

May 4, 2012

MEMORANDUM

TO: ULC Drafting Committee on Residential Real Estate Mortgage  
Foreclosure Processes and Procedures

FROM: John A. Sebert, ULC Executive Director

SUBJECT: Report on Stakeholders Meeting Held January 13, 2012

A Stakeholders Meeting concerning a possible drafting project on mortgage foreclosures was held on Friday, January 13, 2012, from 9 am to 5 pm in the Washington, D.C, offices of K&L Gates. Representing the ULC at the meeting were: ULC President Michael Houghton; Executive Committee chair Harriet Lansing; Study Committee chair William Breetz; Study Committee members Tom Buiteweg, Bruce Coggeshall, Dale Higer, Rusty LaForge, Carl Lisman, Carlyle Ring, and Michael Rubin; American Bar Association advisor Barry Nekritz; Study Committee observers Wilson Freyermuth and Dale Whitman; and me.

About 55 stakeholders representing about 40 different organizations were invited to attend, and 38 representing 23 different organizations did attend Friday's meeting. Attendees included;

Federal Reserve Board	3 representatives
Federal Housing Finance Agency	1
Fannie Mae and Freddie Mac	4
Consumer groups	5
Academics representing consumer interests	3
Banks	3
MERS	1
Mortgage Bankers Assn & American Home Mortgage Servicing, Inc	5
Credit Union National Association	1
Independent Community Bankers Assn	1
Conference of State Bank Supervisors	2
American Securitization Forum	1
American Bankers Association	2
National Association of Attorneys General	1
National Center for State Courts	1
Other attorneys	4

After introductions, Commissioner Breetz offered general comments about the difficulties that have recently been encountered in connection with mortgage foreclosures. He then explained

that the primary purpose of this meeting is to help the Study Committee assess whether there is a need for uniform state legislation concerning mortgage foreclosures and, if so, what subjects might most importantly be addressed in any such uniform legislation and what the prospects for enactment of any such legislation might be. Then the group, with Commissioner Breetz's leadership, spent almost five hours discussing the 17 specific potential issues that were set forth in the "issues list" that accompanied the invitation to the meeting. The discussion elicited useful information and some expected divergence of views. No attempt was made to seek to develop any consensus as to whether a particular issue should be included in an act if the ULC were to initiate a drafting project.

During the afternoon, time was specially allocated to seek from the stakeholders their general views as to whether the ULC should undertake a drafting project on mortgage foreclosures and whether an individual or the organization he or she represented would participate actively in such a drafting project. Representatives of at least the following groups indicated either that they believed the ULC should initiate a drafting project on mortgage foreclosures or that they would recommend to their organization that it participate in such a ULC project:

- Federal Reserve Board
- Federal Housing Finance Agency
- Freddie Mac
- National Community Reinvestment Coalition
- Consumer Mortgage Coalition
- Mortgage Bankers Association
- American Home Mortgage Servicing, Inc.
- Conference of State Bank Supervisors
- American Land Title Association

Representatives of the following organizations expressed either opposition to or serious reservations about the ULC commencing a drafting project on mortgage foreclosures:

- American Bankers Association
- Three of the academics who were representing consumer interests
- One of the consumer organization representatives, speaking on his own behalf and not for his organization

The remaining attendees either did not speak to these issues or, if they did, did not take a position.

The remainder of this memorandum summarizes some of the points that were made during the discussion of specific issues. I have in general not identified by name those who made particular points, but at times I have noted the organization or type of organization that the speaker represented.

Should a potential act cover only residential mortgage foreclosures, or should it cover commercial foreclosures also?

All of those who spoke suggested that any ULC act should cover only residential mortgage foreclosures.

Should a potential act be designed as a comprehensive replacement for existing provisions, or as an overlay to existing state laws?

All of those who spoke suggested that any ULC act should not attempt to replace existing judicial or non-judicial foreclosure statutes in the various states but rather should be drafted as an overlay to those statutes. Some speakers indicated their belief that drafting such an overlay statute would be a challenge.

One speaker stated that, if enactability is a priority, any ULC act should address only a relatively small set of issues.

### Substantive Issues

Who can commence foreclosure, and issues related to assignments?

A number of speakers stated the belief that the UCC is clear on these issues, particularly after the issuance of the recent PEB report, and that a ULC act need not address these issues.

A representative of the Mortgage Bankers Association agreed that the UCC is clear, but he stated that real estate law creates problems when it requires producing proof of assignments and said this is an important issue that should be addressed in an act.

A representative of the Federal Reserve Board said that securitization has changed the landscape, that securitization creates great difficulties in identifying who to contact to seek relief when the borrower begins to be in trouble, and that it is necessary to change the law to reflect these changed circumstances.

What evidentiary proof is required to commence a foreclosure, and at what point must certain proofs be produced?

A representative of FHFA stated that this is a matter on which there is a lot of variation between and even within states, and this may be an area as to which uniformity would be particularly useful.

What pre-foreclosure notices must the mortgagee provide?

A representative of the Consumer Mortgage Coalition said that several years ago there was an attempt to agree on standardized pre-foreclosure notices, and that if a uniform act is drafted these matters should be addressed in the act.

A representative of the Conference of State Bank Supervisors said that one of the identified problems is the inability to prove that the required notice was given, and that a uniform act could help in this respect.

What is the appropriate time and place in the foreclosure process for ADR? Can it be made effective for all parties, and offer legitimate relief to the borrower?

Professor White said that mediation is critical, but that states vary dramatically in their provisions on foreclosure mediation.

Some speakers expressed the fear that mediations can drag out foreclosures, creating substantial costs.

One speaker said that one of the barriers to mediation is that there often are too many entities that would have to agree to a loan modification, and that there may be agreements among lenders on a particular note that preclude making any loan modifications.

A representative of the Mortgage Bankers Association said that may have been true in 2006, but that now both servicers and investors understand the value of loan modifications, and that only a small percentage of current loan securitizations deny services the power to negotiate modifications.

What is the proper scope of statutory redemption periods, so that the foreclosure processes are predictable but borrowers are still afforded appropriate opportunities to save their homes?

Some speakers said that redemption procedures would have to vary significantly depending on whether judicial or non-judicial procedures were used, and that it would be very difficult to draft uniform legislation on redemption.

Another speaker said that most states do not have redemption procedures, and that redemption periods can lead to reduced foreclosure sale proceeds.

To what extent do current foreclosure processes (e.g., newspaper ads for notice) impose unwarranted and hidden costs on the borrower?

A representative of the FHFA said that the question should be stated more generally: are there state foreclosure processes that can be streamlined to the benefit of both borrowers and lenders?

Another speaker suggested that possibly the required published notice could be a lot shorter than presently required and be published for a much shorter period of time.

What additional borrowers' or consumers' rights provisions should be considered?

A number of suggestions were made:

A representative of the Mortgage Bankers Association said that if a foreclosure process is paused because of, e.g., mediation, it needs to be clear that if the mediation fails the foreclosure process can resume and does not have to start over from the beginning.

A speaker suggested that the owner should have the right to cure a default before the lender can accelerate the full debt; another speaker said this may be ok, but there should be a limit on how soon before the planned foreclosure action a borrower could cure, such as not sooner than five days before the action.

One speaker suggested a ban on deficiency judgments. A representative of the Mortgage Bankers Association said the association would object to such a ban; the risk of being subject to a deficiency judgment provides a useful disincentive to strategic defaults.

Keys for cash foreclosure processes: one speaker mentioned the Illinois keys for cash procedures, which have been used with some success after it becomes clear that foreclosure cannot be avoided.

What post-sale court process, if any, should be required to confirm the sale, and for what purpose?

One speaker said he does not think there is need for post-sale processes in judicial foreclosure states, and that to create a process in a non-judicial state would require a new court process, which will impose costs on states. Most judicial foreclosure states do not have a post-sale judicial confirmation process.

Should an act include expedited foreclosure procedures where the property in question is vacant and derelict?

A representative of the FHFA supported giving a government entity to initiate an expedited foreclosure in these circumstances, after a good faith effort to identify the owner.

Are there any other issues that the Study Committee should review and make a recommendation on?

A representative of the Mortgage Bankers Association stated that lenders should be able to rely on business records to establish the right to foreclose.