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Fast Track Foreclosure Laws: Are They Headed in the Right Direction?

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The findings and conclusions presented in this report are those of the author alone.



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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FAST TRACK FORECLOSURE LAW: THE CONTEXT	3
III.	THE EXISTING STATE LAWS.....	5
A.	Michigan	5
B.	Oklahoma.....	6
D.	Indiana.....	7
E.	New Jersey.....	7
F.	Nevada	8
G.	Illinois	9
H.	Uniform Law Commission Draft Proposal (November 2013)	9
IV.	ANALYSIS: THE NINE MAJOR ISSUES RAISED BY FAST TRACK FORECLOSURE LAWS.....	11
	Issue #1: Fast track foreclosure and the mortgagee’s duty to report on the status of properties in foreclosure.	11
	Issue #2: Fast track foreclosures and the mortgagee’s duty to maintain vacant properties during foreclosure.	12
	Issue #3: Application of fast track foreclosure to occupied properties.....	15
	Issue #4: The duty to complete fast track foreclosures of abandoned properties promptly.	16
	Issue #5: The use of presumptions to determine the mortgagee’s right to use fast track foreclosure.....	18
	Issue #6: The borrower’s procedural rights in fast track foreclosure.	19
	Issue #7: The protocol for mortgagee’s inspections and immunity from trespass and conversion.	21
	Issue #8: The effect of fast track foreclosure on parties’ legal claims.....	22
	Issue #9: Shifting to borrowers the mortgagee’s costs of compliance with fast track foreclosure laws.	24
	END NOTES	26

I. INTRODUCTION

The ongoing foreclosure crisis has involved more homes going through state foreclosure procedures than at any other time in United States history. Since 2008, over four million homes have been foreclosed. Before the crisis is over, millions more are likely to follow. The unprecedented volume of cases has produced delays in the foreclosures process in certain areas, primarily in states that require court approval of foreclosure sales. Delays of two years or more are common in some judicial foreclosure states. Not surprisingly, these delays have produced demands from the mortgage lending industry for ways to speed up foreclosures. Much of the industry's attention has focused on laws to create short cuts through judicial foreclosure systems.

In response to these concerns, new state "fast track" foreclosure laws have begun to appear. At least seven state legislatures have enacted such laws since 2009. In most instances, these laws tie a right to fast track foreclosure to a mortgage holder's claim that a property is "abandoned." Proponents of the new laws focus upon the futility of delaying foreclosure while a property remains empty and becomes an increasingly grave threat to its community. There is clearly no benefit to delaying foreclosure in these circumstances, and no one would claim otherwise.

This report examines seven recently enacted fast track foreclosure statutes: those in Michigan, Oklahoma, Kentucky, Indiana, New Jersey, Nevada, and Illinois. The report also considers a draft fast track foreclosure law prepared by the National Conference of Commissioners of Uniform State Law (NCCUSL). The report concludes that several of these laws contain provisions that work effectively to achieve the twin goals of prompt completion of foreclosures of properties that are truly unoccupied and abandoned. Other statutes, however, have been drafted broadly and are clearly over-inclusive in their reach. Several laws expressly apply to occupied properties and others are vague in defining when they apply. Nearly all set up new and burdensome procedural requirements for homeowners. The overwhelming majority of homeowners facing foreclosure today lack access to legal assistance. Under certain fast track laws, homeowners face loss of substantial rights under state property laws if they do not meet new procedural deadlines, submit paperwork promptly, appear for hearings, and rebut evidentiary presumptions. Finally, beyond speeding up foreclosure sales in selected cases chosen by mortgage servicers, these laws generally fail to coordinate a response to the problem of deteriorated and abandoned properties in foreclosure.

There are ways to deal with the problems of abandoned properties in foreclosures that protect communities, preserve existing property rights of borrowers, and allow lenders to minimize losses. After reviewing fast track foreclosure laws now in effect and proposed by the NCCUSL, this report makes nine recommendations for improvement of fast track foreclosure laws.

These are:

- Fast track foreclosure laws must operate in conjunction with statutory requirements that mortgagees inspect properties in foreclosure on a regular basis and report to local authorities on the each property's status. Mortgage servicers should not be allowed to pick and choose which abandoned properties they would like to sell on an expedited basis.
- In addition to requirements to inspect and report on property condition, the fast track laws must require that mortgagees maintain abandoned properties in safe condition while they pursue a foreclosure and eventual re-sale of the property.
- Fast track foreclosure laws must never apply to occupied properties. Borrowers who reside in their homes must have simple and effective means to declare occupancy and stop an attempted fast track foreclosure of an occupied dwelling.
- Once a property has been determined abandoned through a fair and accessible proceeding, mortgagees must not have the option of indefinitely delaying foreclosure.
- The right to use a fast track foreclosure procedure should not be determined through presumptions or a "prima facie" standard applied in summary proceedings. A court or administrative body must make findings of abandonment based on clear and convincing evidence.
- Procedural protections for borrowers must include attempts at personal service of essential documents in the proceeding, clear notices of rights, a hearing, and ease of registering objections based on occupancy.
- A right to fast track foreclosure must not be triggered by claims that a borrower did not allow an inspector inside a home.
- Judgments in fast-track foreclosure proceedings must not have preclusive effect on questions of a borrower's personal liability. A judgment of foreclosure or eviction entered in a fast track proceeding must be subject to being set aside based on evidence that the property was occupied when the judgment was entered.
- When a property has been determined to be abandoned, the mortgagee must bear the cost of maintenance. A borrower must not be charged for maintenance after the abandonment determination and must not be assessed the cost of a bond that a mortgagee posts under a registration law requirement.

If incorporated in a vacant property foreclosure statute, these elements will ensure that any abridgement of standard foreclosure procedures is based on a valid finding of abandonment. All foreclosures of occupied properties should proceed with oversight over loss mitigation reviews. Mortgage servicers' failure to conduct appropriate reviews for loss mitigation leads to unnecessary foreclosures. Unnecessary foreclosures of occupied homes also present a risk of harm to communities, a risk that is at least as great as that posed by delays during foreclosure. Appropriate intervention through mediation programs and other state laws designed to prevent foreclosures through effective oversight of loss mitigation should be the central focus of state legislative activity during the current foreclosure crisis.

II. FAST TRACK FORECLOSURE LAW: THE CONTEXT

Since 2009, seven states have enacted new “fast-track” foreclosure laws. While these laws take on varied forms, they have certain features in common. They focus on properties that are considered abandoned by the borrower or that may still be occupied but show signs of poor maintenance. If a foreclosure involves one of these properties, these statutes authorize mortgagees to skip over considerably longer time frames that would otherwise apply under the state’s general foreclosure laws. When applicable, these laws significantly reduce periods for notices, cure rights, and the exercise of redemption rights.

Enactment of fast track foreclosure laws has been a major goal of mortgage industry advocacy in recent years. The laws further a broader industry strategy to promote speedier foreclosures. To encourage enactment of these laws, financial institutions routinely publicize disparities in foreclosure times between states that require judicial foreclosures and those that use primarily non-judicial foreclosure systems. The publicity typically features charts and graphs comparing groups of judicial foreclosure states (e.g. New York, Florida, Illinois, and New Jersey) compared to non-judicial states (e.g. Georgia, Texas, Virginia, or Tennessee).¹ The judicial states show average foreclosure time frames of one or more years. In the non-judicial states, foreclosures may be completed within three or four months. These charts are often accompanied by conclusory statements to the effect that the long foreclosure time frames in judicial foreclosure states are impeding recovery of the national housing market and contribute to neighborhood blight.² The industry talking points have been widely disseminated through media reports. These reports dutifully pass on the view that the mortgage lending industry is being victimized by unreasonable state laws that require court approval of foreclosures and that the solution is to minimize judicial oversight of foreclosures.

There is some truth in parts of these industry claims, but there is no simple explanation and many factors other than state foreclosure laws have contributed to delays in the foreclosure process. Judicial foreclosures have traditionally taken longer than non-judicial foreclosures. The longer foreclosures take, the more likely the homeowner will move out of the property before the foreclosure is completed. Over the past two years, the inventory of properties listed for foreclosure sales or owned by lending institutions after foreclosure sales has decreased. As of early 2013, the number of properties scheduled for foreclosure sales or bank-owned was at its lowest in five years, down 39 percent from its peak in 2010.³ However, this decline in the foreclosure inventory resulted primarily from disposition of bank-owned properties. At the same time in early 2013, the inventory of properties in the foreclosure pipeline (foreclosure commenced but no auction scheduled) had increased nearly 60 percent from a year earlier.⁴ These properties comprise a “shadow” inventory of homes languishing in long-term foreclosure status. The properties are located overwhelmingly in judicial foreclosure states. Thirty-five percent of the homes in this shadow inventory are estimated to be vacant. In some states, the vacancy rate for homes in the foreclosure pipeline exceeds fifty percent.⁵

While it is clear that foreclosures in judicial foreclosure states have been delayed in recent years, the cause for those delays cannot be simply stated. Mortgage servicers' own conduct has definitely contributed to the delays. In particular, the media attention focused on servicers' use of robo-signed documents led to suspension of much foreclosure activity in judicial foreclosure states over several years.

Robo-signing tends to bypass scrutiny in non-judicial foreclosure states. However, the threat of court oversight in judicial foreclosure states had the opposite effect. During 2010-2011, with negotiations underway between mortgage servicers and government enforcement agencies to fashion remedies for robo-signing abuses, many servicers delayed completion of foreclosures in judicial foreclosure states. In New York, for example, large shadow dockets built up of cases in which foreclosure complaints were filed but never moved toward judgment or other forms of judicial intervention.⁶

Limited judicial resources have likely played a role in delaying foreclosures in certain judicial foreclosure jurisdictions, such as Florida, where the volume of loans in default reached unprecedented levels after 2008. It is also unclear to what extent decisions to delay foreclosures were based on industry calculations that home prices in certain areas might increase over time and that the potential for more lucrative sales in the future might justify delays.

What is clear is that the extraordinarily long delays occurring in judicial foreclosure states from 2010 through 2012 were not something inherent in the statutory procedures and court rules of those states.⁷ The delays were exponentially greater than typical time frames seen during the decades before the foreclosure crisis.⁸ Beginning in 2008, the volume of mortgages in foreclosure reached levels never seen before in the United States. This volume undoubtedly strained judicial resources. Whatever its causes, this crisis-driven bulge in foreclosure numbers should not be the basis for institutionalizing long-term changes to state foreclosure laws, changes that would last long after the crisis subsides.

The next section summarizes the seven recently enacted fast track foreclosure statutes and one proposed model law on the subject. These laws present a range of approaches. Some are clearly targeted to avoiding deterioration of abandoned properties. Others, however, have been structured in a way that will affect a much broader group of properties and the families residing in them.

III. THE EXISTING STATE LAWS

A. Michigan

Michigan is a non-judicial foreclosure state. Michigan law gives the typical borrower a period of six months after the date of a foreclosure sale to remain in possession of the home and attempt to redeem. Prior to 2013, mortgage industry groups in Michigan proposed legislation that would have shortened the post-sale redemption time frame. One proposal would have significantly shortened the redemption period in cases in which the borrower participated in pre-foreclosure mediation. These efforts failed. However, in mid-2013, the Michigan legislature approved new fast-track foreclosure legislation. The new law (effective in January 2014) amends M.C.L.A. 600.3240 to add a provision shortening the post-sale redemption period from six months to thirty days in certain situations.

The new Michigan statute makes no pretense of applying solely to abandoned or vacant properties. A state law in effect for several years had already allowed for a shortened thirty-day redemption period after the foreclosure sale of an abandoned property.⁹ Instead, the new law focuses on the concept of “damaged” property. Under the law, the purchaser at a foreclosure sale who contends that a property is damaged may bring an immediate action to evict the borrower, using the summary procedures available to evict a tenant from rental property.¹⁰ A judgment for eviction in the summary proceeding terminates the borrower’s redemption rights. Under the Michigan law, once a foreclosure sale has been completed, the purchaser may demand to inspect the interior and exterior of the property. If the borrower “unreasonably” refuses to allow an inspection, the purchaser can file a summary eviction action and recover possession.¹¹ If the inspection takes place and shows any basis for claiming that the property is “damaged,” the sale purchaser can also proceed with a summary eviction and terminate redemption rights. The statute defines the requisite “damage” to include a broken window, an unhinged door, accumulated trash, missing fixtures and any condition not complying with local ordinances.¹² The damage may be actual or “imminent.”¹³ If the borrower appears in the eviction proceeding and contests the entry of a judgment for possession, the court may still order eviction unless the borrower repairs all damaged items.

In a July 3, 2013 signing statement, Michigan’s governor noted several problematic features of this legislation.¹⁴ He expressed the hope that that the legislature would take up amendments in its next session. The governor’s signing statement noted in particular that the law contains no provision for advance notice of inspections and makes no distinction between deliberate damage caused by an occupant and other maintenance problems that represent no real harm to the property or the community.

B. Oklahoma

Foreclosures in Oklahoma typically follow a judicial procedure. Under a fast-track foreclosure law in effect since November 2011, borrowers may be evicted through a summary process judgment based on judicial findings that a property has been abandoned and is at risk of harm due to abandonment.¹⁵ Oklahoma's general foreclosure law allows redemption up to the time of the confirmation of a sheriff's sale. Under the fast-track law, a mortgagee may file a motion to "preserve and protect" the collateral property at the same time the foreclosure complaint is filed. Filing the motion to preserve and protect triggers a sheriff's visit to the property. The sheriff makes a determination of vacancy status and posts a hearing notice for a date that may be as soon as fifteen days from the posting date. At the hearing, if the court finds that the property is vacant and abandoned based on the sheriff's report and that there are additional risks of harm due to abandonment, the court may enter a judgment of possession in favor of the mortgagee. Upon entry of a judgment of possession, the mortgagee must take possession of the dwelling and inventory the personal property on the premises. If the borrower fails to appear at the hearing, the property is deemed abandoned. If the borrower appears and rebuts the sheriff's determination of abandonment, the court may still enter an order that the borrower protect and preserve the property.¹⁶ In the event of non-compliance, the borrower will be subject to contempt of court sanctions.¹⁷ The risks of harm that may lead to entry of orders for possession or contempt include unpaid property taxes and unsatisfied liens on the property.¹⁸ A borrower who failed to appear at the motion hearing may later provide evidence of continued occupancy and seek to vacate the order for possession. However, even if the court vacates the order, it may still order the borrower in possession to maintain the property free of risks of harm. The statute provides explicitly that the orders for possession and maintenance do not affect title to the property or otherwise modify the foreclosure process.¹⁹ Presumably, legal title and ultimate liability for matters related to the property's condition remain with the borrower until the transfer of title upon completion of foreclosure. At the same time, the statute authorizes a court to order the mortgagee in possession to maintain the property pending completion of foreclosure. However, the explicit reference to contempt sanctions appears only in relation to orders against borrowers.

C. Kentucky

Kentucky is a judicial foreclosure state. Kentucky statutes provide for a one-year redemption period after most foreclosure sales. In 2012, the Kentucky legislature enacted a new foreclosure law that speeds up the foreclosure process in certain situations.²⁰ Under the new law, during the pendency of a foreclosure proceeding, a mortgagee may file a motion for an expedited sale of an abandoned property. Presumably, the courts' standard motion practices and burdens of proof apply to these motions. A judgment directing an expedited sale may be granted upon affidavits. The court must make two findings in order to authorize an expedited sale. First, there must have been no lawful occupant of the property for 45 consecutive days. Second, the court must find that two or more conditions or indicia of abandonment, as listed in the statute, exist.²¹ Upon entry of the order, the foreclosure sale may take place within 70 days and

confirmation of the sale twenty days thereafter.²² Upon confirmation of the sale, the property may be conveyed. Under pre-existing state law, a finding of abandonment would terminate the borrower's right to possession. The fast track law does not expressly address the effect of the court's abandonment finding on the borrower's post-sale redemption rights. It appears that the redemption rights remain in effect, even though the borrower loses the right to live in the property during the redemption period.

D. Indiana

Indiana is a judicial foreclosure state. Under Indiana foreclosure law, the lender must wait three months after the filing of a foreclosure complaint before a sale may take place. There is no post-sale redemption period. Indiana's fast track foreclosure law went into effect in March 2012.²³ The new law allows a mortgagee to file a petition during the pendency of a foreclosure case in order to have a property determined to be abandoned. When the motion is filed, the court issues an order to show cause as to why the property should not be deemed abandoned.²⁴ The mortgagee's motion filing shifts to the borrower the obligation to appear in the court proceeding and carry a burden of proving that the property is not abandoned. The borrower's appearance must take place within 15-25 days of the show cause order. The borrower's failure *either* to present written evidence in objection to an abandonment finding *or* to appear for the hearing constitutes prima facie evidence that the property is abandoned.²⁵ If the borrower complies with the appearance requirements, the court may still find abandonment based upon a finding that at least one of ten enumerated conditions or indicia of abandonment exist on the property. These ten conditions are set out in the statute.²⁶ The listed conditions include broken or boarded up windows and doors, terminated utilities, the presence of trash, general deterioration of the property, and other evidence of an intent to abandon, such as written statements of the borrower.²⁷ The court's finding of abandonment, whether based on the borrower's procedural default or on a finding that one of the listed conditions exists, permits the court to order an immediate foreclosure sale. This order for immediate sale supersedes the three-month delay before a sale may be scheduled under the general statute. If the mortgagee's motion is filed with the complaint, the expedited order for a sale could issue almost simultaneously with the deadline for the borrower to file an answer to the complaint.

E. New Jersey

New Jersey enacted a fast track foreclosure law that went into effect in December 2012.²⁸ New Jersey is a judicial foreclosure state. The new law creates a summary foreclosure procedure for vacant and abandoned properties. Under the law, the mortgagee may either commence a lawsuit as a summary foreclosure proceeding or convert a regular foreclosure proceeding to a summary foreclosure.²⁹ In order to obtain a summary foreclosure judgment, the mortgagee must establish two conditions by clear and convincing evidence. First, the property must not be occupied by a mortgagor or tenant. Second, at least two of fifteen listed conditions related to the

property must exist.³⁰ These conditions include overgrown grass, accumulated flyers or trash, uncorrected housing code violations, and statements from neighbors. If the mortgagee cannot establish both prongs of this test, the summary foreclosure will not be permitted and the court will not enter a final judgment of foreclosure. The statute expressly provides that a judgment will not enter on an expedited basis if the property is not vacant and abandoned or if the borrower has alleged defenses to foreclosure.³¹ The law requires documentation of efforts at personal service of the motion for expedited judgment. The mortgagee must provide the borrower with a specific notice that it is proceeding under the summary foreclosure alternative. The statute is not clear on the question of whether the court may enter a summary order based on papers alone. One New Jersey commentator has noted the potential conflict between the new law's requirement for clear and convincing evidence and the use of evidentiary presumptions.³²

F. Nevada

In order to start a non-judicial foreclosure in Nevada, the servicer must record a notice of default and intention to sell at least three months before a foreclosure sale date. An amendment to Nevada's foreclosure statutes, effective July 1, 2013, allows for the shortening of this waiting period to sixty days for properties meeting an abandonment definition.³³ In order to shorten the foreclosure time frame, the mortgagee must record two documents: (1) the mortgagee's affidavit setting forth facts showing abandonment; and (2) a certification from a government official who conducted an inspection at the property.³⁴ The law requires that a local government agency keep a registry of properties that are abandoned or in danger of being abandoned. A mortgagee seeking to use the expedited procedure must request that the local agency conduct an inspection. The certifications from the servicer and from the government agency must show that two conditions exist. First, the property must be physically abandoned. This means that, *inter alia*, utilities are off and there are no recent records of certain mail delivery (including government benefits) to the property. Second, the certifications must establish that the property meets at least two of eight additional indicia of abandonment listed in the statute. These indicia are factors showing some additional public harm or danger beyond the vacancy itself. Thus, an unoccupied but properly maintained property would not meet the statutory standard for abandonment; nor would an occupied property regardless of its condition. The new statute limits how property inspections may be conducted. Neither the servicer nor the government official may enter inside the dwelling to conduct an inspection. The law authorizes entry only upon the real property itself for an exterior inspection, and only when the servicer has a reasonable belief that the property has been abandoned. The law absolves individuals making these limited encroachments on the real property from liability for trespass. The certifications of inspection must include facts and documents to support any findings of abandonment. In addition, the agency official must give the borrower notice of a proposed determination of abandonment. The borrower has thirty days to object to the determination. The law explicitly provides for the borrower's right to record an objection at any time before a foreclosure sale under the expedited procedure. The borrower's filing of the objection has the effect of withdrawing the mortgagee's request for an expedited sale.³⁵ If the servicer files

certifications for an expedited sale, but fails to conduct the sale within six months of the filing, the certifications are deemed withdrawn and the servicer is subject to a \$500 penalty.³⁶

G. Illinois

Under Illinois' judicial foreclosure statutes, the borrower may cure a default for ninety days from the date of service of the foreclosure complaint. In addition, the borrower's redemption right extends until the later of seven months from service of the complaint or three months after entry of judgment of foreclosure. The state's new statute authorizing expedited foreclosure judgments and sales significantly alters these time frames.³⁷ The law went into effect in June 2013. Under the law, a mortgagee may file a motion to expedite judgment and sale. This motion may be filed either together with the foreclosure complaint or any time after the complaint is filed. The motion must be supported by an affidavit of abandonment. The court must conduct a hearing within 21 days after the motion is filed, and this date must be at least 21 days after the borrower's answer to the complaint is due.³⁸ If the court finds that the property is abandoned, it may enter judgment of foreclosure immediately. The redemption period ends 30 days after the date of judgment.³⁹ Any right to reinstatement ends at the same time as the expiration of the redemption period. The new statute requires that the court make two findings to support a determination of abandonment. First, the property must not be occupied by the mortgagor or a lawful occupant. Second, two of eleven listed conditions must exist on the property.⁴⁰ The eleven conditions do not include factors common to other state fast track foreclosure laws. They do not include minimal defects such as uncut grass, accumulated flyers, or neighbor hearsay. They do include serious defects such as stripped plumbing, multiple missing windows, no utility service, documented code violations and law enforcement involvement, significant danger of further damage, and signed statements of the mortgagor confirming a clear intent to abandon.⁴¹ The notice of the motion for abandonment may be served by posting. The notice can be posted fourteen days before a hearing. The statute does not set out specific requirements that the notice explain the consequences of the procedure. Nor does the law require a more stringent burden of proof for obtaining an expedited judgment. If the borrower or lawful occupant "appears in the action in any manner", either before or after the hearing and objects, the expedited foreclosure may not proceed. The borrower may also appear before confirmation of a sale and present evidence of non-abandonment.

H. Uniform Law Commission Draft Proposal (November 2013)

The National Conference of Commissioners on Uniform State Law (NCCUSL) is in the process of developing a model "Home Foreclosures Procedures Act."⁴² NCCUSL does not intend that its model law serve as a comprehensive replacement for existing state judicial and non-judicial foreclosure systems. Instead, it proposes to draft discrete statutory provisions that will address common topics under most state foreclosure systems. One set of provisions in the proposed uniform law deals with foreclosure of abandoned properties.⁴³ An introductory definition section applicable to all provisions of the model law defines "abandoned property." The

definition requires that for a property to be deemed abandoned, “the homeowner and persons claiming through the homeowner, including tenants,” must have “relinquished possession” of the property.⁴⁴

Later sections of the model law outline procedures for expedited foreclosure of abandoned properties in judicial and non-judicial jurisdictions. The law authorizes a prompt foreclosure sale after a determination that a property is abandoned.⁴⁵ In a judicial foreclosure jurisdiction a court makes the determination of abandonment. When the court makes this determination, the creditor must then “take necessary and appropriate action” to cause the sale to be completed “within a reasonable time.”⁴⁶ In a non-judicial jurisdiction, a governmental agency must determine whether the property is abandoned. If the agency finds that the property is abandoned, a sale may then take place not earlier than 30 days and not longer than 60 days after the agency determination.⁴⁷ In either type of jurisdiction, the final determination that a property is abandoned terminates all the borrower’s pre-sale and post-sale redemption rights.

In a non-judicial foreclosure state, the governmental agency’s determination that a property is abandoned triggers the mortgagee’s right to use the expedited procedure. The agency inspector must enter the dwelling and prepare an affidavit setting forth the facts supporting an abandonment determination. The agency inspector and the mortgagee must provide copies of the determination to the borrower before seeking to expedite proceedings.

In a judicial jurisdiction, a court may either defer to a government agency’s finding of abandonment, or it may find that at least three of eight conditions enumerated in section 505(a) of the uniform law are present. The eight conditions include accumulated trash and debris, broken doors or windows, and “extremely low” utility consumption. The existence of three of the conditions establishes a presumption that the property is abandoned.⁴⁸

The draft uniform law requires that the mortgagee undertake limited maintenance obligations once a property has been determined to be abandoned. The mortgagee’s obligations focus on conditions affecting the outer appearance of the property.⁴⁹ The vacancy of a property during foreclosure in and of itself does not create a maintenance duty for the mortgagee.⁵⁰ According to the Reporter’s Note, “it would clearly be inappropriate to impose an obligation on a creditor to repair the property subject to the mortgage before the creditor has taken possession or an official determination is made that the property is abandoned.”⁵¹

The requirement that the expedited sale take place within a short time after a determination of abandonment limits the duration of the mortgagee’s duty to perform limited maintenance. Mortgagees must release their liens rather than extend foreclosures sales of abandoned properties indefinitely.⁵² The statute states expressly that a creditor does not become a mortgagee in possession by virtue of performing maintenance duties on abandoned properties.⁵³ The text creates broad immunity for servicers and agents that enter property determined to be abandoned, subject only to negligence or willful misconduct claims.⁵⁴

IV. ANALYSIS: THE NINE MAJOR ISSUES RAISED BY FAST TRACK FORECLOSURE LAWS

Issue #1: Fast track foreclosure and the mortgagee's duty to report on the status of properties in foreclosure.

The premise behind fast track foreclosure laws is that properties abandoned during foreclosure represent a public problem. When it comes to abandoned properties, banks are not the only stakeholders. In fact, banks have not hesitated to emphasize this public concern when they seek to expedite abandoned property foreclosures. The public impact includes the negative effect on neighboring property values, loss of tax revenue, blight, vandalism, heightened crime, and other threats to public safety.⁵⁵

In response to the problems that abandoned properties have created since the foreclosure crisis began, hundreds of municipalities enacted ordinances that require mortgagees and their servicers to register the commencement of foreclosures within a city's limits. These ordinances typically charge a registration fee in order to finance a database of properties in foreclosure. A common feature of these ordinances is the requirement that mortgagees conduct regular inspections of a property while a foreclosure is pending. Reports of the inspections must be filed with the municipality. As part of their inspection obligations, the mortgagees must report vacancies occurring during foreclosures. All reports must include contact information identifying local representatives of the mortgagee. These representatives must be available to respond to concerns about the property's condition. Mortgagees that do not comply with these ordinances may be subject to fines and other penalties.

Several hundred municipal and county ordinances now in effect around the country include many of these standard features.⁵⁶ At the state level, a New Jersey statute also mandates that mortgagees provide registration information whenever they commence a judicial foreclosure in that state.⁵⁷

Notably absent from all the enacted fast track foreclosure statutes discussed above is any reference to an obligation for mortgagees to inspect and report on the condition of properties in foreclosure, such as the duties created under the multitude of existing local ordinances. While a few of the laws, such as the Nevada statute and the draft NCCUSL law, permit consideration of abandonment determinations made by local code enforcement agencies, none of the laws require that servicers report abandoned properties on their own initiative. None of the fast track laws obligate mortgagees to inspect properties in foreclosure regularly and report on the inspection results. The laws allow mortgagees and their servicers to cherry pick the properties they wish to fast track.⁵⁸

In many areas of the country, local housing code enforcement agencies are underfunded and overburdened. The fast track laws tend to give mortgagees complete discretion to direct

government officials to perform inspection and other enforcement tasks when the mortgagees choose. At a minimum, the state statutes should require that mortgagees register all properties subject to foreclosure with local code enforcement agencies. The mortgagees must then arrange for regular inspections and report results of inspections, including abandonment, to the local agencies. Finally, mortgagees must provide local agencies with up-to-date contact information for matters related to the property condition. The inspection requirement does not create a significant new burden for mortgagees and servicers. An array of national companies provides property inspection services to the mortgage servicing industry. Servicers routinely pay for these services during foreclosures (and pass on costs to borrowers). A burgeoning industry of default servicers now specialize in cataloguing local laws on these topics and assisting mortgagees with compliance. Including registration and inspection requirements in a statute of statewide applicability promotes uniformity while still allowing a primary enforcement role for local government.

Recommendation #1. A fast track foreclosure law for abandoned properties must work in tandem with a comprehensive statutory scheme that obligates mortgagees to register commencement of all foreclosures with local government entities and regularly submit inspection reports to these entities.

Issue #2: Fast track foreclosures and the mortgagee's duty to maintain vacant properties during foreclosure.

A common feature of many ordinances mandating registration and inspection of properties in foreclosure is a requirement that mortgagees perform minimal maintenance on abandoned properties until foreclosure is completed. For example, in 2011 the City of Chicago implemented an ordinance that requires mortgagees to register vacant properties in foreclosure and to secure and maintain them until they are conveyed to a foreclosure sale purchaser.⁵⁹ Numerous cities and counties around the country have implemented similar laws. At the state level, New York and New Jersey enacted statutes in 2009 that required the foreclosing plaintiff in a foreclosure action to maintain vacant and abandoned properties until the transfer of ownership after foreclosure sale.⁶⁰ These local and state laws typically amend the existing housing code definition of an "owner" responsible for maintaining properties to include a foreclosing mortgagee with an interest in an abandoned property. Rules requiring maintenance of collateral property during the period between commencement of foreclosure and a foreclosure sale are common in the mortgage industry. The Government Sponsored Enterprises (GSEs) Fannie Mae and Freddie Mac, as well as the Federal Housing Administration (FHFA) have issued detailed rules requiring that their servicers inspect and preserve properties during foreclosure.⁶¹

To date, the validity of state and local laws imposing maintenance duties on mortgagees has not been litigated extensively. Shortly after the Chicago ordinance went into effect, the Federal Housing Finance Agency (FHFA) sued the City of Chicago on its own behalf and on behalf of

the GSEs Fannie Mae and Freddie Mac. FHFA contended that the federal statute that authorized FHFA to exercise conservatorship over the two GSEs precluded state and local government entities from all regulation of FHFA and the GSEs, including enforcement of municipal housing codes.⁶² FHFA also contended that the registration fee and potential penalties for non-compliance with the Chicago ordinance constituted impermissible taxes on FHFA and the GSEs, barred by a federal immunity statute.⁶³ The U.S. District Court for the Northern District of Illinois agreed with FHFA's arguments and entered an order barring enforcement of the Chicago ordinance against FHFA and the GSEs.⁶⁴ ([Federal Housing Financing Agency v City of Chicago](#)) The district court's decision rested exclusively on the federal HERA statute and its immunity provisions for FHFA. The court did not reach the issue of whether a local law could direct a mortgagee to incur costs to secure and maintain abandoned collateral property before title passes to a new entity upon the completion of a foreclosure. The district court decision did not affect enforcement of the Chicago ordinance against non-GSE mortgagees.

Litigation over another municipal ordinance requiring mortgagees to maintain properties in foreclosure is ongoing. In 2011, the City of Springfield, Massachusetts implemented an ordinance to regulate mortgagees who initiate foreclosure of residential properties in the City. The ordinance requires mortgagees to post a cash bond of \$10,000 with the City, with a small part of the bond to be used for administrative expenses and the rest to be returned to the mortgagee after completion of foreclosure (if not needed to reimburse the City for costs the City incurred in maintaining the property during foreclosure). The Springfield law requires that mortgagees preserve and maintain properties in accordance with minimal standards of state and local codes. The ordinance does not require rehabilitation or major repair work. Nor does it limit or impair foreclosure remedies. Several banks are challenging the validity of the Springfield ordinance. The banks have raised primarily state preemption arguments, contending that state legislation on property maintenance and foreclosures occupies the field regulated by the City ordinance. The banks also contend that the ordinance violates the Contracts Clause of the U.S. Constitution because it alters terms of the existing mortgage documents. The U.S. District Court for Massachusetts addressed all of the banks' arguments and rejected them.⁶⁵ ([Easthampton Savings Bank v City of Springfield](#)) The court found that the local ordinance did not conflict with any state statutes and imposed no significant impairment of contractual rights of mortgagees. The banks appealed the ruling to the Court of Appeal for the First Circuit. The First Circuit has referred the matter to the Massachusetts Supreme Judicial Court (the highest Massachusetts state court) for rulings on the state law issues.⁶⁶ [Easthampton Savings Bank v. City of Springfield](#).

The mortgagees' objections in the *City of Springfield* and *City of Chicago* cases rest in part upon their view that a "mortgagee" and an "owner" of property are fundamentally different legal entities. In their view, a governmental agency cannot require that a "mortgagee not in possession" enter into collateral property and perform work on the premises. It is certainly true that under the laws of many jurisdictions a mortgage creates only a security interest in real property. A mortgagee with only a security interest in real property typically has no right to

possession. However, under a recognized exception to this rule, the mortgagee who takes possession after the mortgagor has abandoned the property may take possession and retain possession through the foreclosure.⁶⁷ Therefore, the possession issue is not a significant barrier to abandoned property legislation, particularly if care is taken in drafting the statutory test for abandonment. In addition, form mortgages almost invariably give the mortgagee the right to enter the collateral property in order to preserve it, particularly when the mortgagor has abandoned the premises.⁶⁸ Even in the case of an occupied property a statute could set out requirements for a mortgagee to give notice and have access for maintenance. In terms of possessory rights in real property, landlords of residential properties are in much the same position as mortgagees. Many states have enacted statutes that regulate how and when a landlord may access rental dwellings for inspections and repairs. There are thus many ways to address mortgagees' concerns that their agents will be accused of trespass if they enter a property under an incorrect belief that the mortgagor had abandoned it.

An objective of most fast track foreclosure statutes is to define "abandonment" in the context of mortgages in default. The laws can give a court or administrative body the authority to determine whether a statutory definition of abandonment has been met in a particular case. If these determinations are made with proper procedural protections, they will not impair the borrower's rights. At the same time, compliance with the statutory procedures to determine whether a property is abandoned can safeguard the mortgagee from trespass and related claims.

As the court in *City of Springfield* recognized, mortgagees' Contracts Clause objections to maintenance laws have little merit. The laws apply to mortgagees that have formally declared an intention to foreclose upon and sell the properties through a public auction. The laws require the mortgagee to disclose to a public agency some basic facts about the condition of the property and to ensure that the property does not cause harm to the public while awaiting the foreclosure sale. Requiring the mortgagee to take some minimal steps to preserve the condition of its collateral is not the type of substantial impairment of rights that the Contracts Clause would preclude.

Among the existing fast track laws, the Oklahoma statute and the NCCUSL draft law address this maintenance duty to a limited extent. The Oklahoma statute requires that a mortgagee commence proceedings for expedited foreclosure when it is aware that a property has been abandoned. The law authorizes courts to direct the mortgagee to maintain a property determined to be abandoned until the foreclosure is completed.⁶⁹ The NCCUSL law also requires mortgagees to preserve and secure properties that have been determined abandoned by a court or government agency. While its Reporters Note and text create some ambiguity on the point, the NCCUSL draft appears to require that mortgagees perform some maintenance work on collateral property before a formal determination of abandonment has been made. This obligation would be limited to instances where a public agency found a health or safety risk in the property's condition.⁷⁰

Recommendation #2. A fast track foreclosure law must require that the mortgagee perform minimal maintenance work to ensure that the collateral property does not cause harm to the public while awaiting sale.

Issue #3: Application of fast track foreclosure to occupied properties.

A questionable aspect of several fast track foreclosure statutes, notably those enacted in Michigan and Oklahoma, is their application to occupied properties. The Michigan and Oklahoma statutes allow mortgagees to circumvent significant requirements of each state's traditional foreclosure procedure and evict borrowers summarily based on the alleged condition of occupied properties. The conditions that trigger the mortgagee's right to fast track foreclosure can be insubstantial, such as uncut grass, accumulated flyers, or hearsay statements from neighbors. These conditions could be just as indicative of a temporary absence or illness. Under other statutes, such as those of Indiana and New Jersey, the mortgagee's allegation that certain conditions exist on the property triggers a presumption of abandonment. This presumption sets in motion obligations of the borrower to comply with certain new procedural burdens. Borrowers who reside in their homes, and who therefore should not be subject to summary foreclosure, may fail to comply with these additional procedural demands. They will then be subject to fast track foreclosure.

Allowing fast track foreclosures for occupied properties is inappropriate. Abandoned properties are a hot button issue, and banks freely use the stereotype of a non-paying borrower deliberately trashing a home in foreclosure as a supporting anecdote for these laws. In reality, to the extent that the stereotype of the destructive deadbeat borrower ever truly exists, such a borrower is legally responsible for these actions. Current state and local laws can adequately address the problem. If the dwelling is truly occupied, the borrower, as title owner of the property, must answer to enforcement of existing housing codes. The mortgagee would also have remedies against a destructive borrower in the nature of an action to restrain waste. On the other hand, when the property is abandoned, the mortgagee has traditionally had the right to enter the collateral property and preserve it. There is simply no need to subject occupied properties to fast track foreclosures as if they had been truly abandoned.

The NCCUSL draft foreclosure law appears to limit fast track foreclosure to vacant properties. The statutory definition of "abandoned property" requires that the homeowner have relinquished possession of the property.⁷¹ Section 505 of the NCCUSL draft specifically addresses fast track foreclosures. The main text here is not as clear on the point. The accompanying Reporter's Note is consistent with the statutory definition of abandoned property and applies the procedures only to unoccupied properties.⁷² On the other hand, none of the eight presumptive criteria for abandonment listed in section 505(a) require a court to make a specific evidentiary finding that the property is vacant.

The Nevada and Illinois statutes address the question of actual vacancy in a clear and more effective way. The Nevada statute expressly declares that occupancy is a defense to a fast track foreclosure.⁷³ The Nevada statute prescribes a simple procedure for the borrower to record a statement objecting to the fast track foreclosure, and the procedure must stop. Illinois is a judicial foreclosure state, and under the Illinois law the borrower need only “appear in the action in any manner” either before or after the hearing on a motion for expedited foreclosure and object to a finding of abandonment.⁷⁴ This objection stops the fast track proceeding. The Illinois borrower may also appear before confirmation of a foreclosure sale that was conducted under the expedited procedure and present evidence of non-abandonment. The court must vacate the expedited foreclosure judgment upon the presentation of evidence showing the property was not abandoned.⁷⁵ The Nevada and Illinois statutes make clear that an expedited foreclosure process is available only for situations in which legitimate abandonment of the property occurred and the property is vacant.

As discussed (see Issue #5), the use of presumptions can increase the likelihood that occupied properties will be deemed abandoned. The Indiana statute deems a property abandoned either on the basis of a borrower’s procedural default (failure either to file written objection or appear for a hearing) or on the basis of a finding that one of ten listed conditions exist on the property.⁷⁶ On the other hand, under New Jersey’s statute the court must find by clear and convincing evidence that at least one of fifteen listed conditions exists. In addition, the court must separately find by clear and convincing evidence that the property is vacant and abandoned. Unlike the Indiana statute, the New Jersey law requires a distinct finding of vacancy that trumps all other considerations, including any presumptions of abandonment that would otherwise be determinative.⁷⁷

Recommendation #3. The statute must apply only to vacant and unoccupied properties, and include a simple method for the borrower to bar fast track foreclosure by asserting occupancy.

Issue #4: The duty to complete fast track foreclosures of abandoned properties promptly.

To the extent that any fast track foreclosure procedure is created, the remedy must exist as a narrow exception applicable only to properties determined to be vacant. Blight prevention has been one of the mortgage industry’s major rationales in support of enactment of the laws. The mortgagees’ policy argument is that the expedited procedure is necessary to speed up transfer of the properties to new owners who will see that the properties are occupied and maintained in the future. Mortgagees should be held to this agenda. In return for the privilege of using the fast track procedure for a vacant property, the mortgagee must agree to be held accountable for an expeditious completion of foreclosure.

Municipalities have implemented registration and maintenance ordinances applicable to properties in foreclosure out of concern, in part, for bank walk-aways. Particularly in hard pressed urban areas such as Detroit, Cleveland, and Chicago, mortgagees have engaged in the practice of initiating foreclosures, then abandoning them when the properties appear to be of little value, or turn out to be net liabilities.⁷⁸ Traditionally, mortgage servicers have not informed borrowers that the foreclosures are being abandoned and the loans written off. Borrowers often move out without knowledge of the lender decision to walk away. As a result, title to the vacant properties remains in the borrowers' names. The borrowers remain liable for taxes and other costs associated with the property, including code compliance. The mortgagees walk away, dumping the costs of dealing with the abandoned properties on neighbors and taxpayers.

Allowing a fast track foreclosure, particularly where it involves a summary eviction from an occupied property, and then permitting delay once the property is vacant would run contrary to the stated goal of the expedited procedures. The Nevada statute addresses this issue by mandating a \$500 penalty in instances where the mortgagee files documents for an expedited sale, but fails to conduct the sale within six months of recording the request.⁷⁹ In addition to assessment of the penalty, the mortgagee's request for expedited foreclosure is deemed withdrawn. This penalty amount is likely to be too low to deter bank walk-aways and misuse of the fast track procedures. A significantly higher penalty would be more effective.

Several other fast track foreclosure statutes set out a required time line for the completion of a foreclosure sale after a determination of abandonment. For example, New Jersey's law requires that the sale must occur within 60 days of the court's expedited foreclosure judgment.⁸⁰ The Kentucky statute requires the sale to be within 70 days of the order finding abandonment.⁸¹ The NCCUSL draft model law recognizes a public interest in the prompt completion of foreclosure sales of abandoned properties.⁸² However, the details and time limits are not clearly set out in the most recent NCCUSL's draft, and the draft does not provide for sanctions for mortgagee misuse of the procedures.

Because of the potential for misuse of fast track foreclosure authority, monitoring of foreclosure activity is essential. This is another reason why it is important that the oversight system (described in Issue #1) be in place in any jurisdiction that enacts a fast track foreclosure law. When properties are clearly abandoned and are causing harm to communities, mortgagees should not have the discretion to delay foreclosures indefinitely. Allowing title to remain in former occupants' names while avoiding responsibility for the property's deterioration should not be an option for mortgagees. FHFA's position that the GSEs are exempt from state and local housing code enforcement is troubling. *See, Federal Housing Finance Agency v. City of Chicago.*⁸³ To the extent that the GSEs attempt to benefit from the provisions of a state's fast track foreclosure law, they must be held to comply with all requirements integral to these special foreclosure procedures, including compliance with housing codes.

Recommendation #4. Access to fast track foreclosure for vacant properties must be conditioned upon compliance with housing codes during the foreclosure process and prompt conveyance of the property to a new title owner.

Issue #5: The use of presumptions to determine the mortgagee's right to use fast track foreclosure.

The existing fast track foreclosure laws raise a number of concerns about burdens of proof and standards of proof in foreclosures. These concerns come into play for laws that apply in both judicial and non-judicial foreclosure systems.

The mortgage industry's demand for speedier foreclosures has focused on judicial states. Fast track foreclosures could have a significant effect on how borrowers participate in a judicial foreclosure. One aspect of judicial foreclosures that is often overlooked is that the overwhelming majority of judicial foreclosures proceed by default. In most judicial foreclosure states from 80 to 90 percent of borrowers do not enter an appearance and do not participate in any meaningful way in the proceedings.⁸⁴ Access to legal representation and lack of understanding of the court procedures contributes heavily to these high default rates. Nevertheless, many basic substantive rights, such as statutory time frames for cure and redemption, apply to borrowers even when they default by not filing an answer to a complaint.

The fast track laws can drastically change the structure of a judicial foreclosure. Borrowers stand to lose important protections associated with cure and redemption rights. They may lose these protections based on the operation of presumptions or "prima facie" case standards defined by the fast track statutes. Many of these presumptions are based on mortgagee averments regarding property condition. As described in Issue #3, these property condition checklists should never be used to trump the requirement that the properties be unoccupied and vacant.

Presumptions and "prima facie" case standards in a judicial foreclosure proceeding have the effect of shifting from the plaintiff to the defendant the burden of proof that is standard for a judicial proceeding. The use of rule to show cause hearings, as under the Indiana statute, has the same effect of shifting to the borrower the burden to show entitlement to basic elements of the state foreclosure laws that had always been intended for the benefit of borrowers. The overwhelming majority of defendants in judicial foreclosures, because they do not file any court papers, stand to lose important rights based on the use of these presumptions. A comment to New Jersey's new fast track foreclosure statute noted this problem.⁸⁵ The New Jersey statute requires that the mortgagee establish its right to proceed with an expedited foreclosure by clear and convincing evidence. This is an appropriate standard to apply. However, at the same time the statute authorizes the use of presumptions (a laundry list property conditions) to determine whether a particular property is abandoned. There is a clear conflict between a standard for judgment that requires that a court make express findings by clear and convincing evidence on

the one hand, and the use of presumptions created by documents submitted by the plaintiff on the other hand.

In Michigan, a non-judicial foreclosure state, the fast track foreclosure law requires that the borrower rebut the presumption of abandonment in a summary eviction proceeding. The statute lists nine general property conditions that constitute “damage.” The foreclosure sale purchaser need only allege one of these as the basis for filing a summary eviction complaint against the borrower.⁸⁶ The conditions defined as “damage” under the Michigan law require no showing of causation or severity. The Indiana statute contains a similar list of ten conditions,⁸⁷ and the Kentucky statute lists six.⁸⁸ The NCCUSL draft statute includes a list of eight conditions that may give rise to a presumption of abandonment.⁸⁹ The NCCUSL text relies on a determination by a local governmental agency that a property is abandoned. This structure may prove problematic both for mortgagees and for mortgagors. While Nevada appears to have brought local government agencies on board for an inspection system tied directly to its fast track foreclosure law, not all non-judicial states will have such a system in place. Mortgagees are likely to find a certification system relying on government agencies cumbersome. From the borrowers’ perspective, the NCCUSL model limits the ability to challenge an abandonment determination in non-judicial foreclosures. The borrower must challenge such a determination through the state or local government procedures for appeal of code enforcement decisions. These procedures are likely to be confusing and intimidating for borrowers, and often require a party to initiate court proceedings. Thus, under the NCCUSL proposal, borrowers in a non-judicial foreclosure may have to initiate a legal proceeding in order to challenge a presumption. The Nevada statute provides the simplest procedural option for the borrower. In Nevada, the borrower need only file an objection in writing opposing the fast track foreclosure and indicating that the property is occupied. The Nevada statute achieves the purpose of selecting abandoned properties for fast track foreclosure without creating unnecessary judicial or administrative hurdles for borrowers to overcome in order to rebut a presumption.

Recommendation # 5. Courts must make findings regarding abandonment based on clear and convincing evidence and not presumptions or “prima facie” standards developed for a fast track foreclosure statute.

Issue #6: The borrower’s procedural rights in fast track foreclosure.

There is basic merit to the point that delays in foreclosure of an unoccupied property benefit no one. The challenge is to draft a statute that accurately identifies properties that are unoccupied and abandoned. Few individual consumers encounter a mortgage foreclosure more than once in a lifetime. The lack of clear knowledge about foreclosure procedures among homeowners is pervasive, and access to affordable legal assistance very limited. Therefore, a fast track system that relies on pro se homeowners making informed decisions about the preparation and filing of legal documents raises substantial fairness concerns. A requirement that borrowers take specific

legal action within a short time frame and the use of evidentiary presumptions adds to these concerns.

The fast track foreclosure laws considered here generally do not mandate clear notices that inform borrowers of the nature of the proceedings and what they must do to protect their rights. The Illinois law, for example, mandates a form notice that is incorporated into the statute. The notice, however, repeatedly refers to an “abandonment” determination, without stating the significant legal consequences flowing from the term.⁹⁰ The borrower may have as little time as fourteen days to respond to the Illinois notice. Under other similar laws, borrowers must often act within short time frames to protect their rights. The Indiana law requires that the borrowers both file a written objection and appear for a hearing, otherwise the property will be deemed abandoned. The show cause hearing under the Indiana procedure may take place as soon as fifteen days from service of the notice. Under the Oklahoma statute, the borrower must respond to an agency determination of abandonment in fifteen days. The NCCUSL draft can require that borrowers appeal local government agency determinations in order to avoid a conclusive finding of abandonment. Perhaps the most unusual requirement is under the Oklahoma statute. Under the Oklahoma law a court may require that a borrower complete home repairs as a condition to obtaining the benefit of basic protections under the state’s foreclosure law.

Under any state law, the notices related to fast track foreclosures must give borrowers accurate information about steps they must take to preserve their rights. Notices must inform them not only of the fast track procedures, but also of the rights under the standard foreclosure laws that will be lost or diminished if the borrowers fail to take specified actions.

Establishing personal service for a proceeding that may involve an abandoned dwelling poses an obvious difficulty. A system that leads to the borrower’s forfeiture of significant legal rights based solely on posted service is unacceptable. The U.S. Supreme Court has held that posted service cannot be the sole basis for personal jurisdiction to evict a residential tenant.⁹¹ The basic requirements for documented attempts at personal and other alternative forms of service that satisfy service of process requirements for a civil action under state law should apply in connection with any judicial proceeding that determines whether a foreclosure should be fast tracked. The New Jersey statute addresses service of process most clearly, expressly stating that in addition to regular service of process, a motion for expedited foreclosure must meet additional requirements. The documentation must show at least two attempts at personal services under defined circumstances and other steps to achieve actual notice.⁹²

Hearings on expedited foreclosure rulings should be scheduled automatically, as under the Indiana statute. However, unlike in Indiana, the mortgagee should have the burden of going forward and bear the burden of proof to establish entitlement to use the fast track procedures. The court should make findings and apply a clear and convincing evidence standard in making its ruling.

Any burden placed on the borrower to assert occupancy should be slight. Whether the determination is made in a judicial or administrative forum, the burden on the mortgagee to override the borrower's claim of occupancy should be a strict one. The Nevada approach of allowing any statement by the borrower in objection to be sufficient to terminate the fast track process is reasonable and efficient. Similarly, the provision under the Illinois statute requiring only an appearance by the borrower in any form to stop the fast track proceeding is appropriate.

Recommendation #6. Procedural protections for borrowers under fast track foreclosure laws must include documented attempts at personal service, clear notices to borrowers of their rights and the consequences of the laws, a hearing, and ease of registering an objection that stops the process.

[Issue #7: The protocol for mortgagee's inspections and immunity from trespass and conversion.](#)

Mortgagees often object to laws requiring that they inspect and maintain properties in foreclosure by citing the risk that they may be subject to liability for trespass if they attempt to carry out these duties. The issue of potential trespass claims also comes up in the context of fast track foreclosures. These laws require that mortgagees ascertain whether a property has been abandoned by lawful occupants. Several existing fast track foreclosure statutes include rules on access for inspections. They often include provisions that exempt mortgagees and their agents from liability for trespass in connection with their performance of inspections and maintenance during foreclosures.

A well-established industry of specialized contractors routinely performs property inspections and maintenance work for mortgage servicers. While there have been instances when borrowers have sued these default servicers for trespass, these cases typically involved gross misconduct, such as the forcible eviction of families clearly occupying a home and destruction of their personal property. It is important to keep in mind that approximately one-third of American households live in rental dwellings. Under residential leases, a tenant holds the possessory interest in the property while state laws require the landlord to maintain the property in habitable condition and in compliance with codes. State statutes and common law have been able to come up with reasonable guidelines governing a landlord's access to rental properties for inspections and repairs. State and local laws that require a mortgagee not in possession to inspect and perform limited maintenance for collateral properties do not impose an unreasonable burden on mortgagees. Similarly, many state laws have well-developed doctrines governing rights and liabilities of mortgagees in possession. When properties have been determined to be abandoned, mortgagees can take possession under existing state law. Mortgagees can perform maintenance and related tasks consistently with those rules.

The industry's exaggerated claims for special protections related to inspections have led to some troubling developments in fast track foreclosure statutes. For example, under Michigan foreclosure law the homeowner always had the right to retain possession during the standard six-month post-sale redemption period.⁹³ Under the state's fast track foreclosure statute effective in January 2014, the purchaser at the foreclosure sale (whether the mortgagee or a third party bidder) "may inspect the exterior and interior of the property and all ancillary structures."⁹⁴ The sale purchaser may bring a summary action for eviction at any time during this redemption period "if inspection is unreasonably refused." *Id.* The new Michigan law places no clear limits on the timing and frequency of inspections. It does not require that there be any particular reason for an inspection, and it does not require advance notice in any form to the occupants. The NCCULC draft model law requires that public officials conducting abandonment inspections enter dwellings.⁹⁵ Such a requirement is unnecessary, as the Nevada statute discussed below indicates. The Nevada statute allows a mortgagee or government official to inspect a mortgaged residential property when there is a "reasonable belief that the real property may be abandoned."⁹⁶ However, this inspection is limited to the exterior of the property, with the law stating expressly that a mortgagee's agent or a government official "may not enter any dwelling or structure, to investigate whether the real property is abandoned residential property." *Id.* The Nevada law exempts an inspector from trespass liability to the extent that the individual acts in compliance with these restrictions (i.e. has a reasonable belief that the property is abandoned and limits the inspection to the exterior of a dwelling).

Allowing mortgagees access to properties after there has been a judicial or administrative determination of abandonment should not be controversial, so long as the borrower has been afforded adequate procedural protections. The NCCUSL text, for example, allows for the mortgagee's access for maintenance after the abandonment determination and provides for immunity from trespass claims.⁹⁷ An immunity provisions for entry into dwellings should be carefully drafted to apply only to mortgagees who have obtained formal declarations of abandonment. The Illinois statute is careful to include within the scope of its waiver of trespass liability only parties who were named in the legal proceeding.⁹⁸

Recommendation #7: To the extent that a fast track foreclosure law addresses inspections, the law must limit inspectors' entry on the property to the exterior of dwellings and only when the mortgagee has a reasonable belief that the property is abandoned. The mortgagee should be permitted to enter the dwelling to perform maintenance only after a court or final administrative agency decision has determined that the property is abandoned.

Issue #8: The effect of fast track foreclosure on parties' legal claims.

Fast track foreclosure statutes may allow entry of a final judicial determination, either in the form of a judgment of foreclosure in a judicial foreclosure or a judgment of possession (eviction) after a non-judicial foreclosure. These judgments are entered on an expedited basis and may be based on affidavits incorporating special statutory presumptions created under the fast track

laws. Because the laws address properties that the residents have likely abandoned, there is a great potential for entry of judgments against parties were never personally served with process and had no actual notice of the proceedings.

Given these considerations, it is important to limit the effect of judgments entered in fast track proceedings. The judgments should be limited solely to *in rem* property rights, the enforcement of the mortgage or lien affecting the property, or the right to possession. The statutes should expressly provide that these judgments have no effect on personal liability of the borrowers as to any monetary claims. This includes deficiency claims and any claims related to costs and fees.

Existing statutes vary in how they address the conclusive effect of judgments in fast track proceedings. For example, while not expressly stating so, the Indiana and Kentucky statutes appear to allow for entry of a traditional judgment of foreclosure under their state laws, but on an expedited basis. The Illinois statute clearly states that a judgment entered under the expedited procedures has the preclusive effect of a foreclosure judgment entered under the normal foreclosure procedures.⁹⁹ On the other hand, the Oklahoma statute expressly limits the preclusive effect of orders entered under its provisions.¹⁰⁰ The New Jersey law states that no judgment may be entered under the fast track process if the borrower has filed an answer asserting a valid defense, even if the property is abandoned.¹⁰¹

Because the expedited foreclosure proceedings should be premised on a finding of abandonment, the borrower should be able to vacate a judgment entered under these procedures by offering evidence that the property was in fact not abandoned at the time the proceedings were initiated. As discussed above, the expedited nature of these procedures, the use of presumptions, and short cuts in service of process, can make these proceedings particularly prone to error. For this reason, the burden on an affected borrower to vacate or set aside these proceedings should not be a strict one. Where the borrower seeks to set aside a judgment before a sale takes place, the borrower's objection should effectively terminate the fast track process. While it may be appropriate to set some time limit for filing a motion to set aside a completed sale, the motion should be granted where the borrower has produced verification showing that the property was not abandoned when the fast track proceedings were initiated.

The judgments entered in fast track foreclosure proceedings must have no preclusive effect on monetary claims of borrowers against mortgagees or servicers.

Recommendation #8. Judgments entered in fast track foreclosure proceedings must have limited preclusive effect, applying only to interests in the property, and must be subject to vacating upon a showing of occupancy.

Issue #9: Shifting to borrowers the mortgagee's costs of compliance with fast track foreclosure laws.

Fast track foreclosure and property registration laws address fees-shifting in two ways. One involves fees shifting in general. The other deals with the practical question of accounting for bonds.

The NCCUSL model law text expressly allows a mortgagee to charge the borrower for all costs the mortgagee incurs in using the fast track foreclosure procedures.¹⁰² The proposed text authorizes the fees shifting regardless of contract terms. If the purpose of fast track foreclosure laws is to determine the mortgagee's rights in abandoned properties, such a provision runs counter to that purpose. When mortgagees use these statutes, they seek to treat the borrowers' rights in the property under state law as extinguished. Abandonment confers possession and control over the property to the financial institution that formerly held only a mortgagee's interest in the property. Once this occurs, the former mortgagee cannot proceed to assess fees and costs against a party that has been determined to have relinquished its rights in the property. The NCCUSL text's fees-shifting provision produces a result that is inconsistent with the purpose and general framework of the statute. It simply goes too far in allocating all benefits and no significant burdens to the mortgagee.

Under certain municipal ordinances mortgagees are now required to register foreclosures and post a bond with a local government entity when they begin a foreclosure proceeding. The government entity (a city or county) holds this bond for possible use in the event that it incurs costs to maintain or demolish the property in the future. If the bond is not used by the time title to the property is transferred to a new owner after a foreclosure sale, the municipality returns the bond to the mortgagee. The amounts of these bonds range from a few hundred dollars to \$10,000 in some Massachusetts municipalities. These bond requirements have been the subject of some contention. Mortgagees specifically challenged these provisions in the *City of Chicago* and *City of Springfield* litigation, discussed in Issue #2.

An improper practice related to registration and repair bonds has appeared in several Massachusetts cities. Mortgagees are assessing the full amounts of these registration and repair bonds as foreclosure costs against borrowers as soon as the mortgagees post the bonds with municipalities. The mortgagees do so even though they will likely receive the deposited amounts back upon completion of foreclosure. The funds are tapped only in the event that a city pays to secure a property in foreclosure after the mortgagee refused to do so. The mortgagees ultimately control whether any of the bond funds are ever spent. The practice of imposing the full amount of the bond as a cost on the borrower is clearly improper. However, the practice may go unchallenged because mortgagees often aggregate foreclosure costs in vaguely defined categories when they assess costs against borrowers. State fast track foreclosure laws should expressly bar this type of abusive fees shifting. Municipalities need the funds held for bonds and must assess registration fees in order to fund foreclosure-related code

enforcement. The efficient and fair operation of these local ordinances should be an essential element of a fast track foreclosure law (see Issue #1).

Recommendation #9. Fast track foreclosure statutes must expressly preclude fees shifting from mortgagees to borrowers for costs associated with compliance with state and local laws related to abandoned properties.

END NOTES

¹ Lender Processing Services, Inc., LPS Monthly Mortgage Monitor Reports, including Report of Nov. 1, 2011, discussing “Significant Difference in Inventories, Timelines Between Judicial and Non-Judicial States”; Corelogic National Foreclosure Report April 2013; Federal Housing Finance Agency State Level Guarantee Fee Analysis, <http://www.fhfa.gov/webfiles/25869/StateLevelGfeeAnalysisFinal.pdf> and 77 FR 58991 (Sept. 25, 2012). *See also* RealtyTrac, Foreclosure Activity on Slow Burn (Oct. 11, 2011) listing the ten states with the longest foreclosure time frames as: New York (986 days), New Jersey (974 days), Florida (749 days), Maryland (594 days), Connecticut (584 days), Pennsylvania (535 days), Illinois (527 days), Massachusetts (517 days), New Mexico (472 days), and Ohio (458 days). All but one (Massachusetts) are judicial foreclosure states. States with the shortest foreclosure times were listed as Texas (86 days), Kentucky (94 days), and Virginia (102 days), all non-judicial states.

² *See e.g.* K. Harvey, “Housing Recovery Quicker in Non Judicial States” Charlotte Observer Dec. 12, 2013 <http://www.charlotteobserver.com/2013/12/12/4540187/housing-recovery-quicker-in-non.html#.Ussa3mwo7cs>; J. Swanson, “Unintended Consequences of Judicial vs. Non-Judicial Foreclosure,” Mortgage News May 7, 2013

http://www.mortgagenewsdaily.com/03072013_lps_mortgage_monitro.asp

³ RealtyTrac, Exclusive Report Quarter 1 2013 Foreclosure Inventory Update. p. 1

⁴ *Id.*

⁵ *Id.* at p. 5.

⁶ *See generally*, *State of New York Unified Court System, 2013 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009*. Available at

<http://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf> (discussing history of shadow docket of New York judicial foreclosure cases).

⁷ In the fall of 2011 the average time frame from commencement of a judicial foreclosure to completion of sale was 748 days in Florida, 974 days in New Jersey, and 527 days in Illinois. Press Release, RealtyTrac, Foreclosure Activity on Slow Burn (Oct. 11, 2011), *available at* www.realtytrac.com/content/press-releases/third-quarter-and-september-2011-us-foreclosure-market-report-6880.

⁸ In 2005, the Federal Housing Administration (FHA) published state-by-state due diligence time frames for servicers of FHA-insured loans to complete foreclosures under a given state’s laws. At that time, the reasonable time frame to complete a judicial foreclosure in Florida was 7 months, 14 months for New Jersey, and 12 months for Illinois. HUD Mortgagee Letter 2005-30 (July 15, 2005).

http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/letters/mortgagee/2005ml. Time frames for non-judicial foreclosure states ranged from 3 to 10 months and 6 to 17 months for judicial states. *Id.* On average, the typical non-judicial foreclosure took 5-6 months and the typical judicial foreclosure approximately 10 months. *Id.*

⁹ M.C.L.A. 600.3241, 3241a.

¹⁰ M.C.L.A. 600.3240(13).

¹¹ *Id.*

¹² *Id.* at 600.3240(13)(a)-(i).

¹³ M.C.L.A. 600.3240(13).

¹⁴ Copy of July 3, 2013 Governor Rick Snyder signing letter available at

<http://foreclosure.cedam.info/files/130703.SigningLetter.pdf>

¹⁵ 46 Okla. Stat. § 302.

¹⁶ *Id.* § 302(H)(1).

¹⁷ *Id.*

¹⁸ *Id.* § 302(A)(3).

¹⁹ *Id.* § 302(J).

²⁰ Ken. Rev. Stat. § 426.205.

²¹ *Id.* § 426.205(2).

²² *Id.* § 426.205(3),(4).

²³ Amended Indiana Code §§ 32-30-10.6-1 to 32-30-10.6-5.

²⁴ *Id.* § 32-30-10.6-4(a).

²⁵ *Id.* § 32-30-10.6-5(b).

²⁶ *Id.* § 32030-10.6-5(a).

²⁷ *Id.*

²⁸ N.J.S.A. 2A:50-73.

²⁹ *Id.* 2A:50-73(c).

³⁰ *Id.* 2A:50-73(a).

³¹ *Id.* 2A:50-73(e).

³² 30 N.J. Prac. Law of Mortgages § 27A.3 (2d ed.), referencing New Jersey Court Notice to Bar: Foreclosure of Abandoned Residential Properties – Rule Relaxation Model Pleadings May 23, 2013, at <http://www.judiciary.state.nj.us/notices/2013/n130528a.pdf>.

³³ Nev. Sen. Bill 278 (2013), amending Nev. Rev. Stat. 107.080 – 107.110.

³⁴ Sen. Bill 278 at sec. 4 (6).

³⁵ *Id.* at sec. 4(7).

³⁶ *Id.* at sec. 4(8)(b).

³⁷ 735 ILCS 5/15-1505.8.

³⁸ 735 ILCS 5/15-1505.8(c).

³⁹ 735 ILCS 5/15-1603(b) (4).

⁴⁰ 735 ILCS 5/15-1505.8(b), incorporating 735 ILCS 5/15-1200.5.

⁴¹ 735 ILCS 5/15-1200.5.

⁴² References herein are to the November 2013 draft, designated as a non-final version released for discussion purposes only, available at

<http://www.uniformlaws.org/Committee.aspx?title=Home%20Foreclosure%20Procedures%20Act>.

⁴³ NCCUSL Draft Home foreclosure Procedures Act §§ 505-507.

⁴⁴ *Id.* § 102(1).

⁴⁵ *Id.* § 506(b).

⁴⁶ *Id.* § 506(c). Subsection (a) of section 506 requires that in a judicial foreclosure jurisdiction the sale must be ordered for a date not less than 30 days and not more than 60 days from the court's abandonment determination. However, a "Drafter's Note" refers to a four-month deadline to complete a foreclosure sale of an abandoned property in a judicial jurisdiction. Drafter's Section 506 Drafter's Note No. 3. Section 506(c), on the other hand, refers to scheduling the judicial sale "within a reasonable time." It is not clear whether the language in section 506(c) was meant to set a more flexible standard than the 60-day/four-month time limits indicated elsewhere in the statutory text and notes. Presumably these inconsistencies will be clarified in a later draft.

⁴⁷ *Id.* § 506(b).

⁴⁸ None of the eight conditions require a finding that the property is vacant. However, the vacancy requirement is expressly set forth in the definition of "abandoned property" in section 102 of the NCCUSL draft statute. The Reporter's Note to section 505 recognizes that the finding of actual possession trumps a finding of abandonment based solely on the eight conditions. Section 505 Reporter's Note No. 2. ("If the homeowner or another person holding under the homeowner is in actual possession of the mortgage [sic] property, the property is not abandoned notwithstanding the existence of such conditions.")

⁴⁹ NCCUSL § 507 Reporter’s Note No. 2.

⁵⁰ *Id.* at Note 1.

⁵¹ *Id.* § 506 Reporter’s Note No. 3 and § 507(g).

⁵² *Id.* § 506 Reporter’s Note No. 3.

⁵³ *Id.* § 507(i).

⁵⁴ *Id.* § 506 Reporter’s Note No. 3.

⁵⁵ James H. Carr and Katrin B. Anacker, *Long Term Social Impacts and Financial Costs of Foreclosure on Families and Communities of Color: A Review of the Literature*, National Community Reinvestment Coalition (October 2012); California Reinvestment Coalition, *Home Wreckers: How Wall Street Foreclosures are Devastating Communities* (2011); Dan Immergluck, *The Local Wreckage of Global Capital: The Subprime Crisis, Federal Policy and High-Foreclosure Neighborhoods in the US*, International Journal of Urban and Regional Research (Jan. 2011); Joint Economic Committee, Special Report, *Sheltering Neighborhoods from the Subprime Foreclosure Storm* (Apr. 2007) (available at:

<http://www.jec.senate.gov/archive/Documents/Reports/subprime11apr2007revised.pdf>); Urban Institute, Center on Metropolitan Housing and Communities: G. Thomas Kingsley, Robin E. Smith, and David Price, *The Impact of Foreclosure on Families and Communities: A Primer* (July 2009)).

⁵⁶ Yun Sang Lee, et al, *New Data on Local Vacant Property Registration Ordinances*, Cityscape: A Journal of Policy Development and Research, Volume 15, Number 2, 2013 Cityscape U.S. Department of Housing and Urban Development Office of Policy Development and Research <http://www.huduser.org/portal/periodicals/cityscpe/vol15num2/ch22.pdf>.

⁵⁷ N.J. Stat. Ann. § 46:10B-51.

⁵⁸ The Nevada and Indiana statutes do recognize that local code enforcement agencies may, if they choose, initiate a process to have a property determined abandoned. Indiana recently enacted a statute that allows municipalities to seek abandonment determinations. Ind. Code 32-30-10.6-3.5. However, none of these statutes obligates a mortgagee to report known abandoned properties to agencies so that they will initiate the proceeding to determine abandonment.

⁵⁹ Municipal Code of Chicago § 13-12-126(b).

⁶⁰ N.Y. R.P.A.P.L. § 1307; N.J. Stat. Ann. § 46:10B-51.

⁶¹ These rules and practices are discussed in the GAO’s 2011 Report, *Vacant Properties: Growing Number Increases Communities’ Costs and Challenges*, Report No. 12-34 Government Accountability Office, Nov. 2011, pp. 27-37. (available at: <http://www.gao.gov/new.items/d1234.pdf>.)

⁶² 12 U.S.C. § 4617(a)(7), part of the Housing and Economic Recovery Act of 2008 (“HERA”), provides that “[w]hen acting as conservator or receiver, [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of [FHFA].”

⁶³ 12 U.S.C. §4617(j) (4).

⁶⁴ *Federal Housing Finance Agency v. City of Chicago*, -- F. Supp. 2d --, 2013 WL 4505413 (N.D. Ill. Aug. 23, 2013).

⁶⁵ *Easthampton Savings Bank v. City of Springfield*, 874 F. Supp. 2d 25 (D. Mass. 2012).

⁶⁶ *Easthampton Savings Bank v. City of Springfield*, 736 F.3d 46 (1st Cir. 2013).

⁶⁷ *Restatement 3d Property (Mortgages)* § 4.1(c) (2).

⁶⁸ See e.g. Fannie Mae Standard Security Instrument para. 9.

⁶⁹ 46 Okla. St. Ann. § 302(H)(2).

⁷⁰ NCCUSL Draft § 507(d) and Reporter’s Note.

⁷¹ NCCUSL Draft law § 102(1).

⁷² *Id.* § 505 Reporter’s Note No. 2.

⁷³ Nev. Sen. Bill 278 (2013) sec. 4(7).

⁷⁴ 735 ILCS 5/15-1505.8 (g).

⁷⁵ 735 ILCS 5/15-1505.8 (h).

⁷⁶ Ind. Code § 32-30-10.6-5(b).

⁷⁷ The Kentucky statute also requires a finding that the property is vacant.

⁷⁸ U.S. Govt. Accountability Office, *Vacant Properties: Growing Number Increases Communities' Costs and Challenges* (GAO Report No. 12-34, Nov. 2011); Woodstock Institute, *Deciphering Blight, Vacant Buildings Data Collection in the Chicago Six County Region* (June 2013) and *Left Behind: Troubled Foreclosed Properties and Servicer Accountability in Chicago* (January 2011) both at www.woodstockinst.org.

⁷⁹ Nev. Sen. Bill 278 sec. 4(8)(b) (2013)

⁸⁰ N.J.S.A. § 2A:50-73(j).

⁸¹ Ky. Rev. St. § 426.205(3).

⁸² NCCUSL Draft Home Foreclosures Act § 506, Reporter's Note No. 3.

⁸³ 2013 WL 4505413 (N.D. Ill. Aug. 23, 2013). Here, FHFA took the position that 42 U.S.C. § 4617(a)(7) shielded the GSEs from municipal code enforcement directed at mortgagees not yet in possession of collateral property. In the litigation FHFA asserted that the GSEs would comply with local code enforcement directed at mortgagees who acquire properties at foreclosure sales (an issue not before the court). See *City of Chicago, supra* at note 4. FHFA's distinction is inconsistent in view of its contention in the litigation that the immunity statute precluded all forms of municipal and state housing code enforcement against the GSEs.

⁸⁴ See Nabanita Pal, Brennan Center for Justice, *Facing Foreclosure Alone, The Continuing Crisis in Legal Representation* (Nov. 4, 2011) (Available at: <http://www.brennancenter.org/publication/facing-foreclosure-alone-continuing-crisis-legal-representation>); Melanca Clark and Maggie Barron, Brennan Center for Justice, *Foreclosures: A Crisis in Legal Representation* (Oct. 6, 2009) (Available at: <http://www.brennancenter.org/publication/foreclosures-crisis-legal-representation>.)

⁸⁵ 30 N.J. Prac. Law of Mortgages § 27A.3 (2d ed.), referencing New Jersey Court Notice to Bar: Foreclosure of Abandoned Residential Properties – Rule Relaxation Model Pleadings May 23, 2013, at <http://www.judiciary.state.nj.us/notices/2013/n130528a.pdf>.

⁸⁶ Failure to comply with housing codes; boarded up or closed up windows; broken windows; broken doors; accumulated rubbish or trash, stripped plumbing or wiring; missing fixtures, deterioration below or imminent danger of the property deteriorating below community standards for public safety and sanitation; or a condition constituting waste under state law. MCLA. 600.3240(13).

⁸⁷ These include defective windows or doors, lack of utilities, debris and trash, general deterioration, pending code enforcement, locks changed for fifteen days with no demand for entry, and signed statements of the borrower. I.C. 32-30-10.6-5.

⁸⁸ Overgrown or dead vegetation; accumulation of flyers, mail, or trash, disconnected utilities; absence of window covering or furniture; uncorrected hazardous conditions or vandalism; statements of neighbors, delivery persons, or government employees that the property is vacant. Ky. R.S. § 426.205(2).

⁸⁹ Broken or boarded up windows or doors; low or terminated utility service; trash and debris; general property deterioration under community standards; changed locks for 30 days with no request for entry; written statements of borrower; complaints to law enforcement; and death of the homeowner with no survivor or heir in actual possession. NCCUSL Draft text § 505(a).

⁹⁰ 735 ILCS 5/15-1505.8(l).

⁹¹ *Greene v. Lindsey*, 456 U.S. 444 (1982).

⁹² N.J.S.A. § 2A:50-73(d).

⁹³ MCLA 600.3240(8).

⁹⁴ MCLA 600.3240(13).

⁹⁵ NCCUSL Draft Home Foreclosure Act § 505(d)(2).

⁹⁶ Nevada Senate Bill No. 278, § 4 (2013).

⁹⁷ NCCUSL Home Foreclosure Procedures Act § 507.

⁹⁸ 735 ILCS 5/15-1505.8(k).

⁹⁹ 735 ILCS 5/15-1505.8(a) (foreclosure judgment will be entered pursuant to section 15-1506).

¹⁰⁰ 46 Okla. St. Ann. § 302(K) (“A motion filed, or court order issued, to protect and preserve the property as provided in this section shall not alter, modify, relinquish or release any right, title or interests of any party in or to any property, or alter, modify, relinquish or release any party’s position, standing, claims, defenses or objections in the suit, action or proceeding pending before the court to foreclose or enforce any remedy in the mortgage, contract for deed or deed of trust.”)

¹⁰¹ N.J.S.A. 2A:50-73(e)(2) (“A final residential mortgage foreclosure judgment under this section shall not be entered if the court finds that: . . . the mortgagor or any other defendant has filed an answer, appearance, or other written objection that is not withdrawn and the defenses or objection asserted provide cause to preclude the entry of a final residential mortgage foreclosure judgment.”)

¹⁰² NCCUSL Home Foreclosures Act § 507(f) and Reporter’s Note.

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