Connecticut
Urban Legal
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Via email (mstreet@aba.com, mmichiels@aba.com) and first class mail

Mathew H. Street, Deputy General Counsel
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Office of the General Counsel
American Bankers Association
1120 Connecticut Avenue, NW
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RE: Draft Home Foreclosure Procedures Act

Dear Mathew and Megan-

I write to acknowledge receipt of your letter dated December 12, 2014 and to summarize the conversation Barry Nekritz and I had with you both on December 18, 2014.

SUMMARY OF THE LETTER. After observing that the American Bankers Association ('ABA') is "the voice of the nation's $15 trillion banking industry", the letter details, in a section headed "Assorted and Expanding Foreclosure Rules and Regimes", the "rich variety of American foreclosure law", including state law, the national mortgage settlement, CFPB regulations, Basel III, the GAO Task Force call for additional oversight of non-bank mortgage servicers and the Conference of State Bank Supervisors, that proposes to develop standards and guidelines for non- bank mortgage servicers. The letter states your views that "HFPA has the potential to be incompatible with or unnecessary" with existing law, that it "could further delay an already prolonged foreclosure process in many states", and that HFPA would not be "good for borrowers and lenders together in the current national housing market."

The letter next relates the breadth of ABA's participation in the drafting process, your 'unprecedented efforts' to engage all segments of the lending industry in the drafting process, and ABA's 'extraordinary efforts' to provide direct contact with a wide range of ABA lobbyists, staff and members. As I explain in more detail below, I am happy to acknowledge, and sincerely thank you both, for your consistent participation in the drafting process and the several very real opportunities you afforded Barry and me to present our work product to various components of the ABA structure.

The letter then lists five of what you call 'top-level observations':

Section 108. No Waiver "The blanket prohibition…is severe and runs counter to much of the tone of uniform law….[A]n informed obligor and creditor should (not) be prevented from consenting to otherwise reasonable terms."

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> **Article 3. Pre-Foreclosure Resolution.** "The mediation-like process…presents a material industry concern. …In some states where foreclosure mediation is practiced, it is believed to contribute further delay to the foreclosure process. It is certainly not an unequivocal success wherever it is in place. …Adding a process that can prolong foreclosure is undesirable."
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> **Article 6. Abandoned Property.** "…Article 6 in the current draft…would be onerous to creditors. Onerous expedited foreclosure provisions discourage our members from availing themselves of the process due to the increased costs associated with maintenance and the uncertainty around liability…."
>
> **Article 7. Remedies.** "Article 7 contains extensive, negative liability and remedy provisions…. HFPA would authorize a court to…assess penalties if it sees a pattern or practice of noncompliance."
>
> **Section 706. Effect of the Holder in Due Course Rule.** "Our members continue to oppose…modifying the holder-in-due-course doctrine."

The letter concludes:

> [N]o banker and no state bankers association has told ABA that they want this bill….It is seen as not offering the banking industry any particular benefit that cannot be gained by continued advocacy in states, and it is also seen as potentially imposing burdens on the mortgage lending process by restricting credit supply…. HFPA (is) yet another layer of burdensome foreclosure requirements without substantial benefit to all affected parties.

OUR RESPONSE and SUBSEQUENT CONVERSATION After we read your letter, Barry and I spoke at length in an effort to develop responses to your five 'top-level observations'. As you know, the Drafting Committee's charge from the outset has been to draft a statute that would be enactable in the states. Accordingly, Barry and I discussed how we might best respond to the concerns you present and to other issues that we believe are of concern to the lending community. In doing so, our obvious hope was to gain lender support for the Act, while still preserving policy outcomes which the Drafting Committee has consistently deemed important to borrowers.

Based on those conversations, by the time Barry and I spoke with you on December 18, we believed there were amendments we could support to each of the five issues –and others - that, if adopted by the Drafting Committee, would substantially alleviate the concerns that ABA and

other lenders have expressed while still providing substantial benefits to borrowers.

In our conversation, however, it became immediately clear that any effort to find common ground on these – or any - issues would not be successful. Barry initiated our conversation by describing the efforts he and I had made to identify language that might lead to agreement, and then followed with a rhetorical question: if we could offer possible amendments to remedy the perceived flaws in each of the five issues enumerated in your letter, what would the ABA response be?

You were both very cordial and very direct: there was nothing to discuss. You were clear that no amendments to HFPA, whatever the substance might be, would suffice to secure either ABA support or even neutrality for the Act.

Barry and I are both 'deal' lawyers. As such, we think we made every effort to identify possible bases for an agreement that would have accomplished the goal that you identify in your letter: "produce a text that would gain the support of the banking industry by offering benefits that would outweigh additional burdens."

But there comes a time in a negotiation – as it has in this one - when those involved must acknowledge that, at least for the present, no agreement will be forthcoming. Given the substantial resources committed by the Commissioners and staff of the Uniform Law Commission and the generous funding support provided by the Federal Housing Finance Agency and others, I very much regret that outcome.

Nevertheless, ULC and its supporters will continue to encourage others with an interest in the policy issues surrounding the foreclosure process to support our work product. I remain confident that the policy choices posed in the Home Foreclosure Procedures Act – including especially the value of pre-foreclosure resolution, limiting the Holder-In-Due Course doctrine, and expediting foreclosures through the Negotiated Transfer and Abandoned Property provisions of HFPA - will resonate over time with state legislators across the country.

In closing, let me express again my appreciation for the ABA's efforts during this extended drafting process. Without doubt, your participation, and the several opportunities to engage directly with ABA's members, were entirely genuine and very welcome. Although we were unable to 'get to yes' on a subject of fundamental importance to your members and many of our fellow citizens, the collaborative process that was evident in our dealings on this Act will surely serve as a template for cooperation between our organizations on future projects.

Very truly yours,

WILLIAM BREETZ