

MEMORANDUM

**TO: DRAFTING COMMITTEE MEMBERS, REPORTERS, ADVISORS,
AND OBSERVERS FOR THE UNIFORM RESIDENTIAL REAL ESTATE
MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS ACT**

FROM: Bill Breetz, Chair

DATE: May 16, 2012

RE: OUR UPCOMING MEETING – JUNE 8 AND 9, 2012

As our first meeting at the Donovan House in Washington DC approaches, let me welcome you all to this enterprise. To orient us a bit, I am happy to provide the following description of our task, prepared by the Executive Committee of the Uniform Law Commission and distributed to all members of the ULC:

Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections. This committee will draft an act that applies only to residential mortgages and that will be drafted as an overlay to, rather than a replacement of, existing state legislation. The drafting committee will consider a specific list of issues that were recommended for consideration in the final report of the Study Committee, and the drafting committee is asked to return to the Scope and Program Committee for approval if it wishes to address additional issues, or if it believes that revisions to UCC Articles 3 or 9 are necessary.

With this memorandum I hope to do three things:

First, I attach several documents that will be relevant to our work and describe additional materials which will be sent to you shortly.

Second, I want to describe several developments that have occurred since President Houghton appointed the drafting committee.

Third, I want to outline what I hope we will be able to accomplish during our first meeting, and give you some sense of what additional materials we plan to distribute to you in advance of that meeting.

I. ATTACHMENTS The following documents are attached to this memo:

- A.** The Report that the Study Committee prepared in January 2012 and which was the basis for the Executive Committee's decision to authorize creation of this drafting committee.
- B.** One of the exhibits to that Study, namely the initial list of issues that the Drafting Committee is charged with considering, as noted above in the charge to the Committee.
- C.** A memorandum prepared by John Sebert, Executive Director of the Uniform Law Commission. It describes what took place at the January Study Committee meeting with Stakeholders.
- D.** The Drafting Committee roster, which includes a list of the observers who have been invited to participate in our deliberations.

While some members of the Drafting Committee will have seen some of these materials, other members will not have. In any case, these materials will hopefully be of interest to our observers, since none of these materials have previously been distributed outside of the Uniform Law Commission.

I also expect to provide you with the following additional materials in ample time for your review before the June meeting:

- E.** A memorandum prepared by Professor/Co-Reporter White describing existing State Foreclosure Mediation Laws; the memo will include examples of existing statutes, and research that Prof. White has done which will bear on the suitability of this subject for a uniform statute.
- F.** A memorandum prepared by Prof. White summarizing those provisions of the recent national servicer settlement, now part of a federal consent decree, regarding Foreclosure Related procedures. Prof. White notes that "the prospective terms govern many aspects of foreclosure practices, including issues under study by the Committee."
- G.** A memorandum prepared by Professor/Co-Reporter Smith describing the use of so-called 'cash for keys' agreements and providing examples of existing statutes and posing some of the policy issues implicit in this example of several approaches that have come to be known colloquially in the field as 'graceful exits' that offer alternatives to judicial or non-judicial foreclosure.
- H.** A memorandum prepared by Prof. Smith detailing the issues surrounding vacant or abandoned properties which may or may not have been foreclosed on by

secured parties, together with examples of existing legislative responses at both the state and municipal levels as well as current judicial challenges to those statutes or ordinances.

I. A summary prepared by ULC staff of a much longer 50 state study of bills that have introduced during the past two years in the States that generally bear on the subject matter of our study committee, an indication of what legislation has been enacted, and a general summary of the subjects that have attracted the widest interest. The complete survey is available from the ULC office in Chicago for those who wish to receive it.

J. A memorandum or other materials responding to the request of Commissioner Higer of Idaho, who writes in pertinent part:

“It would be helpful to me, and I assume to other members of the committee, to get a little more background on the foreclosure abuses and other problems that have arisen over the last few years....I have heard about robo signers, I have heard about plaintiffs not having proof they hold the note and mortgage being foreclosed on, but I suspect there are other problems as well. Would it be possible...to outline the perceived problems so that we that we can then prioritize the issues to be addressed.”

II. RECENT DEVELOPMENTS Since our appointments, these events have been significant:

A. Appointment of Committee Members, Reporters and ABA Advisors The roster described in I E above includes the names and contact information for the members of the Drafting Committee, the Co-Reporters and our advisors.

B. Appointment of Co-Reporters John Sebert has successfully persuaded two exceedingly able scholars to serve as co-reporters for our committee. In alphabetical order they are:

James C. Smith – Professor Smith joined the faculty of the University of Georgia School of Law in 1984 and was named the John Byrd Martin Chair of Law during 1997. He specializes in property, real estate transactions and commercial law. Among his many professional achievements, Professor Smith has assumed authorship of *Friedman on Contracts and Conveyances of Real Property*, a well-known treatise on real estate law, now in its seventh edition. A detailed description of his course work and scholarship can be found at this web address: <http://www.law.uga.edu/profile/james-c-smith>

Alan M. White - Alan White has been a professor of law at the Valparaiso University School of Law in Indiana since 2007, and will join the faculty of City University of New York (CUNY) School of Law this summer. His teaching and research interests include, among other subjects: credit markets, property, real estate finance, bankruptcy, financial services regulation and consumer protection. Among his other professional activities, Professor White is a Consumer Fellow on the UCC Committee of the American Bar Association's Business Law Section; he has also served as a consultant to the National Consumer Law Center. His resume can be found at the following web address:

<http://www.valpo.edu/law/wp-content/uploads/pdfs/awhite.pdf>

C. Foreclosure Mediation: Invited Experts, Summary, and Appointment of Special Consultant As detailed below, a subject for the Drafting Committee's consideration for possible inclusion in our statute is the increasingly widespread use of foreclosure mediation procedures. As I noted above, you will shortly be receiving several concept papers from our co-reporters; one of them was prepared by Professor Alan White, summarizes the existing state mediation programs, provides examples of existing statutes and presents the major policy issues with which any statute might be expected to address.

With the approval of the President and Executive Director, I have invited several heads of mediation programs from around the country to join us at our June meeting to discuss these subjects.

In addition, Attorney Heather S. Kulp has agreed to assist the drafting committee in its work concerning foreclosure mediation. Attorney Kulp is a 2010 graduate of Northwestern Law School and is presently a Skadden Arps Fellow working in Chicago with an NGO called Resolution Systems Institute. Her work focuses largely on foreclosure mediation efforts throughout the United States; she is extremely well versed in the details of each existing mediation program and she is highly regarded by the heads of the various mediation programs.

Attorney Kulp has also prepared an analysis of many issues that are addressed in the various statutes and ordinances that are already in place.

III SUMMARY AND INITIAL ANALYSIS OF ISSUES; TENTATIVE AGENDA

A. SUMMARY OF ISSUES Clearly, the Drafting Committee's overall agenda must include consideration of those issues presented to the Committee by the ULC Executive Committee, as detailed in the attached materials. In addition, there are likely to be other related subjects that will be posed to the drafting committee either by its members, by observers or by third parties that the drafting committee would wish to seek authorization from the Executive Committee to address as part of the ultimate work product of the committee.

In order to bring some structure to our initial meeting, I have reviewed the list of issues with John Sebert and the co-reporters. The issues before the Drafting Committee, as completely articulated in Attachment I B to the memorandum, may be summarized in four general categories as follows:

1. MAJOR SCOPE ISSUES

- a. Should a potential act cover only residential mortgage foreclosure, or should it cover commercial situations?
- b. Should a potential act be designed as a comprehensive replacement for existing provisions, or as an overlay to work with existing state laws?

The charge to the drafting committee from the Executive Committee, cited above, has resolved both these questions.

2. SUBSTANTIVE CONSUMER-ORIENTED ISSUES

[8]. What additional borrowers' or consumers' rights provisions should be considered?

- a. Should we consider putting an outside deadline on the time given financial institutions to approve or deny short sales?
- b. Should we consider mandating judicial supervision over: (i) foreclosures of all residential mortgages: (ii) the accounting of foreclosure sale proceeds and prompt release of any surplus to the borrowers?
- c. Should the act require note/mortgage holders to consider loss mitigation, including loan modification and other workout alternatives, as a condition to allowing the foreclosure of a home? Aside from the timing of such procedures, this is the thrust of issue # 7 (below), in which the Committee might consider mandating a meaningful mortgage modification program – including a single point of contact and authority for the lender's representative -- either before or during foreclosure.

- d. Should the act require that homeowners be given a meaningful notice of their rights before the lender commences foreclosure, and be personally served with the notice of sale or Foreclosure complaint?
- e. Should the act provide borrowers with a substantive right to cure a default by catching up on missed payments without penalty at least 60 days before acceleration and before beginning any foreclosure proceeding?
- f. Should homeowners be guaranteed the right to re-instate the mortgage by paying the arrearage and costs up to the time of a foreclosure sale?
- g. Should the act prohibit mortgage holders from pursuing homeowners for deficiency judgments after foreclosure?
- h. Should the act empower state foreclosure judges to temporarily restructure mortgage notes on principal residences, so long as (1) a statutorily established percentage of the borrowers' current income is sufficient to service an 'A' note equal to at least the current appraised value of the home based on currently available mortgage terms, and (2) the entire balance of the 'B' note is payable upon sale of the home or the borrower's subsequent default?
- i. Should the act authorize a 'keys for cash' foreclosure process in which the lender and borrower, either before or after commencement of a foreclosure action, might agree to payment of at least a statutorily minimum sum to the borrower, which would then enable the lender to proceed promptly to foreclose junior liens and take title to the property?

3. LENDER-ORIENTED AND OTHER SUBSTANTIVE– NON-CONSUMER- ISSUES

These issues are listed in the same order as in the issues memo attachment I B. above:

- 1. Who can commence foreclosure? Further, who are necessary parties, and who are permissive? (See, e.g., Illinois, 735 ILCS 5/15-1501).
- 2. Assignments: Should the act require establishment of a chain of title for assignments, and requiring proof of those assignments, whether or not recorded on the land records, before commencing a foreclosure?
- 3. What evidentiary proof (e.g. note, copies, electronic versions) is required to commence a foreclosure, and at what point must certain proofs be produced?
- 4. What pre-foreclosure notices must the mortgagee provide?

5. What is the appropriate time and place in the foreclosure process for ADR?
6. What is the proper scope of statutory redemption periods, so that foreclosure processes are predictable, but borrowers are still afforded appropriate opportunities to save their homes?
7. To what extent do current foreclosure processes (such as newspaper advertising requirements) impose unwarranted and hidden costs on the borrower or the lender?

**** [This connotes the deletion of para. 8 of the issues memo, which contained the 'consumer' issues detailed above.]

9. To what extent, and in what circumstances, may private actors fulfill the role of government officials in the foreclosure process? A uniform law might consider whether private actors (e.g., auctioneers) might fulfill certain judicial foreclosure functions while still offering protections for the borrower.
10. What post-sale court process, if any should be required to confirm the sale, and for what purpose? State statutes also vary regarding post-sale confirmation. The need for post-sale confirmation (or the type of evidence to be considered in post-sale confirmation) may legitimately vary, depending upon such factors as whether the lender is seeking a deficiency judgment or merely confirmation of its title. A uniform law might provide better guidance on whether post-sale processes are warranted, in both judicial and non-judicial foreclosures.
11. To what extent is the purchaser at a non-judicial sale entitled to a presumption of the sale's validity based upon the trustee's representations of compliance with the state's non-judicial foreclosure statute? A uniform act might provide greater consistency regarding the appropriate requirements to trigger a presumption of finality in non-judicial sales.
12. Should an act include special foreclosure procedures where the property in question is vacant, abandoned and derelict?

4. OTHER SIGNIFICANT QUESTIONS FOR THE COMMITTEE'S CONSIDERATION

- a. [13] Are there areas in the Uniform Commercial Code that may be affected by potential provisions of this Act and, if so, are there any conforming changes to the UCC that may be necessary?
- b. [14] Should this act incorporate a provision similar to Section 3-116 of the Uniform Common Interest Ownership Act, which provides unit owner associations with a senior lien for 6 months of unpaid common charges on a unit, together with legal fees, and thus

provides the association the means to collect their common charges in the same manner as a tax lien?

- c. [15] Based on independent, non-uniform legislation enacted in the states during the mortgage foreclosure crisis, and on issues that are being debated in the Congress, are there other related issues that the Study Committee should review and make a recommendation on? I note that under the charge to the Drafting Committee from the Executive Committee, any such additional issues must first be authorized by the Executive Committee.
- d. Finally, over the past two to three years, the states have actively considered legislation on a broad range of topics – some addressed by this memo, and others not. The attached 50 State survey provides a general sense of where the greatest attention has been directed in the States.

B. INITIAL ANALYSIS REGARDING THE ISSUES

- 1. Regarding each of these four categories of potential issues:

Regarding “Major Scope Issues”: As noted, the Executive Committee’s charge to the drafting committee has resolved these issues.

Regarding the listed consumer-oriented issues: Whatever the merits of mandating judicial supervision of all foreclosures [8(b)] or the merits of authorizing state foreclosure judges to mandate a judicial restructuring of an existing mortgage [8(h)] – and I personally would support both outcomes -- I believe it is unrealistic to assume that provisions in our act on these topics would be enactable in the States. I therefore recommend that the Drafting Committee vote not to expend time debating the merits of these two issues.

Regarding the lender-oriented and other substantive issues: In contrast to the two consumer issues that I propose we not debate, I believe that each of the issues listed in this category should be debated, and that whatever the merits of these several issues, some version of these provisions may be enactable.

Regarding the ‘Other Significant Issues’ category: The Association’s ‘super lien’ provision from the Uniform Common Interest Ownership Act has proven very valuable to condominium, cooperative and homes associations in the States that have adopted it, by allowing them to address the problems of abandoned units and non-payment by unit owners, both of which have contributed to substantial financial stability problems in “second home” states such as Florida.

In any case, I believe we should give early consideration to the ‘association lien priority’ issue as well as the general subject of whether our work may impact the Uniform Commercial Code or other existing uniform acts.

Finally, we should discuss whether there are other significant issues affecting the foreclosure field where we might usefully consider proposing a new statutory solution. Among such potential issues are these:

- a. Servicing standards: Should the Act incorporate the servicing standards agreed to by the lenders who participated in the State Attorneys General consent decree? Commissioner Pepe has suggested this topic and Professor White will be providing the committee a summary of what those standards are.
- b. Encouraging Lenders to Rent to Defaulting Homeowners: Are there issues that the committee should be asked to consider in connection with a scenario in which a defaulting home owner agrees to a ‘quick take’ foreclosure in return for which the lender agrees that the home owner may continue to occupy the home for a period of months or years, with or without the payment of rent?
- c. Issues Surrounding Proposed Principal Reductions and Shared Appreciation Mortgages: A significant issue in the literature and one that is being vigorously debated in the Congress is the extent to which the GSEs – Fannie Mae, Freddie Mac, and the Federal Home Loan Banks – should be authorized or required to provide principal reductions to borrowers, or shared appreciation mortgages, as an additional mortgage modification alternative to foreclosure.

This act plainly will not address federal loan modification policy, or the federal tax consequences of any form of debt forgiveness. However, the act might address a range of collateral issues related to such behavior, including the lien priority to be enjoyed by a first lender that agrees to accept an ‘equity kicker’ as part of a principal reduction – compared to the interest of the second lender.

- d. Issues surrounding a voluntary or mandatory national electronic recording / storage system for notes and mortgages. This topic is likely beyond the scope of our committee’s work. However, Professor Dale Whitman has recently proposed that Congress enact legislation creating such a system and various other advocates have vigorously touted such a system. Are there any steps that we might take in this Act to ease the work of those who might be tasked in the future with crafting such a system?

C. PROPOSED AGENDA

Subject to additional or alternative thoughts the drafting committee might have, I propose this agenda for our meeting:

FRIDAY JUNE 8

9 AM – WELCOME AND INTRODUCTIONS

- ULC leadership and staff
- Drafting committee members
- Division chair
- ABA advisors
- Co-reporters
- Mediation consultant
- Observers

9:30- Noon ORGANIZATIONAL MATTERS

- Background discussion as appropriate
- Review of Issues memo; set priorities
- Any initial remarks from observers
- Committee consensus on the agenda and goals for this meeting
- Initial discussion of any additional subjects for submission to Executive Committee
 - Servicer standards
 - Rent following default
 - State law issues surrounding principal reductions/ equity kickers
 - Electronic recording

Noon -1:30 LUNCH (on own)

1:30 - 3:30 CONSIDERATION OF FORECLOSURE MEDIATION ISSUES

- Introduction of foreclosure mediation program guests
- Review of Reporter White's mediation memorandum
- Attorney Kulp remarks and review of her memorandum
- Discussion by guests, questions and observations from Drafting Committee
- Comments by observers
- Guidance to reporters of subject outline for next meeting's draft

Break

3:45- 5 pm CONSIDERATION OF 'CASH FOR KEYS' ISSUES

- Review of Reporter Smith's Memorandum regarding 'cash for keys' agreements.
- Discussion and observations from Drafting Committee
- Comments by observers
- Guidance to reporters of subject outline for next meeting's draft

SATURDAY, JUNE 9

9 AM- noon CONSIDERATION OF 'SERVICER STANDARDS' ISSUES

- Review of Reporter White's memorandum summarizing the consent decree
- Discussion and observations from Drafting Committee
- Comments by observers
- Decision on whether to seek Executive Committee approval to propose incorporating consent decree standards into the act.

CONSIDERATION OF TREATMENT OF VACANT, ABANDONED,
AND DERELICT PROPERTY

- Review of Reporter Smith's memorandum
- Discussion and observations from Drafting Committee
- Comments by observers
- Guidance to reporters of subject outline for next meeting's draft

Noon- 1:30 LUNCH (on own)

1:30- 4:30 pm CONSIDERATION OF OTHER ISSUES ON THE LIST, AS TIME
PERMITS

4:30- 5 pm WIND-UP

- Review of decisions made
- Consideration of whether to meet in Nashville
- Discussion of Fall 2012 meeting.