor is a necessary pre-condition to instituting a foreclosure. Because note
28 transfers are not generally recorded, advocates for mandating this outcome
29 believe that recording of mortgage assignments is necessary to provide a complete
30 public record of land title transfers, to protect borrowers-obligors from double
31 liability, and to prevent post-sale title challenges.

32
33 Under Alternative #2, a transfer of the note without an accompanying
34 express assignment of the note does not deprive the assignee of the ability to
35 foreclose. The principle that “the mortgage follows the note”, e.g., Restatement of
36 Property §5.4(a), means that the current holder or owner of the mortgage
37 obligation has an equitable right to obtain and record an assignment of the
38 mortgage or deed of trust from any prior record mortgagee, mortgage assignee or
39 beneficial owner, unless the parties intended otherwise.

40
41 Under the second alternative, the complaint or affidavit required by
42 Section 401 must identify and describe all necessary assignments and
43 substitutions. Recordation of a separate assignment, or endorsement on the
44 mortgage itself, provides record notice of the chain of mortgage ownership, and
45 insulates the foreclosure sale purchaser from attacks on title based on transfer
46 defects. The mortgage transfer should be described in the complaint in a judicial

1 proceeding or the affidavit in a nonjudicial proceeding and appear of record prior
2 to the recording of the foreclosure sale deed. It is sufficient to record an
3 assignment to the foreclosing person's agent, so long as the agency is described in
4 the complaint or affidavit. When the mortgage is in the form of a deed of trust,
5 transfer is generally effected by recording a substitution of trustee. The recorded
6 substitution of trustee must describe any transfers of beneficial ownership.
7

8 **SECTION 403. LOST INSTRUMENT; AFFIDAVIT.**

9
10 (a) [**Alternative #1**] If an instrument secured by a mortgage has been lost [or
11 destroyed], the creditor may foreclose the mortgage only if the creditor makes an affidavit
12 attesting to the facts stated in [UCC § 3-309(a)(1) through (a)(3)].

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

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

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

25 (d) In a nonjudicial foreclosing proceeding, the creditor shall include the affidavit
26 described in subsection (a) with the notice of foreclosure required by Section 2-103 together with
27 a statement that the borrower-obligor has the right to petition the [name of appropriate court]

1 where the property is located for an order requiring the creditor to provide adequate protection
2 against a claim by another person.

3 **Reporters' Drafting Notes**

4
5 1. The policy choice facing the Drafting Committee, of course, is the
6 extent to which this Act should give license to foreclosing creditors who sign
7 "lost" or "destroyed" note affidavits without ever having possessed either the
8 original or a certified copy of the note, and without any evidence of a written
9 assignment of the underlying mortgage to that creditor. For comparison purposes,
10 even under the "business records" exception to conventional hearsay rules, it is
11 not clear that unsigned contracts would be admissible evidence that the parties
12 named in the contract would be entitled to enforce it. Further, if one is to speak of
13 "moral hazard," there is little doubt that a liberal "lost note" affidavit policy offers
14 a powerful incentive to the first note holder intentionally to discard the original
15 note and thereby avoid the cost and uncertainty of maintaining thousands of
16 original paper notes. It would be useful for the Drafting Committee to discuss
17 this subject, in light of the potential for fraud against a borrower an obligor.

18
19 2. Subsection (a) offers two alternatives to deal with the problem of lost or
20 destroyed promissory notes, both of which interface with the UCC Article 3
21 treatment of lost or destroyed negotiable instruments. The first alternative is
22 compatible with the 2002 amendments to Article 3. In specifying when a creditor
23 is entitled to enforce a negotiable instrument secured by mortgage
24 notwithstanding its inability to confirm possession of the instrument, subsection
25 (a) tracks the requirements of UCC § 3-309 (2002). In states that have adopted
26 the 2002 amendments to Article 3, Section 3-309 makes it clear that the person
27 who lost possession may be a predecessor of the creditor who seeks to enforce the
28 instrument.

29
30 3. Alternative #2 to subsection (a) is consistent with the text of UCC § 3-
31 309 prior to the 2002 amendments. Most states have not yet adopted the 2002
32 amendments. Most of these states follow the 1990 Official Text of Article 3. In
33 these states there are a few cases holding that the affidavit must be signed by the
34 person who lost the note. See, e.g., Atlantic Nat. Trust, LLC v. McNamee, 984
35 So. 2d 375 (Ala. 2007) (examining prior cases; holding that assignee of
36 promissory note that was not in possession when lost may enforce the note).
37 Alternative #2 requires the creditor who forecloses be the person who lost or
38 destroyed the note and who executes the affidavit.

39
40 4. In some states, the circumstances in which a creditor is allowed to
41 enforce an unavailable instrument are broader than under either the 2002 version
42 or the earlier version of UCC § 3-309. E.g., Va. Code § 55-59.1(B) ("[i]f a note or
43 other evidence of indebtedness secured by a deed of trust is lost or for any reason
44 cannot be produced"). In some states, the circumstances are more restricted

1 because the creditor's affidavit must attest to additional facts. E.g., Md. Code §
2 7-105.1 (affidavit not sufficient unless it "(1) Identifies the owner of the debt
3 instrument and states from whom and the date on which the owner acquired
4 ownership; (2) States why a copy of the debt instrument cannot be produced; and
5 (3) Describes the good faith efforts made to produce a copy of the debt
6 instrument.").

7
8 5. When the loan documents executed by the parties did not include a
9 negotiable instrument, the creditor seeking to foreclose may or may not possess
10 an original writing or record (including a counterpart) that evidences the
11 obligation. This section does not require an affidavit for a creditor who lacks
12 possession of such an original record. Some states require "lost note affidavits"
13 under these circumstances. E.g., Va. Code § 8.01-32 ("any past-due lost bond,
14 note, contract, open account agreement, or other written evidence of debt"); Va.
15 Code § 55-59.1(B) ("note or other evidence of indebtedness").
16

17 6. This section does not discuss the evidentiary effect of the affidavit in
18 judicial proceedings. Some states have statutory law on point. For example, an
19 Alabama statute provides that a lost note affidavit "must be received as
20 presumptive evidence both of the contents and loss or destruction of such
21 instrument, unless the defendant by answer, verified by affidavit, denies the
22 execution of such bond, note or bill or the endorsement, acceptance, or the
23 contents thereof, in which case proof of such execution, endorsement, acceptance,
24 or contents must be made by the plaintiff." Ala. Code § 6-5-284.
25

26 7. Some statutes dealing with lost note affidavits appear to require an
27 affidavit only if the creditor is unable to produce the original *or a copy* of the
28 instrument.
29

30 8. Subsection (b) follows UCC § 3-309(b), which requires adequate
31 protection for the obligor from the risk that at some point in the future the
32 instrument will surface and its possessor will assert the right to be paid. (UCC §
33 3-309(b) was not affected by the 2002 amendments to Article 3.) Subsection (b)
34 requires that the affidavit include a written indemnity, binding the creditor, to
35 protect all obligors against the risk that a person other than the creditor will seek
36 to enforce the instrument. This indemnity serves to reinforce the rights that the
37 obligor already has under principles of restitution and unjust enrichment. See,
38 e.g., Restatement (Third) of Restitution and Unjust Enrichment § 6 (2011):
39 "*Payment Of Money Not Due*. Payment by mistake gives the payor a claim in
40 restitution against the recipient to the extent payment was not due." In appropriate
41 cases, a court may require a bond in addition to a written indemnity.
42

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

44 (a) Mortgaged property may be sold at a public sale only after giving a commercially

1 reasonable public advertisement of the sale. ~~If the sale is postponed, a commercially reasonable~~
2 ~~notice of postponement must be given.~~

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

4 (1) the name of the ~~borrower~~homeowner and, if not the same, the name of the
5 person who signed the mortgage agreement;

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

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

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

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

12 (6) the amount of the ~~debt~~obligation, including ~~cost~~expenses of foreclosure, to be
13 satisfied by proceeds of the sale;

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

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

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

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

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

23 (d) The public advertisement, or other information pertaining to the sale, may be posted

1 at the location of the mortgaged property.

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

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

9 (2) For a newspaper advertisement, the timing of publication is commercially
10 reasonable if published once per week for three consecutive weeks before the sale, with the first
11 publication not more than 30 days before the sale.

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

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

17 (f) A copy of the public advertisement shall be sent to the ~~borrower~~homeowner and to
18 any obligor. The notice of public advertisement may be sent with the notice of commencement
19 of foreclosure or may be sent separately.

20 (g) The person conducting the sale may postpone or cancel the sale for any cause the
21 person considers appropriate. Announcement of a postponement must include the time and
22 location of the rescheduled sale. If oral announcement of the postponement is made at the time
23 and place advertised for the sale, a new public advertisement is not required unless the sale is

1 postponed for longer than thirty (30) days beyond the date originally advertised.

2 3 **Reporters' Drafting Notes**

4
5 1. This section allows a public sale of the mortgaged property only if the
6 creditor first gives a commercially reasonable public advertisement. The purpose
7 is to ensure that the public has a meaningful opportunity to learn of the proposed
8 sale in order to appear and engage in competitive bidding. This section supersedes
9 existing state laws covering advertisements for public sales for all foreclosures
10 that are within the scope of this [act].
11

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

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

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

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

39 6. Subsection (c) adopts a bright-line rule with respect to legal descriptions
40 of the real property and recording information. The failure to include such
41 information does not make the public advertisement insufficient. This
42 information is seldom of importance to a person who reads a foreclosure
43 advertisement for the purpose of deciding whether the person has potential
44 interest. Anyone who develops a potential interest is highly likely to investigate

1 further before appearing at the sale to bid. That investigation may include title
2 information, which will disclose the legal description and recording references for
3 the mortgage and other recorded instruments in the chain of title, and typically
4 will include other information as well bearing on the property.
5

6 7. Subsection (d) authorizes the creditor to post the public advertisement
7 or a sign on the property, regardless of whether that right is reserved in the
8 mortgage. [Note: Is this appropriate? Do foreclosure signs including “bank sale”
9 signs have negative consequences for the neighborhoods? What about zoning and
10 HOA covenants that may restrict or limit signs?]
11

12 8. Subsection (e) creates four safe harbors. First, the method of
13 publication is commercially reasonable if the creditor publishes the public
14 advertisement both in a local newspaper and with an appropriate Internet website.
15 The Internet site may be one operated by the newspaper or by any other person,
16 whether or not located in the jurisdiction where the mortgaged property is located.
17 The Internet site, however, must be one that has characteristics suggesting that
18 interested members of the public are likely to find and to read the posting. There
19 are two safe harbors with respect to timing for newspaper advertisements and
20 Internet advertisements, which seek to ensure public access to the advertisement
21 for approximately one month preceding the date of sale. Last, a safe harbor for
22 postponed sales allows a shorter length of time than required for the safe harbor
23 for the original notice because members of the public with potential interest in the
24 property had the opportunity to read the original notice.
25

26 **SECTION 405. NOTICE OF SALE, POSTPONEMENT OF SALE AND**
27 **CANCELLATION OF SALE.**
28

29 (a) The creditor shall give the ~~borrower~~homeowner and any obligor written notice
30 of the date, time, and place of the scheduled foreclosure sale. ~~If the sale is postponed, the~~
31 ~~creditor shall give the borrower a new written notice of the date, time and place of the~~
32 ~~sale.~~ Notice of sale, ~~including postponed sales,~~ shall be delivered by first class mail to
33 the ~~borrower's~~ last known addresses es of the homeowner and any obligor, and by personal
34 delivery to the property address. Notice of sale shall be delivered at least 30 days prior to
35 the sale date, ~~or the postponed sale date.~~

36 (b) If the sale is postponed pursuant to Section 404(g), the creditor shall promptly
37 give the homeowner and any obligor a commercially reasonable notice of the

1 postponement. If the sale is cancelled pursuant to Section 404(g), the creditor shall
2 promptly notify the homeowner and any obligor by first class mail as provided in
3 subsection (a).

4 **Drafter's Notes to the alternatives presented in Sections 406 and 407**

5 ~~—These alternatives comprise what the drafters believe to be a rational range~~
6 ~~of options on the question of whether confirmation of a foreclosure sale is~~
7 ~~appropriate.~~

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

13
14 ~~**Alternative 1** is continued in Section 407 of this draft, and addresses the need for~~
15 ~~a confirmation hearing in a non-judicial foreclosure state. It requires judicial~~
16 ~~confirmation of the sale after a nonjudicial sale if the creditor desires to obtain a~~
17 ~~deficiency judgment against an obligor.~~

18
19 ~~The Reporters are not aware of any nonjudicial foreclosure state that requires~~
20 ~~judicial confirmation of a foreclosure sale as a general matter. North Carolina~~
21 ~~requires a lender who sells property pursuant to a power of sale to file with the~~
22 ~~clerk of the superior court "a final report and account of his receipts and~~
23 ~~disbursements within 30 days after the receipt of the proceeds of such sale." N.C.~~
24 ~~Gen. Stat. § 45-21.33. The lender also must file copies of notices, and the clerk is~~
25 ~~required to audit and record the account of sale. The North Carolina statute,~~
26 ~~however, does not require confirmation of the sale.~~

27
28 ~~A number of nonjudicial foreclosure states require confirmation of the foreclosure~~
29 ~~sale if the creditor wishes to obtain a deficiency judgment. Two examples are~~
30 ~~Georgia and Texas. See Ga. Code § 44-14-161; Tex. Property Code § 51.003.~~
31 ~~Georgia requires a report of the sale to the superior court within 30 days of the~~
32 ~~sale, followed by a confirmation hearing and the issuance of a confirmation order~~
33 ~~if the court finds the property sold for "its true market value." Under a Texas~~
34 ~~statute adopted in 1991, an action to recover a deficiency must be brought within~~
35 ~~two years of the sale. If requested by the borrower, the court determines the fair~~
36 ~~market value. If the fair market value exceeds the foreclosure sale price, that~~
37 ~~value is used instead of the sale price to calculate the deficiency.~~

38
39 ~~**Alternative 2**, set forth below, is presented in a newly drafted provision granting~~
40 ~~the lender an optional right to seek judicial confirmation in order to establish the~~
41 ~~conclusive effect of a sale and thereby promote the certainty of title which~~
42 ~~subsequent purchasers may require. This alternative does not mandate judicial~~
43 ~~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) 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) 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 named in the order without the necessity of any further proceedings or instruments. A certificate of sale shall be recorded within _____ days after the later of the order of confirmation or payment in full of the price.~~

Reporters' Drafting Notes

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.

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.”

——— 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 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.

Add the following notes after section 405 -

Reporters' Drafting Notes

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

2. Once a foreclosure sale is scheduled, the creditor may elect to postpone or cancel the sale pursuant to Section 404(g). A postponement might also take place for other reasons, such as a judicial order or an automatic stay in bankruptcy. Homeowners and obligors should receive prompt notice of any postponement or cancellation. The rules of subsection (a) do not apply to notices of postponement or cancellation. Subsection (b) covers notices of postponement and cancellation, requiring that the notice be commercially reasonable under the facts and circumstances. A postponement may be as short as one day. An oral announcement of the postponement, made at the time and place of the originally scheduled sale, would suffice if the homeowner and any obligor were present, in which event no written or additional notice would be necessary.

**SECTION 407406. [Continuation of Alternative #1]—OPTIONAL
CONFIRMATION OF SALE AFTER NONJUDICIAL FORECLOSURE
PURSUANT TO [POWER OF SALE]; DEFICIENCY JUDGMENT.**

(a) If the price at which the mortgaged property is sold at an auction sale pursuant to nonjudicial foreclosure, 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. A number of nonjudicial foreclosure states require by requiring 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.

SECTION 406-407. ~~[Alternative #2]~~ OPTIONAL CONFIRMATION OF SALE IN JUDICIAL FORECLOSURE.

(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 [or 407](#) 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. 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.

ARTICLE 5

OTHER PROVISIONS

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

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

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

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

Reporters' Drafting Notes

1. The Section authorizes a transfer from the ~~borrower~~homeowner 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 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

1 innovation here is to discharge junior liens on the property without the need for a
2 foreclosure sale.

3
4 2. This Section does not specify a minimum consideration to be received
5 | by the borrowerhomeowner in exchange for the borrowerhomeowner's agreement
6 | to transfer the mortgaged property in satisfaction of the obligation. The sole
7 | exception is that if the borrowerhomeowner is in possession and there are third
8 | parties entitled to notification of the proposed transfer, the agreement may not
9 | require the borrowerhomeowner to vacate possession prior to the expiration of the
10 | period for notified persons to submit an objection.

11
12 3. As suggested in the prior paragraph, the Reporters, Chair and ABA
13 | advisor note that the consensus of the discussion at the November meeting
14 | appeared to be that there was no apparent justification for mandating that a
15 | 'negotiated transfer' under this section include any statutory minimum
16 | consideration to be paid to the borrowerhomeowner; this draft accordingly deletes
17 | reference to that original requirement in this section.

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

26
27 **SECTION 502. NOTICE OF NEGOTIATED TRANSFER.**

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

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

35 (1) any person from which the creditor has received, before the
36 | borrowerhomeowner and the creditor agreed to the proposed transfer, an authenticated

1 notification of a claim of an interest in the mortgaged property; and

2 | (2) any person that, 10 days before the ~~borrower~~homeowner and the creditor
3 agreed to the proposed transfer, held an interest in the mortgaged property, perfected by a filing
4 in the public records, that is subordinate to the mortgage that is the subject of the proposed
5 transfer.

6 **Reporters' Drafting Notes**

7
8 1. This section is based on UCC § 9-621, which provides for a notification
9 procedure for an acceptance of personal property by a secured party in full or
10 partial satisfaction of a secured obligation.

11
12 2. Subsection (a) provides for the court to notify parties to the foreclosure
13 | proceeding of an agreement proposed by the ~~borrower~~homeowner and creditor for
14 a transfer in full satisfaction of the debt or other obligation. If there are no parties
15 | to the action, other than the ~~borrower~~homeowner and the creditor, then there is no
16 one to notify. Holders of subordinate interests in the mortgaged property should
17 have been joined as necessary parties to the foreclosure action.

18
19 3. Subsection (b) provides for the creditor to notify persons who have
20 subordinate interests in the mortgaged property of an agreement proposed by the
21 | ~~borrower~~homeowner and creditor for a transfer in full satisfaction of the
22 obligation. Such subordinate interest holders may have their rights terminated by
23 the negotiated transfer, and therefore they have the right to request protection
24 pursuant to Section 503.

25 **SECTION 503. HEARING ON OBJECTIONS TO NEGOTIATED TRANSFER.**

26
27
28 (a) If the court receives an effective notification of objection from any person holding an
29 interest in the mortgaged property that would be affected by the negotiated transfer, the court
30 shall promptly schedule a hearing regarding that objection.

31 (b) If, at the hearing, the creditor who is a party to the proposed transfer demonstrates by
32 appraisal or otherwise that that there is no equity in the mortgaged property available to satisfy
33 the interests of the objecting interest holder, the court shall overrule the objection and approve
34 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~~homeowner'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~~homeowner's rights in the mortgaged property , except for any right of the ~~borrower~~homeowner to continue to occupy the mortgaged property pursuant to an agreement between the ~~borrower~~homeowner 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

1 (4) terminates any other subordinate interest.

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

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

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

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

16 (f) [Nothing in Sections 501 through 504 prevents a ~~borrower~~homeowner and creditor
17 from entering into any other form of agreement on mutually agreeable terms, but the effects of a
18 negotiated transfer described in these sections do not apply to an agreement that fails to state that
19 the agreement is made pursuant to section 501.] (g) Nothing in this article affects the rights of
20 any creditor holding an interest in the mortgaged property which is senior to the interests of the
21 creditor that takes title to the mortgaged property pursuant to this section.

22 **Reporters' Drafting Notes**

23
24 1. This section is based upon UCC § 9-622, which specifies the effect of
25 acceptance of personal property mortgaged property by a secured party in full or

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

9
10 2. Paragraphs (2) through (4) indicate the effects of a transfer on various
11 property rights and interests. Under paragraph (2), the creditor acquires “all of the
12 borrowerhomeowner’s rights in the mortgaged property.” Under paragraph (3), all
13 junior encumbrances are discharged. Paragraph (4) provides for the termination of
14 other subordinate interests. Under existing law, a deed-in-lieu of foreclosure
15 accepted by a creditor does not terminate subordinate mortgages, subordinate
16 liens, or other subordinate property rights. This Act changes by result by
17 authorizing a transfer in full satisfaction of the obligation, which terminates junior
18 interests.

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

25
26 4. The last sentence of subsection (f) is bracketed to reflect at least one
27 policy choice that the Reporters, Chair and the ABA Advisor believe should be
28 made by the Committee.

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

35
36 The converse of the policy is reflected in this observation from Reporter
37 Smith:

38
39 “I believe the better policy is to displace existing state laws on “deed in
40 lieu” transactions within the scope of this act. Among other problems, if
41 we keep both, there will be transactions in which the lender has not clearly
42 documented whether the intent to proceed under this act or under other
43 law.”
44

1 **SECTION 505. ABANDONED PROPERTY.**

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

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

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

7 | ~~(3)~~ (1) One or more doors to the mortgaged property are boarded up, closed off,
8 | smashed through, broken off, unhinged, or continuously unlocked; or multiple windows are
9 | boarded up or closed off; or multiple window panes are broken.

10 | ~~(4)~~ (2) Gas service, electric service, water service, or other utility service to the
11 | mortgaged property has been terminated; or utility consumption is extremely low so as to
12 | indicate that the property is not regularly occupied.

13 | ~~(5)~~ (3) Rubbish, trash, or debris has accumulated on the mortgaged property.

14 | ~~(6)~~ (4) The mortgaged property is deteriorating ~~and is either below or in imminent~~
15 | ~~danger of falling below minimum community standards for~~ so as to constitute a serious threat to
16 | public health or safety ~~and sanitation.~~

17 | ~~(7)~~ (5) The creditor has changed the locks on the mortgaged property and for at least
18 | 30 days after the changing of the locks the ~~borrower~~ homeowner has not requested entrance to the
19 | mortgaged property.

20 | ~~(8)~~ (6) There exist one or more written statements, including documents of
21 | conveyance, signed by the ~~borrower~~ homeowner that indicate a clear intent to abandon the
22 | mortgaged property.

23 | ~~(9)~~ (7) The police or sheriff's office has received at least two reports of trespassers

1 on the mortgaged property or of vandalism or other illegal acts being committed on the
2 mortgaged property.

3 (10-8) The ~~borrower~~homeowner has died and there is no evidence that a survivor
4 of the ~~borrower~~homeowner is in actual possession of the mortgaged property.

5 (b) In a judicial foreclosure proceeding, the plaintiff or the city or [county] in which the
6 mortgaged property is located may petition the court for a determination that the mortgaged
7 property is abandoned property. ~~The city or other governmental entity in which~~If the mortgaged
8 property is located in a common interest community, the association that governs that
9 community shall have the right to intervene in the proceeding. ~~After notice and a hearing, the~~
10 ~~court may issue an order finding that the mortgaged property is abandoned property.~~

11 (c) In a judicial foreclosure proceeding, after notice and a hearing, the court may issue an
12 order finding that the mortgaged property is abandoned property. In a nonjudicial foreclosure
13 proceeding, the creditor or the city or [county] in which the mortgaged property is located may
14 seek a determination that the mortgaged property is abandoned property by submitting a request
15 accompanied by an affidavit to [name of official]. The ~~creditor~~person seeking the determination
16 must send a ~~copy of the request and affidavit~~notification to the ~~borrower~~homeowner and other
17 persons entitled to notice under Section 201. The notification must include a copy of the request
18 and the affidavit, must describe the consequences that will follow from a determination of
19 abandonment, and must inform the recipient has the right to contact the [name of official] to
20 obtain further information or to object to the proposed determination of abandonment. After
21 personal inspection of the mortgaged property, which shall include entry into the dwelling unit,
22 the [name of official] may issue a written determination finding that the mortgaged property is
23 abandoned property. The [name of official] shall send the written determination to the creditor,

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

4 **Reporters' Drafting Notes**

5
6 1. This Act authorizes an expedited foreclosure procedure for abandoned
7 properties for both judicial foreclosure and for nonjudicial foreclosures.¹ An
8 expedited procedure is appropriate for two reasons. First, the
9 ~~borrower~~homeowner is no longer making a valuable economic use of the property
10 to provide shelter for the ~~borrower~~homeowner or the ~~borrower~~homeowner's
11 family or someone claiming under the ~~borrower~~homeowner, such as a tenant. A
12 foreclosure sale will not result in a possessor being forced to relocate to other
13 housing. Second, properties that are facing foreclosure and that are vacant have
14 significant negative impacts on neighborhoods and the surrounding communities.
15 Vacancies reduce the market values of neighboring properties. Neighborhood
16 crime increases. The vacant properties tend to suffer from lack of repair and
17 maintenance, creating public health risks, including infestations by vermin,
18 mosquitoes, and other insects. There are fiscal impacts on local governments, who
19 find property taxes on vacant properties often become delinquent; yet the
20 governments are faced with added expenses to provide essential services to
21 blighted neighborhoods, such as police and fire protection. By providing for an
22 expedited foreclosure procedure, this Act seeks to return abandoned properties to
23 the stock of occupied, well-maintained housing as soon as reasonably possible.
24

25 2. The conditions giving rise to prima facie evidence of abandonment set
26 forth in Subsection (a)~~(1)~~ through (a)~~(9)~~ closely track the criteria set forth in Ind.
27 Code § 32-30-10.6-5(a)~~(1) through (9)~~ (effective March 16, 2012). A government
28 agency's issuance of a determination that the mortgaged property is abandoned by
29 itself constitutes prima facie evidence of abandonment. The government's
30 determination, finding, or order might not use the word "abandoned"; it might, for
31 example, refer to the property as vacant. Of course, the homeowner or another
32 person has the right to challenge the correctness of the governmental
33 determination.
34

35 With respect to ~~The presence of one or more of~~ the statutory conditions
36 listed in Subsection (a)(1) through (a)(8), the presence of [three] or more of such
37 conditions constitutes prima facie evidence, giving rise to a presumption of
38 abandonment. Such conditions are not conclusive on the issue of abandonment.
39 Many residential properties will exhibit at least one such condition, when the
40 homeowner is still in possession of the property. If the ~~borrower~~homeowner or
41 another person holding under the ~~borrower~~homeowner is in actual possession of

¹ Defer for later discussion by the Committee maintenance and repair obligations of ~~borrower~~homeowners and creditors with respect to abandoned property.

1 the mortgage property, the property is not abandoned notwithstanding the
2 existence of such conditions. Likewise, mortgaged property may be abandoned
3 under this Section notwithstanding the absence of any of the statutory conditions.
4

5 3. Mortgaged property often becomes vacant, both under standard
6 mortgage and reverse mortgage transactions, when the ~~borrower~~homeowner dies.
7 Under Subsection (a)(~~118~~) proof of death of the ~~borrower~~homeowner constitutes
8 prima facie evidence that the mortgaged property is abandoned, provided that
9 there is no evidence that an heir or other beneficiary of the ~~borrower~~homeowner's
10 estate is in actual possession. Of course if there are multiple
11 ~~borrower~~homeowners, this condition is met only if all the ~~borrower~~homeowners
12 have died.
13

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

22 Judicial review of the decision is available to any interested person.
23 Subsection (c) does not specify the nature of that actions, which in many
24 jurisdictions will be a mandamus action.
25

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

27 (a) If the court issues an order finding that the mortgaged property is abandoned property
28 pursuant to Section 505(b) and it has previously issued, or at the same time issues, a judgment of
29 foreclosure, then at the same time the court shall order an expedited sale of the property. The
30 order shall call for public sale of the property no sooner than [30] days and no later than [60]
31 days after entry of the order.

32 (b) In a nonjudicial foreclosure proceeding, upon the issuance of a written determination
33 that the mortgaged property is abandoned property pursuant to Section 505(c), the creditor may
34 conduct an expedited sale of the property. A public sale of the property may take place no sooner
35 than [30] days and no later than 60 days after the issuance of the written determination, unless
36 judicial review of the determination is commenced. The creditor shall comply with the notice

1 requirements of Section 405, except that [15] days advance notice of the sale is sufficient.

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

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

11 Reporters' Drafting Notes

12
13 1. This Section provides for an expedited public sale of the mortgaged
14 property after a determination that the mortgaged property is abandoned. In a
15 judicial foreclosure, the court must order the sale to take place no longer than ____
16 days after the court enters its order finding the property to be abandoned, unless
17 the creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor
18 may select the date, provided it is no sooner than ____ days after the written
19 determination of abandonment.

20
21 2. This Section does not authorize a disposition of abandoned property
22 other than public sale, but other dispositions are available under other sections of
23 this Act. For example, the ~~borrower~~homeowner and creditor may agree to a
24 negotiated transfer to the creditor in lieu of foreclosure pursuant to Sections 501
25 to 504 [cash for keys agreement].

26
27 3. Once a creditor decides to take advantage of the expedited foreclosure
28 procedure allowed by this Section, there is a public interest in ensuring that the
29 property becomes occupied as soon as reasonably possible. For this reason
30 subsection (c) does not allow the creditor to suspend indefinitely its efforts to
31 consummate the foreclosure. There may be exceptional circumstances in which it
32 is not feasible to hold the foreclosure sale within 60 days of the judicial order or
33 written determination finding the property to be abandoned, as required by
34 subsection (a) and (b). In that event, subsection (c) provides an outside limit of
35 [four months] to complete the sale.
36

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

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

16
17 4. In states that afford the borrower/homeowner and other persons a
18 statutory right of redemption after completion of a foreclosure sale, subsection (d)
19 serves to terminate those redemption rights.

20
21 5. On February 8, 2013, Illinois enacted detailed provisions providing for
22 expedited foreclosure for abandoned properties. 2012 Ill. Legis. Serv. P.A. 97-
23 1164 (S.B. 16). The core provision is set forth below:

24
25 § 15-1505.8. Expedited judgment and sale procedure for abandoned residential
26 property.

27 (a) Upon motion and notice, the mortgagee may elect to utilize the
28 expedited judgment and sale procedure for abandoned residential property stated
29 in this Section to obtain a judgment of foreclosure pursuant to Section 15-1506.
30 The motion to expedite the judgment and sale may be combined with or made part
31 of the motion requesting a judgment of foreclosure. The notice of the motion to
32 expedite the judgment and sale shall be sent by first-class mail to the last known
33 address of the mortgagor, and the notice required by paragraph (1) of subsection
34 (l) of this Section shall be posted at the property address.

35 (b) The motion requesting an expedited judgment of foreclosure and sale
36 may be filed by the mortgagee at the time the foreclosure complaint is filed or any
37 time thereafter, and shall set forth the facts demonstrating that the mortgaged real
38 estate is abandoned residential real estate under Section 15-1200.5 and shall be
39 supported by affidavit.

40 (c) If a motion for an expedited judgment and sale is filed at the time the
41 foreclosure complaint is filed or before the period to answer the foreclosure
42 complaint has expired, the motion shall be heard by the court no earlier than
43 before the period to answer the foreclosure complaint has expired and no later
44 than 15 days after the period to answer the foreclosure complaint has expired.

45 (d) If a motion for an expedited judgment and sale is filed after the period

1 to answer the foreclosure complaint has expired, the motion shall be heard no
2 later than 15 days after the motion is filed.

3 (e) The hearing shall be given priority by the court and shall be scheduled
4 to be heard within the applicable time period set forth in subsection (c) or (d) of
5 this Section.

6 (f) Subject to subsection (g), at the hearing on the motion requesting an
7 expedited judgment and sale, if the court finds that the mortgaged real estate is
8 abandoned residential property, the court shall grant the motion and immediately
9 proceed to a trial of the foreclosure. A judgment of foreclosure under this Section
10 shall include the matters identified in Section 15–1506.

11 (g) The court may not grant the motion requesting an expedited judgment
12 and sale if the mortgagor, an unknown owner, or a lawful occupant appears in the
13 action in any manner before or at the hearing and objects to a finding of
14 abandonment.

15 (h) The court shall vacate an order issued pursuant to subsection (f) of this
16 Section if the mortgagor or a lawful occupant appears in the action at any time
17 prior to the court issuing an order confirming the sale pursuant to subsection (b–3)
18 of Section 15–1508 and presents evidence establishing to the satisfaction of the
19 court that the mortgagor or lawful occupant has not abandoned the mortgaged real
20 estate.

21 (i) The reinstatement period and redemption period for the abandoned
22 residential property shall end in accordance with paragraph (4) of subsection (b)
23 of Section 15–1603, and the abandoned residential property shall be sold at the
24 earliest practicable time at a sale as provided in this Article.

25 (j) The mortgagee or its agent may enter, secure, and maintain abandoned
26 residential property subject to subsection (e–5) of Section 21–3 of the Criminal
27 Code of 2012.

28 (k) Personal property.

29 (1) Upon confirmation of the sale held pursuant to Section 15–1507, any
30 personal property remaining in or upon the abandoned residential property shall
31 be deemed to have been abandoned by the owner of such personal property and
32 may be disposed of or donated by the holder of the certificate of sale (or, if none,
33 by the purchaser at the sale). In the event of donation of any such personal
34 property, the holder of the certificate of sale (or, if none, the purchaser at the sale)
35 may transfer such donated property with a bill of sale. No mortgagee or its
36 successors or assigns, holder of a certificate of sale, or purchaser at the sale shall
37 be liable for any such disposal or donation of personal property.

38 (2) Notwithstanding paragraph (1) of this subsection (k), in the event a
39 lawful occupant is in possession of the mortgaged real estate who has not been
40 made a party to the foreclosure and had his or her interests terminated therein, any
41 personal property of the lawful occupant shall not be deemed to have been
42 abandoned, nor shall the rights of the lawful occupant to any personal property be
43 affected.

44 (l) Notices to be posted at property address.

45 (1) The notice set out in this paragraph (1) of this subsection (l) shall be
46 conspicuously posted at the property address at least 14 days before the hearing

on the motion requesting an expedited judgment and sale and shall be in boldface, in at least 12 point type, and in substantially the following form:

**“NOTICE TO ANY TENANT OR OTHER LAWFUL
OCCUPANT OF THIS PROPERTY**

A lawsuit has been filed to foreclose on this property, and the party asking to foreclose on this property has asked a judge to find that THIS PROPERTY IS ABANDONED. The judge will be holding a hearing to decide whether this property is ABANDONED. IF YOU LAWFULLY OCCUPY ANY PART OF THIS PROPERTY, YOU MAY CHOOSE TO GO TO THIS HEARING and explain to the judge how you are a lawful occupant of this property. If the judge is satisfied that you are a LAWFUL OCCUPANT of this property, the court will find that this property is NOT ABANDONED. This hearing will be held in the courthouse at the following address, date, and time: . . .

IMPORTANT

This is NOT a notice to vacate the premises. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have. . . .

[Other required provisions of the notice criminalize intentional removal of the notice and trespass on the property.]

(2) The notice set out in this paragraph (2) of this subsection (1) shall be conspicuously posted at the property address at least 14 days before the hearing to confirm the sale of the abandoned residential property and shall be in boldface, in at least 12 point type, and in substantially the following form:

**“NOTICE TO ANY TENANT OR OTHER LAWFUL OCCUPANT OF
THIS PROPERTY**

A lawsuit has been filed to foreclose on this property, and the judge has found that THIS PROPERTY IS ABANDONED. As a result, THIS PROPERTY HAS BEEN OR WILL BE SOLD.

HOWEVER, there still must be a hearing for the judge to approve the sale. The judge will NOT APPROVE this sale if the judge finds that any person lawfully occupies any part of this property.

IF YOU LAWFULLY OCCUPY ANY PART OF THIS PROPERTY, YOU MAY CHOOSE TO GO TO THIS HEARING and explain to the judge how you are a lawful occupant of this property. You also may appear BEFORE this hearing and explain to the judge how you are a lawful occupant of this property.

If the judge is satisfied that you are a LAWFUL OCCUPANT of this property, the court will find that this property is NOT ABANDONED, and

1 there will be no sale of the property at this time.

2 This hearing will be held in the courthouse at the following address, date,
3 and time:

4
5 [Other required provisions of the notice criminalize intentional removal of
6 the notice and trespass on the property.]
7

8
9 **SECTION 507. MAINTENANCE OF ABANDONED PROPERTY.**

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

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

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

20 (d) The creditor's obligation to maintain abandoned property shall continue until the
21 conveyance of the property through foreclosure to a purchaser other than the creditor or until the
22 creditor records a release of its mortgage.

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

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

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

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

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

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

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

20 **Reporters' Drafting Notes**

21
22 1. This Section requires creditors to maintain abandoned properties under
23 certain circumstances. The obligation may arise based upon action of the creditor
24 or action of the municipality or other governmental entity where the property is
25 located. The creditor does not become obligated to maintain merely by
26 commencing foreclosure proceedings at a time when the dwelling unit is vacant.
27 Rather, the obligation arises when the creditor seeks to use the expedited

1 foreclosure procedure authorized by Section 505 and obtains either a judicial
2 order or official determination that the property is abandoned. Under subsection
3 (c) the obligation may also arise any time after the creditor has commenced
4 foreclosure proceedings if the municipality or other local governmental entity
5 cites the property as both abandoned and presenting a threat to public safety or
6 health.

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

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

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

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

40 41 **SECTION 508. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.**

42 **PREAMBLE TO REVISED SECTION 508.**

43 The Committee will recall that Section 3-116 of the Uniform Common Interest
44 Ownership Act provides the unit owners association a super priority – that is, priority over first

1 mortgages - for six months of regular common expense assessments, plus court costs and legal
2 fees, when those common charges are unpaid.

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

9
10 Of those four original alternatives, the first provided super priority for all regular periodic
11 common charges plus interest – compared to the existing six months - , but did not give super
12 priority for any association’s legal fees, for special assessments or for other charges.

13
14 The second alternative proposed a limitation on the priority claim of the association’s
15 legal fees, but was otherwise identical to alternative 1.

16
17 Alternative # 3 proposed an automatic increase in the super priority lien for all delayed
18 foreclosures, while Alternative 4 provided the association a right to accelerate its own
19 foreclosure actions for non-payment of common charges, as well as to seek acceleration of a
20 foreclosure of the first mortgage, in order to minimize the association’s own lost common
21 charges which would be wiped out by the foreclosure.

22
23 Upon consideration, it may simplify consideration of this issue by the Drafting
24 Committee to consider only a single proposed section. In drafting that section, we sought
25 to take into account much of the discussion at the November meeting, as well as the
26 thoughts of association advocates and other views expressed by lenders.

27
28 Finally, and separate from consideration of this section, it may be appropriate for
29 the Drafting Committee to consider the utility of authorizing creditors who provide
30 mortgage financing to purchasers of dwelling units in common interest communities to,
31 first, require those purchasers to escrow funds for common charges as well as real estate
32 taxes and casualty insurance; and, second, to require that home owner associations accept
33 periodic payments of common charges from lenders –say, quarterly instead of monthly –
34 rather than directly from the unit owner, in order to minimize the lenders’ risk of failed
35 common charge payments.

36
37 **SECTION 508. [NEW] LIEN FOR SUMS DUE ASSOCIATION;**
38 **ENFORCEMENT.**

39 **Drafter’s Note**

40
41 Other than necessary style matters, this section incorporates all the
42 relevant language of Sec. 3-116 of the Uniform Common Interest Ownership Act,
43 with two exceptions:

1
2 First, the highlighted text in subsection (c) limits the association's legal
3 fees in an uncontested matter to a sum equal to 3 months of the association's
4 common charges;
5

6 Second, the highlighted text in subsection (d) provides that if a mortgage
7 foreclosure is not completed in 12 months, then, in addition to the existing 6
8 month priority granted to associations, the association would thereafter begin to
9 add a month's priority for every additional month, beginning in month 13.
10

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

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

26 (c) A lien under this section is also prior to first mortgages described in subdivision (2)
27 of subsection (b) to the extent of (1) the "priority amount," that is, an amount equal to the
28 common expense assessments based on the periodic budget adopted by the association pursuant

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

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

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

(a) A borrowerhomeowner 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 borrowerhomeowner 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][may] award reasonable attorney's fees and costs to a

1 ~~borrower~~homeowner who prevails in an action under this Section.

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

6 **Reporters' Drafting Notes**

7
8 Prior to confirmation of the foreclosure sale, the ~~borrower~~homeowner may raise a
9 material violation of the statute, for example a materially inaccurate notice of the amounts
10 needed to cure a default, to prevent the foreclosure sale (or confirmation), until the violation has
11 been corrected and remedied. After a foreclosure sale the ~~borrower~~homeowner's remedy for
12 violations of the statute is to seek damages from the foreclosing creditor, and a bona fide sale
13 purchaser is entitled to rely on the conclusive effect under Section 407. If a violation by the
14 creditor can be cured timely so that full compliance is achieved, the foreclosure may proceed.

15
16 CHAIR'S NOTE – the substance of the following sections 602 through 607
17 (excluding the alternative provisions regarding abrogation of the holder in due
18 course doctrine) were prepared, at my request, by observer George Holler. The
19 Reporters and I have edited Attorney Holler's text to conform to Conference
20 style, with the result that considerable portions of his original text have been
21 moved to the Reporter's Comments. I also deleted certain other provisions of the
22 original text which I felt were inherent in the authority of a court and need not be
23 restated.

24 **SECTION 602 –ADDITIONAL DEFENSES TO FORECLOSURE**

25
26
27 (a) In addition to the rights granted a homeowner under Section 601, and without
28 limiting any rights existing under common law or by statute, the following are defenses to
29 foreclosure:

30 1. Payment or tender of payment;

31 2. Discharge;

32 3. Cure, in accordance with Section 204 of this Act.

- 1 4. Any defense that the homeowner or obligor could assert under applicable contract
2 law, including forgery, lack of capacity, duress, absence or failure of
3 consideration, fraud, misrepresentation, unconscionability, failure of a condition
4 precedent, or other generally applicable contract defenses.
- 5 5. Any equitable defenses such as estoppel, laches or unclean hands.
- 6 6. Release by cancellation of debt.
- 7 7. A violation by a creditor, servicer, their predecessors in interest, or their agents of
8 [insert state UDAP and other relevant consumer protection statutes applicable to
9 residential mortgage obligors], or Chapter 41 of Title 15 of the United States
10 Code.
- 11 8. If a mortgage is defective in that it does not comply with [insert state mortgage
12 execution requirement statute], and has not been cured under [insert state curative
13 statute] that non-compliance is a defense to foreclosure entitling the homeowner
14 or obligor to an order by the court releasing the mortgage.
- 15 9. If, at the time the loan was made, the creditor or its predecessor in interest was not
16 licensed under [insert state mortgagee licensing statute] or was not legally
17 authorized to make the loan under federal law, that lack of licensing or legal
18 authorization is a defense to foreclosure entitling the homeowner or obligor to an
19 order by the court releasing the mortgage.
- 20 10. Breach of the duty of good faith and fair dealing.

21 **SECTION 603 – PROCEDURE FOR ASSERTING DEFENSES IN A NON-JUDICIAL**
22 **FORECLOSURE**
23

24 (a) In a non-judicial foreclosure proceeding, a homeowner or obligor may bring a separate
25 action against a creditor and or its agents asserting a defense to foreclosure. The filing of an

1 action under this Section by a homeowner or obligor shall operate as an automatic stay,
2 applicable to all entities, of any foreclosure, pending a court hearing or order lifting the stay.

3 (b) If the obligor or homeowner establishes a defense to foreclosure or a violation of this act,
4 the court [shall] [may] award the obligor or homeowner attorney's fees and costs pursuant to
5 Section 606(a)(3).

6 (c) In an action under this section, if the court determines that a valid defense to the
7 foreclosure action exists, the court may enter whatever order is just and equitable under the
8 circumstances.

9 **SECTION 604– ENFORCEMENT BY ATTORNEY GENERAL**

10 The attorney general may bring an action to enjoin a pattern of violating this statute. In
11 such an action the court may issue an injunction or order, which may include requiring steps to
12 be taken to remedy violations or the payment of damages to aggrieved homeowners, the
13 reasonable costs of the attorney general's investigation, or additional funds for consumer
14 education programs, training, and other activities designed to protect against violations of this
15 act. The injunction or order may bind the creditor, servicer, their predecessors in interest, or their
16 agents.

17 **SECTION 605 – CERTAIN ACTS PROHIBITED**

18 A creditor, servicer, or its agent shall not:

19 (a) Discourage, either overtly or by implication, the homeowner or obligor from
20 participating in any loss mitigation or facilitation;

21 (b) Communicate directly with any homeowner or obligor represented by counsel without
22 express permission from that counsel; or

23 (c) Misrepresent any aspect of the foreclosure process,

1 **SECTION 606 – CIVIL LIABILITY**

2 (a) When a homeowner or obligor establishes a defense to foreclosure or when any creditor,
3 servicer, or its agent fails to comply with any provision of this act with respect to any obligor or
4 homeowner, such creditor, servicer, or agent is liable to such obligor or homeowner for:

5 (i) Any actual damage sustained by such obligor or homeowner;

6 (ii) Such additional damages as the court may allow, but not exceeding [\$15,000.00] per
7 obligor and homeowner.

8 (iii) In the case of any successful action to enforce the foregoing liability or establish a
9 defense to foreclosure, the costs of the action or defense, together with a reasonable attorney's
10 fee as determined by the court.

11 (b) In determining the amount of liability under subsection (a)(2), the court shall consider,
12 among other relevant factors:

13 (i) The frequency and persistence of noncompliance by the creditor, servicer, or agent;

14 (ii) The nature of such noncompliance, and

15 (iii) The extent to which such noncompliance was intentional.

16 **SECTION 607 – ABROGATION OF THE HOLDER IN DUE COURSE RULE IN**
17 **FORECLOSURES**

18
19 [Alternative # 1] (a) Nothing in this act shall be deemed to abrogate the rights of a
20 holder in due course to pursue its rights against an obligor on an instrument. Notwithstanding
21 the foregoing, a creditor who forecloses under this act is subject to all claims and defenses that
22 the homeowner or obligor could assert against the creditor who first owned the obligation.

23 [Alternative # 2] (a) Notwithstanding [insert reference to State UCC 3-305], when a
24 party with the right to foreclose under Section 401 initiates foreclosure, the homeowner or
25 obligor may assert any available defense, including those set forth in Section 602 [Alternative #

1 3: provided, that:

2 (a) a homeowner may not assert a defense against a party entitled to foreclose which
3 could not, because of any applicable statute of limitations, be asserted against the original holder
4 of the note for which the mortgage serves as collateral; and

5 (b) a party entitled to foreclose who is not the original holder of the note for which the
6 mortgage serves as collateral shall not be liable for more than the outstanding principal amount
7 of the note for which the mortgage serves as collateral unless that person is the original holder of
8 that note.]

9 [Alternative # 4: (c) A [creditor] [party entitled to foreclose] who is not the original
10 holder of the note for which the mortgage serves as collateral is not subject to any claims and
11 defenses (other than the defenses to which a holder in due course is liable under [insert reference
12 to UCC Section 3-_____] unless that note was executed after the date this [act] became effective in
13 this state.]

14 15 Reporters' Drafting Notes

16
17 1. Section 602 lists a broad range of potential defenses available to a homeowner; they
18 include:

- 19
20 a. Payment as provided in UCC Sections 3-602 and § 3-603 and other applicable law;
21 b. Discharge as provided in UCC Section 3-604 and other applicable law.
22 c. Cancellation of debt might include, for example, a case where a creditor, servicer, their
23 predecessors in interest, or their agents file a Form 1099-C, "Cancellation of Debt" with
24 the Internal Revenue Service; such a filing would be a defense to foreclosure.
25 d. Breach of the duty of good faith and fair dealing encompasses a broad range of potential
26 'bad' behavior which, if sufficiently egregious, would warrant the court's determination
27 that the mortgage should not be enforced against the homeowner. The failure by a
28 creditor, servicer, their predecessors in interest, or their agents to fairly and honestly
29 perform their obligations under the note, mortgage, or any federal or state mortgage
30 lending or mortgage servicing law, regulation or rule, or any mortgage-related settlement
31 to which the Attorney General, Department of Banking or Department of Consumer
32 Protection is a party, may constitute a defense to foreclosure. Without limiting the

1 general application of the foregoing, the following conduct by any of the named entities
2 might, in appropriate circumstances, constitute a breach of the implied covenant of good
3 faith and fair dealing:

- 4
- 5 1. Conjuring up a pretended default;
- 6 2. Asserting an interpretation of law or contract contrary to the creditor, servicer, or
7 agent's own understanding;
- 8 3. Falsification of facts;
- 9 4. Taking advantage of the necessitous circumstances of the obligor or homeowner to
10 extort a Modification of the note or mortgage without a legitimate commercial reason;
- 11 5. Harassing demands for assurances of performance;
- 12 6. Rejection of performance for unstated reasons;
- 13 7. Willful failure to mitigate damages;
- 14 8. Abuse of a power to determine compliance or to terminate a modification or
15 forbearance agreement;
- 16 9. Failure to inform the obligor and homeowner of all loss mitigation options available;
- 17 10. If demanded by the obligor or homeowner, failure to provide to the obligor or
18 homeowner written proof of any investor restrictions to any form of loss mitigation;
19 and
- 20 11. Failure to honor any loss mitigation process that had already commenced before the
21 creditor, servicer or their agent became the creditor, servicer or agent with respect to
22 the mortgage.

23

24 2. The potential judicial remedies available under Section 603(c) might include, for example:

- 25
- 26 a. A permanent or temporary injunction barring the foreclosure of the mortgage for a
27 period of time to be determined by the court;
- 28 b. Reduction of the amount of principal, interest or penalties assessed by the creditor;
- 29 c. An order by the court releasing the mortgage; or
- 30 d. An award of actual or statutory damages and attorney's fees and costs to the obligor
31 or homeowner pursuant to SECTION 606 of this act;

32

33 3. Examples under Section 605 (c) of how a creditor might be found to have violated this
34 provision might include such actions as: (i) informing the homeowner or obligor that a sale date
35 is set when the procedures for setting a sale have not been completed; (ii) stating that a
36 foreclosure has been stayed due to loss mitigation and at the same time continuing with the
37 foreclosure process; or (iii) Stating that a homeowner is not eligible for loss mitigation options
38 when those options have not yet been evaluated.

39

40 **ARTICLE 7**

41 **EFFECTIVE DATE AND REPEALER**

42

43 **SECTION 701. EFFECTIVE DATE** This Act takes effect on [INSERT DATE].

1 **SECTION 702. PRE-EFFECTIVE DATE TRANSACTIONS.**

2 (a) Except as otherwise provided in this Section, this Act applies to the foreclosure of a
3 mortgage within its scope, even if the mortgage was created before this Act takes effect.

4 (b) This Act does not affect a foreclosure commenced before this Act takes effect.

5 **Reporters' Drafting Note**

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

10
11 **SECTION 703. SPECIFIC REPEALER.** The following acts and parts of acts are hereby
12 repealed:

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

14 **Legislative Drafting Note**

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

28 **SECTION 704. GENERAL REPEALER.** All acts and parts of acts inconsistent with
29 this Act are hereby repealed.

30 **Reporters' Drafting Note**

31
32 This section provides for the repeal of all other legislation inconsistent with this
33 Act.
34