

MEMORANDUM

To: Mortgage Satisfaction Act Drafting Committee and Observers

From: R. Wilson Freyermuth, Reporter

Date: April 15, 2003

Re: Preliminary "Issue Memorandum" for May 2-4 Drafting Committee Meeting

I have prepared this draft "issue memorandum" for Committee members to review in preparation for the Committee's meeting in Atlanta on May 2-4, 2003.

This memorandum identifies a series of issues that the Committee will presumably wish to discuss and resolve during its upcoming meeting. As the memorandum identifies each issue, it provides a narrative summary of statutory approaches taken by various states to date and identifies questions for the Committee's consideration.

The Appendix to this memorandum, which begins on page 12, provides some *very* tentative draft language for the Act, which reflects language adapted from various state provisions and existing Uniform laws.

In addition, there is also a Statutory Appendix to this memorandum. The Statutory Appendix includes the full text of the state statutes relating to mortgage satisfaction from all 50 states. This Statutory Appendix may prove useful to you as you review this issue memorandum. [In a number of places, the memorandum refers to the positions or approaches of various states; the Statutory Appendix will permit you to quickly refer to the precise language of any particular state should you wish to do so.]

While I hope that this list of issues is thorough, I do not view it as necessarily complete. I encourage any Committee member or Observer to identify other potential issues that the Act might address, but that are not reflected in this memorandum. Likewise, I have not attempted to prioritize the issues in any hierarchical fashion with respect to their presumed importance.

1. Definitions.

Most of the existing state statutes use the customary terms "mortgage" and/or "deed of trust." The recently approved Uniform Nonjudicial Foreclosure Act (UNFA) used the general terms "security

interest,”¹ “security instrument,”² and “secured creditor.”³ Several of the state statutes (*e.g.*, GA, UT) use more general terms such as “secured lender,”⁴ “secured loan,”⁵ “security interest,”⁶ “grantee,”⁷ and “grantor.”⁸ For purposes of terminological consistency with other Uniform laws, and to avoid interpretive difficulties in states with strongly defined differences between mortgages and deeds of trust, I would suggest that the Act use terminology similar to that reflected in the UNFA and the Utah statute. I have set forth some suggested definitions (and their antecedents) in the Appendix beginning on page 12.

Many of the statutes make no reference to the mortgage servicer as distinct from the mortgagee. A few statutes specifically identify the servicer as a separate party upon whom those statutes impose similar or distinct duties. *See, e.g.*, UT. Others expressly equate the mortgagee and its servicer. *See, e.g.*, GA.⁹

¹“Security interest’ means an interest in real or personal property created by a security instrument that secures payment or performance of an obligation.” [UNFA § 102(20)]

²“Security instrument’ means a mortgage, deed of trust, security deed, contract for deed, land sale contract, lease, or other document that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property. A document is a security instrument even if it also creates or provides for a security interest in personal property. If a security instrument provides that a default under any other agreement is a default under the security instrument, the security instrument includes the other agreement. The term includes a modification or amendment of a security instrument and a document creating a lien on real property to secure an obligation owed by an owner of the real property to an association in a common interest community or under covenants running with the real property.” [UNFA § 102(19)]

³UNFA § 102(18) defines “secured creditor” as the party entitled to enforce a security interest.

⁴“Secured loan’ means a loan or extension of credit, the repayment of which is secured by a mortgage, a trust deed, the holding or retention of legal title under a real estate sales contract, or other security interest in real property, whether or not the security interest is perfected.” Ut. Rev. Stat. § 57-1-38(1)(b).

⁵“Secured lender’ means: (i) a mortgagee on a mortgage; (ii) a beneficiary on a trust deed; (iii) a person that holds or retains legal title to real property as security for financing the purchase of the real property under a real estate sales contract; and (iv) any other person that holds or retains a security interest in real property to secure the repayment of a secured loan.” Ut. Rev. Stat. § 57-1-38(1)(a).

⁶“Security interest’ means an interest in real property that secures payment or performance of an obligation. Security interest includes a lien or encumbrance.” Ut. Rev. Stat. § 57-1-38(1)(c).

⁷“Grantee’ means heirs, devisees, executors, administrators, successors, transferees or assigns, and any servicing agent or any person or entity to whom indebtedness is paid on behalf of or by any grantor.” Ga. Code Ann. § 44-14-3(a)(3).

⁸The Georgia statute provides that “Grantor’ means heirs, devisees, executors, administrators, successors, transferees, or assigns.” Ga. Code Ann. § 44-14-3(a)(4). It would appear something is missing from this definition, however; perhaps it was intended to describe the original party granting a security interest and that party’s heirs, devisees, etc.

⁹See note 7.

The Committee should consider at least the following questions:

- Should the Act use traditional “mortgage” terminology or more generic terminology?
- How should the Act distinguish (if at all) between the mortgagee and the mortgagee’s servicer?

2. What events/actions are necessary to trigger mortgagee liability for failure to prepare/record mortgage satisfaction?

In some jurisdictions, a mortgagee wishing to avoid statutory sanctions must record a notice of satisfaction upon receiving full performance of the mortgage debt, either immediately or within some grace period. In these jurisdictions, no formal demand by the mortgagor or her successor is required. *See, e.g.*, CA (30 days), DE (“forthwith”), FL (60 days), KY (30 days), ME (60 days), NH (60 days), NY (90 days), OH (90 days), UT (90 days), VT (30 days), WV (30 days).

In most jurisdictions, the mortgagor or her successor must first make sufficient demand upon the mortgagee (either at or after satisfaction of the mortgage debt) for the preparation and/or recording of a notice of satisfaction. In these jurisdictions, the mortgagee will incur the specified statutory sanctions only if it fails to prepare and/or record the required notice of satisfaction within the applicable grace period. *See, e.g.*, AL (30 days), AK (10 days), AR (60 days), CT (60 days), ID (no grace period specified), IL (1 month), IN (15 days), IA (30 days), KS (20 days), LA (30 days), MD (30 days), MA (45 days), MI (7 days), MN (10 days), MS (1 month), MO (15 business days), MT (90 days), NB (60 days), NV (21 days), NJ (15 days), NM (no grace period specified), ND (30 days), OK (10 days, but mortgagor cannot make demand until 50 days after satisfaction), OR (30 days), PA (45 days), RI (10 days), SC (3 months), SD (10 days), TN (45 days), VA (90 days), WA (60 days), WI (7 days), WY (30 days).

In most of the remaining jurisdictions, the mortgagee must record a notice of satisfaction upon full performance of the mortgage debt, even without formal demand by the mortgagor (and can be held liable for actual damages for failure to do so), but cannot be held liable for statutory sanctions or penalties unless the mortgagor has made formal demand and a sufficient grace period has passed. *See, e.g.*, AZ (30-day initial grace period, second 30-day period following demand), GA (60-day grace period), NC (60-day initial grace period, second 30-day period following demand), TN (heightened sanctions following additional 30-day grace period).

In those states where the applicable grace period commences following a request, most states have required this request or demand to be in writing. *See, e.g.*, AL, AK, AZ, CT, HI, IN, LA, MD, NE, NV, NM, OK, SD, TN, WI, WY. A number of states require a “demand” or “request” but do not expressly require that it be in writing. *See, e.g.*, AR, FL, ID, IL, IA, KS, MA, MI, MN, MS, MT, NJ, ND, OR, PA, RI, SC, VA, WA.

In some states, the mortgagor cannot recover any statutory damages or penalties unless the mortgagor has accompanied its request for notice of satisfaction with a “tender of reasonable charges” (*i.e.*, charge or fee for preparation and/or recording of the necessary notice of satisfaction). *See, e.g.*, AK, MA, MI, MN, MO, NJ, OR, PA, RI, SC. South Carolina and Maryland do not permit a fee larger than \$25. In California, any fee of \$45 or less is presumed reasonable.

The Committee should consider at least the following questions:

- Should the relevant grace period for recording a notice of satisfaction commence upon satisfaction of the debt, or upon demand by the mortgagor or her successor?
- What form should a demand take? [Here, it may be prudent to use media-neutral terminology, as per Revised Article 9.]
- Should the Act attempt to specify (or provide any guidelines for) the content of the demand? [Discussion of this question may be linked with discussion of the questions posed in ¶ 5(c) below.]
- Should the relevant grace period commence upon the mortgagor’s proper demand, or upon mortgagee’s receipt of a proper demand?
- How should the Act address the fees that a mortgagee may charge, if any, for the preparation/recording of a notice of satisfaction?

3. What grace period (if any) should the Act provide for the mortgagee to comply with a request for notice of satisfaction?

A comprehensive list of the applicable grace periods existing under the laws of the various states appears in Appendix A to the Study Committee Report. [I have included the Study Committee Report as an additional enclosure.] A few state statutes do not specify a grace period, presumably leaving to judicial resolution whether the mortgagee has timely complied with its obligation to prepare and/or record a notice of satisfaction. *See, e.g.*, CO, DE, ID, NM. By contrast, the overwhelming majority of the states provide for grace periods ranging from as long as 90 days (NY, OH, UT, MT, VA; three months in SC) to as little as 7 days (MI, WI). Among the states with explicit grace periods, the median grace period is 30 days.

The Committee should consider at least the following questions:

- What should be the duration of the appropriate grace period?
- What rules should the Act provide for calculation of time?¹⁰

¹⁰For reference purposes, the UNFA provides: “If this [Act] or a notice given pursuant to this [Act] requires performance on or by a certain day and that day is a Saturday, Sunday, or legal holiday, the performance is sufficient if done on the next day that is not a Saturday, Sunday, or legal holiday.” UNFA § 106.

4. What sanctions (if any) should the Act provide for the mortgagee who fails timely to comply with a request for notice of satisfaction?

A comprehensive list of the applicable statutory sanctions and/or penalties existing under the laws of the various states appears in Appendix A to the Study Committee Report. Some states provide judicial discretion as to the appropriate sanction. *See, e.g.*, AR and PA (any sum not exceeding mortgage amount), DE (up to \$1,000), IN (up to \$500), MS (\$200 + any sum not exceeding mortgage amount). Most of the remaining states impose a statutory penalty, irrespective of actual damages. Roughly 20 states provide for a flat penalty, ranging from as low as \$10-25 (NM) to 10% of the mortgage amount (MO) up to the lesser of one-half of the mortgage debt or \$25,000 (SC); most of these penalties fall in the \$100-500 range. [By way of comparison, UCC § 9-625(e)(4) imposes a \$500 statutory penalty for failure timely to file a required statement terminating the effectiveness of an Article 9 financing statement.] There are several states that provide a recurring daily or weekly penalty, up to a predetermined cap. *See, e.g.*, CT and LA (\$200/week up to \$5,000); WY (one-tenth per cent of principal per day, up to \$100/day); OK (one percent of principal per day, up to \$100/day, not to exceed mortgage principal); WI (\$100/day, up to \$2,000); KY (\$100/day, rising to \$400/day after 45 days have elapsed); NJ (\$50/day, up to \$1,000); RI (\$50 + \$5/day); VT (\$25/day up to \$5,000).

Most of the state statutes expressly authorize the affected party to recover actual damages in addition to the statutory penalty. [Again, by way of comparison, UCC § 9-625 provides a comparable rule for the secured party's liability for failure timely to provide a termination statement.¹¹] Some of the statutes are silent in this regard, leaving open the question whether the statutory penalty provides a floor or a cap on the mortgagee's liability. *See, e.g.*, AL, IL, IN, TN, VA. Many of the statutes also expressly authorize the recovery of attorney fees. *See, e.g.*, CT, FL, GA, HI, IL, IN, IA, KS, LA, ME, MD, NE, NV, NM, NC, RI, SC, SD, TN, UT, VT, VA, WA, WV.

Utah provides that the mortgagee or its servicer is liable for the greater of \$1,000 or treble actual damages, plus costs and attorney fees, but also provides that the mortgagee or its servicer is not liable if (a) it has established reasonable procedures for discharging in a timely manner, (b) it complied with those procedures, and (c) "it is unable to release the security interest within 90 days after receipt of the final payment because of the action or inaction of an agency or other person beyond its direct control."

The Committee should consider at least the following questions:

- What is the appropriate statutory penalty for the mortgagee's noncompliance?
- Should the penalty constitute a cap on the mortgagee's liability, or should the mortgagee also be liable for actual damages and/or attorney fees?

¹¹Again, by way of comparison, Article 9 provides for a statutory penalty of \$500 for a secured party that fails to file a termination statement. § 9-625(e)(4).

- Should the Act incorporate a liability “shield” provision akin to the Utah statute (which might serve to protect a “good faith” servicer from liability on account of the mortgagee’s failure to act, or vice-versa)?

5. Nonjudicial Process for Obtaining Notice of Satisfaction.

Twenty-seven of 50 states have enacted legislation creating a nonjudicial satisfaction procedure (NSP) that allows a designated party to record a notice of satisfaction on behalf of the mortgagee — thereby clearing the title — based upon the filing of an affidavit demonstrating that the mortgage debt has been paid and that the mortgagee has failed to provide a recordable notice of satisfaction within the statutory grace period following notice. There is significant variability, however, among these 27 state statutes, and a summary of these variations should help focus the Committee’s discussions on the important issues to be resolved with respect to a uniform NSP.

Of the various state NSPs, there are three predominant frameworks. The “New England” model permits a licensed attorney to execute a satisfaction based upon the preparation of a satisfactory affidavit. For a good example of this model, you might wish to review either the New Hampshire statute (page 66 of the Statutory Appendix) or the Vermont statute (page 111 of the Statutory Appendix). The “title insurer” model, the most common, permits a title insurer to execute a satisfaction based upon the preparation of a satisfactory affidavit. For a good example of this model, you might wish to review either the Indiana statute (page 34 of the Statutory Appendix) or the South Dakota statute (page 101 of the Statutory Appendix). The final model is the “Utah” model, which permits a title insurer to execute a satisfaction form whose contents are specified by the statute. For this model, you may wish to review either the Utah statute (page 107 of the Statutory Appendix) or the Wyoming statute (page 124 of the statutory appendix).

In crafting an NSP for the Act, the Committee should consider, at a minimum, the following issues:

A. Should the NSP apply to all mortgages, or should it be limited to mortgages of certain types or amounts?

Most of the existing state NSPs contain no scope provision limiting their applicability, such that those NSPs could be used to obtain a satisfaction of any mortgage — residential or commercial — without regard to the original or outstanding principal balance of that mortgage. A few states, however, have placed “type” scope limits on their NSP. *See, e.g.*, MA (federally-related mortgage securing 1-4 family residential dwellings only); NY (1-6 family owner-occupied dwellings only), OH (2 or fewer residential units); VT (2 or fewer residential units occupied by owner as principal residence, or farmland). A few other states have adopted “amount” scope limits. *See, e.g.*, MN (mortgages of \$1.5 million or less); ND

(mortgages of \$500,000 or less).

In the preliminary draft reflected in the Appendix (see page 15), I have not included any particular limitation on the Act's applicability, though such a limitation can be easily added if the Committee concludes that such a limitation is prudent. The Committee should specifically consider at least the following questions:

- Should the Act generally be limited to mortgages of certain types or amounts?
- Should the Act's NSP be limited to mortgages of certain types or amounts?

B. Who may actually record a notice of satisfaction under the NSP?

Among the 27 states with NSPs, the most common statutory approach permits action by a licensed title insurer. *See, e.g.*, AZ, CA, CO, CT, HI, ID, IL, IN, MN, NV, NJ, ND, OR (deeds of trust only), RI, SD, TX, UT, WY). Most typically, this would be the title insurer being asked to issue an Owner's Policy to a purchaser from the mortgagor and/or a Loan Policy to that purchaser's mortgagee. The other prevalent statutory approach permits recording by a licensed attorney. *See, e.g.*, CT, DE, GA, MA, NH, NJ, NY, RI, SC, VT. Other isolated statutory approaches authorize a releases by a "settlement agent" (VA), a "designated closing agent" (KS), a "lender" (KS), or a "financial institution" (GA).

The Committee should consider what party or parties should be permitted to record a notice of satisfaction. Given the Conference's objective of enactability, and the existing pattern of state NSPs, the three most plausible scenarios seem to be (a) title insurers only; (b) attorneys only; or (c) title insurers and attorneys. Based upon the weight of existing state NSPs, I have included a proposed draft in the Appendix (page 15) that provides for filing by title insurers.

C. Must the party seeking a notice of satisfaction provide the mortgagee with a second notice and opportunity to cure?

Many of the state NSPs provide a "one-step" approach to notifying the mortgagee, and permit the authorized party to file a notice of satisfaction if the mortgagee fails to fulfill its obligations to release the mortgage within the grace period discussed in ¶ 3 above. In these states, the authorized party has no obligation to give the mortgagee further notice or grace period to cure that failure. *See, e.g.*, GA (same notice can suffice for both purposes), HI, KS, MN, SC, SD.

Other of the state NSPs follow a "two-step" approach to notice. These states require that the authorized party provide a separate written notice to the mortgagee of its intention to execute and file a release, and provide the mortgagee with a grace period to fulfill its obligation to prepare and/or record an appropriate satisfaction. *See, e.g.*, AZ, IN, OR, RI (notice may be sent no earlier than 60 days after

mortgage debt was satisfied, and must be sent 30 days before authorized party may file notice of satisfaction); NV (notice may be sent no earlier than 75 days after mortgage debt was satisfied, and must be sent 30 days before authorized party may file notice of satisfaction); CT, NH, NJ, TX (notice may be sent no earlier than 60 days after mortgage debt was satisfied, and must be sent 15 days before authorized party may file notice of satisfaction), CA (notice may be sent no earlier than 60 days after mortgage debt was satisfied, and must be sent 10 days before authorized party may file notice of satisfaction); MA, ME, VT (notice may be sent no earlier than 30 days after mortgage debt was satisfied, and must be sent 15 days before authorized party may file notice of satisfaction); DE (notice may be sent no earlier than 120 days after mortgage debt was satisfied, and 15 days before authorized party may execute release); UT, WY (notice may sent no earlier than 30 days after mortgage debt was satisfied, and must be sent 30 days before authorized party may file notice of satisfaction). This is a “two-step” approach because, generally speaking, these latter provisions do not “coordinate” this notice with the notice/demand discussed in ¶ 2 above. As a result, in these states, the mortgagor or its successor would have to send separate notices for the purpose of (a) starting the grace period for statutory sanctions against the mortgagee (at least in those states requiring such a demand) and (b) starting the grace period for recording a notice of satisfaction.

The Committee should consider at least the following questions:

- Should the Act require a “one-step” or “two-step” approach? If the latter, what additional grace period is warranted prior to the recording the notice of satisfaction?
- To what extent should the Act specify or dictate the content and/or manner of transmission of the required notice(s)?
-

D. What documentation is necessary to accomplish the recorded satisfaction of the mortgage?

The existing state NSPs take two primary approaches. Essentially all of the jurisdictions require that the party seeking to record the satisfaction must execute an affidavit or certificate indicating the fulfillment of the necessary preconditions (*i.e.*, full payment of the mortgage, request to mortgagee for preparation/recording of satisfaction, nonresponse by mortgagee). In some jurisdictions, this affidavit or certificate itself may be filed for record, and constitutes a sufficient notice of satisfaction of the mortgage lien. *See, e.g.*, ME, MA, NH, OR, RI, SC, TX. In other states, the authorized party must prepare a separate notice of discharge or satisfaction in customary form, and submit that for recording along with the required affidavit or certificate. *See, e.g.*, NJ. In Utah and Wyoming, the authorized party does not file a separate affidavit, but a specified satisfaction form in recordable form that functions as a satisfaction.

The existing state NSPs require the following information to be contained within the affidavit or certificate:

- Name of mortgagor/mortgagee [AZ, CA, CT, DE, IN, KS, MN, MA, ME, NH, NJ, NV, NY, OR, RI, SC, SD, TX, VT]
- Date of mortgage [AZ, CA, CT, DE, IN, KS, MN, MA, ME, NH, NJ, NV, NY, OR, RI, SC, SD, TX, VT]
- Recording information for original mortgage [AZ, CA, CT, DE, IN, MN, MA, ME, NH, NV, NY, OR, RI, SC, SD, TX, VT]
- Information regarding last recorded assignment [IN, MN, NY, SD, VT] or all assignments [CT, ME, MA, NH, RI, TX]
- Identification of servicer [SD]
- Legal description [AZ, DE, KS, MA, ME]
- Evidence of payment [CT, GA, HI, ME, NY, RI, TX, VT] or affirmation of payment [all others with NSPs]
- Affirmation of demand for satisfaction [CT, DE, IN, ME, MA, NH, NJ, OR, TX, VT]
- Evidence of demand for satisfaction [RI]
- Signature of affiant/certifier
- Signature of witnesses [SC]
- Signature of notary

A number of states provide that the affidavit/certificate shall be deemed sufficient to satisfy the statute (and shall be accepted for recording) as long as it is substantially in compliance with a suggested statutory form. *See, e.g.*, NH, NJ, ND, VA, UT, WY. My research assistant has prepared a sample affidavit or certificate, which reflects the requirements of a composite of the various state NSPs, for the Committee's general reference, or you may wish to review some or all of the various state NSP provisions in the Statutory Appendix.

1. I am [(a) an attorney-at-law duly admitted to practice before the Courts of this State;
(b) an officer or a duly appointed agent of a title insurance company authorized and licensed to transact the business of insuring titles to interests in real property in this state; or
(c) [other person authorized by statute to discharge security instrument].]
2. On ___[date]___, a security instrument was granted by ___[mortgagee]___ to ___[mortgagor]___, which security instrument is recorded in the offices of the [Register of Deeds] in book _____ at page _____. This security instrument covers the following described real property: [legal description]
3. To the best knowledge of the undersigned, the last recorded assignment of the security instrument was to ___[assignee]___.
4. The undersigned received written payoff information and made such payoff and/or is in possession of a canceled check, wire confirmation, payoff statement or other

evidence of payment to secured creditor, a copy of which is attached as Exhibit A hereto.

5. On _____ [date] _____, the undersigned made written demand upon the secured creditor for a satisfaction of the security instrument pursuant to the provisions of _____ [applicable state statute requiring secured creditor to execute satisfaction of security instrument upon request] _____, but secured creditor has failed to provide such a satisfaction.
6. The undersigned has examined this affidavit this ____ day of ____ and, to the best of my knowledge and belief, it is true, correct, and complete.

_____ (affiant signature)

_____ (notary attestation and signature)

E. What consequences should follow if a notice of satisfaction is wrongfully entered?

Some existing state NSPs are silent regarding the consequences if a notice of satisfaction is wrongfully entered. Others provide a variety of sanctions, summarized in the table below:

| | |
|--|--------|
| Not more than 2X amount falsely discharged, if information was known to be false | RI |
| Not more than \$5,000 or between 1 and 5 years imprisonment, if information known to be false | CT |
| If fraudulent, felony punishable by 1-3 years imprisonment, or fine between \$1,000 - \$5,000 | GA |
| Perjury | CA, SC |
| If gross negligence or bad faith, treble actual damages and reasonable attorneys fees and costs | HI |
| Signer liable for remaining balance of mortgage debt, plus interest, actual damages, and attorneys fees | KS |
| If information known to be false, releasing party liable for greater of actual damages or \$5,000; court has discretion to award attorney fees and costs | TX |
| If information was known to be false, releasing party liable for up to \$5,000 and “all other remedies” (presumably includes actual damages) | MA |

| | |
|---|----------------|
| Actual damages | MN, VA, UT, WI |
| Actual damages, attorney fees, and costs | AZ, NV, NY |
| Title insurer filing release indemnifies mortgagee for all damages, costs, liabilities, and reasonable attorneys fees | CO |

The Committee should consider whether the Act should provide for a statutory penalty in addition to any actual damages that might result from an improper release.

Appendix

SECTION 101. SHORT TITLE.

This [Act] may be cited as the Uniform Mortgage Satisfaction Act.

SECTION 102. DEFINITIONS.

In this [Act]:

(_) “Debtor” means a person who owns the real property described in a security instrument.¹²

(_) “Real property” means any estate or interest in, over, or under land, including minerals, structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether or not described or mentioned in the contract of sale or instrument of conveyance.¹³

(_) “Record,” used as a noun, means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.¹⁴

(_) “Record,” used as a verb, means to submit a document complying with applicable legal standards, with required fees and taxes paid, to the appropriate governmental office under [the recording act of this State].¹⁵

(_) “Recording data” means the date and [book and page number] [document number] at which a document is recorded in the [office of the county recorder].¹⁶

¹²Consistent with UCC § 9-102(a)(28)(A).

¹³Adapted from UNFA § 102(13) (“Real property” means any estate or interest in, over, or under land, including minerals, structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether or not described or mentioned in the contract of sale or instrument of conveyance. The term includes the interest of a landlord or tenant and, unless the interest is personal property under the law of the state in which the property is located, an interest in a common interest community.”). UNFA also contains a special definition of “residential real property”: “real property that, when a security instrument is entered into with respect to the property, is used or is intended by its owner to be used primarily for the personal, family, or household purposes of its owner and is improved, or is intended by its owner to be improved, by one to [four] dwelling units.” UNFA § 102(17).

¹⁴Verbatim from UCC § 9-102(a)(69).

¹⁵Verbatim from UNFA § 102(14).

¹⁶Verbatim from UNFA § 102(15).

1 () “Secured creditor” means a person that holds a security interest.
2

3 () “Security instrument” means a mortgage, deed of trust, trust deed, security deed, or other document
4 that creates or provides for an interest in real property to secure payment or performance of an obligation.
5 A document is a security instrument even if it also creates or provides for a security interest in personal
6 property.¹⁷
7

8 () “Security interest” means an interest in real property created by a security instrument that secures
9 payment or performance of an obligation.¹⁸
10

11 () “Send,” in connection with a record or notification, means (A) to deposit in the mail, deliver for
12 transmission, or transmit by any other usual means of communication, with postage or cost of transmission
13 provided for, addressed to the address specified in the security instrument or, if none, to any address
14 reasonable under the circumstances; or (B) to cause the record or notification to be received within the time
15 that it would have been received if properly sent under subparagraph (A).¹⁹
16

17 () “Servicer” means a person that services and receives loan payments on behalf of a secured creditor
18 with respect to an obligation secured by a security interest.²⁰
19

20 () “Sign” means, with present intent to authenticate or adopt a record: (i) to execute or adopt a tangible
21 symbol; or (ii) to attach to or logically associate with the record an electronic sound, symbol, or process.
22

23 () “Title insurance company” means a corporation or other business entity authorized and licensed to

¹⁷Adapted from UNFA § 102(19). “Security instrument” means a mortgage, deed of trust, security deed, contract for deed, land sale contract, lease, or other document that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property. A document is a security instrument even if it also creates or provides for a security interest in personal property. If a security instrument provides that a default under any other agreement is a default under the security instrument, the security instrument includes the other agreement. The term includes a modification or amendment of a security instrument and a document creating a lien on real property to secure an obligation owed by an owner of the real property to an association in a common interest community or under covenants running with the real property. [UNFA § 102(19)]

¹⁸Adapted from UNFA § 102(20) (“‘Security interest’ means an interest in real or personal property created by a security instrument that secures payment or performance of an obligation.”); Utah Rev. Stat. § 57-1-38(1)(c) (“‘Security interest’ means an interest in real property that secures payment or performance of an obligation. Security interest includes a lien or encumbrance.”)

¹⁹Adapted from UCC § 9-102(a)(74) (additional language underlined).

²⁰Adapted from Utah Rev. Stat. § 57-1-38(1)(d) (“‘Servicer’ means a person that services and receives loan payments on behalf of a secured lender with respect to a secured loan.”).

1 transact the business of insuring titles to interests in real property in this state.²¹
2
3

4 **SECTION 103. SECURED CREDITOR’S OBLIGATION TO RECORD SATISFACTION OF**
5 **SECURITY INSTRUMENT**
6

7 [Option A: grace period runs from full payment, without need for demand]²²
8

9 A secured creditor or servicer shall record a satisfaction of a security instrument within ___ days
10 after receiving full payment of the obligation secured by that security instrument.
11

12 [Option B: grace period runs from demand following full payment]²³
13

14 At or after full payment of the obligation secured by a security instrument, the debtor may send to
15 the secured creditor or its servicer a signed record requesting that the secured creditor or its servicer
16 record a satisfaction of the security instrument. [This record may include a statement of the debtor’s
17 intention to record a certificate of satisfaction, pursuant to section 105, if the secured creditor or its servicer
18 fails to record a satisfaction of the security instrument within the time specified in this section.] The secured
19 creditor or servicer shall record a satisfaction within ___ days after [receiving] this request.
20
21

22 **SECTION 104. SECURED CREDITOR’S LIABILITY**²⁴

²¹See, e.g., Minn. Rev. Stat. § 507.401.

²²Representative examples include Ky. Rev. Stat. § 382.365(1) (“A holder of a lien on real property, including a lien provided for in KRS 376.010, shall release the lien in the county clerk’s office where the lien is recorded within thirty (30) days from the date of satisfaction.”); N.H. Rev. Stat. § 479:7 (“The mortgagee, within 60 days after said mortgage is satisfied and having reasonable charges tendered to the mortgagee, shall cause the discharge of the mortgage to be recorded in the registry of deeds where the land lies.”); Ohio Rev. Stat. § 5301.36 (“Within ninety days from the date of the satisfaction of a residential mortgage, the mortgagee shall record the fact of the satisfaction in the appropriate county recorder’s office and pay any fees required for the recording.”).

²³Ala. Rev. Stat. § 35-10-27 (“If a mortgage or deed of trust which is of record has been fully paid or satisfied, the mortgagee or transferee or assignee of the mortgage, or trustee or cestui que trust of the deed of trust, who has received payment or satisfaction, must on request in writing of the mortgagor, or of a creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, or owner of the lands mortgaged, or a junior mortgagee, or of the debtor in a deed of trust, enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust.”);

²⁴Utah law contains a “good faith” exception to liability that the Committee may wish to discuss. This statute, Utah Rev. Stat. § 57-1-38(4), provides that “A secured lender or servicer is not liable . . . if the secured lender or servicer: (a) has established a reasonable procedure to release the security interest on a secured loan in a timely manner after the final payment on the loan; (b) has complied with this procedure in good faith; and (c) is unable to release the security

1 A secured creditor or servicer who fails to comply with its obligations under Section 103 is liable
2 to the debtor for (a) the greater of _____ [insert amount] _____ or actual damages incurred because of such
3 failure, and (b) reasonable attorneys' fees and court costs.
4

5
6 **SECTION 105. NONJUDICIAL SATISFACTION**²⁵

interest within 90 days after receipt of the final payment because of the action or inaction of an agency or other person beyond its direct control.”

²⁵The contents of sections 105, 106, 107, and 108 would vary somewhat if the Committee chose to provide for filing by parties other than a title insurer (e.g., by a licensed attorney). If, for example, the Committee chose to provide for filing by attorneys, a representative statute would be Vt. Stat. Ann. tit. 27, § 464a, which provides as follows:

(a) A recorded mortgage on a dwelling of two units or less occupied by the owner as the owner's principal residence or on farmland may be discharged by an attorney-at-law licensed to practice in this state if the mortgagee, after receipt of payment of the mortgage in accordance with the payoff statement furnished to the mortgagor by the mortgagee, or the mortgagee's agent, fails to make that discharge of the mortgage. The attorney shall execute and record an affidavit in the record of deeds affirming that: (1) the affiant is an attorney-at-law in good standing and licensed to practice in Vermont; (2) the affidavit is made at the request of the mortgagor or the mortgagor's executor, administrator, successor, assignee or transferee or the transferee's mortgagee; (3) the mortgagee has provided a payoff statement with respect to the loan secured by the mortgage; (4) the mortgagee has received payment of the mortgage in accordance with the payoff statement that has been proved by a bank check, certified check or attorney client funds account check negotiated by the mortgagee or by evidence of receipt of payment by the mortgagee; (5) more than 30 days have elapsed since the payment was received by the mortgagee; and (6) the mortgagee has received written notification by certified mail 15 days in advance, sent to the mortgagee's last known address, that the affiant intends to execute and record an affidavit in accordance with this section, enclosing a copy of the proposed affidavit; the mortgagee has not delivered a discharge or acknowledgment of satisfaction in response to the notification; and the mortgagee has failed to dispute payoff of the mortgage.

(b) The affidavit must include the names and addresses of the mortgagor and the mortgagee, the date of the mortgage, the book and page number and similar information with respect to the most recent recorded assignment of the mortgage.

(c) The affiant shall attach to the affidavit the following, certifying that each copy is a true copy of the original document: (1) photocopies of the documentary evidence that payment has been received by the mortgagee, including the mortgagee's endorsement of a check; and (2) a photocopy of the payoff statement.

(d) An affidavit recorded under this section has the same effect as discharge under sections 431, 462 or 463 of this title.

By contrast, Georgia's statute, Ga. Code Ann. § 44-14-3(c1) permits an affidavit by either a licensed attorney or by a federally-insured financial institution which either paid the indebtedness or caused it to be paid:

In the event that a grantee or holder of record has failed to transmit properly a legally sufficient

1 [Option A: no additional notice]²⁶
2

3 If the secured creditor or servicer fails to comply with its obligations under section 103, an officer
4 or duly appointed agent of a title insurance company may, on behalf of the debtor, execute a certificate of
5 satisfaction that complies with the requirements of section ___ and record the certificate of satisfaction in
6 the real property records of the county where the real property described in the security instrument is
7 located.

8
9 [Option B: additional notice/grace period]
10

11 If the secured creditor or servicer fails to comply with its obligations under section 103, the debtor
12 may send to the secured creditor or its servicer a signed record stating that the debtor intends to record

satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the instrument of record within 60 days after a written notice mailed to such grantee or holder of record by registered or certified mail or statutory overnight delivery, return receipt requested, the clerk or clerks are authorized and directed to cancel the instrument upon recording an affidavit by an attorney who has caused the secured indebtedness to be paid in full or by an officer of a regulated or chartered financial institution whose deposits are federally insured if that financial institution has paid the secured indebtedness in full. The notice to be mailed to the grantee or holder of record shall identify the indebtedness and include a recital or explanation of this subsection. The affidavit shall include a recital of actions taken to comply with this subsection. Such affidavit shall include as attachments the following items: (1) A written verification which was given at the time of payment by the grantee or holder of record of the amount necessary to pay off such loan; and (2)(A) Copies of the front and back of a canceled check to the grantee or holder of record paying off such loan. (B) Confirmation of a wire transfer to the grantee or holder of record paying off such loan. (C) A bank receipt showing payment to the grantee or holder of record of such loan.

By further contrast, the Kansas statute, Kan. Stat. Ann. § 58-2309a(a), simply authorizes a “lender” or “designated closing agent” to enter a satisfaction, but does not specify the contents of any affidavit necessary to demonstrate the preconditions for such an entry:

In the event the mortgagee or the mortgagee’s assignee fails to enter satisfaction or cause satisfaction of such mortgage to be entered within 20 days after written demand by certified or registered mail, the lender or a designated closing agent acting as a closing agent in the sale, financing or refinancing of the real estate subject to such mortgage, who upon reliance of written payoff information provided by the mortgagee, and which payoff information shall be deemed as the correct and full amount due and owing under such mortgage, has caused the indebtedness to be paid in full may cause satisfaction of the mortgage to be entered.

²⁶See Minn. Rev. Stat. § 507.401 (“An officer or duly appointed agent of a title insurance company may, on behalf of a mortgagor or a person who acquired from the mortgagor title to all or a part of the property described in a mortgage, execute a certificate of release that complies with the requirements of this section and record the certificate of release in the real property records of each county in which the mortgage is recorded if a satisfaction or release of the mortgage has not been executed and recorded after the date payment in full of the loan secured by the mortgage was sent in accordance with a payoff statement furnished by the mortgagee or the mortgage servicer.”).

1 a certificate of satisfaction of the security instrument pursuant to this section. If the secured creditor or
2 servicer shall fail to record a satisfaction of the security instrument within the following ___ days following
3 [receipt of] this request, an officer or duly appointed agent of a title insurance company may, on behalf of
4 the debtor, execute a certificate of satisfaction that complies with the requirements of section ___ and
5 record the certificate of satisfaction in the real property registry of the county where the real property
6 described in the security instrument is located.
7
8

9 **SECTION 106. CERTIFICATE OF SATISFACTION — CONTENTS**

10
11 (1) The contents of a certificate of satisfaction are sufficient if the certificate:

- 12
13 (a) identifies the original parties to the security instrument, the debtor, the secured creditor, the
14 servicer (if applicable), the date of the security instrument, the legal description of the real property
15 covered by the security instrument; the recording data for the security instrument, and the recording
16 data for the last recorded assignment of the security instrument (if applicable);
17 (b) is executed and acknowledged as required by law for any conveyance;
18 (c) states that the person executing the certificate of satisfaction is an officer or a duly
19 appointed agent of a title insurance company authorized and licensed to transact the business of
20 insuring titles to interests in real property in this state;
21 (d) states that the certificate of satisfaction is made on behalf of the debtor;
22 (e) states that the secured creditor or servicer provided a payoff statement which was used
23 to make full payment of the unpaid balance of the obligation secured by the security instrument;
24 (f) states that full payment of the unpaid balance of the obligation secured by the security
25 instrument was made in accordance with the payoff statement;
26 (g) states that full payment of the unpaid balance of the obligation was received by the secured
27 creditor or servicer, as evidenced by documentary evidence of payment attached to the certificate;
28 [(h) identifies the date on which the secured creditor or servicer was sent a signed record under
29 section 105, and states that the secured creditor or servicer has failed to record a satisfaction of
30 the security instrument within ___ days following the sending [receipt] of that record.]
31

32 (2) [Include safe harbor certificate form?]
33
34
35

36 **SECTION 107. EFFECT OF CERTIFICATE**²⁷

²⁷Adapted from S.D. Codif. Laws § 44-8-33 (“For purposes of releasing a mortgage, a certificate of release containing the information and statements provided for in §§ 44-8-31 and executed as provided in §§ 44-8-30 to 44-8-35, inclusive, is prima facie evidence of the facts contained in it, shall be recorded with the county register of deeds, and operates as a release of the mortgage described in the certificate of release. The county register of deeds shall rely upon

1 (1) A certificate of satisfaction containing the information and statements specified in section 106(1)
2 is prima facie evidence of the facts contained in it, shall be recorded in the [recording office] in the county
3 where the real property described in the security instrument is located, and operates as a satisfaction of the
4 security instrument described in the certificate.

5
6 (2) Recording of a wrongful or erroneous certificate of satisfaction does not extinguish or otherwise
7 affect the liability of any party personally liable for repayment of the obligation secured by the security
8 instrument.

9
10 [Note: Some states have included a provision allowing a title insurer to record a master appointment of
11 agent with the register of deeds. I did not include such a provision in the suggested draft, but the South
12 Dakota statute, quoted in the footnote below,²⁸ provides a representative example.]

13
14
15 **SECTION 108. LIABILITY FOR WRONGFUL OR ERRONEOUS CERTIFICATE**

16
17 [Option A: actual damages only]

18
19 In addition to any other remedy provided by law, a title insurance company wrongfully or
20 erroneously recording a certificate of satisfaction shall be liable to the secured creditor for any actual
21 damages sustained due to the certificate, including reasonable attorneys' fees and court costs.

22
23 [Option B: actual damages; treble damages if certificate known to be false]

24

the certificate of release to release the mortgage. Recording of a wrongful or erroneous certificate of release by a title insurance company or its agent does not relieve the mortgagor, or the mortgagor's successors or assigns, from any personal liability on the loan or other obligations secured by the mortgage....").

²⁸S.D. Codif. Laws § 44-8-32 ("A certificate of release authorized by § 44-8-30 shall be executed and acknowledged as required by law in the case of a deed pursuant to § 43-25-5 and may be executed by a duly appointed agent of a title insurance company, but such delegation to an agent by a title insurance company does not relieve the title insurance company of any liability for damages caused by its agent for the wrongful or erroneous execution of a certificate of release. The appointment of agent shall be executed and acknowledged as required by law in the case of a deed pursuant to § 43-25-5 and shall state: (1) Title insurance company as the grantor; (2) The identity of the person, partnership, or corporation authorized to act as agent to execute and record certificates of release provided for in §§ 44-8-30 to 44-8-35, inclusive, on behalf of the title insurance company; (3) That the agent has the full authority to execute and record certificates of release provided for in §§ 44-8-30 to 44-8-35, inclusive, on behalf of the title insurance company; (4) The term of appointment of the agent; and (5) That the agent has consented to and accepts the terms of the appointment. A single appointment of agent may be recorded in each county in the register of deed's office. A separate appointment of agent is not necessary for each certificate of release. The appointment of agent shall be shown on each certificate of release. The appointment of agent may be rerecorded if necessary to establish authority of the agent, but such authority continues until a revocation of appointment is recorded in the office of the county register of deeds where the appointment of agent was recorded.").

1 In addition to any other remedy provided by law, a title insurance company wrongfully or
2 erroneously recording a certificate of satisfaction shall be liable to the secured creditor for any actual
3 damages sustained due to the certificate, including reasonable attorneys' fees and court costs. If the title
4 insurance company knew that the statements contained in the certificate were false, the company shall be
5 liable to the secured creditor for treble actual damages sustained due to the certificate, including reasonable
6 attorneys' fees and court costs.