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: **October 15, 2012**

RE: **OVERVIEW OF SCHEDULED DRAFTING COMMITTEE MEETING NOVEMBER 2 AND 3, 2012,
L'ENFANT PLAZA HOTEL, 480 L'ENFANT PLAZA SW,
WASHINGTON, DC**

INTRODUCTION In anticipation of our upcoming meeting, I wanted to distribute to the Drafting Committee members and our observers the following materials:

- The agenda for the meeting;
- The table of contents for the initial draft of the Act, the full text of which is being distributed to you separately, together with a brief summary of what you may expect to find in that initial draft;
- A summary of what I identify as some significant developments in the field since our June meeting, together with copies or links to materials bearing on those subjects; and
- A list of the attached Exhibits.

As we continue our work, we should be mindful that the foreclosure crisis still confronts the nation. There have been some positive signs: various sources report that housing prices have begun to rise in some markets, the rate of foreclosures has abated somewhat in some markets[1], mortgage financing is becoming more available and servicers are apparently responding positively to the mandates imposed in the Attorney Generals' settlement. At the same time, however, the nation's economic recovery remains tepid, millions of Americans still are at risk of losing their homes, the reported $7 trillion dollars of lost equity suffered by homeowners to date

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[1] ***ForeclosureRadar***, a West coast data compiler, wrote the following in its October 10, 2012 issue: "September 2012 California Notices of Default were down 20.7 percent from the prior month, and down 48.1 percent compared to last year. September 2012 California Foreclosure Sales are down 17.9 percent from the prior month, and down 30.4 percent compared to last year.

[Other] foreclosure starts are down, with Arizona down 37.1 percent, Nevada down 40.1 percent, Oregon down 40.0 percent, and Washington down 31.2 percent from the prior month. Sales are also down with Arizona down 24.3 percent, Nevada down 19.5 percent, Oregon down 0.3 percent, and Washington down 33.5 percent from the prior month.

It was recently reported that the nation's five largest mortgage servicers have implemented all of the 320 servicing standards required under the national mortgage settlement *** The continued decline in Foreclosure Starts clearly shows that even though servicers are now apparently in compliance and clear to move forward with foreclosures, they are still in no rush to foreclose on the majority of delinquent borrowers."

has not yet begun to be recaptured and new allegations of both civil and criminal fraud on the part of various participants in the mortgage industry occur regularly.

Further, as the materials I attach in the Significant Developments section demonstrate, the tension between the creditor/servicer communities and borrower advocates also continues.

- The Federal Housing Finance Agency, in a controversial announcement, expects to impose higher interest costs for future borrowers in those five states that have unusually long times for completing the foreclosure process; it also threatens to charge higher fees to borrowers in other states to address the "impact of recently-enacted state and local laws that may increase the Enterprises' costs." It is not clear whether that threat would apply to California, which recently enacted a Homeowner Bill of Rights (also discussed in Significant Developments) or to the recently enacted Chicago vacant property ordinance that FHFA has challenged in federal court. **See Exhibit 1** and **Significant Developments, para. III A.**

- FHFA, over loud objections from its critics, has also declined to engage in any program of forgiving principal owed by its borrowers, choosing to rely instead on the existing loan modification programs mandated by federal law, including in some cases, principal forebearance. Paragraph B in 'Significant Developments' contains links to Acting Director DeMarco's July 3`, 2012 letter to Congress and to FHFA's analysis titled a "*Review of Options Available for Underwater Borrowers and Principal Forgiveness*". **See Significant Developments, para. III B.**
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- A recent Study by the Federal Reserve Bank of Boston addresses the controversial subject of the impact of foreclosures on neighboring properties. The paper's principal conclusion - that delays in the foreclosure process impose small but real costs on nearby properties - may bear on the deliberations of the Drafting Committee: "Our analysis shows that policies that slow the transition from delinquency to foreclosure likely exacerbate the negative effect of mortgage distress on house prices." Excerpts from that July 25, 2012 paper entitled *Foreclosure Externalities: Some New Evidence,* and a link to where it can be found, are in **Significant Developments, para. III C.**

- At the State level, California's new Homeowner Bill of Rights will become effective next year; it is applauded by borrowers and condemned by industry; Paragraph III D in 'Significant Developments' discusses the subject at length. A Lexis report entitled '*The California Homeowner Bill of rights: Its Origins, Its Protections and Its Practical Implications' that* summarizes the statute is available from Lexis; it is cited as 2012 Emerging Issues 6633. Another summary from the *Housing Law Bulletin*, quoted at length in Paragraph III D, appears as **Exhibit 3.** An example of industry media coverage of the new statute is attached at **Exhibit 4.** The executive summary of a pamphlet describing industry opposition to the proposed California statute – prepared on behalf of the Mortgage Bankers Association and others – is attached as **Exhibit 5.**

- California, where nonjudicial foreclosure is the norm, recently adopted prolix legislation mandating prompt recording of a deed following completion of that foreclosure process; that legislation was vigorously supported by Community Associations Institute ("CAI"), an advocacy group for condominium and homeowner associations. While our Act, as now drafted, does not include that requirement, I have attached some CAI materials documenting the significant losses incurred by associations as a result of the failure of unit owners and their lenders to pay common charges in that state; this is the issue addressed in proposed Section 508 of this Act. **See Exhibit 6.**

- In a more positive development, the State of Washington has enacted a mediation statute requiring independent reviews of the loan modification process conducted by servicers in the case of delinquent borrowers. That process - reflected to some degree in Section 303(b) of this draft –is reported to be the result of a successful negotiation in Washington between industry and borrower representatives. I have a variety of Powerpoint presentations and other materials describing Washington's 'Foreclosure Fairness Act' and how the Net Present Value calculation operates; I cannot attach those materials to this memorandum, but I would be happy to forward them to those interested in learning more about this process. You will also find materials on the NPV described in the Act itself in the comments to Section 303. The subject is addressed in **Significant Developments, Para. III E. Exhibit 7** outlines the substance of what the Washington statute provides.

  Especially relevant to our work, I think, is an email from Bruce Neas, one of the lawyers who participated in the negotiations of Washington State's Foreclosure Fairness Act. The complete text of that email is attached as **Exhibit 8**. He writes in part:

  > "[T]he financial services industry agreed to and fully supported this legislation. *** The major servicers/financial interests were all very well represented by legal counsel from major law firms *** Those negotiations, hard fought and difficult, produced the Foreclosure Fairness Act effective July 22, 2011. **** The workgroup that negotiated the FFA continued to work on amendments starting in the fall of 2011 **** that led to other agreed-to changes during the "special session" in December of 2011 as well as during the general session of 2012.
  >
  > I would have to say that from what I have heard of the other state legislative battles, ours was quite different. *** Both sides compromised heavily from starting positions, there was a spirit of trust b/t me and the main bank lobbyist/negotiator, and we both did our best to keep non-constructive conversations/arguments out of the negotiation process."

- I also attach two memoranda from Attorney Tom Cox; he expresses continuing reservations about the utility of this Act, he criticizes our process and makes several recommendations for additional subjects that the Act should address. I outline his concerns in considerable detail below. Those complete memoranda are attached as **Exhibits 9 and 10. Significant Developments, Para. III F** contains extended excerpts from his memoranda.

- Other attachments: Professor Jim Smith, one of the Reporters, prepared a summary of our discussion at the June meeting. You may also recall that he prepared two memoranda that were circulated at the last meeting; one on so-called Cash for Keys, addressed in Sections 501 through 504 of the new Act and the other on Abandoned Property, addressed in Sections 505 through 507 of the new Act. All three of these documents are attached, respectively, as **Exhibits 11, 12 and 13** to this memorandum. Professor Alan White, our other Reporter, also prepared a research memorandum on mediation programs around the country; it is attached at **Exhibit 14.**

- I have provided links to several law review articles that address topics which this Act also addresses. They include recent articles that discuss (i) the problem posed by unpaid common charges in common interest communities and propose solutions to that problem; (ii) what municipalities are doing to deal with vacant and abandoned properties; and (iii) the problems arising from a failure to record mortgage assignments.

- Finally, I am told the GSEs believe that a number of recent changes in their procedures, including standards for servicer review of loan modifications, timelines for approval of short sales, streamlined procedures for accepting deeds-in-lieu of foreclosure and other matters, are contributing significantly to a reduction in the number of foreclosures. In the time available to me, I have not been able to assemble documentation of those procedures or the claimed results; it may be that representatives of the GSEs would be able to assemble that information in advance of our meeting.

I AGENDA; MEETING PROCEDURES The agenda for the meeting is attached as **EXHIBIT 1.** As you will see, we expect to begin promptly at 9 am on both Friday and Saturday and continue until 5 pm, unless we have covered the entire agenda before the end of business on Saturday. There will be a break for lunch for 1 ¼ hours each day, and a brief pause in the morning and afternoon each day.

After introductions and a summary of what we think are important developments in the field since our June 2012 meeting, we will proceed to discuss each of the draft sections in the order in which they appear in the initial draft.

As is the practice of the Uniform Law Commission, this initial draft, while intended to address the outcomes of our June meeting, is solely the product of professors Jim Smith and Alan White - our two co-Reporters - and me as Drafting Committee Chair; we three also had the benefit of insights and comments from Barry Nekritz, the American Bar Association's senior representative. As a consequence, the Drafting Committee and our observers may rightly view this draft as simply our effort to articulate a more or less comprehensive but exploratory treatment of the subject. While drafted with considerable effort and the intent to incorporate the June discussion, it does not purport to represent the views of anyone other than the authors.

Indeed, the ULC process encourages and commonly produces rigorous comment and debate concerning the drafts of any act among both the committee members and the observers; I anticipate that process, in our case, will likely result in substantial amendments to this initial draft.

It may be helpful to those participating in our meeting to also understand the decision-making process of the ULC drafting committee. Specifically, if broad consensus does not emerge from the discussion among the participants regarding a particular proposal, it is common practice for the Chair to seek either a straw vote of all present or, in the alternative, a binding vote solely among the members of the Drafting Committee and other uniform law commissioners in attendance. I expect to follow that protocol, when appropriate, at this meeting.

At the end of Friday, the agenda calls for an update and possible further discussion of the idea of an electronic recording system for mortgages and notes. While this initial draft does not address that subject, several Commissioners have been long time advocates for such a system and other stakeholders continue to express an interest in that subject. For example, on October 9, 2012, the Federal Housing Finance Agency published its *Strategic Plan for Fiscal Years 2013-2017*; that plan is found at http://www.fhfa.gov/webfiles/24576/FinalFHFAStrategicPlan10912F.pdf. The Plan includes this action item:

> ***Develop a new system for document custody and electronic registration of mortgages, notes titles and liens.*** FHFA will work with the Enterprises and other stakeholders to develop a sound, efficient system for document custody and electronic registration of mortgages, notes titles and liens. The system will take into account local property laws and will seek to enhance the liquidity of mortgages so that borrowers may benefit from a robust secondary market for buying and selling mortgages.

FHFA Strategic Plan at 22.

II SUMMARY OF THE INITIAL DRAFT Without formally articulating our goal during the preparation of this draft, the four of us who prepared it have in fact produced an Act that seeks to address the tension inherent in the contrasting positions of the lending industry and borrowers' advocates. We might summarize those contrasting positions as follows:

The lending industry, on behalf of its stockholders or, in the case of Fannie and Freddie, the taxpayers, seeks simply to minimize its losses in the face of massive defaults by millions of people who borrowed real money to buy their homes, and now are unwilling or unable to pay that money back. Those lender losses arise from a combination of (i) unpaid principal and interest due on the mortgage notes, little of which is likely to be recaptured in deficiency judgments; (ii) reduced market values of those defaulting borrowers' homes as a result of the housing crisis and the further discounts resulting from forced sales; and (iii) the considerable costs incurred by lenders during and after the foreclosure in terms of legal fees, servicer fees, insurance, real estate taxes, property maintenance and staff time. All of these costs are exacerbated in some states as a result of a long-delayed foreclosure process coupled with long redemption periods; the longer the delay in taking final title and the subsequent resale of the borrower's home, the greater the lost principal and interest and the greater the costs likely to be incurred in foreclosing and ultimately reselling the home so that the investor might be repaid some portion of the sums it advanced.

Thus, from the lending industry's perspective, the efforts to (i) quickly determine whether the borrower is likely to succeed in paying a loan modification that has a greater net present value than foreclosure; (ii) expedite short sales and deed in lieu procedures; and (iii) shorten the time to foreclosure if (i) and (ii) fail, are all simply intended to minimize their very real economic losses.

For borrower advocates, the lending industry's efforts to speed up the foreclosure process and displace borrowers from homes they are losing - usually through no fault of their own - appears simply as the last step in an inhumane process visited on underwater borrowers by an industry that ignores the responsibility of the lending industry for creating the housing crisis, and that ignores the economic and social costs suffered by those borrowers. The current spate of mortgage fraud prosecutions, coupled with the lending industry's refusal to allow home owners the same benefits of a federal bankruptcy system that other debtors regularly use, is ample evidence of the lending industry's past misdeeds. Meanwhile, the stunning extent of dislocation, suffering and reduced quality of life experienced by displaced home owners, by their neighbors and by the municipalities in which they once lived is unprecedented in the lives of most living Americans. Further, the misdeeds of the loan servicing industry – well documented but only partially remedied by the national servicer settlement – are ample evidence of the lending industry's unwillingness to voluntarily help those in need. And, finally, when their economic and personal sufferings are compared with the generous salaries and stock options paid to those who the dispossessed view as responsible for that suffering, it is not difficult to understand why the dispossessed, and their elected representatives, seek to use the legal system to redress that imbalance. In these circumstances, consumer advocates naturally use all their resources, legislatively and in the courts, to keep their clients - regardless of their ability to pay - in their homes as long as possible or to assist them in finding a graceful means to move to the next stage of their lives.

Our challenge in this drafting effort is to identify those policies which would maximally serve the interests of both the lending and the borrowing communities in a package which, considered as a whole, might be supported by both lenders and borrowers.

Hopefully to that end, this initial draft contains 28 sections divided into six Articles.

> **Article 1** contains three sections, on Title, Definitions, and Scope. The Reporters, ABA Representative and Chair all agree that a simpler title is required. Most of the definitions will be familiar both the drafting committee and our observers; nothing unusual is intended in any of them. The Scope section suggests that the Act applies to 1 to 4 residential properties and to mortgages on them, regardless of whether those mortgaged

were recorded before or after the effective date of the Act. Further discussion is likely to focus on how this Act integrates with existing law in the enacting state.

Article 2 contains four sections; they address Pre-Foreclosure Notices, the contents of the Notice of Default, Acceleration, and Right to Cure, Manner of Delivery and the substantive Right to Cure the Default. Generally, the provisions track existing standards of the Uniform Fannie/Freddie Mortgage, though there are some proposed variations. We don't anticipate a great deal of controversy here.

Article 3 deals with the proposed mediation process, and is divided into four sections: (301) - Notice of mediation; (302) - Duty to participate in mediation and negotiate in good faith (303) - Standards to be adopted by mediation agency; and (304) - Prohibition on foreclosure during mediation. Section 304 would abolish the 'dual track' problem, while Section 303 seeks to do 2 things: first, it would empower the agency (or judicial system) to adopt regulations, and second, it would adopt in principle the Washington State mediation approach discussed by Bruce Neas.

Article 4 contains seven sections dealing with the Right to Foreclose and the Effects of foreclosure. They are: (401) the right to foreclose; (402) transfer of mortgage (that is, assignments); (403) lost instrument and affidavit; (404) public advertisement of foreclosure sale; (405) notice of sale; (406) confirmation of sale; and (407) conclusive effect of sale.

The article deals with several controversial subjects. Among other topics, the section on assignments is presented in two alternative versions, one mandating written or recorded assignments, the other allowing foreclosure without an assignment. The drafters had lively debate regarding the extent to which lost note affidavits could be prepared by someone other than the person who lost it, and the best means of establishing that a sale following a nonjudicial foreclosure would be conclusively presumed to be valid.

Article 5 contains eight sections that address the 'Cash for Keys" issue (sections 501-504), Abandoned Property (Sections 505-507) and the super lien for common charge assessments (508). The Act presents entirely new proposals for each topic.

In the 'Cash for Keys' sections, the draft suggests that in return for a statutorily set minimum consideration of either free continued occupancy or cash payment [the Act as drafted does not suggest what those minimum amounts should be], the creditor would be entitled to what we call a 'negotiated transfer', which provides a 'quick take' title, extinguishing subordinate lien holders. This contrasts with a simple deed-in-lieu of foreclosure which would, today, then require a normal foreclosure. In this Act, while junior lien holders are provided a brief period for objection, their only remedy after receiving notice of the negotiated transfer, upon demonstrating that there is excess equity for their benefit, would be to quickly pay off the senior creditor and step into its shoes in its agreement with the borrower. The section also provides that the statutory quick take would waive all borrowers' rights of redemption and waive any creditor rights to a deficiency. The statute makes clear that, as a general matter, borrowers and creditors would continue to be able to reach any other form of agreement but the benefits of this Act for negotiated transfers would not be available (except when the property is already vacant) unless the minimum consideration was made available to the borrower.

In the Abandoned Property sections, the Act provides standards for determining when property is abandoned, creates a procedure for determination that those standards have been met, and again provides a 'quick take' foreclosure. It also addresses, to a limited degree, the rights of municipalities in dealing with abandoned property.

The 'Superlien' section (508) presents four alternatives means by which the statute might address the challenges faced by associations with unpaid common charges.

> **Alternative 1** makes all regularly assessed common charges – but not special assessments and not legal fees – senior to a first mortgage.
>
> **Alternative 2** adds legal fees to the super priority, but with statutory caps on the amount of the fee;
>
> **Alternative 3** preserves the existing '6 month plus legal fees' priority in Section 3-116 of the Uniform Common Interest Ownership Act, but then suggests that after passage of some statutory period [say, 6 more months] each month's delay in the passage of title would add that month to the association's super lien.
>
> **Alternative 4** does not change the period of priority but provides the association with a right to a 'quick take' foreclosure in its own foreclosure, or to force a 'quick take' foreclosure in an action commenced by a lender, unless either the unit owner or the association pays back common charges and keeps them current.

<u>**Article 6** (Remedies) contains a single section.</u> It provides a borrower a defense in a judicial foreclosure for any material violation of this Act or the right to seek injunctive relief against any nonjudicial foreclosure sale. It also provides a borrower injured by any violation of this statute a claim for damages against the foreclosing party, including reasonable attorney's fees and costs to a prevailing borrower.

III SIGNIFICANT DEVELOPMENTS IN THE FIELD Several developments in the foreclosure field at both the federal and state levels warrant detailed mention**.**

A. Federal Housing Finance Agency Proposes to Charge Higher Guarantee Fees to Borrowers in States with Extended Times to Foreclosure. On September 25, 2012, FHFA published a notice in the Federal Register; the citation is **Federal Register** /Vol. 77, No. 186 Tuesday, September 25, 2012 /Notices at 58991. In pertinent part, the Notice reads**:**

> Though the Enterprises are congressionally chartered and federally supervised and regulated, state laws and practices can have a significant impact on their loan default costs.
>
> This Notice sets forth an approach to adjust the guarantee fees (''g-fees'') that the Enterprises charge for mortgages that finance properties with one to four units (''single-family mortgages'') in certain states to recover a portion of the exceptionally high costs that the Enterprises incur in cases of mortgage default in those states.

The notice goes on to indicate that FHFA intends to charge each loan originator in Connecticut, Florida, Illinois, New Jersey and New York a higher guarantee fee than is charged to borrowers in other states. The fees would likely be 15 basis points in Illinois, 20 basis points in Connecticut, Florida and New Jersey and 30 basis points in New York. FHFA assumes the lender would pass these fees through to borrowers in terms of higher interest rates and estimates that

> <u>Under FHFA's planned approach, a homeowner in an affected state obtaining a 30-year, fixed rate mortgage of $200,000 could see an increase of approximately $3.50 to $7.00 in his or her monthly mortgage payment, reflecting a range of upfront fee adjustments of 15 to 30 basis points.</u>

The notice goes on to describe the possible use by FHFA of both carrots and sticks with regard to these and other states' foreclosure laws. As to sticks, the notice states that

> The approach set forth in this Notice ***<u>does not include the forward-looking impact of recently-enacted state and local laws that may increase the Enterprises' costs.</u> FHFA intends to periodically reassess state-level pricing based on updated Enterprise data. <u>The agency may include the impact of newly-enacted laws if they clearly affect foreclosure timelines or costs,</u> where such costs may be reasonably estimated based on relevant experience.

The Drafting Committee may keep this threat in mind as it considers the recently enacted California Homeowner Bill of Rights discussed below.

On the other hand, there may be carrots for states that speed up their foreclosure process:

> If those states (that is, the 5 to be charged higher fees) were to adjust their laws and requirements sufficiently to move their foreclosure timelines and costs more in line with the national average, the state level, risk-based fees imposed under the planned approach would be lowered or eliminated.

Exhibit 2 contains extended excerpts from FHFA's Federal Register notice.

B. FHFA Rejects Principal Forgiveness For Underwater Borrowers, Despite US Treasury's Proposal to Subsidize Fannie and Freddie.

On July 31, 2012, the Acting Director of FHFA wrote to the chair and ranking member of the Senate Committee on Banking, Housing and Urban Affairs "regarding whether FHFA will authorize Fannie Mae and Freddie Mac (the Enterprises) to implement the Home Affordable Modification Program (HAMP) Principal Reduction Alternative (PRA)." That letter can be found at http://www.fhfa.gov/webfiles/24110/PF_LettertoCong73112.pdf. The letter was accompanied by an extended FHFA analysis titled a "*Review of Options Available for Underwater Borrowers and Principal Forgiveness*"; that review can be found at http://www.fhfa.gov/webfiles/24108/PF_FHFApaper73112.pdf. The letter states:

> After much study, I have concluded that Fannie Mae and Freddie Mac's adoption of HAMP PRA would not make a meaningful improvement in reducing foreclosures in a cost effective way for taxpayers.

The Review presents some of the arguments favoring principal forgiveness, together with FHFA's arguments in support of its position; the essential arguments are quoted in the footnote below.[2] FHFA's decision was very significant – and controversial - because it rejected what a

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[2] "In 2010, to encourage greater use of principal forgiveness for loans with current LTV ratios above 115 percent, the U.S. Department of the Treasury supplemented HAMP with the principal reduction alternative (HAMP PRA). HAMP PRA requires that principal forgiveness be used as the first step in the loan modification process. The take-up rate on HAMP PRA has been low, and earlier this year Treasury announced it would triple its current payment incentives to investors who use this approach in HAMP and for the first time offered to pay incentives to the Enterprises.

It is important to note that HAMP PRA produces the same monthly payment for a borrower as HAMP – 31 percent of gross monthly income. But HAMP PRA achieves that payment amount in a different way -- first forgiving a portion of the underwater principal over three years, then applying rate reductions and/or term extensions and/or forbearance, as necessary*** While both original HAMP and HAMP PRA focus on a borrower's ability to pay, HAMP PRA also addresses a borrower's willingness to pay by reducing the loan balance. The rationale for the reduction in the loan balance is that a borrower whose mortgage exceeds the home's value may not be willing to continue to make affordable monthly mortgage payments. In other words, even though the borrower may achieve an affordable monthly payment (the ability to pay) through an original HAMP modification, the borrower may not be willing to pay because they are number of experts had asserted would be one of the most effective tools in easing the foreclosure crisis; my cover memo in preparation for the June meeting cited many of those experts' Congressional testimony.

C. Federal Reserve Bank Study of Impact of Foreclosures on Nearby Properties. On July 25, 2012 the FRBB published a paper entitled *Foreclosure Externalities: Some New Evidence.* The most current version of that paper is available on the FRBB website at http://www.bostonfed.org/economic/ppdp/index.htm. The paper's principal conclusion - that, basically, delays in the foreclosure process impose small but real costs on nearby properties - may bear on the deliberations of the Drafting Committee.

The paper's abstract reads in part:

> **** We find that while properties in virtually all stages of distress have statistically significant, negative effects on nearby home values, the magnitudes are economically small, peak *before* the distressed properties complete the foreclosure process, and go to zero about a year after the bank sells the property to a new homeowner. The estimates are very sensitive to the condition of the distressed property, with a positive correlation existing between house price growth and foreclosed properties identified as being in "above average" condition. ****
>
> <u>Our analysis shows that policies that slow the transition from delinquency to foreclosure likely exacerbate the negative effect of mortgage distress on house prices.</u>

(Emphasis added). In their conclusion, the authors write:

> Perhaps the most important conclusion that one should take from this analysis is that <u>the effects of foreclosure and distressed property in general on the prices of neighboring homes are fairly small</u>. ….Our estimates of the negative externality are smaller than the estimates in much of the previous literature****

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underwater. By forgiving principal as part of HAMP, the lower loan-to-value ratio should improve a borrower's willingness to pay, which is a reasonable expectation. ****

Yet, for the Enterprises, HAMP PRA surrenders the opportunity for taxpayers to share in the upside success of the loan modification – all the upside goes to the individual borrower. Should house prices appreciate over the three year period ***the adjustment upward would accrue to the borrower without any provision for compensation to the taxpayer.

Principal forbearance, as noted above, would give taxpayers a share in that price appreciation." *Review*, at 6.

> ****Our results suggest that the key to minimizing the costs of foreclosure is to minimize the time that properties spend in serious delinquency and in REO. On one hand, this implies putting pressure on lenders to sell properties out of REO quickly.
>
> <u>On the other hand, and perhaps much less palatably, it implies minimizing the time a borrower spends in serious delinquency, which means accelerating the foreclosure process</u>.
>
> Put another way, <u>our results suggest that delaying the foreclosure process exacts a cost on society as a whole that should be taken into account when making policy.</u> As an example, Massachusetts passed a "right-to-cure" law in 2007, which forced lenders to give borrowers an additional 90 days to cure their mortgage before foreclosure proceedings could start. …. <u>[T]he law did not benefit borrowers in the sense that borrowers subject to the law were no more likely to cure or to renegotiate their loans than borrowers who were not.</u> One might say that the law only failed to produce benefits, but our analysis suggests that it may also have imposed costs on homeowners who lived near borrowers who were able to take advantage of the law.

FRBB Paper at 33-34. (Emphasis added).

D. California Adopts Homeowner Bill of Rights. On July 11, 2012, Governor Brown signed several acts which, taken together, are known as the Homeowner Bill of Rights ("CHBR"). The law becomes effective in 2013. The principal outcomes under CHBR are these:

- **Dual Tracking -** The law significantly restricts dual-tracking, where banks foreclose on homeowners while they simultaneously negotiate loan modifications.

- **New Notice Requirements** The Homeowner Bill of Rights requires additional notices before foreclosure.

- **Documentation of Authority to Foreclose T**he Homeowner Bill of Rights gives borrowers the opportunity to request that the mortgage servicer document its right to foreclose.3 The law also explicitly states that no foreclosure may be initiated unless the entity conducting the foreclosure is the holder of the beneficial interest under the deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest under the deed of trust.

- **Single Point of Contact** Under the new law, if a borrower requests a loan modification, the mortgage servicer must assign a single point of contact for the borrower.

- **Private Right of Action** The Homeowner Bill of Rights creates a private right of action for borrowers, who may now enjoin a pending trustee's sale or recording of the trustee's deed if the mortgage servicer violates the law's requirements. The injunctive relief remains in place until the mortgage servicer corrects the violation. If a trustee's sale

> is completed in violation of the law's requirements, a borrower may recover actual damages, or in the case of willful, intentional, or reckless violations, the greater of treble actual damages or $50,000.This private right of action includes an attorney's fees provision.

The most complete summary of the law that I was able to locate is a Lexis report entitled *'The California Homeowner Bill of rights: Its Origins, Its Protections and Its Practical Implications'*. It is dated September 2012 and appears to be cited as 2012 Emerging Issues 6633. A copy is attached as **Exhibit 3.**

Borrower advocates are clearly pleased with CHBR, while lender and servicer representatives appear united in their opposition.

The August, 2012 issue of the *Housing Law Bulletin,* published by The National Housing Law Project, included a summary of CHBR's principal provisions [the bullet points above are copied from that summary]. It concludes as follows:

> With the passage of the Homeowner Bill of Rights, California became the first state in the nation to write the national mortgage settlement into state law. Consumer advocates hope that the law will spur other states to pass similar legislation. For example, in Oregon, the state's outgoing attorney general has proposed new rules to regulate the processing of loan modifications.

The entire Housing Law Bulletin summary is attached as **Exhibit 3A**.

In contrast, the lending/servicing community vigorously opposed CHBR. For example, an article from the September 5, 2012 issue of National Mortgage News is attached as **Exhibit 4;** it is headlined: ***Who Is Next to Adopt A Homeowner Bill of Rights***?; it details legislative activity in states that are considering the effect of CHBR, and expresses concern that this sort of legislative response might spread to other states. It concludes with these observations from attorneys representing lenders and servicers:

> [M]ore servicers are now going to have to defend their ability to move forward with a foreclosure in court because the borrower will claim certain steps of the law were not followed.
>
> "These sorts of laws can be very good for consumers, but at some point, if the plaintiffs bar gets a hold of the private rights of action, then the activities of lenders can wind up in court which would slow down any disposition of the property***(and) the foreclosure process could be delayed for months or even years."
>
> Nancy Thomas *** agrees**** She said this law tries to codify the national mortgage servicing settlement on a borrower-by-borrower basis, thus ensuring that every individual at risk of foreclosure has an opportunity to be considered for some sort of alternative.

> "When lenders entered into the loans, there were clear rights in the document that said if you don't pay, here's our recourse. The loan document certainly did not say you can foreclose as long as you provide a meaningful opportunity for borrowers to change the terms that they agreed, too," Thomas said. "That's where this is more significant to servicers and will be more expensive."

The Mortgage Bankers Association also strongly opposed CHBR, although it was significantly 'watered down' in the final version that passed. The MBA's position regarding attitude towards CHBR is contained in a glossy pamphlet prepared by Beacon Economics LLC on behalf of the MBA and other lending groups; the Executive Summary from that pamphlet is attached as **Exhibit 5.** . Entitled "*Foreclosure Reform In California: An Economic Analysis*", the Summary stresses these criticisms of CHBR:

> ***[T]he provisions contained in the bills ***impose stricter rules on mortgage servicers seeking to non-judicially foreclose on homes with mortgages in default and expose mortgage servicers to substantial new legal liability.
>
> These rules have the effect of slowing the foreclosure process and increasing fines on mortgage servicers for various transgressions within the foreclosure process. In short, these bills steadily push the state towards the kind of judicial foreclosure system that exists in places like Florida and New Jersey, where the court system plays a larger role in the foreclosure process.
>
> The result will be another crisis of judicial gridlock which may have little meaningful benefit to borrowers particularly since these measures ignore borrowers' underlying financial conditions.
>
> The Summary then makes these five points (the emphasis is in the original):
>
> - <u>These bills will reduce home values</u>
> - <u>These bills are unlikely to help borrowers who are behind on payments</u>
> - <u>These bills could end up costing owners who are in financial trouble on their mortgages</u>
> - <u>These bills could actually increase the number of foreclosures in the stat</u>e
> - <u>These bills will reduce the availability of credit for future homebuyers</u>

E. Washington State Adopts Detailed Mediator-Reviewed Net Present Value Calculation The Comments to Section 303(b) and the accompanying materials describe in some detail, at least from the perspective of the lead negotiator for borrowers' interests, the so-called 'Foreclosure Fairness Act' in Washington. At one point, Attorney Neas wrote:

> The gist of the issue, as we discussed, is to force a conversation about what is really in the <u>investor's</u> interest. If the investors/beneficiary (WRB- that is, the creditor) really are not going to be better financially off with a foreclosure sale than a modification with the homeowner, why shouldn't the investors be encouraged to do that?

> Our state statute is not as strong as it needs to be in that regard. The NPV requirement in the Foreclosure Fairness Act is required to be performed, and the beneficiary must give the inputs to the homeowner and the mediator. That at least encourages a discussion on whether the beneficiary even has the right inputs. Issues like income are often calculated wrong, to the homeowner's detriment.
>
> The enforcement of this requirement is one of the weaknesses. The beneficiary must send a "person with authority" to attend the mediation and do the inputs. Failure to do that is a lack of "good faith" justifying a certification of bad faith, or "lack of good faith." Unfortunately, that certification does NOT stop the foreclosure proceeding. It is merely a ground that the homeowner can use in enjoining the foreclosure sale later.
>
> It would seem that any model statute would need a test like this in order to make the mediation meaningful. I don't know how the ULC is even looking at the concept of meaningful mediation. For many of us on the homeowner advocacy side, it appears that a legislature's best intent is thwarted by the way the financial industry handles what should have been a relatively simple procedure in order to see if foreclosure could be avoided. For those of us in non-judicial foreclosure states, not having any meaningful review of options by a third party is a substantial problem. Mediation is certainly not a silver bullet, but it does hold some promise of an opportunity when all sides play fair.
>
> That latter concept is crucial as well. The history of the financial services industry in this regard is not promising. Any model act must have sufficient safeguards in place in order to make the industry comply and participate in mediations in a productive manner.

Exhibit 7 is a Memorandum from Attorney B. Neas describing the 2011 and 2012 amendments to the Washington State Foreclosure Fairness Act. **Exhibit 8** is a transcript of email from Attorney Bruce Neas describing the support of both lender and borrower advocates in the passage of Washington State's Foreclosure Fairness Act.

F. Attorney Tom Cox of Maine, A Consumer Advocate, Rigorously Criticizes the Uniform Laws Process and the Substance of the Report Of the June 2012 Meeting.

On October 8, 2012, Attorney Cox provided the Chair two final memoranda, which expanded on earlier versions of memoranda that he had previously sent. Those Memoranda are attached as **Exhibits 9 and 10**.

In **Exhibit 9,** entitled "***Response to July 6, 2012 Report on Meeting pertaining to Committee meeting held on June 8-9, 2012***", Attorney Cox makes several points. As a preliminary matter, he writes:

> I urge the members of the Committee to keep an open mind to the possibility that success might also at some point be viewed as a willingness to recognize that this project should not continue, for some or all of the reasons that I outlined in my January 10, 2012 Memorandum to ULC Study Committee on Foreclosure

Procedures, or because a fair balance cannot be achieved between the interests of the mortgage industry and the interests of homeowners.
****
The discussions at the June meeting have not led to any change in my view that the ULC should not proceed with this project. By commenting below as I do, I do not relinquish that view.

> *What follows are extended excerpts from Attorney Cox' first memorandum. I provide them in the hope of conveying the passion he expresses regarding much of our discussion at the June meeting. These remarks were written by Attorney Cox without having read the initial draft of the Act.*

1.1. Transparency—Committee Process. The ULC website for the Committee includes many working documents presented to the Committee and the July 6, 2012 Report. However, that site does not include any materials relating to communications among Committee members and/or the two reporters for the Committee. It should.****[M]emoranda back and forth between the reporters and Committee members should be posted as they are generated. If there are conference calls among Committee members between meetings, minutes of those conference calls should be prepared and posted on the Committee website. Memoranda of observers to the Committee, such as this one, should be posted as they are generated and/or received.

1. 2. Transparency—Committee Funding. There are stakeholders in this process with widely divergent interests. To the extent that some of those stakeholders are funding the work of the Committee, the terms of those funding arrangements must be fully disclosed.

1.3. Equal Access to Committee Process. There was a single homeowner representative in the observer group at the June meeting of the Committee. There were two academics, several individuals who could be called non-aligned, and then the remaining substantial majority of observers who are directly involved in the mortgage industry. National consumer organizations have decided not to participate in the work of the Committee. One homeowner lawyer from a judicial foreclosure state (there is no one participating with any expertise from a nonjudicial foreclosure state) is not enough.

****Other homeowner lawyers might be willing to participate, but they are not able to do so unless their costs of attending are paid.

1.4. Recognition of Causes of Mortgage Servicing Problems. ****For homeowner advocates, their main concern is the *existence of uniformity* in mortgage servicer abuses that have been suffered by homeowners all over the country in this foreclosure epidemic. One cause of servicer abuses is perceived to be perverse financial incentives for servicers that militate in favor of foreclosures instead of loan modifications.**** I respectfully suggest that this issue of perverse servicer incentives must be explored further and be more fully understood by the Committee before the drafting process proceeds.

2. It is premature to begin drafting any proposed act. It is troubling that the drafting process is now apparently underway. ***It is premature to begin with a drafting process until there has been substantial discussion and consensus by the Committee of what the actual substance of the provisions should be that will be included in any initial drafts.

***The Drafting Committee is intent on creating a proposed uniform model *statute*. Some of the provisions under consideration simply do not belong in a statute and are more appropriately the subject of *court rules*, or possibly *regulations*.

**3. Foreclosure Mediation. *****The June 8th mediators panel discussion commented upon in Section 6 of the Report noted the significant variation among different states' mediation programs. ***The consensus that I did hear was that the proposed act should be confined to 'best practices' guidelines."

*** [T]there is no demonstrated need for *a statute* containing such provisions. ***Contrary to serving the purposes of the ULC Criteria, a proposed uniform act containing any provisions, whether substantive or limited to best practices, will constitute a disturbing presumption by the ULC Committee that somehow it is better positioned than state agencies are to tell the states with mediation programs what their best practices should be.***

Beyond this, I am opposed to the incorporation into any *proposed act* of proposed best practices provisions. Many state mediation programs are governed by judicially promulgated *rules*, not by statutes. *** Putting such provisions into a statute will minimize their evolution in useful ways as the states continue to learn from their own, and each others' various mediation programs.

4. Who can commence a foreclosure? This is an issue of tremendous importance to homeowner advocates all over the country—in both judicial and nonjudicial states. It is the source of contentious and constant litigation battles. Homeowner interests are diametrically opposed to the stated interests of the GSEs on this issue. (Attorney Cox then proceeds to make an impassioned plea that only 'owners' of notes, whether or not they are also the holders, should be entitled to foreclose, and then only in their own names.)

5. What evidentiary proof is required for a foreclosure? There is obviously a desire among many of the observers on "the industry" side, and an apparent willingness on the part of a number of Committee members, to consider eliminating or diluting the requirement for the physical production of the note in foreclosure cases.

> *(Attorney Cox proceeds to detail the findings of several courts regarding the inappropriate behavior of servicers purporting to act on behalf of the putative investors and making untrue allegations concerning the original notes. He continues)*

In the face of those sordid revelations, how can this ULC Committee even entertain the idea of weakening evidentiary standards to allow servicers to prove *by affidavit* the critical fact of possession of the mortgage note? ***Such a practice is unjustified in the face of repeated experiences of homeowner lawyer (including my own personal experiences) in finding that foreclosure plaintiffs (1) do not have the note at all, (2) the copies (sometimes multiple and varying copies) of the note that are produced do not match the original, (3) allonges are not affixed or show obvious sign of recent fabrication, and/or (4) false statements are made about alleged losses of notes when they are not lost at all.

**** On behalf of homeowners who have been abused by these practices, I strongly urge that the Committee go in the opposite direction and strengthen the proof requirements. Any proposed act should include an express provision that the original note, if it is claimed to be negotiable, must be physically produced for the court at least no later than the judgment stage of the case, whether that be at trial or at the summary or default judgment stage.

6. Default notices. I do not have a negative reaction to the concept that the terms and forms of pre-foreclosure default notices should be standardized****

7. Chain of mortgage assignments. As a homeowner advocate, I oppose the notion that the Committee should propose an act that will create, or allow to continue to operate a statutory scheme whereby mortgage assignments are rendered meaningless, and parties are allowed to foreclose simply by recording an affidavit that asserts that right to foreclose. The notion, under consideration by the Committee, that the production of the original note should no longer be required and that homeowners must rely upon the (now completely discredited) integrity of the mortgage servicers to record honest affidavits in registries asserting their rights in notes (which they refuse to produce) and rights in mortgages (which they often are unable to prove that they own) is astonishing.

8. Cash for keys. The cash for keys concept is one tool among many to be considered in any loan workout situation. There simply is no evidence before the Committee that a new statute is needed to make this option available.

9. Vacant and abandoned properties. I agree that statutory provisions to deal with this problem are desirable. Yet again, I am doubtful that there is single national or uniform standard that is required.

10. Conclusion The Uniform Law Commission initiated this process at the urging of the mortgage industry. It had the overwhelming numbers, economic clout and organizational ability to persuade the ULC to take on this project. It wants major changes in foreclosure laws throughout the country to make its foreclosures easier, faster, less expensive and more certain of outcome. Homeowners, who have been systematically abused throughout this foreclosure epidemic, after having been abused by the mortgage lending industry in the origination of their loans, lack the economic clout and organizational ability to make their voice heard. However, their needs for reform of foreclosure practices are every bit as important in order to make the foreclosures that they face honest and fair and to give them fair opportunities to save their homes through rational and reasonable loan modifications.

It is imperative that this Committee recognize the enormous power of the financial industry, and the complete lack of power of homeowners, in this process and that the Committee protects these homeowners because they have almost no ability to protect themselves.

In **Exhibit 10,** entitled "*Additional Foreclosure Provisions to be Addressed By Proposed Act*", Attorney Cox proposes that the Act include a number of provisions. Again, he prepared this memorandum without the benefit of reviewing the actual draft of the Act. These are the subjects he proposes to incorporate in the new Act; Exhibit 10 details Attorney Cox' rationale for each of them.

1. **Issues Relating to Loan Origination**.

1.1. Eliminate the status of long-term mortgage notes as negotiable instruments.
1.2. Eliminate the right of foreclosing parties to claim holder in due course status.
1.3. Provide that mortgage brokers will be deemed to be the agents of the loan originator such that misconduct of the mortgage broker shall be a defense that a homeowner may assert in a foreclosure action.

2. Issues relating to loan servicing.

2.1 Private Right of Action.
2.2. Requirement for Loan Owner to Be Foreclosing Party.
2.3. Production of the Original Note.
2.4.Elimination of Power to Record §9-607 Affidavits
2.5.Creation of Servicer Duty of Good Faith and Fair Dealing

2.6 Automatic Disclosure of Key Documents.
2.7.Independence of Mortgage Registry and Electronic Note Registry.

LIST OF EXHIBITS

EXHIBIT 1

AGENDA FOR THE NOVEMBER 2-3, 2012 MEETING

(Separately distributed)

EXHIBIT 2

EXCERPTS FROM FHFA'S FEDERAL REGISTER NOTICE OF INTENT TO CHARGE HIGHER GUARANTEE FEES TO BORROWERS IN STATES WITH EXTENDED FORECLOSURE TIMES

Federal Register /Vol. 77, No. 186 Tuesday, September 25, 2012 /Notices at 58991.

Recent experience has shown a wide variation among states in the costs that the Enterprises incur from mortgage defaults. This is due, in large part, to differences among the states and territories in the requirements for lenders or other investors to manage a default, foreclose, and obtain marketable title to the property backing a single family mortgage. Foreclosure takes longer than average in some states as a result of regulatory or judicial actions. Further, in some states the investor cannot market a property for a period after foreclosure is complete. There is also variation among the states in the per-day carrying costs that investors incur during the periods when a defaulted loan is non-performing and, in some states, when a foreclosed property cannot be marketed. Those variations in time periods and per-day carrying costs interact to contribute to state-level differences in the average total carrying cost to investors of addressing a loan default. Because the Enterprises currently set their g-fees nationally, accounting for expected default costs only in the aggregate, borrowers in states with lower default-related carrying costs are effectively subsidizing borrowers in states with higher costs. The principal drivers of differences across states in the average total carrying costs to the Enterprises of a defaulted single-family mortgage are, in order of importance**—**

1. The length of time needed to secure marketable title to the property;
2. Property taxes that must be paid until marketable title is secured; and
3. Legal and operational expenses during that period.

There is a wide variation among states in all three of those variables. In light of these cost differentials, FHFA's March 2012 Conservatorship Scorecard set forth the objective for Fannie Mae and Freddie Mac of developing appropriate risk-based guarantee fee pricing by state. FHFA's proposal described here would adjust the upfront fees that the Enterprises charge when they acquire single-family mortgages in states where Enterprise costs that are related to state foreclosure practices are statistically higher than the national average. The size of the adjustments would reflect differences in costs in those states from the average. ****FHFA's planned approach focuses on five states that are clear outliers among states in terms of their default-related costs.

This document outlines the approach that FHFA is considering and discusses potential additions and changes to the calculation of such fees in the future. Through this Notice, FHFA is providing an opportunity for public input on these subjects. After reviewing the public input and determining a final state-level guarantee fee pricing method, FHFA expects to direct the Enterprises to implement the pricing adjustments in 2013.

Approach to State-Level G-Fee Adjustments The approach set forth in this Notice is based on Enterprise experience and <u>does not include the forward-looking impact of recently-</u>

enacted state and local laws that may increase the Enterprises' costs. FHFA intends to periodically reassess state-level pricing based on updated Enterprise data. The agency may include the impact of newly-enacted laws if they clearly affect foreclosure timelines or costs, where such costs may be reasonably estimated based on relevant experience.

FHFA's approach would focus on the small number of states that have average total carrying costs that significantly exceed the national average and, therefore, impose the greatest costs on Fannie Mae, Freddie Mac, and taxpayers. Mortgages originated in these highest-cost states would have an upfront fee of between 15 and 30 basis points, which would be charged to lenders as a one-time upfront payment on each loan acquired by the Enterprises after implementation. Based on current data as described below, those five states are Connecticut, Florida, Illinois, New Jersey, and New York. Lenders may pass an upfront fee through to a borrower as an adjustment to the interest rate on the borrower's loan. Because the upfront fee is paid only once, its impact on the annual interest rate is much smaller than the upfront fee itself. Dividing the upfront fee by five provides an approximation of the potential impact on the interest rate.

To illustrate, a 15 basis point upfront fee, if fully passed through by the lender, would be roughly equivalent to an increase in the annual interest rate of three basis points. Under FHFA's planned approach, a homeowner in an affected state obtaining a 30-year, fixed rate mortgage of $200,000 could see an increase of approximately $3.50 to $7.00 in his or her monthly mortgage payment, reflecting a range of upfront fee adjustments of 15 to 30 basis points.

****

The planned approach focuses on the small number of states that have expected total default-related carrying costs that significantly exceed the national average and, thus, cause the greatest increase in average loss given default. Based on current data, loans in five states would be assessed upfront fees. The state between one and one half and two standard deviations from the mean, Illinois, would have an upfront fee of 15 basis points. The states between two and three standard deviations from the mean, Florida, Connecticut, and New Jersey, would have an upfront fee of 20 basis points. The state more than three standard deviations from the mean, New York, would have an upfront fee of 30 basis points.

This approach would allow for variation in practice among the states and impose upfront fees only on those states that are statistical outliers from the rest of the country. If those states were to adjust their laws and requirements sufficiently to move their foreclosure timelines and costs more in line with the national average, the state level, risk-based fees imposed under the planned approach would be lowered or eliminated. The approach recognizes that each state establishes legal requirements governing foreclosure processing that it judges to be appropriate for its residents. It also recognizes that unusual costs associated with practices outside of the norm in the rest of the country should be borne by the citizens of that particular state rather than absorbed by borrowers in other states or by taxpayers.

EXHIBIT 3

Housing Law Bulletin Summary of the California Homeowner Bill of Rights.

California Homeowner Bill of Rights Signed Into Law

California Governor Jerry Brown recently signed landmark legislation restricting dual-tracking, where a lender forecloses even though the borrower is seeking a loan modification to save the home. The Homeowner Bill of Rights 1 also guarantees struggling homeowners a single point of contact at their lender and direct access to decision makers. Additionally, the legislation imposes civil penalties on fraudulently signed mortgage documents and requires mortgage servicers to document their right to foreclose. This article discusses these protections and how homeowners may benefit from the new law, which goes into effect on January 1, 2013.

Background In prior years, the California legislature failed to pass similar legislation to end dual-tracking. This year's success stems largely from the backing of the state Attorney General's office. Further, supporters noted that the nation's five largest mortgage servicers 3 already are subject to similar standards under the national mortgage settlement that was announced in February 2012. 4 On July 2, the legislation passed 54-26 in the Assembly and 25-13 in the Senate. The governor signed the Homeowner Bill of Rights into law on July 11.

Dual Tracking The law significantly restricts dual-tracking, where banks foreclose on homeowners while they simultaneously negotiate loan modifications. When the law goes into effect in 2013, mortgage servicers 5 must give homeowners who complete a loan modification application a yes or no decision on loan modification before initiating foreclosure on a first lien through recording a notice of default.6 If the servicer receives a loan modification application after the notice of default, the servicer may not record a notice of trustee sale or conduct a foreclosure sale while the loan modification application is pending.7

Protections During the Loan Modification Application Process In addition to prohibiting dual-tracking, the law includes other provisions similar to those in the national mortgage settlement that protect borrowers during the loan modification process. The mortgage servicer may not charge a fee to process a loan modification application and may not collect any late fees during the loan modification process.8 When a borrower submits a loan modification application, the mortgage servicer must, within five days of receipt, send a written acknowledgment that includes: (1) A description of the loan modification process, including an estimate of when a decision on the loan modification will be made after a complete application has been submitted by the borrower and the length of time the borrower will have to consider an offer of a loan modification or other foreclosure prevention alternative.9 (2) Any deadlines, including deadlines to submit missing documentation, that would affect the processing of a loan modification application.10 (3) Any expiration dates for submitted documents.11 (4) Any deficiency in the borrower's loan modification application.12

When the Modification Is Approved When a loan modification application is approved, the mortgage servicer must suspend the foreclosure process. 13 In addition, if the borrower has executed and is in compliance with a forbearance plan, a trial modification, or a permanent modification, the servicer must stop the foreclosure process, rescind any existing notice of default, and cancel any pending trustee sales.14 If servicing of the loan is transferred, the new servicer must honor any previously approved loan modifications.15

When the Modification Is Denied When a loan modification is denied, the mortgage servicer must notify the borrower in writing of the reasons for the denial, including: (1) The deadline and instructions for how to appeal the denial;16 (2) If the denial was based on investor disallowance, the specific reasons for the investor disallowance;17 (3) If the denial is the result of net present value (NPV) calculations, the monthly gross income and property value used to calculate the NPV and a statement that the borrower may obtain the NPV inputs;18 (4) A description of and application instructions for other foreclosure prevention alternatives for which the borrower may be eligible.19 Even if the borrower's loan modification application is denied, a notice of default may not be recorded until the later of: (1) 31 days after the borrower receives the denial notice;20 or (2) 15 days after the conclusion of the appeal process, if the borrower appeals the denial.21

When No Modification Is Requested The lender may initiate the foreclosure process if the borrower does not apply for a loan modification prior to the notice of default. In that case, however, the mortgage servicer must still, within five days of the recording of the notice of default, inform the borrower in writing: (1) That the borrower may be evaluated for a foreclosure prevention alternative.22 (2) Whether the borrower is required to submit an application to be considered for a foreclosure prevention alternative.23 (3) The means and process by which a borrower may obtain an application for a foreclosure prevention alternative.24

New Notice Requirements The Homeowner Bill of Rights also requires additional notices before foreclosure. Existing law requires the mortgage servicer to contact the borrower by phone or in person at least 30 days before initiating foreclosure.25 Under the new law, a mortgage servicer also must send the borrower a statement that: (1) If the borrower is a service member or a dependent of the service member, he or she may be entitled to protections under the federal Service members Civil Relief Act.26 (2) The borrower may request (i) a copy of the promissory note; (ii) a copy of the deed of trust and any assignments; and (iii) a copy of the borrower's payment history since the borrower was last less than 60 days past due.27 The servicer must include a declaration of compliance in the notice of default, and the notice of default may not be recorded until the mortgage servicer complies with these requirements. When a foreclosure sale is postponed by at least 10 business days, the lender must provide the borrower with written notification of the new sale date within five business days of the postponement.28 Under existing law, a new notice of sale is not required if the new date is within one year of the original sale date.29

Documentation of Authority to Foreclose In *Gomes v. Countrywide*, the California Court of Appeal held that a borrower does not have a right to determine whether the owner of a promissory note has authorized its nominee to initiate the foreclosure process. 30 In response to *Gomes*, the Homeowner Bill of Rights gives borrowers the opportunity to request that the mortgage servicer document its right to foreclose.31 The law also explicitly states that no foreclosure may be initiated unless the entity conducting the foreclosure is the holder of the beneficial interest under the deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest under the deed of trust.32.

Before recording or filing foreclosure documents such as a notice of default, notice of trustee sale, assignment of deed of trust, or a substitution of trustee, the mortgage servicer must ensure that it has reliable evidence to substantiate the borrower's default and the servicer's right to foreclose.33 In addition to the private right of action described below, government entities can seek civil penalties of $7,500 per deed of trust in cases involving multiple and repeated violations of this provision.34

Single Point of Contact Under the new law, if a borrower requests a loan modification, the mortgage servicer must assign a single point of contact for the borrower. The single point of contact35 is responsible for: (1) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.36 (2) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.37 (3) Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.38 (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.39 (5) Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary. 40 The contact must remain assigned to the borrower until all loss mitigation options are exhausted.41 The contact also must transfer a borrower to a supervisor upon request of the borrower, if the contact has a supervisor.42

Private Right of Action **T**he Homeowner Bill of Rights creates a private right of action for borrowers, who may now enjoin a pending trustee's sale or recording of the trustee's deed if the mortgage servicer violates the law's requirements.43 The Single point of contact is defined as "an individual or team of personnel each of whom has the ability and authority to perform the responsibilities listed."

Injunctive relief remains in place until the mortgage servicer corrects the violation.44 If a trustee's sale is completed in violation of the law's requirements, a borrower may recover actual damages, or in the case of willful, intentional, or reckless violations, the greater of treble actual damages or $50,000.45 This private right of action includes an attorney's fees provision.46 A borrower is deemed a prevailing party if the borrower was awarded damages or obtained injunctive relief.47 Under this provision, a temporary restraining order or a preliminary injunction is sufficient for a fee award, even if the injunction is lifted following compliance by the servicer.48

Exemptions for Small Lenders Mortgage servicers who foreclose on fewer than 175 properties a year are exempt from the single point of contact requirements49 and most of the new notice requirements. 50 The law still, however, restricts dual tracking51 and requires small lenders to verify their right to foreclose. 52 A private right of action is available to enforce these requirements.53

Conclusion With the passage of the Homeowner Bill of Rights, California became the first state in the nation to write the national mortgage settlement into state law. Consumer advocates hope that the law will spur other states to pass similar legislation. For example, in Oregon, the state's outgoing attorney general has proposed new rules to regulate the processing of loan modifications.54 The *Bulletin* will continue to follow these developments and provide periodic updates.

Footnotes

1 A.B. 278, 2011-2012 Sess. (Cal. 2012) and S.B. 900, 2011-2012 Sess. (Cal.2012) [hereinafter Homeowner Bill of Rights].
3 Those servicers are Ally/GMAC, Bank of America, Citi, JP Morgan Chase and Wells Fargo.
4 For more about the national mortgage settlement, see
http://www.nationalmortgagesettlement.com.
5 The bill defines "mortgage servicer" as a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis (including collecting and crediting periodic loan payments), managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner's authorized agent. Act of July 11, 2012, ch. 86, § 2 (to be codified at Cal. Civ. Code § 2920.5)."Mortgage servicer" also means a subservicing agent to a master servicer by contract. *Id.*
6 Homeowner Bill of Rights, *supra* note 1, § 7 (to be codified at Cal. Civ.
Code § 2923.6).
7 *Id.* § 14(b) (to be codified at Cal. Civ. Code § 2924.11(b)).

8 Homeowner Bill of Rights, *supra* note 1, § 14(f) (to be codified at Cal. Civ. Code § 2924.11(f)).
9 *Id.* § 13(a)(1) (to be codified at Cal. Civ. Code § 2924.10(a)(1)).
10 *Id.* § 13(a)(2) (to be codified at Cal. Civ. Code § 2924.10(a)(2)).
11 *Id.* § 13(a)(3) (to be codified at Cal. Civ. Code § 2924.10(a)(3)).
12 *Id.* § 13(a)(4) (to be codified at Cal. Civ. Code § 2924.10(a)(4)).
13 *Id.* § 14 (to be codified at Cal. Civ. Code § 2924.11).
14*Id.*
15 *Id.* § 14(g) (to be codified at Cal. Civ. Code § 2924.11(g)).

16*Id.* § 7(f)(1) (to be codified at Cal. Civ. Code § 2923.6(f)(1)).
17*Id.* § 7(f)(2) (to be codified at Cal. Civ. Code § 2923.6(f)(2)).
18*Id.* § 7(f)(3) (to be codified at Cal. Civ. Code § 2923.6(f)(3)).
19*Id.* § 7(f)(5) (to be codified at Cal. Civ. Code § 2923.6(f)(5)).
20*Id.* § 7(e)(1) (to be codified at Cal. Civ. Code § 2923.6(e)(1)).
21*Id.* § 7(e)(2) (to be codified at Cal. Civ. Code § 2923.6(e)(2)).
22*Id.* § 12(a)(1) (to be codified at Cal. Civ. Code § 2924.9(a)(1)).
23*Id.* § 12(a)(2) (to be codified at Cal. Civ. Code § 2924.9(a)(2)).
24*Id.* § 12(a)(3) (to be codified at Cal. Civ. Code § 2924.9(a)(3)).
25Cal. Civ. Code § 2923.5(a) (2012).
26Homeowner Bill of Rights, *supra* note 1, § 6(b)(1)(A) (to be codified at Cal. Civ. Code § 2923.55(b)(1)(A)).

27*Id.* § 6(b)(1)(2) (to be codified at Cal. Civ. Code § 2923.55(b)(1)(2)).
28*Id.* § 10(a)(5) (to be codified at Cal. Civ. Code § 2924(a)(5)).
29Cal. Civ. Code § 2924g(c)(2) (2012).
30 Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149 (2011).
31Homeowner Bill of Rights, *supra* note 1, § 6(b)(1)(B) (to be codified at Cal. Civ. Code § 2923.55(b)(1)(B)).
32*Id.* § 10(a)(6) (to be codified at Cal. Civ. Code § 2924(a)(6)).
33*Id.* § 20(b) (to be codified at Cal. Civ. Code § 2924.17(b)).
34*Id.* § 20(c) (to be codified at Cal. Civ. Code § 2924.17(c)).
35 Homeowner Bill of Rights, *supra* note 1, § 9(e) (to be codified at Cal. Civ. Code § 2923.7(e)).
36*Id.* § 9(b)(1) (to be codified at Cal. Civ. Code § 2923.7(b)(1)).
37*Id.* § 9(b)(2) (to be codified at Cal. Civ. Code § 2923.7(b)(2)).
38*Id.* § 9(b)(3) (to be codified at Cal. Civ. Code § 2923.7(b)(3)).
39*Id.* § 9(b)(4) (to be codified at Cal. Civ. Code § 2923.7(b)(4)).
40*Id.* § 9(b)(5) (to be codified at Cal. Civ. Code § 2923.7(b)(5)).
41*Id.* § 9(c) (to be codified at Cal. Civ. Code § 2923.7(c)).
42*Id.* § 9(d) (to be codified at Cal. Civ. Code § 2923.7(d)).
43The private right of action is limited to enforcement of §§ 2923.55 (notice requirements), 2923.6 (dual-tracking), 2923.7 (single point of contact), 2924.9 (post-notice of default notice requirements), 2924.10 (acknowledgment of receipt), 2924.11 (dual tracking), and 2924.17 (verification of documents). Homeowner Bill of Rights, *supra* note 1, § 16 (to be codified at Cal. Civ. Code § 2924.12(a)(1)). Other provisions of the law still may be enforced through California's Unfair Competition Law, which allows aggrieved parties to sue for restitution and injunctive relief, in addition to any existing remedies. Cal. Bus. & Prof. Code § 17200 (2012).

44Homeowner Bill of Rights, *supra* note 1, § 16(a)(1) (to be codified at Cal. Civ. Code § 2924.12(a)(1)).
45*Id.* § 16(a)(2) (to be codified at Cal. Civ. Code § 2924.12(a)(2)).
46*Id.* § 16(i) (to be codified at Cal. Civ. Code § 2924.12(i)).
47*Id.*
48This is similar to the catalyst theory of fee recovery, which remains available under California law. *See* Graham v. DaimlerChrysler Corp., 21 Cal. Rptr. 3d 331 (2004) (reaffirming catalyst theory under California law despite contrary ruling in Buckhannon Board & Care Home, Inc. v. W. Virginia Dep't of Health & Human Resources, 532 U.S. 598 (2001)).
49Homeowner Bill of Rights, *supra* note 1, § 9(g) (to be codified at Cal. Civ. Code § 2923.7(g)).
50The exemptions are stated in Section 8(i) (to be codified at Cal. Civ. Code § 2923.6(i)), Section 12(b) (to be codified at Cal. Civ. Code § 2924.9(b)) and Section 13(c) (to be codified at Cal. Civ. Code § 2924.10(c)). *Compare* § 4 (to be codified at Cal. Civ. Code § 2923.5) (pre-notice of default notice requirements for small servicers) *with* § 6 (to be codified at Cal. Civ. Code § 2923.55). *Compare* § 21 (to be codified at Cal. Civ. Code § 2924.18) (dual-tracking restriction for small lenders) *with* § 14(i) (to be codified at Cal. Civ. Code § 2924.11(i)).
51*Id.* § 21 (to be codified at Cal. Civ. Code § 2924.18).
52*Id.* § 20 (to be codified at Cal. Civ. Code § 2924.17).

53*Id.* § 22 (to be codified at Cal. Civ. Code § 2924.19).
54Elliot Njus, *Attorney General John Kroger Proposes Expansion of Nationwide Mortgage Settlement Standards*, Oregonian, June 12, 2012, http://www.oregonlive.com/ front-porch/ index.ssf/ 2012/ 06/ attorney_general_john_kroger_p.html.

EXHIBIT 4

National Mortgage News

Who Is Next to Adopt A Homeowner Bill of Rights?

By Evan Nemeroff
SEP 5, 2012 12:14pm ET

With California Gov. Jerry Brown slowly signing into law parts of the California Homeowner Bill of Rights that provides mortgage borrowers greater protection during the default foreclosure process, there are two lingering questions that persist: What other attorneys general are going to implement similar bills for their state residents and how is this going to impact the housing market in the future?

The California Homeowner Bill of Rights, which goes into effect at the beginning of 2013, prohibits a series of inherently unfair bank practices from taking place, including restricting dual-track foreclosures, instituting a single point of contact between a servicer and borrower, and imposing civil penalties on fraudulently signed mortgage documents. In addition, homeowners may require loan servicers to document their right to foreclose.

“Californians should not have to suffer the abusive tactics of those who would push foreclosure behind the back of an unsuspecting homeowner,” Brown said in a press release after signing the bill into law. “These new rules make the foreclosure process more transparent so that loan servicers cannot promise one thing while doing the exact opposite.”

Now that California has codified the national mortgage servicing settlement for Golden State residents, are attorneys general, specifically those on the West Coast, going to “follow the leader” and enact this type of legislation within their state?

According to Keith Dubanevich, associate attorney general and chief of staff for the Oregon Department of Justice, Oregon is instituting new policies to address the state’s foreclosure crisis on a step-by-step basis based on complaints from its constituents, rather than creating one large bill like California.

For example, in July, Oregon AG Ellen Rosenblum announced the adoption of rules that regulate the conduct of home mortgage loan servicers who violated the state’s Unlawful Trade Practices Act.

As part of the new rules, all servicers who operate in Oregon can no longer assess a late fee charge against a homeowner for any loans that were paid in full within the grace period applicable for that payment. Additionally, servicers cannot misrepresent to a borrower any material information regarding a loan modification and not disclose the proper information set forth in an affidavit detailing a borrower's default and the servicers right to foreclose.

"We wanted to address the most common consumer complaints and clarify precisely what we perceive to be wrongful conduct so there was no ambiguity," Dubanevich told this publication. "The industry was well aware of what is prohibited and now homeowners are also aware of what their servicer is forbidden to do."

Secondly, the Oregon Legislature adopted a new mediation program last month (Senate Bill 1552) allowing any homeowner at risk of foreclosure, but not in default, the opportunity to meet face-to-face with the servicer to explore alternative options to foreclosure including loan modifications, refinancing and short sales before any final decision is made. In essence, this eliminates dual-tracking.

As part of SB 1552, a servicer has to provide the homeowner 30 days notice that no loss mitigation strategy could be finalized, therefore resulting in eventual foreclosure.

"The rational is to give fair warning to homeowners that they are not eligible for a loan modification anymore and will have to vacate the property soon," Dubanevich added.

Although Nevada posted the nation's highest foreclosure rate in the first half of 2012, according to RealtyTrac, the state is currently analyzing its "Foreclosure Fraud Reform" law that went into effect October 2011 in relation to the California Homeowner Bill of Rights.

AB 284 gives Nevada residents access to information on the companies that hold their mortgages by requiring the documents used in the foreclosure process to be recorded in the county where the property is located. Additionally, the legislation requires a party who wants to issue a foreclosure in Nevada has to record a notarized affidavit of authority ensuring that they have the legal right to exercise the power of sale.

"This law helps protect Nevadans from improper foreclosures and protects the integrity of the system for homeowners," said Cortez Masto in a press release. "This bill creates security, legitimacy and transparency in the foreclosure process by ensuring homeowners and prospective purchasers can get a clean chain of title and are treated more fairly."

Meanwhile, the press secretary for the Arizona attorney general's office said Tom Horne would consider pursing a homeowner bill of rights, but he would first need to discuss this with state agency stakeholders, particularly Department of Financial Institutions, industry representatives and consumer groups. So far though, no decision has been made to institute a homeowner bill of rights in Arizona.

In general, it seems like the California Homeowner Bill of Rights was intended to benefit homeowners by allowing them to stay in their homes for a longer period of time and also have the capability to access courts to enforce their rights under this legislation.

But attorneys think the new California legislation is not going to be beneficial for the housing market in the Golden State because it will only slow down the foreclosure process there.

Donald Lampe, a partner at Dykema, a law firm that represents servicers and creditors, believes the California Homeowner Bill of Rights was created in favor of the borrowers. He added that more servicers are now going to have to defend their ability to move forward with a foreclosure in court because the borrower will claim certain steps of the law were not followed.

“If what is needed in California is healing of the housing market, forming up of real estate values and providing affordable financing for future homeowners who can afford to buy homes in California, then this is basically moving in the opposite direction,” Lampe said in an interview. “These sorts of laws can be very good for consumers, but at some point, if the plaintiffs bar gets a hold of the private rights of action, then the activities of lenders can wind up in court which would slow down any disposition of the property.”

If litigation does result because of the California Homeowner Bill of Rights, Lampe said the foreclosure process could be delayed for months or even years.

Nancy Thomas, co-chair of the financial services litigation practice group at Morrison & Foerster, agrees with Lampe that the California Homeowner Bill of Rights has serious implications for servicers. She said this law tries to codify the national mortgage servicing settlement on a borrower-by-borrower basis, thus ensuring that every individual at risk of foreclosure has an opportunity to be considered for some sort of alternative.

“When lenders entered into the loans, there were clear rights in the document that said if you don’t pay, here’s our recourse. The loan document certainly did not say you can foreclose as long as you provide a meaningful opportunity for borrowers to change the terms that they agreed, too,” Thomas said. “That’s where this is more significant to servicers and will be more expensive.”

EXHIBIT 5

Beacon Economics LLC: Executive Summary from pamphlet entitled "*Foreclosure Reform in California: An Economic Analysis*"

(May 2012)

Executive Summary

This year, California legislators have introduced several pieces of legislation focused on residential mortgage and foreclosure reform, with Attorney General Kamala Harris's *California Homeowner Bill of Rights* (CHBR) receiving the most attention. Seven bills of her initial legislative package are moving through the normal legislative channels; however, bills dealing with the more contested issues of "dual-tracking" and "robo-signing" were moved to a conference committee, thereby avoiding the typical legislative process.

In fact, the financial services community is supportive of many measures contained within the CHBR that are moving through that typical legislative process, including legislation that deters blight, offers enhanced protections to tenants whose landlords are subject to foreclosure, and limits advance fees paid to individuals claiming they can negotiate a loan modification.

However, the provisions contained in the bills subject to conference committee review impose stricter rules on mortgage servicers seeking to non-judicially foreclose on homes with mortgages in default and expose mortgage servicers to substantial new legal liability.

These rules have the effect of slowing the foreclosure process and increasing fines on mortgage servicers for various transgressions within the foreclosure process. In short, these bills steadily push the state towards the kind of judicial foreclosure system that exists in places like Florida and New Jersey, where the court system plays a larger role in the foreclosure process. This is all being done at a time when the Legislature, due to budget considerations, is slashing the judicial system with unprecedented budgetary cuts which will lead to even longer delays in efforts to recover collateral when a borrower violates their contractual commitment to repay their loan.

Advocates contend that the bills are, "designed to protect homeowners from unfair practices by banks and mortgage companies and to help consumers and communities cope with the state's urgent mortgage and foreclosure crisis." [fn1] The result will be another crisis of judicial gridlock which may have little meaningful benefit to borrowers particularly since these measures ignore borrowers' underlying financial conditions.

There is no doubt that California has just experienced an unprecedented wave of foreclosures. But this does not support the idea that there is something broken in the state's foreclosure process or that a major overhaul is needed. California's housing market has actually turned the corner faster than that of many other states where the foreclosure process is more costly and slower. According to data from the Mortgage Bankers Association, approximately 92.5% of mortgages in California are neither in foreclosure nor seriously delinquent.[fn2] Even amidst this current foreclosure crisis, most mortgages are performing. Nonetheless, if the legislation in conference committee were implemented, it would not merely impact the mortgages that are non-performing; it ultimately would have a negative impact on the majority of borrowers that are able to keep up with their payments. In short, it is Beacon Economics' opinion that if these legislative proposals were to be signed into law they will ultimately harm, not help, the vast majority of California homeowners.

These bills will not help California's housing market recovery: A press release issued by proponents of the bills states that the proposed reforms to the state's foreclosure process are necessary to help communities cope with the crisis. Yet, the "foreclosure peak" is far behind us at this point in time. All indications show that the number of distressed mortgages in California has fallen dramatically from its high of three years ago, even as the overall market has begun to find its footing.

Sales are trending up and prices have started to move off their 2011 bottom. California's housing market has also clearly turned the corner faster than some of the other states hit by mortgage debt problems—a result that is highly correlated with our more efficient foreclosure system. Florida, which exists at the other end of the spectrum in terms of foreclosure process, is still mired in problem mortgages and is seeing little sign of a turn in its housing market.

These bills will reduce home values: Housing markets with longer length foreclosures see greater discounts on foreclosed units when mortgage servicers eventually sell them—relative to non-distressed transactions. This is likely due to the additional physical degradation the property goes through while being lived in by "short-term" tenants. These discounts, in turn, pull the whole market down with them.

These bills are unlikely to help borrowers who are behind on payments: All the provisions being proposed functionally raise the cost of foreclosing for the mortgage servicer—both in the increased time it takes to bring a foreclosed property back to the market and the higher administrative cost of using a quasi-judicial process, as these measures appear to create, to complete a foreclosure. The losses to the mortgage servicer will be that much greater at the end of the day. This increase in costs could be perceived as beneficial for current homeowners who are behind on mortgage payments, as a longer foreclosure process could provide them with the time they need to restructure their mortgage or catch up on their payments. Yet there is no evidence to suggest that states with longer foreclosure processes have greater rates of loan modifications or a lower share of delinquent borrowers moving into foreclosure.

These bills could end up costing owners who are in financial trouble on their mortgages: The non-judicial foreclosure process is more efficient compared to the judicial foreclosure process, and it comes with an important caveat: when using non-judicial foreclosure, lenders are not allowed to pursue deficiency judgments. In other words, the lender cannot seek compensation for their mortgage losses out of the borrower's other assets. If the non-judicial route is lengthened and made more costly, many lenders may decide to pursue a judicial foreclosure, as is within their rights, and thus pursue remedies like deficiency judgments, ultimately costing the borrower more in the long run.

These bills could actually increase the number of foreclosures in the state: One issue that must be considered is how homeowners respond to the incentive of a longer foreclosure process.

Research shows that lengthening the time of foreclosure actually encourages more homeowners to default on their loans, due to the recognition that the homeowner can live in the home longer, "rent-free."

These bills will reduce the availability of credit for future homebuyers: One impact these rules absolutely will have is to raise the risk of lending in the state of California for mortgage companies, because the bills increase losses incurred by the mortgage servicer in the event that it has to foreclose on a property. Future California homebuyers will end up delivering more money for down payments and face tougher credit standards than they have in the past—an issue intensified by the high proportion of private lenders (rather than the GSEs—Fannie Mae and Freddie Mac) because of so many homes in the state falling outside of the lending limits put into place by these federal government sponsored institutions coupled with the strategic plan to unwind these institutions' concentration in future mortgage lending. Households that are on the credit bubble may find themselves no longer able to purchase a home in California—reducing the long-run rate of homeownership in a state that already has some of the lowest home affordability rates in the nation.

These aren't empty claims. As this paper will demonstrate, our conclusions are supported by a wide variety of research on foreclosure processes and housing outcomes. There is little direct evidence that these measures will succeed or have a positive impact on California's housing market. Florida has a very restrictive foreclosure process, and it's clear that Florida's real estate market is lagging far behind California's in terms of recovery. And while Nevada recently put multiple new rules into place that have similar features as these proposals, to slow the foreclosure process, there is little evidence of relief in Nevada's market. It seems unwise for California to proceed down the same path as Nevada, only to prove this point.

A foreclosure is an undesirable outcome for homeowners and mortgage servicers. It is the last resort for a mortgage servicer when other loss mitigation options are infeasible. But, at the same time, it is a necessary part of the process when a borrower has defaulted on his or her financial commitment. The availability and low cost of mortgage loans is due to the ability of the home to serve as collateral to the lender—ultimately lowering costs for all buyers. Foreclosure can provide those who have lost their homes with a clean slate, as they are almost always forgiven any remaining balances on their mortgage debt. While a defaulter's credit does take a hit, that clears the books faster than many would imagine, and, as this paper will show, households are often able to borrow and buy again within a relatively short period of time. A recent article from Reuters reported the following: "Data is not available, but interviews with more than 30 lenders, builders, realtors and consumers suggest that a growing number of Americans are getting back into the housing market, even though they went through a foreclosure, bankruptcy or short sale in recent years."[fn3]

Add it up, and it becomes clear that, while well-intentioned, the legislation the conference committee is considering will fail to address the core economic issues contributing to a borrower's inability to meet their debt obligations and will result in substantial distortions of the residential lending marketplace while forestalling California's economic recovery.

Sean O'Toole, Founder and CEO of ForeclosureRadar, has said in response to the measures considered in the conference committee:

> "The real problem is negative equity, and the only thing stopping foreclosures will accomplish is insuring that we are stuck with the negative equity problem for far longer than necessary….[S]topping foreclosures will lead to a much longer economic recovery, increased blight, fewer jobs, lower property tax receipts, and fewer opportunities for new homebuyers and investors." [fn4]

Any solutions advanced by the Legislature should consider the long-term impacts on the future access to capital and the affordability of that capital particularly at a time when the federal government's concentration in residential lending is waning.

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[1]Press Release,"Attorney General Kamala D. Harris Joins Legislative Leaders to Unveil California Homeowner Bill of Rights," California's Office of the Attorney General, February 29, 2012.

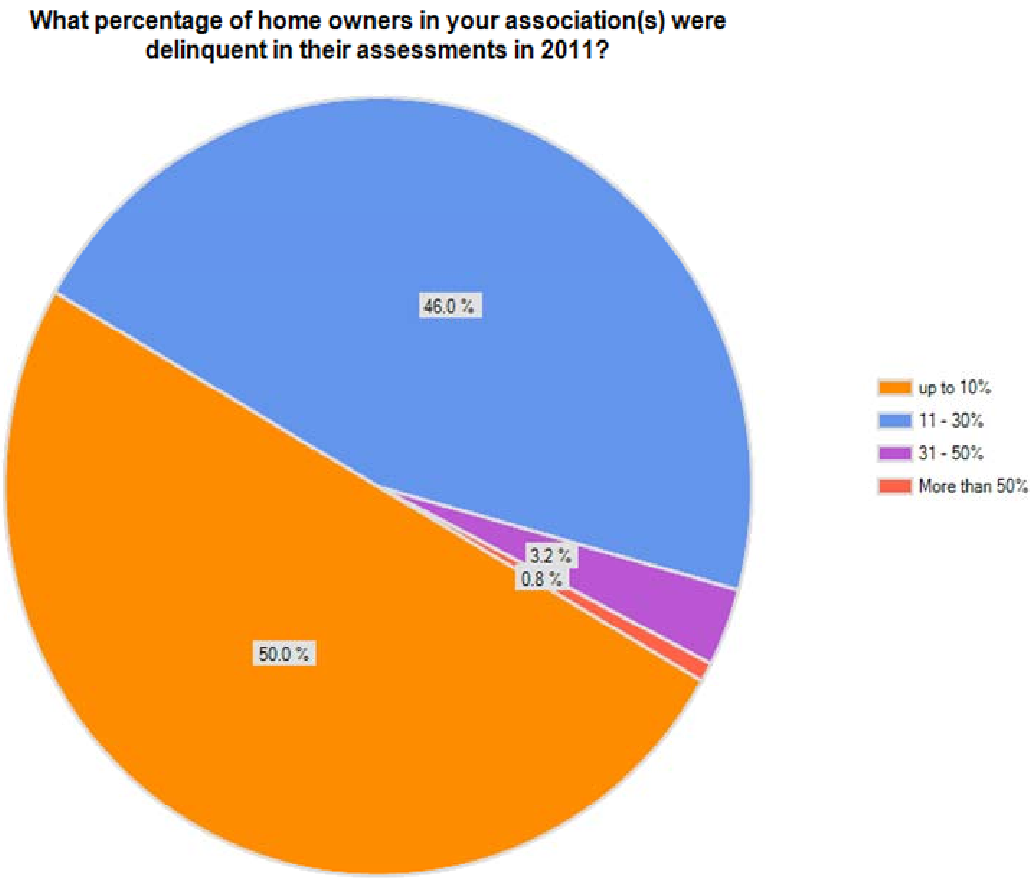
[2]Mortgage Bankers Association, California Mortgages, 2012. Raw data. Washington.

[3]Mincer, Jillian. "Back from Foreclosure to Homeownership." *TODAY.com*. 16 May 2012.

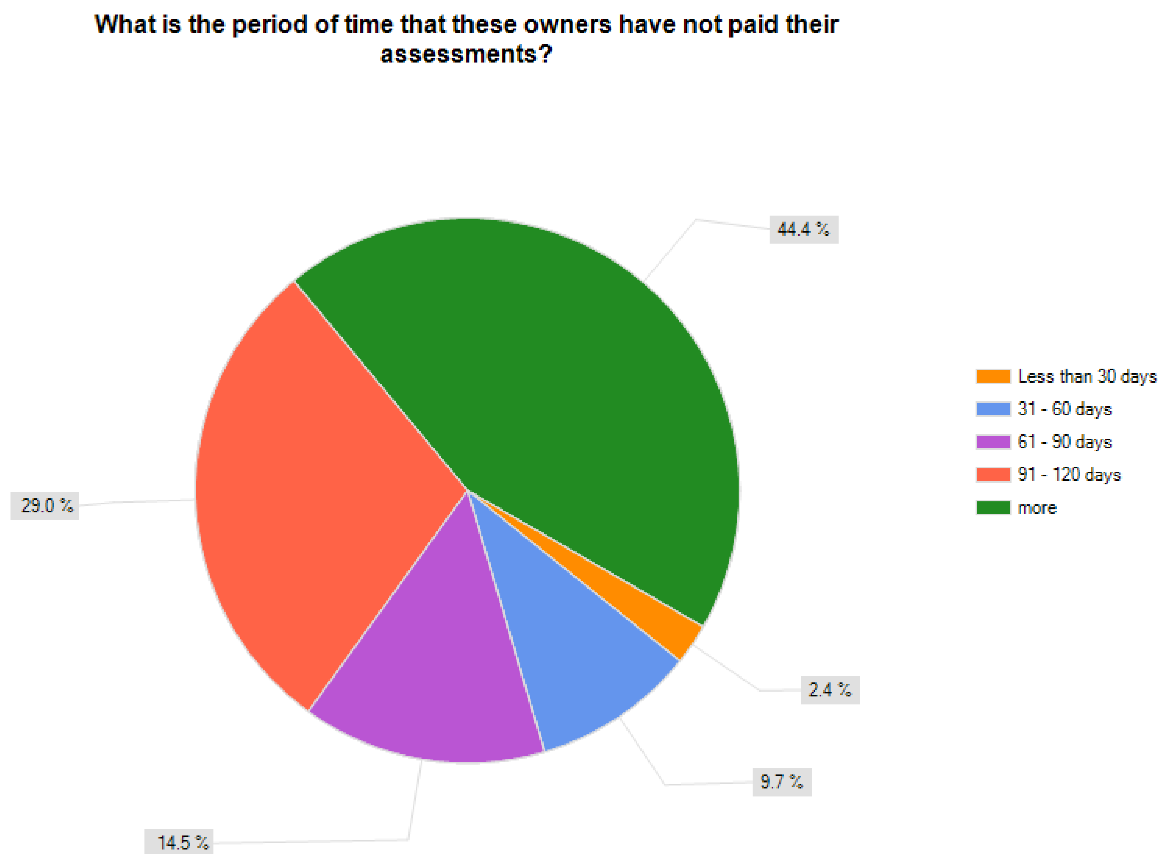
[4]ForeclosureRadar. The Foreclosure Report - May 2012. http://www.foreclosureradar.com/foreclosure-report/foreclosure-report-may-2012.

EXHIBIT 6

MATERIALS PREPARED BY COMMUNITY ASSOCIATIONS INSTITUTE REGARDING THE CONSEQUENCES OF UNPAID COMMON CHARGES IN CONDOMINIUMS AND HOME OWNER ASSOCIATIONS IN CALIFORNIA.

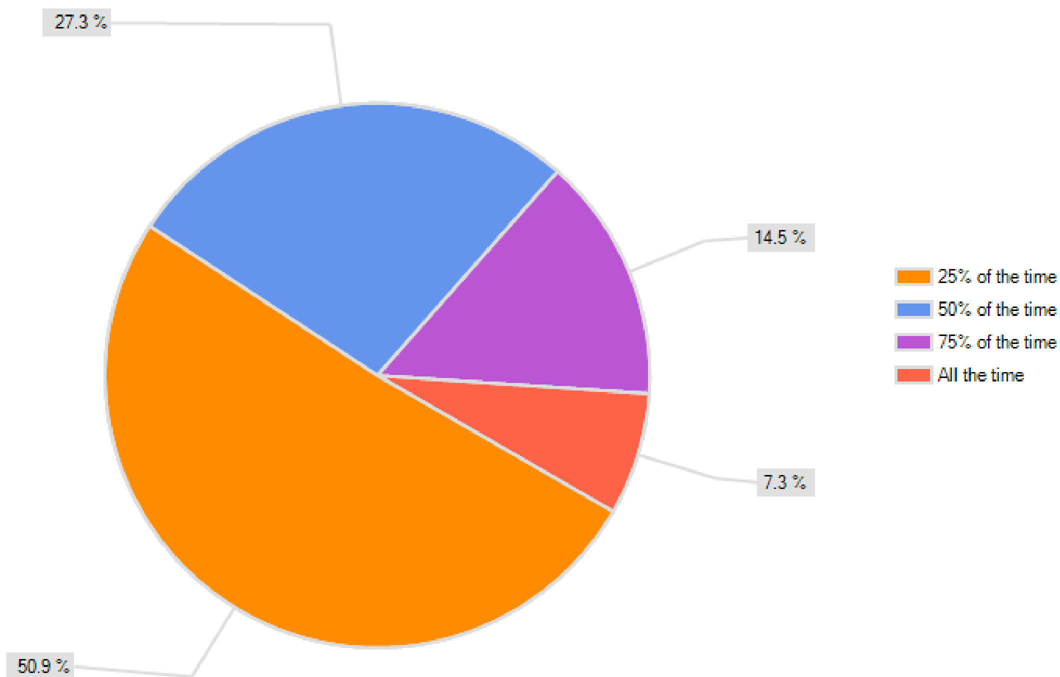


Half of HOA's surveyed had delinquencies of more than 10%. Some had a 50% delinquency rate.

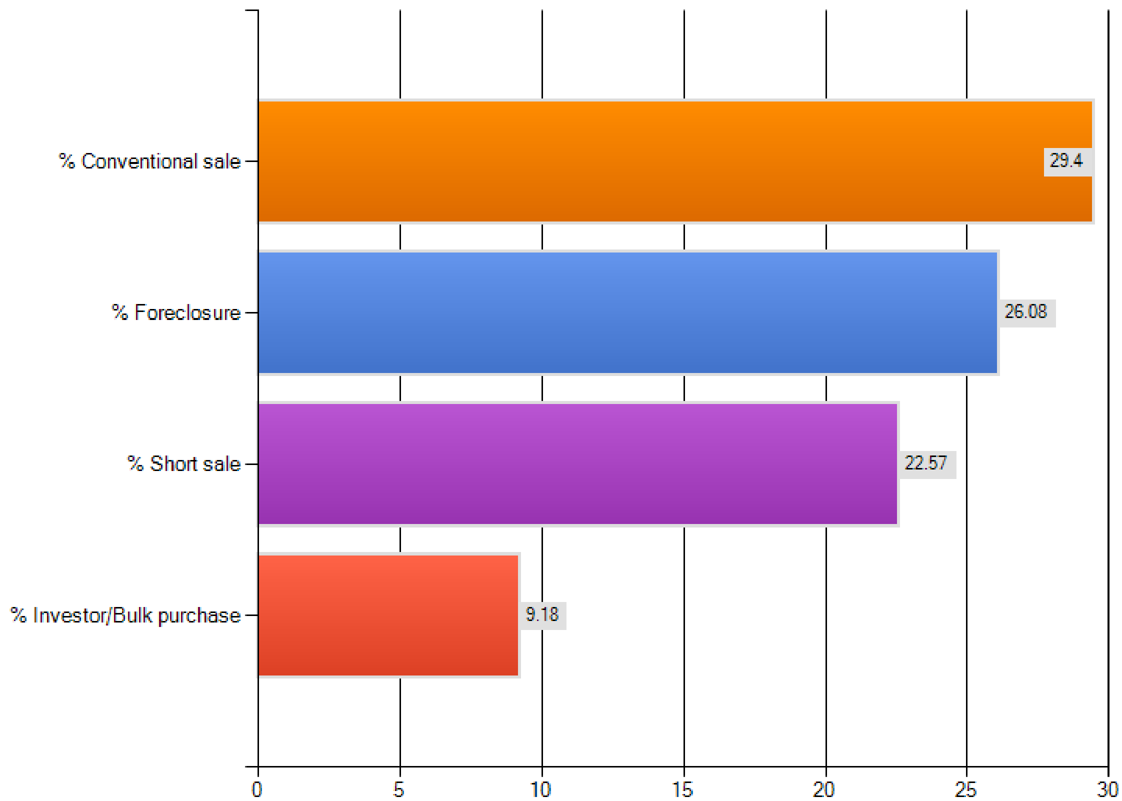


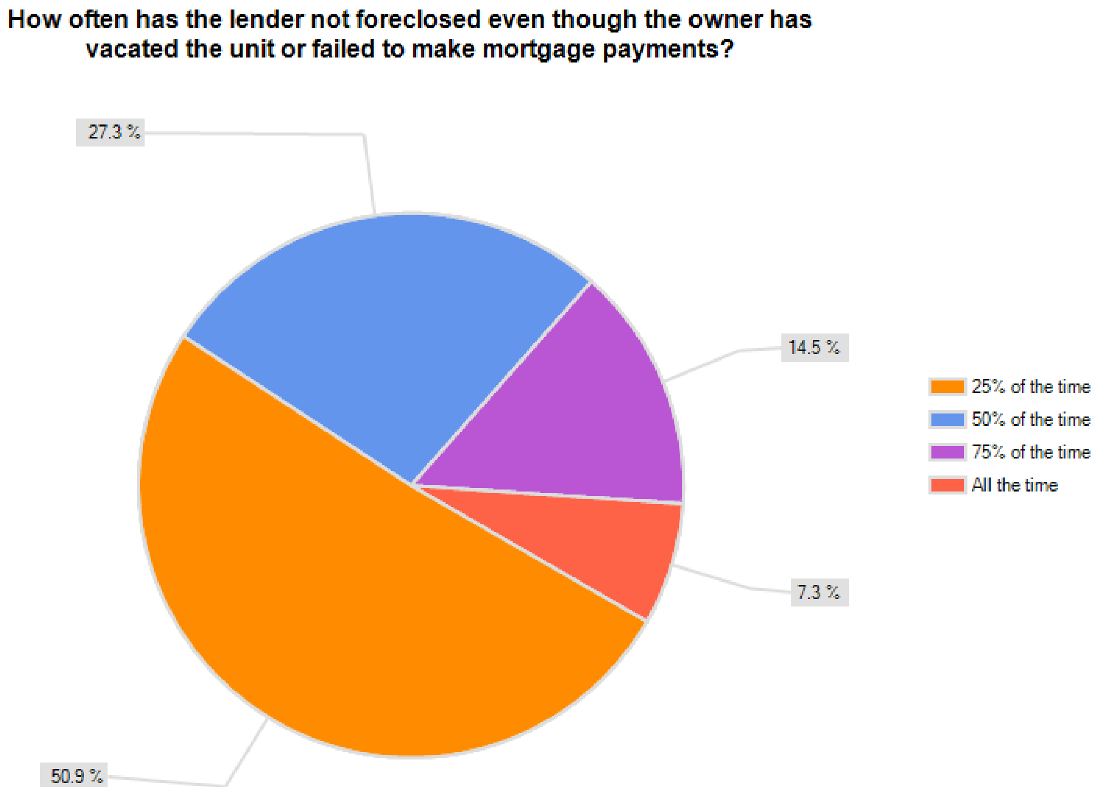
75% of the time a lender will not foreclose when an owner vacates.

How often has the lender not foreclosed even though the owner has vacated the unit or failed to make mortgage payments?

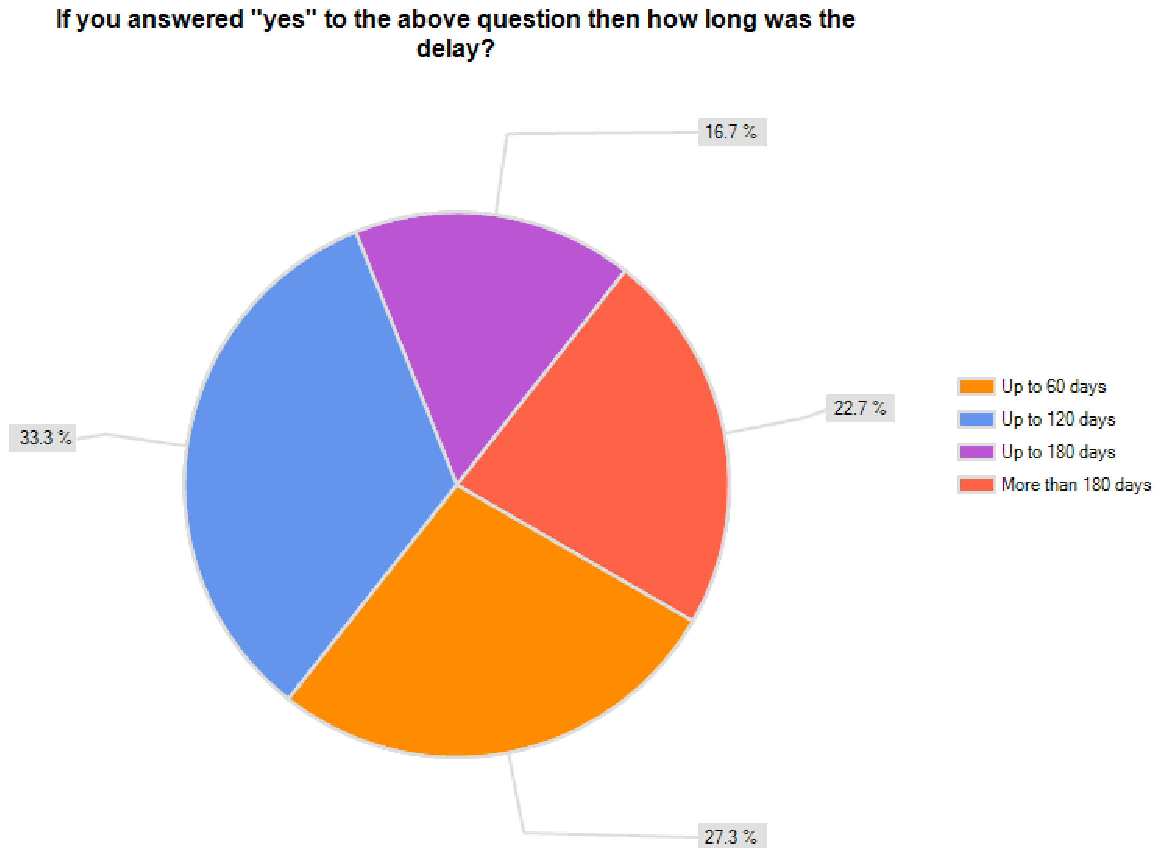


What percentage of units that have been sold this year were due to:

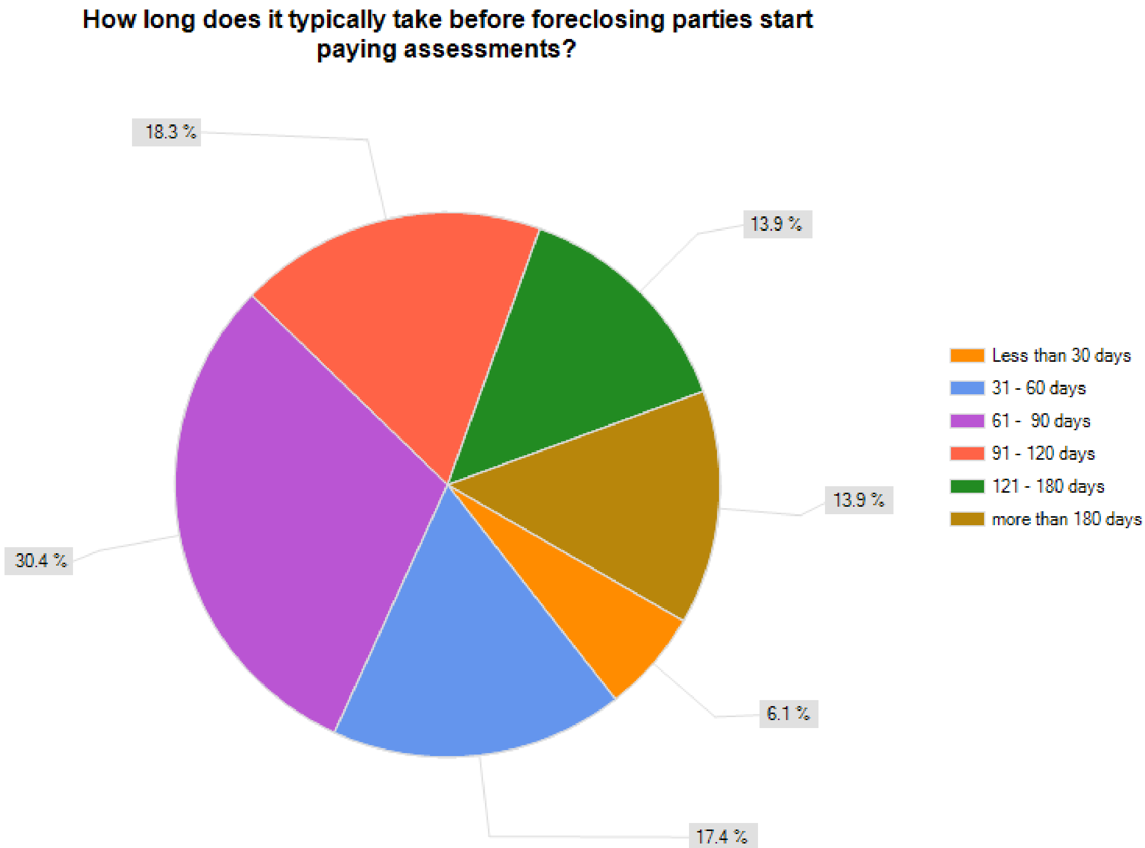




60% of the time foreclosure sales are not timely recorded by the foreclosing party.



73% of delayed foreclosure recordations were delayed more than 60 days.
23% of delayed foreclosure recordations were delayed more than 6 months.

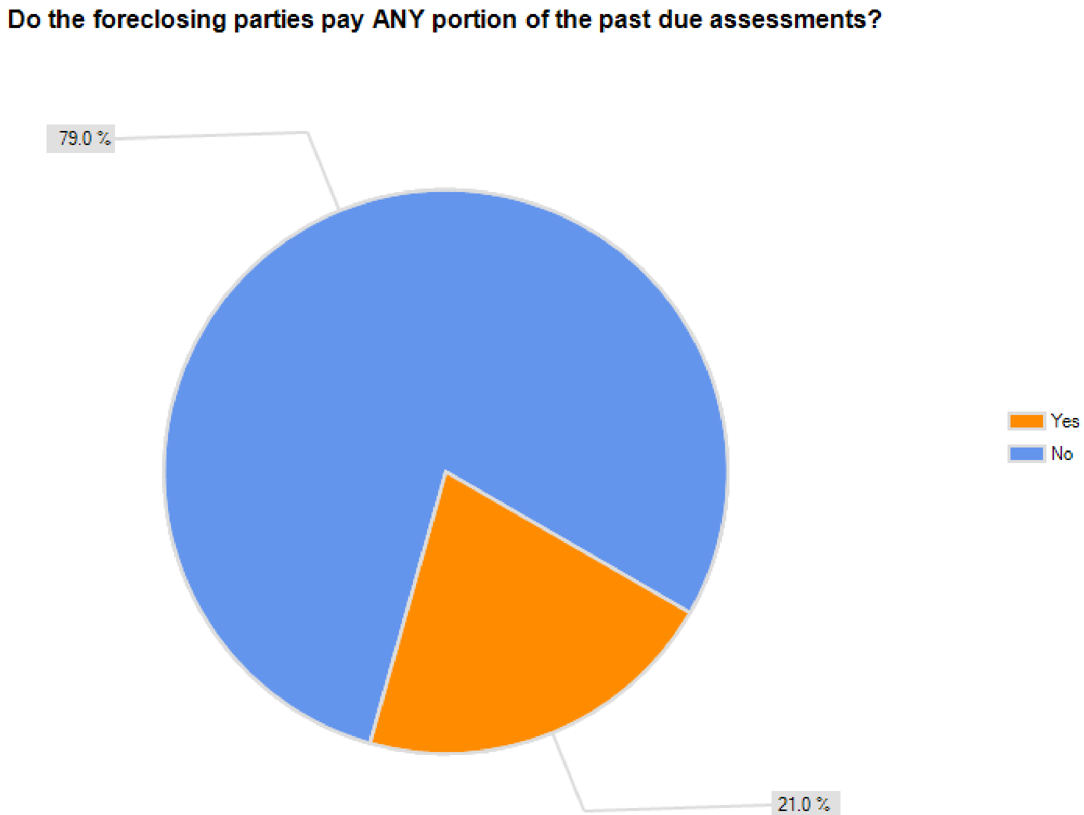


24% of the foreclosing parties begin to pay assessments within 60 days of sale.

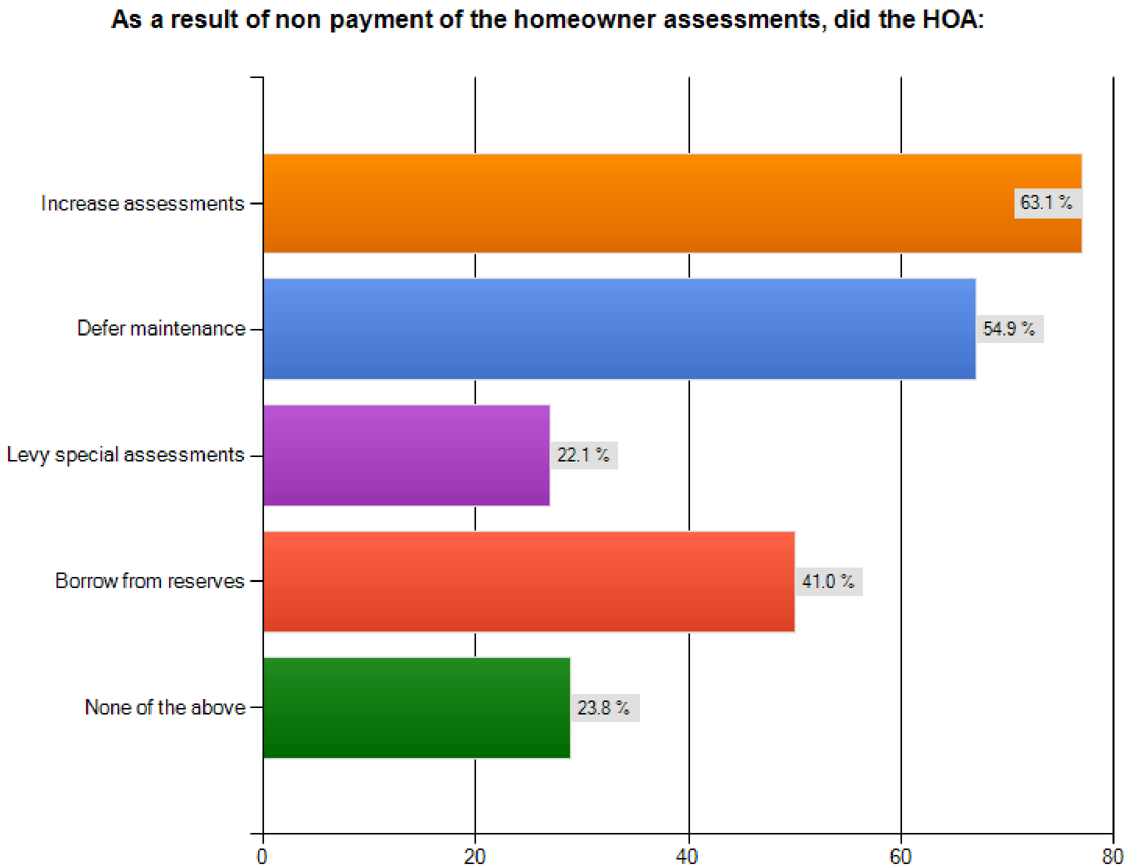
76% of the time, assessments are not paid until more than 60 days after the sale.

28% of the time, assessments are not paid until more than 4 <u>months</u> after the sale.

14% of the time, assessments are not paid until more than 6 <u>months</u> after the sale.



79% of the time, foreclosing parties fail to pay ANY portion of past due assessments.



This chart illustrates the HARM that is done when foreclosing parties fail to timely record sales, leaving the HOA with no ability to identify or locate the new owner for purposes of invoicing assessments.

63% find it necessary to raise assessments, harming fixed income owners, perhaps to the point of causing them to become delinquent in their payments.

55% defer maintenance, drastically reducing the curb value of the properties and community, in addition to incurring future expensive repairs.

Only 22% of HOAs can or elect to levy special assessments due to financial limitations of the association members.

41% of HOAs find it necessary borrow from their own reserves, if they have any. This method requires prompt repayment and supplants the very purpose of the reserve account which is for major rehabilitation of the community's physical plant.

24% of the time, no relief is available to make up for the loss of delinquent assessments. This eventually invites neighborhood blight, which ironically reduces the foreclosing parties' asset value in the property they now own.

END

Survey data compiled from 125 HOA management companies statewide which administer thousands of HOAs.

This chart provided by Community Associations Institute-California Legislative Action Committee on February 15, 2012.

www.caicalif.org

EXHIBIT 7

MEMORANDUM FROM ATTORNEY B. NEAS DESCRIBING THE 2011 AND 2012 AMENDMENTS TO THE WASHINGTON STATE FORECLOSURE FAIRNESS ACT.

Since the adoption of the Foreclosure Fairness Act by the 2011 Washington Legislature, changes have been necessary in order to effect the legislative intent behind the Act. During the December 2011 Special Session, SSB 5988 was adopted in order to deal with mediator immunity issues that had occurred immediately after passage of the Act. In addition, during the regular session, HB 2421was heard and was expected to pass the Legislature; however on the last day of the regular session, the bill was not voted on before the legislature was constitutionally required to adjourn. HB 2421 was then amended onto another bill, SHB 2614, that had passed both houses. SHB 2614 subsequently became the vehicle for the passage of the FFA changes. SSB 5988 had an emergency clause, so was effective upon the Governor's signature of December 20, 2011. SHB 2614 has an effective date of 90 days after the March 8 adjournment, or June 7, 2012, except for Section 12 which became effective on March 29, 2012. Highlights of SSB 5988:

- DRC mediators (not lawyer/judge mediators) are entitled to civil immunity except in cases of willful or wanton misconduct;
- The requirement that prior to scheduling a mediation session the mediator shall require the parties to sign a waiver that the mediator cannot be called as a live witness is deleted;
- A mediator is not subject to discovery or compulsory process to testify in an action between the parties;
- The mediator's certification and all materials presented in the mediation may be deemed admissible evidence in any subsequent litigation between the parties.
- Emergency clause-effective on December 20, 2011.

Highlights of SHB 2614

Sections 1-3. Short Sales and Deficiency Judgments.

If a beneficiary or mortgagee, or its assignees of debt secured by owner-occupied real property intends to release its deed of trust or mortgage in the property for less than full payment of the debt, it must provide written notice to the borrower that, among other things, it is either waiving or reserving its right to collect full payment of the debt. If the beneficiary or mortgagee, or its assignees, does not initiate a court action to collect the outstanding debt within three years of the date it released its security interest, the right to collect the outstanding debt is forfeited.

The statutorily required pamphlet a real estate licensee provides to clients must include a disclosure stating the real estate licensee must notify a seller in writing that a short sale does not automatically relieve the seller of the obligation to pay any debt or costs remaining at closing. (Section 2).

The six year statute of limitations for written contracts is amended to cross-reference the three year limitation applicable to deficiencies in short sales. (Section 3).

Section 4. “Meet and confer” process:

May occur telephonically unless the borrower makes a written request for an in-person meeting, which would occur in the county where the borrower resides;

Beneficiary must provide a toll-free number for initiating and scheduling the meeting;

Requirements applies to borrowers who have filed for bankruptcy;

Borrower may NO LONGER be referred to mediation during the meet and confer period.

Section 5. Housing Counselor/Attorney Role in Referral to Mediation.

Referral to mediation appropriate if borrower has received a Notice of Default;

Referral may be made up until 20 days after the recording of the Notice of Sale.

Section 6. Mediation Process Changes.

Referral to mediation made any time after NOD but no later than 20 days after NOTS recorded.

Within 10 days of request for mediation, Commerce sends notice to parties including statement regarding payment of mediator fee.

o Fee must be paid to mediator within 30 days of receipt of that letter or per mediator’s instruction.

o $400 fee includes preparing, scheduling, and conducting the mediation.

Within 23 days of the notice, borrower transmits documents required for mediation to mediator and beneficiary. Documents include:

o Initial HAMP package;

o Department authorized to create Homeowner Financial Worksheet if necessary.

Within 20 days of the beneficiary’s receipt of the borrower’s documents, beneficiary shall provide its documents to mediator and borrower. These include:

o Same documents as currently required, with some changes;

o NPV data modified to require FDIC NPV input data if no NPV analysis is required by the applicable federal mortgage relief program.

If FDIC becomes unavailable, the department can determine the input data.

o Appraisal information not more than 90 days old at time of mediation.

Mediator must convene mediation within **70 days** of referral from Commerce, unless parties agree to extend the time.

Mediator must provide 30 day notice to the parties and Commerce of time, date and location of mediation.

Mediator may continue the mediation session once after session commences, and thereafter only with consent of both parties.

Mediator **may** (instead of "shall") require the participants to consider the following:

o Same as current statute with change in the NPV requirements-
_ If no NPV required or provided under the particular federal mortgage program, then use the NPV inputs under the FDIC or other NPV inputs as designated by Commerce; _ Mediator may run the calculation for productive mediation/compliance with mediator's certification requirements.

· Good cause requirements:

o Same as current law, i.e., parties must provide the documents as required or pursuant to mediator's instructions, person with authority, timely participation.

· Cancellation of Mediation:
o If mediator reasonably believes borrower will not attend based on conduct such as lack of response;

_ Mediator will send written cancellation to parties and Commerce;
_ Beneficiary may proceed with foreclosure after receipt of written cancellation.

Mediator's certification:
o If no written agreement reached, certification must include a description of the NPV test used and the results expressed in a dollar amount.

Enjoining foreclosure sale due to mediator's certification:

o If an *affordable loan modification* is not offered in the mediation or no written agreement reached, and certification shows NPV of modified loan exceeds recovery at foreclosure sale, that certification constitutes a basis for enjoining.

Section 7. Mediators.

All mediators required to have experience prior to approval to attend training by Commerce.

- o 10 mediations and either 40 hour mediation course and 60 hours mediating; or
- o 10 mediations and 200 hours experience mediating.

"Other experienced mediators" are added as a category of mediator that can be approved by Commerce.

All mediators are provided civil immunity except in cases of willful or wanton misconduct.

Section 8. Commerce Changes to FFA.

Beneficiaries must report and update contact information for person and work group responsible for compliance with FFA.

Reporting and payment changes for beneficiaries.

Section 9. Changes to requisites to a trustee sale (61.24.030).

Sale cannot take place earlier that 150 days from date borrower received NOD.

Up from previous 120 days. Still 120 days for all other foreclosures not subject to NOPFO.

Major revisions to NOD form providing information to borrower subject to NOPFO.

Section 10. Changes to 61.24.040. Notice of Sale.

Time between NOTS and Sale is increased to 120 days for borrowers required to receive the NOPFO.

Still 90 days for all other foreclosures not subject to NOPFO.

Major revisions to NOTS form providing information to borrower subject to NOPFO.

Section 11. Transition questions for borrowers in process before effective date of SHB 2421.

Borrower referred to mediation prior to effective date may continue through with mediation (borrower who requested mediation prior to NOD).

Borrower who has not been referred to mediation prior to effective date may only be referred after NOD and before 20 days after the recording of NOTS.

Borrower who has not been referred to mediation as of effective date and who has NOTS recorded may only be referred to mediation if before 20 days since NOTS recorded.

Section 12. Commerce funding allocation changes.

76% of funds to housing counseling activities, instead of 80%.

13% for implementation by the department, up from 9%.

Emergency clause for this section only. (Section 15).

Section 13. A domestic limited liability corporation may be a trustee under the Deeds of Trust Act.

Section 14. Rescission of Trustee's Sale.

Up to 11 days following a trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the sale and trustee's deed void if: (1) the trustee, beneficiary, or authorized agent asserts that there was an error with the foreclosure sale process including, but not limited to, an erroneous opening bid; (2) the beneficiary and borrower, prior to the sale, agreed to a loan modification or loss mitigation plan to postpone or discontinue the sale; or (3) the beneficiary or authorized agent accepted funds that fully reinstated or satisfied the loan. · If rescission occurs, the trustee must refund the bid amount to the purchaser. The trustee must send a notice of rescission to parties no later than 15 days following the sale. If the rescission is based on an error in the sale process or based on the borrower and beneficiary previously agreeing to a loan modification or postponement of the sale, the trustee may set a new sale date within a certain time and must comply with certain notice requirements.

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EXHIBIT 8

TRANSCRIPT OF EMAIL FROM ATTORNEY BRUCE NEAS DESCRIBING THE SUPPORT OF BOTH LENDER AND BORROWER ADVOCATES IN THE PASSAGE OF WASHINGTON STATE'S FORECLOSURE FAIRNESS ACT.

Bill,
You can certainly represent that the financial services industry agreed to and fully supported this legislation. I can provide more details if necessary, but this was a carefully negotiated process, with over 36 hours of direct negotiations. The major servicers/financial interests were all very well represented by legal counsel from major law firms such as Davis, Wright & Tremaine, as well at K&L Gates. Additionally, the smaller community banks and the credit unions were there. Those negotiations, hard fought and difficult, produced the Foreclosure Fairness Act effective July 22, 2011.

The workgroup that negotiated the FFA continued to work on amendments starting in the fall of 2011. That led to other agreed-to changes during the "special session" in December of 2011 as well as other amendments during the general session of 2012. This has been a highly negotiated area b/t homeowner advocates (the team I led) and the financial services industry. There were a lot of other stakeholders in the process as well. The negotiations leading up to the agreed-to amendments in the special session and the general session contained sometimes 45-50 stakeholders, so it was a difficult negotiation. I have attached a summary of those changes.

I would have to say that from what I have heard of the other state legislative battles, ours was quite different. I met Heather Kulp at a conference earlier this year, and she said that the WA situation was substantially different from the legislative battles in the other states. She attributed that largely to the civil negotiations that we had with the other sides. I do think there is something to that. Both sides compromised heavily from starting positions, there was a spirit of trust b/t me and the main bank lobbyist/negotiator, and we both did our best to keep non-constructive conversations/arguments out of the negotiation process.

The real question is whether the law is effective. We may have a better sense of that when the department charged with implementing the Act presents its report to the Legislature in December.

Please let me know if I can provide additional details. Bruce

EXHIBIT 9

MEMORANDUM FROM ATTORNEY TOM COX DATED OCTOBER 8, 2012 ENTITLED *"RESPONSE TO JULY 6, 2012 REPORT ON MEETING PERTAINING TO COMMITTEE MEETING HELD ON JUNE 8-9, 2012"*

MEMORANDUM October 8, 2012

TO: ULC Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections

FROM: Thomas A. Cox, Esq.

RE: Response to July 6, 2012 Report on Meeting pertaining to Committee meeting held on June 8-9, 2012

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1. Preliminary observations.

I am impressed with the Committee members' belief in the Uniform Law Commission's mission and their dedication to this project. Nevertheless, I remain concerned that the organization's determination to proceed with this project has the potential to lead to an undesirable result. The ULC has substantial "institutional ego" invested in this effort, to the point where I fear that the work of the Committee will be viewed as a success only if it produces a proposed act. I urge the members of the Committee to keep an open mind to the possibility that success might also at some point be viewed as a willingness to recognize that this project should not continue, for some or all of the reasons that I outlined in my January 10, 2012 Memorandum to ULC Study Committee on Foreclosure Procedures, or because a fair balance cannot be achieved between the interests of the mortgage industry and the interests of homeowners.

My participation as an observer in this ULC Committee effort is my first exposure to how the ULC drafting process works. Some of my observations may cause discomfort, because it appears that they may go against the grain of how things have been done in the past. Nevertheless, I hope that they may also be viewed as fresh insight on how the process might be more fair and effective in this situation.

The discussions at the June meeting have not led to any change in my view that the ULC should not proceed with this project. By commenting below as I do, I do not relinquish that view. In this memorandum I address only, but not all of, those categories of statutory provisions listed in the "Report on Meeting of Uniform Law Commission Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections (June 8&9)", (the "Report"), where the reporter states that there was a Committee consensus to include specific topics in the drafting project. In addition, I enumerate in a separate memorandum , of even date herewith, additional statutory provisions that should be considered for inclusion in any proposed act.

1.1. Transparency—Committee Process. This drafting project has the potential to affect more people throughout the country and create more controversy, political and legal, than virtually any other project undertaken by the ULC in recent history. If the deliberations of this Committee were actually taking place in any state legislative body, freedom of information laws would require complete openness and transparency of all aspects of the process. The process of this Committee should be no less open and transparent, because the ULC process circumvents a great deal of the debate and deliberation that would take place in a state legislature if the project were being initiated there. The ULC website for the Committee includes many working documents presented to the Committee and the July 6, 2012 Report. However, that site does not include any materials relating to communications among Committee members and/or the two reporters for the Committee. It should.

The genesis of this issue arises out of the fact that apparently directives have been issued to the reporters for the Committee to begin drafting proposed statutory language. This occurred after the initial meeting in June to identify areas of the law to be covered by the proposed act, but in the complete absence of any substantive Committee discussion or votes on the substance of what provisions should be included within the drafts that the reporters have been instructed to prepare on each such topic. Presumably memoranda exist which contain directives to the reporters that would shed light on what they have been told to draft. Presently these memoranda are not publicly available and have not been provided to observers. Memoranda such as those should be immediately available to all observers and interested parties as they are generated. Similarly, memoranda back and forth between the reporters and Committee members should be posted as they are generated. If there are conference calls among Committee members between meetings, minutes of those conference calls should be prepared and posted on the Committee website. Memoranda of observers to the Committee, such as this one, should be posted as they are generated and/or received.

1.2. Transparency—Committee Funding. There are stakeholders in this process with widely divergent interests. To the extent that some of those stakeholders are funding the work of the Committee, the terms of those funding arrangements must be fully disclosed. The public would have a major interest, and deep concern, about any state legislative process where parties whose business activities were likely to benefit from such legislative activity were funding that legislative activity. The work of this Committee is in effect part of any state's legislative process. To the extent that stakeholders whose interests will be affected by the final product are funding the work of this Committee, there simply must be full disclosure of all of the details of any such funding arrangements, including the terms and conditions and amounts of such funding. Any such funding agreements should also be posted and publicly accessible on the Committee website.

1.3. Equal Access to Committee Process. There was a single homeowner representative in the observer group at the June meeting of the Committee. There were two academics, several individuals who could be called non-aligned, and then the remaining substantial majority of observers who are directly involved in the mortgage industry. National consumer organizations have decided not to participate in the work of the Committee. One homeowner lawyer from a judicial foreclosure state (there is no one participating with any expertise from a nonjudicial foreclosure state) is not enough.

Other homeowner lawyers might be willing to participate, but they are not able to do so unless their costs of attending are paid. Consumer lawyers mostly work as solo-practitioners or in small firms. It is not easy for them to leave solo or small firm practices and abandon client demands and fee-generating work to attend two-day meetings in Washington. Further, those lawyers are paid well below going rates for corporate or salaried lawyers, and they cannot afford the several thousand-dollar expense commitments for attending the multiple meetings involved in this Committee's work. The absence of funding for such lawyers to attend the Committee meetings leaves one of the largest stakeholder groups on the outside, and is likely to lead to a proposed act put out by the Committee that will not be balanced and will be politically unacceptable. Simply put, for any output of the Committee to have any measure of perceived legitimacy, the ULC must find a way to fund the expenses of and bringing into the process homeowner advocates to participate on an equal footing with mortgage industry observers.

1.4. Recognition of Causes of Mortgage Servicing Problems. For the mortgage industry, the main concern seems to be a *lack of uniformity* among foreclosure procedures in the fifty states. For homeowner advocates, their main concern is the *existence of uniformity* in mortgage servicer abuses that have been suffered by homeowners all over the country in this foreclosure epidemic. One cause of servicer abuses is perceived to be perverse financial incentives for servicers that militate in favor of foreclosures instead of loan modifications.[3] These perverse incentives arise out the servicing fee structure, and out of the fact that many servicers hold second mortgages on properties with first mortgages owned by others but serviced by that same party. This issue was raised in the materials circulated in advance of the June meeting, and then was raised again by me during that meeting. The GSE and Bank of America representatives rejected that concept and expressed a lack of awareness of the scholarly treatment of this issue contained in the articles cited in footnote 1 above.

I respectfully suggest that this issue of perverse servicer incentives must be explored further and be more fully understood by the Committee before the drafting process proceeds. This is so because knowing whether perverse servicer financial incentives and/or conflicts of interest are a root cause of some of the major foreclosure problems should influence the decisions on what the solutions should be that are to be put forth by the Committee. I suggest that the Committee should invite some or all of the three authors[4] of the cited articles to address the Committee at the November meeting. A discussion with these authors in the presence of the observers from the mortgage industry might bring greater clarity to the Committee on the servicer incentives issue.

2. It is premature to begin drafting any proposed act.

It is troubling that the drafting process is now apparently underway. The main focus of the June 8-9, 2012 meeting was a discussion of what topics should or should not be included in the proposed statute. While there necessarily was some discussion of what the terms of statutory provisions might be

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[3] See Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Washington L. Rev. 755 (2011), Levitin and Twomey, *Mortgage Servicing*, 28.1 Yale Journal on Regulation 2011, Laurie Goodman, *National Mortgage Servicing Standards and Conflicts of Interest*, Testimony to the Subcommittee on Housing, Transportation and Community Development of the Senate Committee on Banking Housing and Urban Affairs (2011).

[4] Professor Levitin teaches at Georgetown Law and might be readily available to attend the November meeting in Washington, D.C.

in given areas, that was not the focus of the June meeting and there was no comprehensive and ordered discussion of the substance of any given topic, nor was there any observable consensus of the substance of statutory provisions to be included on any given topic. It is premature to begin with a drafting process until there has been substantial discussion and consensus by the Committee of what the actual substance of the provisions should be that will be included in any initial drafts.

The June meeting added an additional related issue to my concerns. The Drafting Committee is intent on creating a proposed uniform model *statute*. Some of the provisions under consideration simply do not belong in a statute and are more appropriately the subject of *court rules*, or possibly *regulations*. See Section 3 below, for example. A full discussion by the Committee of this issue should take place with respect to each area of consideration *before* any draft statute is circulated.

3. Foreclosure Mediation.

The Report notes:

> the consensus of the Committee that the act should deal with mediation; that it is important to consider the relationship between mediation and related processes, including loan modification and loss mitigation programs, and that one approach that may have merit is to draft "best practices" guidelines.

The June 8th mediators panel discussion commented upon in Section 6 of the Report noted the significant variation among different states' mediation programs. Although the Report does not state this, I heard the Committee reach some consensus in a position that the proposed act should not contain provisions creating any specific form of mediation process. The consensus that I did hear was that the proposed act should be confined to " 'best practices' guidelines."

I oppose the notion of this ULC Committee drafting best practices provisions to include in a proposed act. While the outside recommendations of best mediation practices, now being obtained by the Committee, could be useful to state mediation programs, there is no demonstrated need for *a statute* containing such provisions. States are still evolving their own best practices and should be allowed to continue to do so. Referring to ULC Criteria No. 1(b), there is no evidence that "uniformity [among states] is desirable or practicable" in this regard. Referring to subparagraph (3) of ULC Criteria 1(c), there has been no evidence put before the Committee that such statutory provisions will facilitate interstate relations, or respond to a "need common to many states as to which uniform legislation may be more effective." Nor is their any evidence before the Committee that "significant disadvantages [are] likely to arise from diversity of state law" regarding their mediation programs.

Contrary to serving the purposes of the ULC Criteria, a proposed uniform act containing any provisions, whether substantive or limited to best practices, will constitute a disturbing presumption by the ULC Committee that somehow it is better positioned than state agencies are to tell the states with mediation programs what their best practices should be. There is no basis for such a presumption.

Beyond this, I am opposed to the incorporation into any *proposed act* of proposed best practices provisions. Many state mediation programs are governed by judicially promulgated *rules*, not by statutes. See, for example, Maine Rule of Civil Procedure 93. It is in the judicial rule making process where any such provisions belong, not bottled up in a statute that is subject to the political maneuvering and lobbying efforts of the financial industry in the various states' legislative processes, and insulated from future change by judicial agencies who supervise the state mediation programs. Putting such provisions into a statute will minimize their evolution in useful ways as the states continue to learn from their own, and each others' various mediation programs.

4. Who can commence a foreclosure?

This is an issue of tremendous importance to homeowner advocates all over the country—in both judicial and nonjudicial states. It is the source of contentious and constant litigation battles. Homeowner interests are diametrically opposed to the stated interests of the GSEs on this issue. Insufficient attention was given to the conflicting interests of the financial industry and homeowners on this issue at the June meeting. It is inappropriate for any drafting of proposed statutory language to begin until there has been a full exploration of this issue by the Committee.

I do not agree with the assertion in the Report that "the holder of the note is the person entitled to foreclose", especially in a situation where that holder is separate from the owner of the note. The PEB Report of November 14, 2011 states that "[i]f a note secured by a mortgage is sold. . . the note automatically transfers a corresponding interest in the mortgage to the assignee. . ." There is a strong argument that the provisions of UCC §9-203(g), and the interpretation given by the PEB, require that it be *the owner* of the loan who must be the party to bring a judicial foreclosure, and if the note is negotiable, that owner must also be the §3-301 party entitled to enforce. This is a complex issue (likely the subject of at least one forthcoming law review article) and is a topic of hot debate among many lawyers involved in foreclosure work

Regardless of one's views on this legal controversy, there is no good policy reason to allow a holder of a mortgage note, who is not also the owner of the note and the mortgage, to foreclose. The *sole reason* offered at the June ULC Committee meeting to support the Fannie/Freddie practice of forcing servicers to foreclose GSE loans in the names of the servicers was the assertion made by Fannie Mae counsel that foreclosures in the names of the GSEs would confuse homeowners. This is so, it was asserted, because homeowners are used to dealing with the servicer on any given GSE loan and are not even aware of the GSE ownership of the loan.

There are two ready responses to the unsupportable assertion by Fannie Mae counsel of potential homeowner confusion. First, any confusion is created by the GSEs themselves[5], who attempt to hide their identity as owners of loans in foreclosure—they could easily require their servicers to disclose the GSE ownership of the loan in every default notice and subsequent borrower communication; then there could be no surprise or confusion when the GSE is named as plaintiff in the foreclosure. Second, the GSEs asserted at the June meeting that they are only involved in 20% of US foreclosures. In the remaining 80%

[5] An example of the confusion caused by this practice of the GSEs is set out nicely in an August 2, 2012 article entitled "Appeals court ruling could invalidate foreclosures in Georgia" dealing with confusion created by a court decision construing a statute requiring the giving of a foreclosure notice "by the secured creditor" and equating the term "secured creditor" with the term " owner of the loan". The author of the article notes the confusion that this is going to cause for foreclosures of Fannie/Freddie mortgages where their ownership has been concealed and where they are not mentioned in the notices of default.

of foreclosure cases it is almost always the owner of the loan, such as a trustee of a securitized trust, which is named as the plaintiff. There has been no evidence of borrower confusion in those cases, and to my knowledge there is not a single court decision evidencing any such confusion—either by the defendants or by the courts.

The real reason for this practice is political, not legal. Recently, counsel for Wells Fargo Bank was remarkably candid in his statement of this reason in the case of *Erichsen v. Wells Fargo Bank, N.A.*, Civil Action No. 10-11123-ST (US DC Ma.) in a June 22, 2012 hearing, where Wells Fargo counsel stated in response to questioning from Massachusetts Federal District Judge Tauro:

> . . . because Freddie Mac is a government entity, they don't want to foreclose on people. They don't want to make it look like the government forecloses on people. They would actually insist that the mortgage be assigned back to Wells Fargo so that they foreclose in their name to create the impression that the government is not foreclosing on people. That is why they set it up this way. There is nothing, you know, more complicated than that.

Transcript of June 22, 2012 hearing at p. 35. I suspect that the reason for the GSE's actions goes even more deeply, and that a major part of the reason for their approach is that they do not want the media, Congress and the public to see the depth of their involvement in the current foreclosure epidemic.

While there are no good legal or policy reasons for allowing non-owners of mortgage loans to have standing for foreclose, there are compelling reasons that any proposed act should mandate that only the owner of mortgage loan be the party with standing to maintain a judicial foreclosure action. It is GSEs to whom the servicers remit mortgage payments collected by them, the GSEs whose 1,000 plus page servicing manuals control every aspect of the serving of the loan, the GSEs whose servicing guidelines control the servicers actions in modifying loans, and the GSEs to whom legal title to a foreclosed property is conveyed when the foreclosure is complete—they are the true real parties in interest in the foreclosures of their loans in every respect and at every stage of the foreclosure process.

In judicial foreclosures where mediation occurs, the GSEs' practice hides from homeowners, from their advocates, and from mediators the essential knowledge of whose rules control the available loan modification alternatives. A foreclosure action brought in the name of Wells Fargo Bank on a Freddie Mac owned loan hides from the homeowner and the mediator the fact that it is solely the servicing guidelines of Freddie Mac that set the loan modification alternatives.[6] "[T]here is a genuine consumer borrower interest in transparency of mortgage assignments so that the identity of the real

[6] While the GSEs maintain "loan look-up" websites where their ownership of a given loan can usually be discovered, those sites are not fully accurate. Furthermore, unrepresented homeowners, and often their lawyers are not knowledgeable about the loan-lookup sites, and mediators are not like to find or use those sites.

counterparty is known. These basic consumer protection goals should inform the design of any modernized legal infrastructure for recording mortgage loan transfers."[7]

Similarly, this concealment by Fannie Mae and Freddie Mac deprives states of the ability to gather information as to the types of lenders foreclosing within their jurisdictions and other such data that is vital to them in managing their state foreclosure processes. Such information gathering and reporting is mandated by Maine law, 14 M.R.S. §6111(3-B)[8], and probably by laws of other states as well. Under Maine law, this perverse practice by the GSEs also interferes with legislatively mandated allocations of transfer tax revenues derived from mortgagee foreclosure sales, and it interferes with protections built into the foreclosure statutes against low-ball bidding by foreclosing parties. Undoubtedly, similar provisions are adversely impacted in other states whose foreclosure statutes were enacted with the expectation that it would be the true owners of mortgage loans who would be using their foreclosure statutes.

From a legal perspective, there are several reasons that an owner of the note, as opposed to a mere holder, should be the only party entitled to foreclose. First, nothing in Article 3 of the UCC indicates that an Article 3 transfer or negotiation of an instrument also transfers the right to enforce any security agreement associated with the instrument[9]. Section 3-203(b) specifically defines what rights the transferee takes upon transfer, and the right to enforce a security agreement securing payment is not among them. Conversely, Article 9 specifically provides that it is the purchaser of an ownership interest in the note who receives the mortgage interest that gives rise to the right foreclose. See UCC §9-203(g).

Second, it is often said that the party entitled to enforce the note under §3-301 is entitled to payment on the note from the maker, but the owner of the note is entitled to its economic value. PEB Report of November 14, 2011 at page 8. The process of foreclosure is a means to realize the economic value of the note by way of the liquidation of the collateral. Logically, the party entitled to the economic

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[7] White, *Losing the Paper-Mortgage Assignments, Note Transfers and Consumer Protection*, 24.2 Loyola Consumer Law Review 468, 496.

[8] The Maine Bureau of Consumer Credit Protection maintains a website where a foreclosing party is required to provide information as to its own identity and as to the identity of the owner of the loan. The servicers for Fannie and Freddie routinely falsely state that they own the loans in question, thereby frustrating the Bureau's legislatively mandated information gathering and reporting obligations. The GSEs are aware of this practice of falsely representing the identity of the owners of their loans, but they do nothing to require their servicers and lawyers to stop the practice.

[9] Arguments are made that common law operates to have the mortgage interest follow to a note holder under an Article 3 transfer. I do not agree that common law addressed what happens in a situation where the holder of a negotiable note is separate from the owner. Even if the common law did provide in that situation that the mortgage interest followed to the note holder rather than the note owner, there is a strong argument to be made that the 2002 enactment of amendments to Article 9, and in particular §9-203(g), displaced any contrary common law and mandates that the mortgage interest always follows the note to an owner.

value of the note should the party to receive the proceeds of such a liquidation (and that is exactly what the Fannie Mae and Freddie Mac servicing guidelines mandate).

Thirdly, while a handful of cases have found the Fannie/Freddie Uniform Note to be negotiable, none of these cases contain a thoughtful or thorough analysis. See Cohen, *The Calamitous Law of Notes,* 68 Ohio St. L. J. 161, 163 and Whitman, "*The PEB Report on Mortgage Notes"* ("I have not found a single reported decision anywhere in the nation that fully and competently analyzes the negotiability of the standard Fannie Mae and Freddie Mac 1-4 family mortgage note.")

This commentary leads to the ultimate problem with having standing turn on PETE ("party entitled to enforce") status: Judges not well versed in the UCC are ill equipped to effectively analyze the negotiability of promissory notes. See Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 Pepp. L. Rev. 737, 741-742 (2010), discussing how an extensive search of 20 years of case law, both Federal and State revealed only 42 appellate level cases involving negotiability, out of which Courts effectively analyzed the negotiability of the note only 2 of those cases.[10] Asking foreclosure courts to make determinations of standing based on the negotiability of the notes in question leads to uncertainty among litigants, protracted litigation, and the potential for poorly reasoned and/or conflicting decisions or illogical outcomes.

The lack of transparency in the foreclosure process created by Fannie Mae and Freddie Mac practice of hiding their ownership of mortgages under foreclosure has no redeeming features. With the possibility that the conservator for the GSEs, Federal Housing Finance Authority, may be a major funder of the ULC Committee's work on this project, it is critical that the Committee takes great care to analyze this issue with complete independence, and in much greater depth than has occurred so far. The analysis must be conducted openly and fully in order for the Committee to come to a decision free of influence from any project funder, as to whether a proposed act should prohibit this practice. No drafting on this issue should begin until such a process has occurred in Committee deliberations with full participation of all of the observers.

5. What evidentiary proof is required for a foreclosure?

I was surprised and disturbed by the manner in which this issue was treated by the Committee and the observers at the June meeting. There is obviously a desire among many of the observers on "the industry" side, and an apparent willingness on the part of a number of Committee members, to consider eliminating or diluting the requirement for the physical production of the note in foreclosure cases. As stated in the Report, the Committee agreed to consider the following issues:

> One issue is whether physical production of the note is necessary, or whether an alternative is sufficient; e.g. a lender's affidavit that it has possession of the note, perhaps accompanied by a copy or image of the note. There is also an issue of timing: If

[10] Since the publication of that article in 2010, there have been several more trial court decisions addressing the negotiability issue, most of which come down on the side of negotiability, but all of which also lacked a full presentation by the litigants of all of the various potential negotiability issues relating to the Fannie/Freddie notes.

> production of the note is essential, must it accompany the filing of the foreclosure complaint, or is it sufficient to produce the note later, along with other evidence proven by the plaintiff?

Just the framing of this issue is suggestive of a bias toward the mortgage industry. The Report could just as easily have stated the issue this way: “one issue is whether present requirements relating to physical production of mortgage notes need to be strengthened to better protect homeowners.” Unfortunately, the weight of the “the industry” in the observer group seems to have lead to a framing of the issue favorable to its position.

My perspective on this issue comes from the work in which I have been engaged in dealing with the troubling practices of loan servicers for almost five years. This past December, the Maine Supreme Court came out with its decision in a case dealing with over six years of practices of GMAC Mortgage in filing fraudulent affidavits all over the country. The Court held as follows:

> The affidavit in this case is a disturbing example of a reprehensible practice. That such fraudulent evidentiary filings are being submitted to courts is both violate of the rules of court and ethically indefensible. The conduct through which this affidavit was created and submitted displays a serious and alarming lack of respect for the nation’s judiciaries.

Federal National Mortgage Association v. Bradbury, 2011 ME 120, ¶7, 32 A.3d 1014.

Dissenting Justice Levy went further and stated:

> Because Stephan admitted that he signed thousands of such affidavits and related documents each month and GMAC was previously sanctioned for similar conduct, there was good cause to believe that such misconduct was not limited to this case and that the management of GMAC and Fannie Mae, and their attorneys, knew or should have known of the wrongful manner in which the affidavit presented in this case was produced.

Id. at 2011 ME 120, ¶ 16.

As a result of the revelations at the trial court level in the *Bradbury* case in the fall of 2010, it was found that virtually every major servicer in the country was guilty of similar fraudulent conduct on a national scale in hundreds of thousands, and perhaps millions, of foreclosure cases. In the face of those sordid revelations, how can this ULC Committee even entertain the idea of weakening evidentiary standards to allow servicers to prove *by affidavit* the critical fact of possession of the mortgage note? Some courts have begun to allow such a practice. Such a practice is unjustified in the face of repeated experiences of homeowner lawyer (including my own personal experiences) in finding that foreclosure plaintiffs (1) do not have the note at all, (2) the copies (sometimes multiple and varying copies) of the note that are produced do not match the original, (3) allonges are not affixed or show obvious sign of recent fabrication, and/or (4) false statements are made about alleged losses of notes when they are not lost at all.

Any statute drafted by this Committee that would allow the use of an affidavit in any instance to prove possession of a negotiable instrument will effectively destroy the lost note protections for note obligors provided in UCC §3-309. No PETE will admit to the loss of a note and submit a lost note affidavit under §3-309 (that requires proof of specific facts and exposes the PETE to an obligation to indemnify or provide a bond to the obligor), if it can simply submit an affidavit, outside of the §3-309 requirements, stating that it has the note locked away in some remote custodial vault. Our history with loan servicers discussed above demonstrates their willingness to cut corners and to offer false affidavits.

On behalf of homeowners who have been abused by these practices, I storngly urge that the Committee to go in the opposite direction and strengthen the proof requirements. Any proposed act should include an express provision that the original note, if it is claimed to be negotiable, must be physically produced for the court at least no later than the judgment stage of the case, whether that be at trial or at the summary or default judgment stage. If the original note is lost, a lost affidavit fully compliant with UCC §3-309 must be required. As Chief Justice John Marshall said back in 1812, "[t]he practice of this country is to require that the note should be produced, or its absence accounted for, and the rule is a safe one." Sheehy v. Mandeville, 11 U.S. 208, 218, 3 L.Ed. 317, 7 Cranch 208.[11]

If "the industry" feels burdened by the requirement that original negotiable notes must be produced when judgments upon them are sought, there is an easy solution that it can immediately implement without any statutory change. The industry can end its efforts to continue to call these notes negotiable instruments and cease efforts to enforce them under Article 3 of the UCC. "[T]he concept of negotiability of promissory notes . . . is not only useless but positively detrimental to the operation of the secondary mortgage market."[12] As Professor Whitman concludes in his article, "the negotiability of mortgage notes is a bad idea, and the time has come to end this practice."[13]

If this ULC Committee could do one productive thing, it would be to propose to the PEB, or to provide in the proposed act that it intends to produce, that this practice of treating 30-year mortgage notes as negotiable instruments will not be allowed to continue.[14]

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[11] It is also important to note that, in *Sheehy v. Mandeville*, the Supreme Court was dealing with a case at the default judgment stage, yet the holding still was the original note had to be produced even at that stage of the case.

[12] Whitman, *How Negotiability has Fouled up the Secondary Mortgage Market, and What to Do About It."* 7 Pepp. L. Rev. 737 (2010).

[13] *Id* at p. 770.

[14] For additional arguments against preserving the holder-in-due-course protections, which are what motivates the mortgage industry to hang on the negotiability fiction, see Eggert, *Held Up in Due Course: Codification and the Theory of Form Over Intent In Negotiable Instruments Law*, 35 Creighton L. Rev. 363 (2002), and Greenlee and Fitzpatrick, *Reconsidering the Application of the Holder in Due Course Rule to Home Mortgage Notes, Federal* Reserve Bank of Cleveland Working Paper 08-08 (November 2008).

6. Default notices.

I do not have a negative reaction to the concept that the terms and forms of pre-foreclosure default notices should be standardized. Paragraph 22 of the Uniform Instrument Mortgage (in most states) already goes a long way to accomplishing that. I understand however that some states have created variations or additions to default notice requirements, and that an attempt to bring more uniformity to this issue might be worthy of consideration.

To the extent that a proposed act does address this issue, I suggest that it should include at least the following provisions:

6.1. Any default notice must comply with average reading level, "least sophisticated consumer,"[15] and "plain English" standards.
6.2. Any default notice must plainly disclose who the owner of the mortgage loan is.
6.3. Any default notice, if sent by a party other than the owner of the loan, must plainly disclose the relationship between the owner and the party sending the notice, and what the authority is of the sender to give the notice.
6.4. Any default notice must disclose a specific cure amount, and a specific payoff amount, good for the life of the cure period without the need for any additional call by the homeowner to the servicer.
6.5 Any default notice must contain a statement of loan modification programs available from the owner of the loan and/or the servicer, a statement of how the homeowner can apply for a loan modification inducing detailed contact information.
6.6 Any default notice must include a list of Federal or State approved housing counseling agencies available to help homeowners avoid foreclosure.

Creating a proper notice of default and right to cure is not rocket science, yet, in my experience in Maine, servicers and their lawyers seem to have a singular inability to do it properly. There is variation among state decisions about what the consequence of an improper notice should be. A simple and clear consequence of an improper notice of default should be a part of any proposed act—the sending of a completely proper default notice should be considered by any court to be a condition precedent to acceleration of the debt and to the commencement of foreclosure, with a non-compliant notice nullifying the foreclosure without any requirement of a showing of harm by the homeowner resulting from the defective notice.[16]

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[15] See Easterling v. Collectco, Inc.,. __F.3d ___ (2nd Cir. 8/30/12) citing *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993)

[16] See *Bank of New York v. Laks*, 27 A.3d 1222 (NJ App. 8/9/11); *Rostamkhani v. Option One*, 2011 U.S. Dist. LEXIS 88640 (D. Minn. 8/9/11). The holding of *Laks* that a defective default and cure notice mandated dismissal was overruled in *US Bank, N.A. v. Guillaume*, 209 N.J. 449, 38 A.3d 570, but its holding that a default notice strictly complying with statutory requirements is required was left in tact.

7. Chain of mortgage assignments.

The Report states that there is "near universal acceptance of the rule that ownership of the mortgage follows ownership of the note" and that "there is no sound reason" for requiring a foreclosing party to prove that it is the assignee of an assignment of the mortgage. The only reason that this "near universal acceptance" was not completely universal at the June meeting is that there was only one representative speaking at that meeting on behalf of homeowners.

Even if the rule that "ownership of the mortgage follows the note" is as universal and as clear as the Report suggests, there are major consequences of that position that were not recognized in the Report and have not been recognized by the Committee. For example, if the "ownership of the mortgage follows ownership of the note," then a note *holder*, separate from the note *owner*, never has standing to foreclose, because any mortgage assignment to that separate holder is meaningless—it could not have been effective to assign the mortgage to that separate holder because, as a matter of the operation of law (UCC §9-203(g)), that mortgage interest always remains with the owner. This issue is the subject of interesting and challenging legal debate.

As a homeowner advocate, I oppose the notion that the Committee should propose an act that will create, or allow to continue, to operate a statutory scheme whereby mortgage assignments are rendered meaningless, and parties are allowed to foreclose simply by recording an affidavit that asserts that right to foreclose. The notion, under consideration by the Committee, that the production of the original note should no longer be required and that homeowners must rely upon the (now completely discredited) integrity of the mortgage servicers to record honest affidavits in registries asserting their rights in notes (which they refuse to produce) and rights in mortgages (which they often are unable to prove that they own) is astonishing. The PEB Report of November 14, 2011 suggests that, in nonjudicial foreclosure states, parties asserting the right to foreclose but lacking recorded mortgage assignments, may as a matter of routine record an affidavit stating their rights to foreclose pursuant to UCC §9-607(a)&(b). The public record makes clear that mortgage servicer affidavits are not to be trusted. Any proposed act should provide that the §9-607 rules will not apply to residential foreclosures.

The Committee has not given any consideration to what it would mean to have a statute that eliminates the need for, and integrity of, mortgage assignments. If the validity of mortgage assignments is destroyed by a proposed act, the American real estate title system is at risk. No buyer of real estate will ever be able to rely upon a recorded mortgage discharge, because such a document will be meaningless unless accompanied by proof that the party giving it was the actual owner of the note at the time of such a discharge. Judicial decisions granting foreclosure judgments to mere holders of notes will be insufficient to create mortgage foreclosure sales where clear title can be conveyed because the rights in the note and mortgage will have remained with the note owners who are often not parties to those foreclosure proceedings (see Section 3 above.). Such a policy will drive the cost of title insurance to substantially higher levels.

It is my view that the system created by the amendments to Article 9 in the 2002 amendments (particularly Sections 9-203(g) and 9-607(a)&(b)), if it indeed means that assignments no longer matter, was ill advised and inimical to the best interests of homeowners and the American system for tracking real estate ownership. It appears that these rules were designed purely to benefit the financial industry.

Rather than simply accepting that result, the Committee should engage in a serious analysis and debate as the desirability of rolling back those changes, at least in the case of residential mortgage foreclosures.

8. Cash for keys.

The cash for keys concept is one tool among many to be considered in any loan workout situation. There simply is no evidence before the Committee that a new statute is needed to make this option available. It is already available and is being used constantly. Again, for the Committee to draft an act that contains some variant of cash for keys settlement option would be an act of casting the process in the concrete of a statute and limiting the continuing development of variations of the process and other workout options. There is no evidence before the Committee that loan owners or servicers are calling for statutorily created cash for keys alternatives. Homeowners are not seeking such a statute. Efforts by the Committee to create a proposed act in this area will be a process of creating a law to solve a problem that has not been demonstrated to exist. To the extent that the Committee is determined to pursue this issue, it should be vigilant to provide protection against industry efforts to use such a tool to strip homeowners of legal claims for inadequate consideration.

9. Vacant and abandoned properties.

I agree that statutory provisions to deal with this problem are desirable. Yet again, I am doubtful that there is single national or uniform standard that is required. As the Report notes, various provisions to address this problem exist among various states. The solutions for an urban area such as Cleveland, Ohio may not be the same as those that are appropriate for a rural state such as Maine. I question the prudence of efforts by the Committee to prescribe a one-size-fits-all statute. To the extent that any vacant or abandoned property provision is included in a draft act, it is imperative that there be a requirement for independent verification of abandonment and other effective provisions against servicer abuse of the process.

An additional requirement for any abandoned property provision in the proposed act should be that, whether or not the foreclosing party is seeking to expedite the foreclosure due to abandonment, no mortgagee shall be permitted to enter upon the mortgaged property or to change locks or to remove any personal property unless and until there has been independent verification of abandonment. The proposed act should include: (1) a provision for the servicer to be directly liable for a wrongful entry notwithstanding the fact that the entry was by an independent subcontractor, (2) a compensatory and punitive damages provision and (3) provision for the homeowner to recover legal fees in any action where there is proof of wrongful entry by servicer's subcontractor. We regularly see reports of wrongful entries upon properties that are not abandoned and have seen repeated efforts by servicers to insulate themselves from liability by claims that they are not liable for the actions of their independent subcontractors.

10. Conclusion.

The Uniform Law Commission initiated this process at the urging of the mortgage industry. It had the overwhelming numbers, economic clout and organizational ability to persuade the ULC to take on this project. It wants major changes in foreclosure laws throughout the country to make its foreclosures easier, faster, less expensive and more certain of outcome.

Homeowners, who have been systematically abused throughout this foreclosure epidemic, after having been abused by the mortgage lending industry in the origination of their loans, lack the economic clout and organizational ability to make their voice heard. However, their needs for reform of foreclosure practices are every bit as important in order to make the foreclosures that they face honest and fair and to give them fair opportunities to save their homes through rational and reasonable loan modifications.

It is imperative that this Committee recognize the enormous power of the financial industry, and the complete lack of power of homeowners, in this process and that the Committee protects these homeowners because they have almost no ability to protect themselves.

EXHIBIT 10

MEMORANDUM FROM ATTORNEY TOM COX DATED OCTOBER 8, 2012 ENTITLED *"ADDITIONAL FORECLOSURE PROVISIONS TO BE ADDRESSED BY PROPOSED ACT."*

MEMORANDUM   October 8, 2012

TO: ULC Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections

FROM: Thomas A. Cox, Esq.

RE: Additional Foreclosure Provisions to be Addressed By Proposed Act

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2.7. Independence of Mortgage Registry and Electronic Note Registry. ………......8

At the end of the June meeting, suggestions were made for the inclusion of several additional topics to be included in any proposed act put forward by the Committee. Those topics, not noted in the Report of the June meeting, plus additional ones to be considered, are set forth below. It is requested that these additional topics be addressed at the November meeting and that the Committee agree that any proposed act should address the following issues.

1. Issues Relating to Loan Origination.

The present foreclosure crisis arises in large part out of a loan origination process that generated unsound, and often fraudulently induced and/or underwritten loans. Rectifying some of the conditions that allowed that situation to occur is an important first step in preventing any future foreclosure epidemic.

1.1. Eliminate the status of long-term mortgage notes as negotiable instruments.

Loan underwriting broke down in the last decade because mortgage brokers, loan originators and loan purchasers, such as securitized trusts and the GSEs, had no skin in the game. The parties who ultimately had skin in the game, the investors in the securitized trusts, were virtually excluded from any ability to holding the offending parties responsible by the structure of the loan securitization system and the documents employed in it.

One key component of the liability limiting system was the effort to have all residential mortgage notes created as negotiable instruments thereby benefiting from the holder in due course protections of UCC §3-305. If the negotiability status of these notes is eliminated going forward, then the secondary market will be forced to establish procedures to ensure that mortgage brokers and loan originators employ responsible underwriting and origination practices.

Elimination of negotiable status for residential mortgage notes will also resolve other issues discussed in this memorandum and my companion memorandum of even date dealing with requested statutory provisions requiring owners of such notes to be the foreclosing parties. Elimination of negotiability status for residential mortgage notes will:

a. Eliminate the perverse effects of the practice of the GSEs to hide their identity in foreclosure of mortgages owned by them.

b. Force the true real parties in interest, loan owners, to be the foreclosing parties (see Section 4 of companion memorandum).

c. Eliminate the decietful practices of loan servicers in lying to courts about the identity of parties in possession of the notes, in fabricating note indorsements, creating false affidavits under UCC §3-309 regarding allegedly lost notes, and lying about other facts relating to proof of the right to enforce under UCC §3-301 (see Section 5 of companion memorandum).

1.2. Eliminate the right of foreclosing parties to claim holder in due course status.

If elimination of negotiable status for residential mortgage notes cannot be achieved (and the history of deliberations within the PEB suggests no reason for optimism on this issue), then any proposed act put forward by this Committee should provide that, in any foreclosure of a residential mortgage, not withstanding the provisions of UCC §3-305, the holder in due course doctrine may not be relied upon by the foreclosing party to eliminate defenses otherwise available to the homeowner in any residential foreclosure action.

An excellent and thorough analysis of this issue was presented by Professor Kurt Eggert in a pair of articles published in 2002, which state in compelling terms the case for eliminating the use of the holder in due course doctrine in residential mortgage transactions.[17] Professor Eggert was prescient, since the worst of the subprime lending industry's practices came to light only over the ten years following the publication of his articles, and those subsequent revelations require any independantly minded person to conclude that his call for elimination of the holder in due course doctrine must be acted upon.

In 1975, The Federal Trade Commission recognized the abuses faced by consumers in the finance industry's use of the holder in due course doctrine in retail installment sale contracts and promulgated its Holder In Due Course Rule. This rule required retail sellers to include in all retail installment sale contracts a provision that purchasers of those contracts take them subject to all claims and defenses that the obligor could assert against the originator of that contract.[18] The mortgage industry's use of the holder in due course doctrine in abusing homeowners is no different. The abuses of the mortgage loan origination process during the last decade should compel any independently minded Committee member to conclude that now is the time to eliminate this abusive system and to bring the to residential mortgage industry the same consumer protections that exist for homeowners in retail installment sale contracts.

The conclusion of Professor Eggert in his second article could not be more appropriate for consideration by the Committee in its work on the proposed act:

> The time has come to end the holder in due course doctrine in the last area where it is damaging the innocent, non-commercial makers of negotiable instruments who have no way of knowing of its existence, let alone its effect. The history of the negotiable instrument at first was the story of the intent of the makers of negotiable instruments driving the legal development of those instruments. Since the codification of negotiable instruments law, however, and its takeover by bankers and their attorneys, the history of negotiable instruments has been that of the victimization of makers of negotiable instruments who neither intended nor understood they were

[17] Eggert, *Held Up In Due Course: Codification and the Victory of Form Over Substance in Negotiable Instruments Law*, 35 Creighton L. Rev. 363 (2002) ("Eggert I"), and Eggert, *Held Up in Due Course: Securitization, Predatory Lending and the Holder in Due Course Doctrine*, 35 Creighton L. Rev. 503 (2002) ("Eggert II").

[18] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53,506 (Nov. 18, 1975).

> making negotiable instruments, with no clear idea of negotiability or its effects. The holder in due
> course doctrine is no longer necessary in non-commercial loans. It is no longer needed to provide an effective currency substitute. Its purpose of providing liquidity to those loans has been taken over by securitization, which has provided more ease in the transfer of notes than the holder in due course doctrine ever could have done.
>
> The banking and lending industry has too long reaped the benefit of seizing control over the codification of negotiable instruments law. It is time to return the proper role of intent to that law by preventing those who are unlikely to understand the holder in due course doctrine or to intend they be bound by it from creating negotiable instruments. We must finally end the pernicious effects of widespread, unintentional negotiability.

Id., Eggert II at p. 64.

It is appropriate for this Committee to address this issue in the context of any proposed foreclosure act, because it is in the foreclosure process that the mortgage industry realized the benefits, and homeowners suffer the detriments, of this unfair holder in due course doctrine. The history of deliberations in the PEB suggests that this concept will be agressively opposed by the mortgage industry. It is disserving of full and complete attention from this Committee. The Committee should consider inviting Professor Eggert to the November meeting to join the discussion. For the mortgage industry to gain from the Committee the uniformity of state laws that it is seeking through this Committee, it should be compelled to surrender the holder in due course shield that it has used against far to many homeowners who were abused by unscrupulous mortgage brokers and loan originators.

1.3. <u>Provide that mortgage brokers will be deemed to be the agents of the loan originator such that misconduct of the mortgage broker shall be a defense that a homeowner may assert in a foreclosure action.</u>

Elimination of holder in due course status does not fully resolve the mortgage industry's failure ensure proper loan origination and underwriting practices, or provide a sufficient remedy for homeowners victimized by unscrupulous mortgage brokers. When mortgage brokers are involeved in the origination of loans, loan originators require them to make homeowners sign agreements that provide that the mortgage broker is an independent contractor and is not an agent of the originating lender. Any proposed act should include a specific provision providing that any mortgage broker originating a loan shall be deemed to be the agent of the originating lender and that neither the broker nor the originating lender my require, or permit, the borrower to waive the right to assert claims and/or defenses arising out of the broker's misconduct in the origination of the loan.

2. Issues relating to loan servicing.

2.1. <u>Private Right of Action.</u> At the end of the June meeting I specifically stated the need for any proposed statute to include a provision for a private right of action for homeowners. This request was not noted in the Report of the June meeting. This private right of action is needed in two areas:

2.1.1 First, a homeowners urgently need provisions granting them third party beneficiary status and a corresponding ability to obtain court orders compelling loan owners and servicers to comply with existing loss mitigation programs, such as the Treasury's Making Homes Affordable programs.

2.1.2. Second, homeowners must be granted the right to sue servicers to compel their compliance with (a) loan servicing standards to which they have consented as part of the 49 State Attorney General Settlement and (b) loan standards promulgated by any regulatory agency, such as the CFPB.

2.2. Requirement for Loan Owner to Be Foreclosing Party. As noted in Section 4 of my companion memorandum of even date, at the end of the June meeting, I also stated a request for inclusion in any proposed act of a provision that only actual loan owners will be the proper parties to maintain judicial foreclosures. The Report does not reflect this request. If action is taken to define residential mortgage notes as non-negotiable, then there will be no need for this provision.

2.3. Production of the Original Note. Also as noted in my companion memorandum, it is my request that the Committee include in any proposed act a process for nonjudicial states whereby homeowners may compel foreclosing parties, who claim that their notes are negotiable, to prove that they have the original notes and that they are acting upon direct authority of the loan owners. I am not experienced in the nonjudicial process and it is imperative for the Committee to bring in representation of homeowner interests from nonjudicial states to help develop this concept.

2.4. Elimination of Power to Record §9-607 Affidavits. I urge the Committee to consider for inclusion in the proposed act provisions that will eliminate in nonjudicial states the apparent right of foreclosing parties to act under UCC §9-607(a)&(b) to create virtual assignments by recording affidavits stating their right to foreclose when assignments are missing. My comments in Section 7 in my companion memorandum explain my reasons for this request.

2.5. Creation of Servicer Duty of Good Faith and Fair Dealing. I request that any proposed foreclosure act will include a provision imposing upon loan servicers a duty of good faith and fair dealing in their dealings with homeowners, including a provision for the right of homeowners to be awarded actual and compensatory and punitive damages, including damages for emotional distress, and including the right of homeowners to recover legal fees for successful pursuit of any such claim.

The common law has not kept up with the development of the loan servicing industry over the last twenty years or so, and there are virtually no common law remedies available to homeowners when they are victimized by servicer misconduct. For example, in the class action of *Bradbury v. GMAC Mortgage, LLC,* the U.S. District Court ruled that causes of action for abuse of process and/or fraud upon the court will not lie for the kind of servicer dishonesty described by the Maine Supreme Court in its opinion quoted above. *Bradbury v. GMAC Mortgage, LLC,* 780 F.Supp.2d 108 (Me. Feb. 16, 2011).

Loan servicers stand in unique relationships with homeowners. They deal and communicate (often misleadingly) directly with homeowners in collecting payments, accounting for those payments, determining when to credit payments to the loan account, incurring expenses charged to homeowner loan accounts, negotiating loan modification agreements, selling the homes and accounting for sale proceeds, yet there are no common law or general tort remedies available to homeowners when servicers fail to act fairly and exercise good faith in their dealings with homeowners. Additionally, when servicing mortgages owned by securitized trusts, servicers have minimal oversight by the trusts and wide discretion in loan modification decisions. Servicer abuses at all stages of this process are widely reported. Any proposed act must provide a remedy for such abuses and the ability of homeowners to recover damages when abuses occur. Statutory damages against servicers under the Fair Debt Collection Practices Act are limited in scope, 15 USC §1692k, and non-existent in cases where a servicer took on servicing responsibility before a loan was in default, 15 USC §1692a(6)(F)(iii).

2.6 Automatic Disclosure of Key Documents. Any proposed act applicable to judicial foreclosures, and perhaps even nonjudicial foreclosures, should include a provision for an automatic disclosure of key documents and information by the foreclosing party, similar to the requirements of F.R. Civ. P. 26(a)(1). The initial disclosure package should, at a minimum, include:

2.6.1. A complete copy of both sides of every page of the note together with every allonge and every other document containing any evidence of the right asserted by the foreclosing party to enforce the note, with the foreclosing party being barred from offering any differing version of the note or its indorsements at any later stage of the case,

2.6.2. The mortgage, and every assignment or transfer document from the initial mortgagee to the foreclosing party,

2.6.3. Every other document required to prove the foreclosing party's ownership of the note and mortgage.

2.6.4. Every loan modification or other agreement evidencing any amendment to the terms of the note, the mortgage or the loan arrangement evidenced by them,

2.6.5 An itemized payoff statement itemizing by date, category and amount every charge made to the loan account, together with copies of invoices from every vendor whose charges are included on the payoff statement,

2.6.6. A complete payment history for the loan showing every credit to and recoverable charge made against the loan account, including any code sheet necessary for an outside person, such as a judge and/or a homeowner to fully understand the entries on any such loan history.

2.6.7. The default and right to cure notice relied upon by the foreclosing party including any proof of sending or delivery to the homeowner.

2.6.8. A copy of the latest appraisal or other valuation of the mortgaged property obtained by the servicer.

This request is necessitated by the massive and constant abuse of the pre-trial discovery process by the servicers and their attorneys. In almost five years of this work, I have yet to see a complete and professionally responsible response by a loan servicer to discovery requests propounded by a homeowner's lawyer, and this practice by servicers and the lawyers hired by them is endemic across the country. Just two months ago, I obtained a dismissal with prejudice of a foreclosure on a Fannie Mae owned loan due to such massive discovery abuses by its servicer, Aurora Bank, FSB, whose lawyer has been a serial offender in this area for at least four years.

2.7. <u>Independence of Mortgage Registry and Electronic Note Registry.</u> Any proposed act should mandate that assignments of mortgages purportedly generated by MERS or any other electronic mortgage registry will be admissible at any foreclosure trial only if the registry generating those assignments, is a governmantal or independent nonprofit entity free of any ownership or control by any participants in the mortgage industry. This provision would need to grandfather electronic notes created before the effective date of the statute in any state but should apply to all electronic notes created thereafter.

Similarly any proposed act should provide that in any foreclosure action, evidence of the right to enforce an electronic note presented on behalf of a party seeking to enforce it through foreclosure, shall be admissible only if the electronic registry, which has maintained the evidence of transfers of interests in the electronic note, is a governmental or independent nonprofit entity free of any ownership or control by any participants in the mortgage industry. This provision also would need to grandfather electronic notes created before the effective date of the statute in any state but should apply to all electronic notes created thereafter.

The credibility and integrity of the mortgage industry and of MERS have been substantially damaged during the current foreclosure epidemic. It is not fair to homeowners to force them to accept judicial reliance upon electronic registry systems that are owned and controlled by the mortgage industry. A provision such as this may be a way that the proposed act can encourage the development of the national mortgage registry system being proposed by Professor Dale Whitman in his soon to be published article

EXHIBIT 11

REPORT FROM PROFESSOR JAMES SMITH DATED JUNE, 2012 ENTITLED *"REPORT ON MEETING OF UNIFORM LAW COMMISSION DRAFTING COMMITTEE ON RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS, JUNE 8-9, 2012, DONOVAN HOUSE HOTEL, WASHINGTON, D.C."*

Report on Meeting of Uniform Law Commission Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections, June 8-9, 2012, Donovan House Hotel, Washington, D.C

James Smith, Co-Reporter

July 6, 2012

FRIDAY, JUNE 8, A.M. SESSION

Chairman Bill Breetz welcomed the attendees. All present were introduced. The attendees included President Michael Houghton, Executive Committee Chair Harriet Lansing, Division Chair Barry Hawkins, and Executive Director John Sebert of the Uniform Law Commission (ULC); Co-Reporter Prof. James Smith, and Barry Nekritz, American Bar Association advisor. Co-Reporter Prof. Alan White was unable to attend the session because he is teaching in South America. Drafting Committee Members attending the meeting were: Thomas Buiteweg, Bruce Coggeshall, Michael Ferry, Dale Higer, Melissa Hortman, Carl Lisman, Fred Miller, Carlyle Ring, Martha Walters, and Lee Yeakel. A list of observers in attendance during some or all of the meeting is attached.

Chair Breetz began by summarizing some of the points made in a White Paper issued by the Federal Reserve titled *The U.S. Housing Market: Current Conditions and Policy Considerations* (Jan. 2012) and then turned to the list of issues identified in his Memorandum (May 16, 2012) circulated to Drafting Committee Members, Observers, and other participants in advance of the meeting.

The language in the headings for most of the issues discussed at this meeting, set forth below in this report, is taken verbatim from the resolution of the ULC Executive Committee approving the appointment of the Drafting Committee (Jan. 21, 2012).

1. Should the act put an outside deadline on the time given financial institutions to approve or deny short sales?

A "short sale" is a sale by the borrower to a third-party (not the lender) that yields sales proceeds less than the debt, with the borrower customarily released from further liability on the mortgage loan. The Federal Housing Finance Agency (FHFA) has established time limits for loans held by government-sponsored enterprises (GSEs) for both short sales and loan modifications. The present time guidelines are: The servicer has 30 days after receipt of the complete borrower package to make a decision. The servicer must acknowledge receipt of the package within 3 days, and notify the borrower if additional information is needed. The servicer may be entitled to an additional 30 days if it needs that time to acquire more information. If the servicer fails to meet the schedule, "compensatory fees" (not fines) are payable to government, and the borrower may ask for accelerated consideration of the proposed short sale. The FHFA guidelines do not apply to loans held by institutions other than the GSEs. The Consumer Financial Protection Bureau (CFPB) will be issuing guidelines, which may include regulation of short sales. Those guidelines may come out in July 2012.

After discussion and comments from observers, it was the consensus of the Committee that this issue requires further work before a determination can be made as to whether and how short sales might be addressed by the act.

2. Should the act mandate judicial supervision over foreclosures of all residential mortgages, and over the accounting of foreclosure sale proceeds and a prompt release of any surplus to the borrowers?

Chair Breetz recommended that the act not include a mandate of judicial supervision of all residential foreclosures or judicial supervision of the sale proceeds for all foreclosure sales. The Committee unanimously concurred. This decision is consistent with the Committee's understanding of its charge to draft the act "as an overlay to, rather than a replacement of, existing state legislation" as a directive to preserve the distinction between states that allow non-judicial foreclosure and those that require judicial foreclosure.

3. 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?

The Fannie Mae/Freddie Mac Uniform Note requires the mailing of notice of default prior to acceleration of the debt and foreclosure. It was reported that all non-judicial foreclosure states require a mailed notice prior to a foreclosure sale. One issue is the choice between methods of notification: mailing of notices, mailing of notices by certified mail, personal service by judicial process, and service by publication. At some point, multiple notices to borrowers may not be helpful. A safe-harbor notice provision, similar to those found in UCC Article 9, may be useful.

After discussion and comments from observers, it was the consensus of the Committee that the act should address notice but that further work is necessary to determine how the act should treat notice.

4. 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 a mortgage holder demands immediate full payment of the entire mortgage balance, and before beginning any foreclosure proceeding?

5. 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?

The Fannie Mae/Freddie Mac Uniform Note allows the borrower to avoid acceleration of the debt by making up past-due installments within 30 days after the lender sends a notice of default. This reflects a substantive right to cure the default. A right to cure "without penalty" could mean several different things. Lenders typically require the payment of the late charges specified in the note in addition to the past-due installments of principal and interest. Generally, there are few additional fees other than late charges within the first month or two after default, but fees assessed later on, including attorneys' fees, can be very substantial. Once acceleration of the debt has taken place, many states (perhaps 15 to 20) have statutes that allow borrowers to reinstate by paying arrearages and costs. The statutes vary widely with respect to details such as timing and costs. Many observers said that if the act does include provisions on a borrower's right to cure, that right to cure should end at some definite, and not overly distant, time, so that there is finality. The question was raised whether the right to cure defaults and to reinstate should be limited to defaults in payment, or should extend to other defaults. The leaning of the Committee was to confine the issue to payment defaults.

After discussion and comments from observers, it was the consensus of the Committee that the act should address the borrower's right to cure, and possibly the right to reinstate, but that further work is necessary to determine how the act should treat the subject.

6. 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?

Chair Breetz recommended that the Committee not consider authorizing judges to restructure the terms of mortgage debt due to the probability that such a provision would not be accepted by state legislatures. The Committee concurred without objection.

FRIDAY, JUNE 8, P.M. SESSION

Foreclosure Mediation Panel Presentation

At the invitation of the Drafting Committee Chair Bill Breetz, a panel consisting of the following five mediation experts made presentations describing their experiences with foreclosure mediation procedures in the context of residential mortgage foreclosures:

1. Heather S. Kulp, Resolution Systems Institute, Chicago. Ms. Kulp has agreed to serve as a special consultant to the Drafting Committee concerning ADR matters.
2. Roberta Palmer, Connecticut Judicial Branch

3. Annette Rizzo, Judge, First Judicial District Comm., Pennsylvania
4. Verise Campbell, State of Nevada Foreclosure Mediation
5. Kahlill Palmer, Center for Dispute Settlement, Washington D.C.

Issues discussed by the panelists, Committee members, and observers included: (a) the distinction between loss mitigation programs and mediation; (b) the distinction between "meet and confer" laws and mediation; (c) judicial supervision of mediation compared to administration by other third parties; (d) the distinctions between "opt in" and "opt out" mediation programs (that is, programs in which the borrower must affirmatively choose to participate versus those programs that automatically include the borrower unless the borrower declines to participate); (e) the sending to the parties of notices of the availability of mediation; (f) how mediation programs are financed; (g) distinctions between state-wide mediation programs and local programs; (h) the need for preparation in advance of the mediation, including the exchange of documents and information; (i) whether the parties and their representatives who attend mediation sessions have the authority to settle; (j) the significance of legal requirements that parties participate in mediation in good faith and sanctions for a party's failure to do so; and (k) the success rate for mediation, which the panelists indicated may include as "successes" not only a mediation that result in an agreement that allows the owners to retain their property and mortgage loan but also a mediation in which the owners understand that they cannot afford their home and should arrange for a "graceful exit." Further discussion by the Committee was deferred until later in the day (see #11 and 12 *infra*).

7. Who can commence foreclosure?

8. What evidentiary proof (e.g. note, copies, lost note affidavits, electronic versions) is required to commence a foreclosure, and at what point must certain proofs be produced?

As a general statement, following a default, if the mortgage loan includes a negotiable promissory note, the holder of the note is the person who is entitled to foreclose. There is on-going debate as to whether other persons, including agents of the holder or persons holding a security interest in the note, may also foreclose after default. Although there is some question as to whether the Fannie Mae/Freddie Mac Uniform Note is negotiable, there are a handful of recent cases holding that these notes are negotiable, with no decisions holding to the contrary. It was reported that almost all notes held by Fannie Mae are endorsed in blank, but that some judges do not allow a plaintiff who has possession of the note to foreclosure unless the note is endorsed to the plaintiff. One issue is whether the act might adopt the positions taken in the *Report of the Permanent Editorial Board on the Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (Nov. 14, 2011). The uniform act might authorize a "servicer" as defined in the federal Real Estate Settlement Procedures Act (RESPA) to foreclose. One issue is whether physical production of the note is necessary, or whether an alternative is sufficient; e.g. a lender's affidavit that it has possession of the note, perhaps accompanied by a copy or image of the note. There is also an issue of timing: If production of the note is essential, must it accompany the filing of the foreclosure complaint, or is it sufficient to produce the note later, along with other evidence proven by the plaintiff?

After discussion and comments from observers, it was the consensus of the Committee that the act should treat the issues of who can commence foreclosure and with what evidence.

9. Should the act require establishment of a chain of title for assignments and require proof of those assignments, whether or not recorded on the land records, before commencing a foreclosure?

At least ten states requires an assignment of the mortgage to the person who brings the foreclosure action. There appears to be no sound reason for such a requirement, given near universal acceptance of the rule that ownership of the mortgage follows ownership of the note.

After discussion and comments from observers, it was the consensus of the Committee that the act should authorize foreclosure with no requirement that the foreclosing party have an assignment, recorded or otherwise, from the original mortgagee or the last mortgagee of record.[j1] At the same time, the Committee should address in comments or otherwise the policy reasons underlying the contrary rule in the states [j2]that require an assignment.

10. What pre-foreclosure notices must the mortgagee provide?

A pre-foreclosure notice of default to the borrower is essential. One additional issue is whether the lender should give a notice of default not only to the borrower, but also to a third party such as a state agency or a housing counselor. Some states have such requirements. One concern is whether some borrowers might not want the fact or allegation of their mortgage default sent to a third party.

After discussion and comments from observers, it was the consensus of the Committee that the act should treat the issue of pre-foreclosure notice to the borrower. The issue whether notices should go, or may go, to third parties requires further work.

11. 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?

12. Should the act require mortgage holders to consider loss mitigation, including loan modification and other workout alternatives, as a condition to allowing the foreclosure of a home?

Earlier in the day Committee members and observers discussed mediation and ADR, with the presentations by the Foreclosure Mediation Panel serving as a basis for that discussion. See also Reporter Alan White's Memorandum on State Foreclosure Mediation Laws: Examples and Research for a Uniform Statute (May 11, 2012). It was the consensus of the Committee that the act should deal with mediation; that it is important to consider the relationship between mediation and related processes, including loan modification and loss mitigation programs, and that one approach that may have merit is to draft "best practices" guidelines.

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[j3]

13. 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?

14. Should the act guarantee homeowners a statutory right to redeem and reacquire title to their home, for a fixed period of time after a foreclosure sale?

Less than half of the states presently extend the right of statutory redemption to borrowers, allowing the borrower to redeem during a fixed time period after the foreclosure sale. The details vary widely from state to state. In many but not all states, waivers by borrowers of statutory redemption rights are allowed. In many but not all states, junior lienors in addition to borrowers have a statutory right to redeem. In many states, some of the rights and obligations of the parties during the redemption period are not clearly defined; for example, whether the lender, the borrower, or purchaser is responsible for paying homeowner association dues. In some states, a principal purpose of statutory redemption is to protect farmers, which is not present for most U.S. residential mortgage loans, in connection with which the borrower is not engaged in farming operations.

After discussion and comments from observers, it was the consensus of the Committee that this issue requires further work before a determination of whether the act should have provisions on redemption and, if so, how redemption should be addressed by the act. There was consensus that the need for, and value of, statutory redemption relates closely to the opportunities that owners have to save their homes from foreclosure prior to the filing of the foreclosure and prior to the completion of the foreclosure sale.

15. To what extent do current foreclosure processes (such as newspaper advertising requirements) impose unwarranted and hidden costs on the borrower?

In evaluating foreclosure notification procedures, it is important to differentiate between notice to owners and other holders of rights in the property, and notice to potential buyers. Newspaper foreclosure ads do not provide meaningful notice to homeowners of the pending foreclosure sale. Another problem is that foreclosure ads are sometimes run in obscure local newspapers, with limited circulation. In today’s world, hard copy newspapers no longer perform the function of notifying residents and potential buyers as they once did. Newspapers, however, derive significant revenues from foreclose sales notices and other legal notices, and therefore may oppose an act that eliminates their role. Most newspapers have electronic versions. Perhaps ads can be placed there, or newspapers can run “short versions” of foreclosure notices in the hard copy newspaper, with a cross reference to additional information available online. Perhaps the act can give lenders the option to place sales notices in local newspapers or to select another outlet. If the act requires that a lender sell the property in a commercially reasonable manner, the form of advertisement or public notice might be subsumed within that general standard. Other foreclosure costs that might be reduced include: (1) expenses associated with sheriffs’ sales, which may exceed those for private sales, (2) transfer taxes paid to governments, and (3) legal requirements that foreclosure sales take place at the property location.

After discussion and comments from observers, it was the consensus of the Committee that the act should include a provision dealing with advertisement or public notice of foreclosure sales, and that further work is necessary to decide whether the act should include other cost-saving measures.

16. To what extent, and in what circumstances, may private actors fulfill the role of government officials in the foreclosure process?

One problem is that in some jurisdictions where the sheriff's office conducts sales, the sheriff's office lacks sufficient personnel to handle recent volumes of foreclosure sales. The act might authorize sheriff's sales, but also allow alternatives, such as sales conducted by private auctioneers.

After discussion and comments from observers, it was the consensus of the Committee that the act should include provisions describing the roles played by private actors in non-judicial foreclosure proceedings, and that issues related to allowing private actors to fulfill roles traditionally performed by government officials in judicial foreclosure actions require further work before a determination of whether and such issues might be addressed by the act.

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

State statutes vary considerably regarding post-sale confirmation, including the nature of the paperwork required and the form of the decree. [j4]In some situations the purpose of post-sale confirmation is to confirm good title in the foreclosure purchaser, and in others such as Georgia the purpose is to allow the lender to pursue a deficiency judgment. With respect to the quality of title, there is value in providing for the relatively quick issuance of a confirmatory deed. The recently approved Uniform Partition of Heirs Property Act has a confirmation of sale provision that may be useful to consult.

After discussion and comments from observers, it was the consensus of the Committee that the act should treat the process required for judicial confirmation of foreclosure sales that take place in judicial foreclosure actions, and that issues related to confirmation of sales in non-judicial foreclosure proceedings require further work before a determination of whether and how judicial confirmation of non-judicial foreclosure sales might be addressed by the act.

18. 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?

States that allow non-judicial foreclosure generally have statutory provisions that create a presumption of the validity of the foreclosure sale, but those provisions vary considerably. The Uniform Nonjudicial Foreclosure Act, for which Professor Dale Whitman served as reporter, contains presumption provisions, which may be useful for this Committee to consider.

After discussion and comments from observers, it was the consensus of the Committee that the act should provide for a presumption of validity for foreclosure sales in non-judicial foreclosure states, but that the reporters should explore what additional statutory requirements might be imposed to address the potential for abuse in such situations.

19. Are there areas in the Uniform Commercial Code that may be affected the act, and if so, are there any conforming changes that may be necessary?

A primary area of overlap involves the UCC rules dealing with negotiable notes. Issues to consider include whether the note has to be paper, rather than electronic; how the note is transferred; and the rules discharging the obligation by payment (whom the payor should pay). The act might adopt a rule authorizing the borrower to pay the original lender until notice is given to pay someone else.

After discussion and comments from observers, it was the consensus of the Committee that these issues require further work before a determination of whether any of these issues should be addressed in the act and, if so, how to address UCC-related issues.

20. Should the 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?"

Roughly one half of the states presently have some type of super lien priority for homeowners' associations and other associations in common interest communities. The Uniform Condominium Act and the Uniform Common Interest Ownership Act both have super lien provisions. The issue is important because when owners stop paying their assessments, this creates a financial burden for the association, which ultimately falls upon the non-delinquent homeowners. The problem becomes more acute when a community has a sizeable percentage of delinquent owners. A number of issues have arisen under the super-priority legislation. When, if ever, does a lender become obligated to pay the assessments? If a lender pays off the lien that has priority over its mortgage, does a subsequent second failure to pay an assessment by the homeowner create a new lien? Does the super-lien assessment include attorneys' fees and other costs? How many months does the obligation last? Some states, such as Nevada, include "fees" as part of the obligation without elaboration. Such fees could be better described and perhaps limited by type or amount. It was reported that some associations have attempted to collect very large additional fees, and that some lenders have delayed the completion of foreclosure proceedings in order to avoid the assumption of liability for assessments and fees. Lenders might attempt to manage the risks associated with unpaid assessments by opening escrows, just as they do for real estate taxes. This may be administratively difficult, and perhaps not feasible, due to the huge number of community associations.

After discussion and comments from observers, it was the consensus of the Committee that the act should provide for a senior lien for unpaid assessments in common interest communities and that an effort should be made to address the various issues raised by lenders.

21. Should the act address issues surrounding a voluntary or mandatory national electronic recording system for notes and mortgages? 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?

The Drafting Committee and observers discussed a number of issues related to the electronic recording and storage of promissory notes, mortgages, and other loan documents. Professor Dale Whitman (an observer at this meeting) has written an article proposing that Congress enact legislation creating a national federally-operated registration system. States might adopt legislation to create electronic mortgage registration systems, or to give legal effect to documents entered into a national system. The area as a whole is complicated by the interplay between federal statutes and regulations and state law, one example being the federal E-sign act, which authorizes electronic documents. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 to 7031 (but the act does not address the legal status of paper documents whose images are stored in electronic databases). State and federal cooperation may facilitate the creation and operation of an effective national registration system.

President Houghton observed that the creation of an electronic registration system is outside of the scope of the work of the Drafting Committee, but that specific ancillary issues could be addressed. Two members of the Drafting Committee disagreed with that position, believing that the Committee should undertake at least to draft principles that would guide the development of an electronic registration system. A number of participants suggested that the act might anticipate that such a system will be created at some point in the future, and that the act, for example, might authorize the holder of documentation issued by an electronic registration system to foreclose. The Committee invited Thomas Baxter of the Federal Reserve Bank of New York to consider preparing and submitting a letter or memorandum expressing views on the federal government's interest and possible role in the subject.

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22. 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?

Co-Reporter Jim Smith summarized his Memorandum on "Cash for Keys" Agreements (May 17, 2012). Lenders frequently use cash-for-keys agreements in two distinct situations. First, they negotiate agreements with homeowners to obtain possession without going through the time and expense of formal foreclosure. This is seen by some as a "graceful exit" option from the owner's perspective. Second, lenders negotiate agreements with residential tenants to obtain possession, typically when they believe that having the property vacant will enhance the value of the collateral or otherwise make the property more saleable. The act could authorize cash-for-keys agreements and set forth permissible terms, perhaps including minimums in terms of compensation, the time that the occupant may remain in possession before vacating, and discharge of liability on the mortgage debt. Courts could approve cash-for-keys agreements ex ante (before they become effective). One impediment under present law to cash-for-keys agreements involves junior liens, which ordinarily survive the execution of cash-for-keys agreements, thereby impairing title to the property.

After discussion and comments from observers, it was the consensus of the Committee that the act should contain provisions that authorize cash-for-keys agreements, and other similar alternative work-out scenarios, with appropriate terms to protect the parties and encourage and facilitate their use. Such terms might address such subjects as deficiencies, waiver of redemption periods, accelerated foreclosure, and other devices. Some terms may be optional, in which case the provisions probably should be drafted as a "safe harbor," thus leaving room for other approaches to cash-for-keys agreements, rent following foreclosure, and similar measures.

23. Should the act include special foreclosure procedures where the property in question is vacant and derelict?

Co-Reporter Jim Smith summarized his Memorandum on Abandoned and Vacant Properties (May 17, 2012). Dwelling units that have gone through foreclosure or are threatened by foreclosure are much more likely to be abandoned than other residential properties. Studies have shown that vacant homes have substantial negative impacts on their surrounding communities, including reduced property values, increased crime, public health risks, and added costs for local governments. Many states and local governments have responded to the avalanche of vacant residential properties by imposing duties upon owners and foreclosing lenders to maintain such properties. Cities usually have the legal right to maintain vacant properties after notice to the owner, and at the owner's expense secured by a lien on the property, but cities infrequently choose to exercise that right. Many cities have enacted registration ordinances, which require that owners and sometimes mortgage lenders register vacant homes with the local government and pay fees specified by the ordinance. One problem, which existing statutes and ordinances often do not resolve, is how to define vacant and abandoned properties, including who makes that determination. The two main areas that an act might address are (1) the obligations of owners and lenders with respect to vacant or abandoned properties and (2) the foreclosure procedures that apply to vacant or abandoned properties, which could be streamlined, compared to the regular procedures for occupied residences.

After discussion and comments from observers, it was the consensus of the Committee that the act should contain streamlined foreclosure procedures for vacant and abandoned properties, and that issues related to maintenance and repairs require further work before a determination of whether and how maintenance and repair issues might be addressed by the act.

24. Should the act incorporate the servicing standards agreed to by the lenders who participated in the State Attorneys General consent decree?

The Drafting Committee and observers discussed a number of issues related to the roles played by loan servicers prior to foreclosure and during the foreclosure process. The act might incorporate the servicing standards agreed to by the five large servicers who participated in the national mortgage servicer settlement agreement (the "consent decree"). See Reporter Alan White's Memorandum on the National Servicer Settlement Foreclosure-Related Provisions (May 11, 2012). The CFPB is about to issue regulations, which may incorporate provisions from the settlement agreement dealing with the largest five servicers. The act could address whether owners should have a private cause of action against servicers who violated their obligations.

After discussion and comments from observers, it was the consensus of the Committee that this issue requires further work before a determination of whether, and if so how, to address servicing standards in the act.

Future Work

After the Drafting Committee and observers offered some additional comments, Chair Bill Breetz announced that the committee's next meeting will be held Nov. 2-3, 2012, in Washington D.C. at a location to be determined later. A reasonably comprehensive draft of a proposed act will be circulated well in advance of that meeting. Committee members and observers are invited to submit comments and documents, which should be sent to John Sebert.

The meeting adjourned at 3:58 p.m.

EXHIBIT 12

MEMORANDUM FROM PROFESSOR JAMES SMITH DATED MAY 17, 2012 ENTITLED *"CASH FOR KEYS" AGREEMENTS*

MEMORANDUM

"Cash for Keys" Agreements

James Smith, Reporter

May 17, 2012

"Cash for keys" agreements are used in two sectors in the context of residential mortgage foreclosures. First, lenders have offered cash-for-keys agreements to homeowners who have defaulted on their home mortgage loans and are in the midst of foreclosure proceedings or are headed towards foreclosure. In this context of owner-occupied housing, cash for keys is considered by some to be one of the types of "graceful exits," which results in the homeowner leaving without the need for completion of a foreclosure proceeding. Second, lenders have also used cash-for-keys agreements when foreclosing upon rental properties. Lenders pay tenants to vacate their premises when the landlord-mortgagor is facing or has suffered a foreclosure.

In both settings – owner-occupied housing and rental housing – the lender's objective is the same: to remove occupants from dwelling units at a lower cost than that associated with the normal foreclosure process. Projected cost savings have both a temporal component and a regulatory component. The process of foreclosure and eviction is lengthy and costly when conducted in accordance with applicable laws. In most jurisdictions it takes a substantial amount of time to evict defaulting mortgagors from their homes. Generally recovering possession from a mortgagor cannot be accomplished, due to legal or practical restraints, until after completion of a foreclosure sale. In some states, eviction is delayed further due to an owner's statutory right of redemption, which lasts for a time period after the foreclosure sale. Similarly, it is time consuming to evict tenants from dwelling units in most jurisdictions, even when there is proof that the lease has terminated due to the tenant's default, has expired in accordance with its terms, or has ended as a consequence of the completion of foreclosure.

From the lenders' perspective, cash-for-keys agreements not only accelerate the time when the lender or its buyer obtains vacant possession of the property; they also save regulatory costs. In the absence of the voluntary surrender of possession by homeowners and tenants, the lender must incur significant expenses to recover possession, which include attorneys' fees, litigation costs, and other related regulatory expenses.

I. Owner-occupied Housing

Mortgage lenders and their representatives have developed cash-for-keys programs that offer cash settlements to homeowners in exchange for the keys, a quick turnover of possession, and a promise to leave the dwelling unit in good physical condition. Negotiation of cash-for-keys agreements gives the lender a degree of assurance that the owner will not abandon the property, without notice to the lender. Such agreements also increase the likelihood that the owner will not commit waste or allow waste to the property.

Cash-for-keys agreements, in addition to specifying the cash payment and the transfer of possession, usually contain other owner promises relating to the condition of the property. Owners usually are required to waive any legal claims and defenses that they might otherwise assert against the lender, its successors, and buyers of the property through foreclosure. Relinquishment of title may be reflected by an owner's execution of a deed in lieu of foreclosure. The agreement may have the effect of waiving an owner's redemption right prior to the normal expiration of a redemption period, or accelerating the time at which deed in lieu of foreclosure will otherwise become effective under state law.

Cash-for-keys agreements may be individually negotiated between lenders or their servicers and homeowners facing foreclosure, or the lenders may offer standardized terms. One example of the latter is CitiMortgage, which in 2010 initiated a program allowing homeowners to remain in their homes for six months, without making any payments to the lender. At the end of six months, the owner must relinquish possession, title is transferred to the lender pursuant to a deed in lieu of foreclosure, and the owner receives $1,000 in relocation assistance, provided that the property has remained in good shape.[19]

Cash-for-keys agreements have not yet generated any appreciable number of judicial decisions. In a Georgia case, Fannie Mae successfully relied upon a cash-for-keys agreement entered into between its representative and a tenant of the mortgagor as evidence that the mortgagor was not in possession of the leased premises on the date of the foreclosure sale.[20] In a Nevada case, a homeowner alleged that Wells Fargo participated in mediation in bad faith "because it refused to offer anything other than a cash-for-keys option to avoiding foreclosure," but the court resolved the litigation on other grounds.[21]

II. Rental Housing

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[19] Mary Ellen Podmolik, *Citi to Launch "Cash for Keys*," Chicago Tribune, Feb. 11, 2010.

[20] Steed v. Federal Nat. Mortg. Corp., 689 S.E.2d 843 (Ga. Ct. App. 2009).

[21] Leyva v. National Default Servicing Corp., 255 P.3d 1275, 1277 n.1 (Nev. 2011) (lender violated mediation statute by failing to bring required documents to hearing).

Congress enacted the Protecting Tenants at Foreclosure Act of 2009 (PTFA)[22] to address problems associated with the foreclosures of residential real estate. State mortgage law generally allows a purchaser at foreclosure (whether the lender or a third-party purchaser) to evict tenants who have leased part or all of the property from the mortgagor. The standard application of property priority rules achieves this result. When leases are junior to the mortgage (which usually is the case), leases are treated the same as other real property interests that are subordinate to the mortgage being foreclosed. Junior interests are terminated.

The PTFA is designed to preempt the state-law rights of lenders and their foreclosure purchasers to terminate junior leases. All residential tenants must receive a 90-day notice before being evicted as the result of a foreclosure. Longer periods of possession are guaranteed for some tenants. The PFTA requires that the new owner honor existing leases for the duration of their term unless the tenant is "without a lease or with a lease terminable at will under state law," or the purchaser at foreclosure is acquiring the property for occupancy as a primary residence.[23] In these cases, the tenants still have the right to receive the statutory 90-day notice to vacate, but they lack a right under the PFTA to stay longer than the notice period.

The PTFA has a sunset provision, which provides for expiration on December 31, 2012.[24] Congress may decide to extend all or part of the PTFA.

The PFTA does not state whether tenants may waive their statutory rights to remain in possession for the entire 90-day notice period. Lenders have negotiated cash-for-keys agreements whereby tenants agree to leave voluntarily during the notice period. In addition to relinquishing possession, cash-for-keys agreements typically include tenant waivers of claims against the lender and its successors in connection with the lease, including any liabilities arising under tort law.

Typically, the tenant also waives return of the security deposit. In other words, from the tenant's perspective the return of the security deposit amount is one component of the agreed-upon cash payment. One concern mentioned in the literature is the possibility that some tenants fail to understand how the agreement treats their security deposit and fail to realize that their relocation expenses will include the need to pay a security deposit to a their new landlord.

Reports indicate that cash payments typically range from $1,000 to $3,000 per tenant. From the tenant's perspective, the agreed-upon amount may be sufficient to enable the tenant to cover moving expenses and any related costs of finding a new rental home. Offers often include a premium over such projected costs, especially when the foreclosing party believes that the property value for resale will be maximized if the property is empty. Lenders sometimes tier the offered payment,

[22] Pub. L. No. 111-22, §§ 701-704, 123 Stat. 1632, 1660-62 (2009).

[23] PTFA § 702(a)(2).

[24] PTFA § 704.

offering a certain sum for a tenant to leave immediately (or within several days) and a lesser amount for vacating at a later date, such as within two weeks.

According to reports, one motivation for lenders to negotiate cash-for-keys agreements with tenants is to avoid the PTFA requirement that foreclosing lenders undertake state-law landlord duties to the mortgagor's tenants after foreclosing on the properties.

When the foreclosure consists of multi-tenant buildings, the foreclosing lender (or its servicer who handles the foreclosure) has to make the decision whether it is preferable to sell an empty or largely empty property or one with existing tenants. One report claims that standard practice is for servicers to offer cash-for-key payments to induce tenants, even those who have not defaulted, to vacate based on a belief that empty properties increase third-party bids because prospective purchasers will not have to initiate their own cash-for-keys programs.[25]

In January 2009, prior to congressional adoption of the PTFA, Fannie Mae developed and implemented a program known as the "National Real Estate Owned (REO) Rental Policy." The policy permitted tenants residing in Fannie Mae-owned foreclosed properties to remain in their dwelling units or to vacate the property with financial assistance. Tenants who chose to remain were required to sign a new month-to-month lease with Fannie Mae, providing for market rate rents and no security deposit. Alternatively, tenants could choose to vacate in exchange for a cash-for-keys payment designed to provide financial assistance for the move to another home. The cash-for-keys option was short lived. In June 2010, after the PTFA became effective, Fannie Mae replaced its policy with the "REO Tenant-in-Place Rental Policy." Under the new policy, relocation assistance is only available to tenants who sign a twelve-month lease with Fannie Mae. Such tenants are eligible for relocation assistance, equal to one month's rent, at the end of the lease term.[26]

Although the PTFA preempts state laws that provide residential tenants with less protection than the federal scheme, it allows states to give greater protection.[27] The PFTA is a floor, not a ceiling. Massachusetts is an example. In 2010 it adopted the Tenant Protections in Foreclosed Properties Act.[28] The Act regulates "eviction," which is broadly defined as "an action, without limitation, by a foreclosing owner of a housing accommodation which is intended to actually or constructively evict a tenant or otherwise compel a tenant to vacate such housing

[25] Robin S. Golden, *Building Policy through Collaborative Deliberation: A Reflection on Using Lessons from Practice to Inform Responses to the Mortgage Foreclosure Crisis*, 38 Fordham Urb. L.J. 733, 739 (2011).

[26] *See* Fannie Mae's REO Tenant-in-Place Rental Policy FAQs, available at

http://www.fanniemae.com/resources/file/help/pdf/rental_faqs.pdf.

[27] PTFA § 702(a).

[28] Mass. Gen. Laws ch. 186A.

accommodation."[29] The Act provides that "a foreclosing owner shall not evict a tenant except for just cause or unless a binding purchase and sale agreement has been executed for a bona fide third party to purchase the housing accommodation from a foreclosing owner."[30] The statutory language does not indicate whether tenants can waive their statutory rights by entering into cash-for-keys agreements, but the Massachusetts attorney general has interpreted the statute as prohibiting such agreements in the absence of a judicially approved agreement for judgment.[31]

III. Issues to Consider with Respect to Cash-for-keys Agreements

The following issues may be useful to consider in connection with possible statutory provisions that relate to "cash for keys" agreements.

1. Should the statute authorize cash-for-keys agreements? If so, what are the permissible terms for a cash-for-keys agreement? For example, some jurisdictions authorize a deed in lieu of foreclosure if the owner is released from personal liability for a deficiency judgment. *E.g.*, 735 Ill. Comp. Stat. § 5/15-1401 (but statute allows personal liability to continue "to the extent a person agrees not to be relieved in an instrument executed contemporaneously"). The Uniform Commercial Code applies the same rule for a transfer of personal property collateral to the secured party in a consumer transaction. UCC § 9-620(g) (prohibiting acceptance of collateral in partial satisfaction of the obligation in a consumer transaction).

2. The term "***cash***" for keys implies that the owner will receive a monetary payment. Should there be a minimum sum that the lender must pay? Defining a minimum might be difficult. In some circumstances, a total release of liability (waiver of the right to pursue a deficiency judgment) will be a substantial benefit to the owner. Similarly, if the owner is allowed a significant period of time to remain in possession before the agreed-upon date for the transfer of possession, that occupancy may represent a significant economic benefit.

3. How would statutory regulation of cash-for-keys agreements relate to general principles of contract law? For example, standard contract law would allow an owner to avoid a cash-for-keys agreement under doctrines that police bargaining behavior such as unconscionability, duress, undue influence, misrepresentation, and fraud. In appropriate cases, other doctrines such as mutual mistake of fact may apply. Would these standard contract-law doctrines adequately police cash-for-keys agreements without the need for statutory contract terms?

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[29] *Id.* § 1(a).

[30] *Id*. § 3.

[31] Mass. Att'y Gen. letter Dec. 13, 2010. *See* James F. Creed, *Residential and Commercial Landlord-Tenant Practice in Massachusetts* § 15.6.5 (Mass. Continuing Legal Education, Inc. 2011).

4. Should courts play a role in the ex-ante approval of cash-for-keys agreements? If so, for all such agreements; or only for a set of those agreements, such as those entered into after the filing of a judicial foreclosure action?

5. Are there issues of timing that a statute should address? For example, if a cash-for-keys agreement is to be judicially approved, should there be an accelerated foreclosure process, compared to the normal time sequence for foreclosures that are contested or that end with a default judgment? Is there a minimum time period for which the owner should have the right to retain possession before the agreed-upon date of vacation?

6. Should the statute address the quality of title obtained by the lender or the foreclosure purchaser pursuant to a cash-for-keys agreement? In the absence of a statutory provision, presumably the lender's position with respect to junior interests in the property can be no better than under existing law when the lender accepts a deed in lieu of foreclosure. In other words, junior interests as well as senior interests remain effective. The grantee under a deed in lieu of foreclosure gets the same title as the grantor-mortgagor. A statute could include a mechanism for terminating junior liens and other junior interests upon the closing of a cash-for-keys agreement. Whether such a mechanism is judicial or non-judicial, it should include a provision for notice to junior interest holders, with an opportunity for such holders to protect their interests.

7. What is the status of the owner in possession after execution of a cash-for-keys agreement? Does the owner become a tenant of the lender; and if so, what type of tenancy, and what are its terms?

8. How do cash-for-keys agreements relate to other similar transactions? When a cash-for-keys agreement is accomplished without ex-ante judicial supervision, is it the same as a deed-in-lieu of foreclosure transaction? When it is accomplished with judicial foreclosure, is it the same as strict foreclosure; or is it perhaps a subtype of strict foreclosure? Illinois has a special statutory procedure for "consent foreclosure" in which the lender takes title free of subordinate interests, the borrower waives all rights of reinstatement and redemption, and the lender waives all rights to a deficiency judgment. 735 Ill. Comp. Stat. § 5/15-1402 (enacted 1987). A cash-for-keys agreement may be seen as one type of consent foreclosure.

9. Should the statute deal with cash-for-keys agreements only in the context of owner-occupied property; or should it also deal with cash-for-keys agreements entered into between lenders and their agents and residential tenants?

EXHIBIT 13

MEMORANDUM FROM PROFESSOR JAMES SMITH DATED MAY 17, 2012 ENTITLED *"ABANDONED AND VACANT PROPERTIES"*

MEMORANDUM

Abandoned and Vacant Properties

James Smith, Reporter

May 17, 2012

Dwelling units that have gone through foreclosure or are threatened by foreclosure are much more likely to be abandoned than other residential properties. The recent high foreclosure rates exacerbate the problem. In other words, the correlation between foreclosure and vacant homes is positive but not linear. As foreclosure rates increase, so does that probability that affected units are vacant. There are two reasons for this. First, due to the flood of foreclosure proceedings, especially in states that require judicial foreclosure, the average foreclosure takes much longer than before. For many properties, this results in a longer period of vacancy between the departure of the mortgagor and the next occupant. Second, since the housing bubble began to collapse in 2007, the market for residential sales has remained weak. This means that even when lenders are able to complete foreclosure expeditiously, in many markets there is little opportunity for lenders to sell the foreclosed properties to buyers who will take occupancy or who will readily lease the properties to tenants. This market reality has resulted in lenders choosing to slow down the foreclosure process in some markets.[32] This results in a feedback loop; lenders who are able to foreclose and gain title to residential units due to mortgagor default elect to hold off, believing that taking ownership of properties they cannot sell is not in their best interest.

Mortgage delinquency and foreclosure proceedings trigger abandonment not only for owner-occupied properties, but also for rental properties. Tenants in most jurisdictions do not receive prompt notice of foreclosure proceedings commenced against their landlord, but sooner later the situation becomes apparent to tenants, sometimes due to problems such as utility cutoffs associated with the landlord's financial distress. When they learn of pending foreclosure, many tenants abandon their dwelling units in the belief that if the foreclosing lender does not evict them, the quality of the housing will be impaired.[33]

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[32] Renae Merle, *Foreclosure Wave Threatens Stability of Housing Market*, Washington Post, Mar. 12, 2010 ("Some of the positive housing data may not be signaling a true turning point, as many servicers are holding back on foreclosures and the related houses are not yet being offered for sale").

[33] Dora Galactos et al., *Giving Tenants Their Due: Housing Court and Post-Foreclosure Procedure*, N.Y.L.J, Mar. 9, 2011; Aleatra P. Williams, *Real Estate Market Meltdown, Foreclosure and Tenants' Rights*, Symposium, 43 Ind. L. Rev. 1185, 1207 (2010).

Foreclosed properties that remain vacant have negative impacts on neighborhoods and the surrounding communities. Neighboring property values are reduced by 0.9% to 1.1% by each foreclosure, the reduction being partially attributable to empty properties. Neighborhood crime increases by 6 to 7%. Vacancies and the associated problems of lack of repair and maintenance create public health risks, including infestations by vermin, mosquitoes, and other insects.[34] There are fiscal impacts on local governments, who find property taxes on vacant properties often become delinquent; yet the governments are faced with added expenses to provide essential services to blighted neighborhoods, such as police and fire protection.

I. State and Local Government Responses

Many states and local governments have responded to the avalanche of vacant residential properties by imposing duties upon owners and foreclosing lenders to maintain such properties. The next sections review legal development in two states, New York and California, and in one city, Chicago. Although there is appreciable diversity in the approaches taken in other jurisdictions, these three examples are sufficient to illustrate a number of the relevant considerations and choices.

A. New York

In December 2009 New York responded to its foreclosure crisis by enacting section 1307 of the Real Property Actions and Proceedings Law.[35] Section 1307 obligates lenders to maintain foreclosed properties after obtaining a judgment of foreclosure. The statute provides:

> A plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale . . . involving residential real property . . . that is vacant, or becomes vacant after the issuance of such judgment, or is abandoned by the mortgagor but occupied by a tenant . . . shall maintain such property until such time as ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded . . . .[36]

The statute grants to the lender or its agents "the right to peaceably enter upon such property . . . for the limited purpose of inspections, repairs and maintenance as required by this section."[37]

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[34] Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Hous. Pol'y Debate 57, 59 (2006).

[35] The law became effective on April 14, 2010.

[36] N.Y. Real Prop. Acts. § 1307(1).

[37] N.Y. Real Prop. Acts. § 1307(2). If tenants occupy the property, the lender must give notice to the tenants before entering the property to make repairs.

If the mortgagor commences a bankruptcy proceeding prior to the completion of the foreclosure auction sale, the lender's statutory duties are suspended until the bankruptcy proceeding terminates or the bankruptcy court removes the automatic stay of the foreclosure sale.[38]

The statute defines the lender's duty to "maintain" by reference to the standards set forth within various sections of the New York property maintenance code. In addition, tenant-occupied property must be "maintained in a safe and habitable condition."[39]

The New York statute does not override local laws that prescribe property maintenance obligations, or the local government's ability to enforce its laws.[40]

The statute makes significant changes to prior law. It abrogates the traditional common-law principle that a mortgagee not in possession or control of real property is not liable for the condition of the property. The statute appears to override a provision of the Multiple Dwelling Law that requires an "owner" to keep the dwelling "in good repair," but defines the "owner" to include a lender only when that person is a "mortgagee in possession.[41]

Section 1307 imposes a maintenance obligation upon a lender "who obtains a judgment of foreclosure and sale." Precisely when this takes place is not clear. Possibly "obtaining a judgment" occurs when the trial court enters a written judgment of foreclosure; possibly service on the parties is required; possibly the obligation does not arise if the litigation is not concluded because a party has moved the court for reconsideration.

Many vacant properties are in the process of foreclosure, but are not subject to the statutory maintenance obligation because foreclosure is still in the pre-judgment stage. Judicial foreclosures in New York are not quickly completed, especially since the upsurge in loan delinquencies and mortgage foreclosure filings that began in 2007. Many factors delay the issuance of foreclosure judgments, including the unavailability of personnel to conduct foreclosure sales, problems with publication, bidder defaults, title issues that require resolution, and judicial claims asserted by mortgagors and third parties.

The lender's maintenance obligation, once it begins, lasts under Section 1307 until "such time as ownership has been transferred through the closing of title in foreclosure, or other disposition." The statute provides no additional clues as to the ending point. It seems plain that the obligation can last no longer than the time of recordation of a deed of conveyance to a third-person purchaser. It is

[38] N.Y. Real Prop. Acts. § 1307(4).

[39] N.Y. Real Prop. Acts. § 1307(5).

[40] N.Y. Real Prop. Acts. § 1307(8).

[41] N.Y. Mult. Dwell. §§ 4(44), 78. *See* Bruce J. Bergman, *New Law Will Create Delay. Additional Costs for Lenders*, N.Y.L.J., Jan. 13, 2010 (citing cases).

not clear what should happen if there is a significant gap in time between delivery of the deed and recording, and what constitutes an "other disposition."

The legislature may have expected that the maintenance obligation it imposed on lenders was a relatively short duration. Although in principle there could be very little time between the foreclosure judgment and the sale of the property to a third person, in most cases the sale is not immediately completed. Thus, in most cases there will be a substantial time period during which the lender is obligated.

The statutory maintenance obligation suffers from indeterminacy because there is no attempt to define "vacant" property or property "abandoned by the mortgagor but occupied by a tenant." The latter term ("abandoned") apparently envisions that the mortgagor as landlord has breached its obligations with respect to the leased premises.

The statute does not address lender liability for vacant properties apart from the New York property maintenance code, but it may have further impacts. Lenders may become subject to the risk of tort liability to third parties under the principles that generally govern premises liability. This would follow from a conclusion that the lender's statutory duty to maintain and repair the premises puts them in a position of care, custody, and control over the property just like other property owners.[42]

Lenders who attempt to meet their statutory repair obligations probably will do so by hiring independent contractors. Such lenders apparently will have the normal obligation of an owner to exercise care in the selection of repairers and in ensuring that their work meets the standards of the maintenance code.

Section 1307 grants a right to municipalities, homeowner associations, condominium boards, and tenants in possession the right to enforce the statutory maintenance obligations in any court of competent jurisdiction. The entity must give the lender seven days notice, unless emergency repair is required. Such an entity may recover its costs in maintaining property from the lender.[43]

In the first case interpreting Section 1307, *Town of Huntington v. Lagone*,[44] the town brought an action against the non-occupying homeowners (the Lagones) and the foreclosing lender to compel repairs to an abandoned, partially constructed residence that was deteriorating and infested with vermin. The lender succeeded in obtaining a dismissal because it had not yet obtained a judgment of foreclosure against the Lagones. The Town argued that the bank had not made "good faith" efforts to conclude the foreclosure sale, but the court reasoned that this was "a policy consideration for the

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[42] *See* Bruce J. Bergman, *New Law Will Create Delay. Additional Costs for Lenders*, N.Y.L.J., Jan. 13, 2010.

[43] N.Y. Real Prop. Acts. § 1307(3).

[44] Town of Huntington v. Lagone, 908 N.Y.S.2d 320 (Dist. Ct. 2010).

legislature,"[45] evidently concluding that Section 1307 was clear on the lack of lender liability. *Lagone* establishes that Section 1307 is to be interpreted literally with respect to the condition that lenders must obtain a judgment of foreclosure before their statutory duties to maintain take effect. In *Lagone*, the court ordered the defendant homeowners (the Lagones) to make the necessary repairs. The statutory language, as interpreted by *Lagone*, creates a disincentive for lenders to prosecute foreclosure proceedings in a diligent manner when the property already has code violations.

It is worth noting that Section 1307 obligates lenders to make repairs that were made necessary by the malfeasance of other persons, usually their borrowers. Vacant properties that are in the worst shape are often heavily vandalized and stripped of fixtures and other components, including appliances, plumbing, and wiring. Section 1307 does not expressly give the lender a remedy for waste committed by the borrower to recoup its maintenance costs. Such an action arises independently, based either on an express covenant in the mortgage or an implied duty, but to assert such a waste action the lender must obtain permission of the court.[46]

The extensive New York statutory obligations on lenders can be expected to affect lender behavior. First, in pending transactions lenders are likely to avoid moving forward to obtaining foreclosure judgments; and when they do so, they are likely to accelerate their efforts to sell foreclosed property quickly to minimize the time period their obligations remain in effect. This may induce lenders to accept lower prices in foreclosure than would otherwise be the case. Second, lenders are likely to consider the risk of statutory maintenance obligations in making new loans; they may impose higher underwriting standards to exclude borrowers who are more likely to default or under-repair the properties, and they may demand additional fees or interest to compensate for the additional risk.

B. California

In 2008 California enacted the Perata Mortgage Relief Bill to reform its foreclosure statutes. One component of the reform measure was a requirement that foreclosure purchasers maintain vacant residential properties. The key provision of California Civil Code section 2929.3 states:

> A legal owner shall maintain vacant residential property purchased by that owner at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust.[47]

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[45] *Id*. at 322.

[46] N.Y. Real Prop. Acts. § 1301(3) ("While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the which the former action is brought.").

[47] Cal. Civ. § 2929.3(a)(1).

The term "legal owner" includes both lenders who purchase at foreclosure sales and third-party foreclosure purchasers. The statute goes on to define "failure to maintain" as

> failure to care for the exterior of the property, including, but not limited to, permitting excessive foliage growth that diminishes the value of surrounding properties, failing to take action to prevent trespassers or squatters from remaining on the property, or failing to take action to prevent mosquito larvae from growing in standing water or other conditions that create a public nuisance.[48]

The statute allows a governmental entity to impose a civil fine of up to $1,000 per day for an owner's violation of the maintenance obligation. The government may impose the fine only after giving notice of the violation to the owner and a period of not less than 14 days for the owner to commence correction of the violation and not less than 30 days for completion of its correction.[49] The fine is stated to be a maximum, with the entity instructed to determine "the amount of the fine [by taking] into consideration any timely and good faith efforts by the legal owner to remedy the violation."[50] The local government must direct all collected fines "to local nuisance abatement programs."[51]

A prior California statute, enacted in 1987, authorizes lenders to repair property acquired through foreclosure under a mortgage or deed of trust.[52] The 1987 statute does not require repairs. The new 2008 statute did not amend the 1987 statute.

The new statute has a sunset provision, which provides for expiration on January 1, 2013, unless extended by the legislature.[53]

The statute is cumulative of rights and remedies provided by other laws; and the statute does not preempt local ordinances, but a governmental entity may not impose fines on a legal owner both under the statute and under a local ordinance.[54]

C. City of Chicago

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[48] Cal. Civ. § 2929.3(b).

[49] Cal. Civ. § 2929.3(a)(1),(2). Shorter notice is allowed if the government "determines that a specific condition of the property threatens public health or safety. *Id*. § 2929.3(c).

[50] Cal. Civ. § 2929.3(a)(2).

[51] Cal. Civ. § 2929.3(d).

[52] Cal. Civ. § 2932.6.

[53] Cal. Civ. § 2929.3(i).

[54] Cal. Civ. § 2929.3(e), (f), (h).

In November 2011, the City of Chicago amended its "Vacant Buildings Ordinance" to impose registration and maintenance requirements upon lenders holding mortgagees on vacant residential real estate. Previously the City's ordinance, like those adopted in many cities, imposed obligations only upon the owners of vacant properties. The City expanded the scope of its ordinance to require lenders to register and maintain properties when owners fail to do so. If payment of a residential mortgage loan is more than 45 days delinquent, the lender is required to inspect the home to ascertain the property has been abandoned. If it is abandoned, the lender has to register the property with the City and secure the property. Subsequently Cook County passed a similar ordinance to impose obligations upon lenders for properties in unincorporated areas of the county and any municipality that chooses to participate.

The City's ordinance requires owners, including lenders, to pay a one-time $500 registration fee for vacant properties and requires monthly inspections of mortgaged properties to determine if they are vacant. The ordinance sets forth detailed maintenance requirements and authorizes the City to impose fines of up to $1,000 per day for an owner's noncompliance.

The City claims that the amended ordinance is achieving its purposes. The City's Department of Buildings reports that there presently are 5,787 homes on its official vacant property registry, more than half of which were added after the new rules went into effect last November. A City attorney reports that it uses the registry quickly to solve complaints about vacant properties: "When a building is registered and we get a complaint through 311 that the building's vacant and open, we go right to the registry, we find out which bank it is, we have their contact, we email them, and by that night the building is boarded. Otherwise the city would have had to do that."[55] During the first quarter of 2012, the City collected $619,000 in fines from financial institutions.[56]

In December 2011 the Federal Housing Finance Agency (FHFA), the entity that regulates Fannie Mae and Freddie Mac, filed an action against the City of Chicago to enjoin enforcement of the ordinance with respect to Fannie Mae and Freddie Mac-owned mortgages.[57] The two federally regulated entities own more than 250,000 mortgages on properties within Chicago, and have guaranteed approximately 750,000 additional Chicago mortgage loans.[58] The plaintiff's theory is that the ordinance impermissibly interferes with its role as sole regulator and conservator of Fannie Mae

[55]Odette Yousef, *Federal mortgage giants lay ground for restitution*, available at http://www.wbez.org/news/federal-mortgage-giants-lay-ground-restitution-98694

[56] May 03, 2012|By Mary Ellen Podmolik, *Vacant building ordinance nets $619,000 in fines so far*, Chicago Tribuen, May 3, 2012 (city said it fined more than 150 mortgage servicers during first quarter for not abiding by its vacant building ordinance).

[57] *Federal Housing Finance Agency v. City of Chicago*, (Dec. 12, 2011, E.D. Ill.), available at http://www.fhfa.gov/webfiles/22831/COMPLAINT_FILE%20STAMPED.pdf

[58] Mary Ellen Podmolik, *Feds look to dispose of vacant property ordinance quickly*, Chicago Tribuen, Jan. 18, 2012.

and Freddie Mac; that the registration fees function as a tax, which the City may not impose; and that the costs of complying with the ordinance increase the costs to federal taxpayers associated with the bailout of Fannie Mae and Freddie Mac.

While the case is pending, Fannie Mae and Freddie Mac have instructed the banks and servicers they work with to pay registration fees to the City "under protest" to preserve the right to obtain refunds if the FHFA prevails. The case is highly significant. If the City prevails, many other states and cities throughout the United States will consider enacting similar ordinances. If the FHFA prevails, a federal exemption for Fannie Mae and Freddie Mac-related mortgage loans will almost certainly result in the demise of Chicago's ordinance, given the market share of residential mortgages controlled by the federal entities.

II. Issues to Consider with Respect to Vacant and Abandoned Properties

A review of the New York and California vacant property statutes and the City of Chicago ordinance suggests the following issues to consider with respect to the preparation of a statute.

1. A statute should attempt to define "vacant" and "abandoned" property. In contrast to the New York and California statutes, with provide no guidance, an Indiana statute that became effective in March 2012 has a multi-part definition:

> [F]or purposes of an abandonment determination under this chapter, one (1) or more of the following constitute prima facie evidence that mortgaged property is abandoned:
>
> (1) The enforcement authority that has jurisdiction in the location of the mortgaged property has issued an order under IC 36-7-36-9 with respect to the property.
>
> (2) Windows or entrances to the mortgaged property are boarded up or closed off.
>
> (3) Multiple window panes on the mortgaged property are broken and unrepaired.
>
> (4) One (1) or more doors to the mortgaged property are smashed through, broken off, unhinged, or continuously unlocked.
>
> (5) Gas service, electric service, water service, or other utility service to the mortgaged property has been terminated.
>
> (6) Rubbish, trash, or debris has accumulated on the mortgaged property.
>
> (7) The mortgaged property is deteriorating and is either below or in imminent danger of falling below minimum community standards for public safety and sanitation.
>
> (8) The creditor has changed the locks on the mortgaged property and for at least fifteen (15) days after the changing of the locks the owner has not requested entrance to the mortgaged property.

(9) There exist one (1) or more written statements, including documents of conveyance, that have been executed by the debtor, or by the debtor's personal representatives or assigns, and that indicate a clear intent to abandon the mortgaged property.

(10) There exists other evidence indicating a clear intent to abandon the mortgaged property.[59]

2. A statute should consider what problems associated with vacant and abandoned properties it seeks to address. The New York statute, by referring to a comprehensive maintenance code, seeks to make sure that the dwelling unit remains in compliance with building and safety codes, and is in good shape suitable for habitation. The California statute is less ambitious, focusing principally on the outward appearance of the properties, which may contribute to neighborhood blight.

3. What persons are responsible for maintaining vacant and abandoned properties? The New York and California statutes and the Chicago ordinance all reflect the trend of expanding liability beyond the homeowner to reach mortgage lenders. When that step is taken, it is critically important to consider not only the scope of a lender's obligation, but timing issues. The statutes impose a liability only after the completion of foreclosure. The Chicago ordinance imposes liability once the mortgage loan becomes seriously delinquent. Obviously, a number of intermediate positions are also possible.

4. What parties have the right to enforce statutory obligations with respect to vacant and abandoned properties; and what are the remedies? The California statute and the Chicago ordinance authorize local governments to impose civil fines. The New York statute grants enforcement rights to local governments, and in addition to homeowners associations, condominium associations, and tenants, but with no civil penalties.

5. If lenders have liability for vacant and abandoned properties, what recourse should they have with respect to mortgagors who are sometimes primarily responsible both for the poor physical condition of the property and the fact of vacancy and abandonment? Neither the New York nor the California statutes adequately address the question of recourse. In California, recourse issues are further complicated by the California anti-deficiency judgment statutes.

6. Should the statute provide special foreclosure procedures when the property is vacant or abandoned? Some states have foreclosure statutes with special provisions for such properties. For example, New Jersey allows the lender to use an "optional mortgage foreclosure procedure without sale" when the owner has abandoned the property. This is a statutory form of strict foreclosure. Entry of judgment transfers title to the lender and extinguishes the mortgage debt, precluding from the lender from obtaining a deficiency judgment. N.J. Stat. § 2A:50-63. Washington provides the

[59] Ind. Code § 32-30-10.6-5(a). Other states have similar statutes. *E.g.*, Colo. Rev. Stat. § 38-38-903; Minn. Stat. § 582.032.

purchaser at a foreclosure sale takes from of the owner's redemption rights when the owner "has abandoned said property for six months or more." Wash. Rev. Code § 61.12.093.

7. Owner-occupied and rental properties both can present substantial problems associated with abandonment and vacancy. Query whether the context and issues are sufficiently similar to be handled by the same statutory provisions. The New York statute's attempt to do this is, at best, highly awkward.

EXHIBIT 14

MEMORANDUM FROM PROFESSOR ALAN WHITE DATED MAY 11, 2012 ENTITLED *"STATE FORECLOSURE MEDIATION LAWS: EXAMPLES AND RESEARCH FOR A UNIFORM STATUTE"*.

State Foreclosure Mediation Laws: Examples and Research for a Uniform Statute

Alan White, Reporter

May 11, 2012

The first part of this memorandum describes the state and local foreclosure mediation laws and programs that have been adopted in response to the 2007 foreclosure crisis. The second part summarizes the existing research on the effectiveness of various foreclosure mediation programs. Appended to the memo are the Connecticut (judicial state) and Nevada (nonjudicial state) statutes as well as a model statute drafted by the National Consumer Law Center.

I. Statutes and Court Programs

Seventeen states have adopted statewide foreclosure mediation programs to date. Twelve statewide programs were established by statute,[60] while another five were implemented via court rule or other court or agency initiative.[61] In at least eight other states, local or county court mediation programs have been established without statewide legislation

[60] Connecticut Public Act 08-176, amended by 09-209; District of Columbia Municipal Regulations Chapter 26-C27; Hawaii Act 48 of 2011, Hawaii Rev. Stat. Chapter 667; Indiana Code 32- 30-10.5 et seq. (2009); Maine Pub. Laws 2009 Chapter 402; Maryland Ann. Code Real Property Article, §7-105.1 (2010); Mich. Cons. L. Ann. §§600.3205a-3205e (2012); Nevada Rev. Stat. §107.086 (2009); New York Civil Procedure Law & Rules §3408 (2009); Oregon Laws 2008, Ch. 19, Section 20, amended by S.B. 628(2009); 12 Vermont S.A. § 4631-4632 (2010); Rev. Code Wash. Ann. §61.24.163 (2011).

[61] Delaware Administrative Directive of the President Judge of the Superior Court of the State of Delaware No. 2011-2; Florida Supreme Court order No. AOSC09-54 (2009) rescinded in part by Florida Supreme Court Administrative Order No AOSC11-44 (2011); Iowa Mediation Service initiative (http://iowamediationservice.com/); New Jersey Supreme Court, Residential Mortgage Foreclosure Mediation Program – Rule Relaxation Order (Nov. 17, 2008); Ohio Foreclosure Mediation program Model, http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/foreclosureMediation.pdf.

or court action.[62] California enacted a statute requiring a 30-day or 90-day delay before nonjudicial foreclosure, during which the servicer must make efforts to contact the borrower and offer foreclosure alternatives.[63] The California law is not, strictly speaking, a mediation statute.

Mediation statutes address a variety of issues, including

- the form and content of the notice of mediation availability and other outreach to homeowners;
- whether mediation is scheduled automatically or only upon request (opt-in vs. opt-out);
- which documents the servicer and homeowner must provide, and to whom (each other, mediator, administrative agency);
- the obligation to attend in-person mediation or have parties with authority present or available;
- the servicer's obligation to evaluate the homeowner's eligibility for HAMP or other programs;
- the duty to participate in good faith;[64] and
- what properties and homeowners are covered or exempted from mediation. Eligibility provisions sometimes require homeowners to be screened by housing counselors or attorneys prior to mediation.

Mediation statutes and rules are inextricably linked to the question of pre-foreclosure notice, because they will affect the content and timing of notice(s). The generic notice of default and acceleration, or notices of intent to foreclose, or notices of sale, may or may not be readily combined with a mediation notice, depending on the sequence and process in each state. There are competing policies of avoiding serial notice periods to avoid extending foreclosure timelines, on the one hand, while insuring that each notice including the mediation

[62] Douglas County, Colorado (http://www.douglascountyhousingpartnership.org/ foreclosure.htm); Cook County Illinois (Chicago), General Administrative Order No. 2010-01; Jefferson County Kentucky (Louisville) 30th Circuit Court Administrative Order (March 30, 2009); Boston, Massachusetts City Council ordinance Docket #1592 (2010); New Mexico First District (Santa Fe) Administrative Order No. 2009-00001; First Judicial District of Philadelphia Court of Common Pleas, Joint General Court Regulation No. 2008-01; Providence Rhode Island Code of Ordinances §§13-213 to 13-218 (2008); Milwaukee Wisconsin foreclosure mediation program, http://www.mediatemilwaukee.com/.

[63] Cal. Civ. Code §§2923.5, 2923.52, 2923.53 (sunsets January 1, 2013).

[64] E.g. Nev. Rev. Stat. §107.086(5); N.Y. C.P.L.R. §3408(f).

notice serves its purpose and encourages default resolution as early as possible in the process, and does not result in information overload.

The main differences between mediation programs in judicial states and nonjudicial states are administrative. In a judicial state, the courts can send notices or prescribe their form, can schedule and supervise mediation sessions, can enforce the rules against recalcitrant parties, and can monitor and evaluate the mediation program's effects and report back to the legislature. In a nonjudicial state, effective monitoring and enforcement requires the involvement of some state agency, which could be the courts, as in Nevada and Maryland, or another state agency such as the Washington Department of Commerce.

Sunset provisions are very common in the state statutes, presumably based on the expectation that foreclosures will return to normal levels as the crisis wanes. For example, Connecticut's law sunsets on July 1, 2014 and New York's on February 13, 2015. On the other hand, the District of Columbia, Maryland, Nevada and Washington have no sunset date. Maine's law requires a report and review by 2013.[65]

II. Research Summary

The available research uniformly supports the effectiveness of foreclosure mediation in achieving workouts and resolutions that avoid the need for foreclosure sales. Several state court systems have compiled statistics regarding their mediation programs. Typically, these tally the number of homeowners who elect mediation (or who appear at mandatory mediation), and sometimes the number and percentage of cases that are settled prior to judgment and foreclosure sale. Connecticut reports about 70% of foreclosure defendants appearing at conferences, 64% of those remaining in their homes, 15% negotiating a "graceful exit" such as a short sale, and 21% going to foreclosure sale.[66] In New York, defaults by

[65] National Consumer Law Center, Rebuilding America: How States can Save Millions of Homes through Foreclosure Mediation 41 (2012)(table with sunset dates).

[66] The Connecticut courts data are summarized in a Boston Federal Reserve staff report, Robert Clifford, State Foreclosure Prevention Efforts in New England, Mediation and Assistance (Federal Reserve Bank of Boston New England Public Policy Research Report, September 2011), http://www.bostonfed.org/economic/neppc/researchreports/2011/neppcrr1103.pdf.

homeowners have declined to 10%, i.e. 90% of eligible homeowners are participating in mediation.[67] Nevada and other states report similar outcomes, i.e. about 70% of mediated foreclosures result in an alternative to foreclosure sale.[68] Mediation has thus been highly successful as a means to get homeowners to respond and participate in loss mitigation and foreclosure prevention.

Court reports and other research also consistently show that automatic or "opt-out" foreclosure mediation results in much higher participation than an on-request or "opt-in" program.[69] Perhaps the clearest illustration of this is in Indiana, where the statewide statutory program was opt-in, i.e. called for a notice of optional mediation to be sent by the plaintiff's attorney. Participation rates initially were less than 5% in 2009. Several county courts took the initiative to have the court, rather than the plaintiff, mail the notice, and to include a date and time for the mediation conference, and response rates increased to 50%. Pennsylvania, New York, and other states have confirmed the impact on participation of the form of notice and whether the mediation is automatically scheduled or held on request only.

On the other hand, opt-out programs require significantly more resources and funding. Chicago, for example, has been unwilling to schedule mediations automatically in all foreclosures because trained mediators, and the funds to pay them, are lacking. The Boston Fed study canvasses the different funding strategies used in various New England mediation programs, and Resolution Systems, Inc. offers a summary of foreclosure mediation funding approaches on its web site.[70]

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[67] STATE OF NEW YORK UNIFIED COURT SYSTEM, 2011 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS PURSUANT TO CHAPTER 507 OF THE LAWS OF 2009, at 4, *available at* http://www.courts.state.ny.us/publications/pdfs/ForeclosuresReportNov2011.pdf.

[68] Clifford, *supra* note 8.

[69] See Andrea Kupfer Schneider and Natalie Fleury, There's No Place Like Home: Applying Dispute Design Theory to Create a Foreclosure Mediation System, Nevada L. J. (forthcoming 2011) at 106 (17% to 20% of defendants in Milwaukee's opt-in program request mediation).

[70] http://aboutrsi.org/pfimages/ForeclosureMediationFunding.pdf.

There are two empirical studies of the impact mediation has on foreclosure outcomes. Philadelphia's Reinvestment Fund's study[71] found that 70% of eligible homeowners appeared at mandatory mediation conferences, and of those, 35% achieved a settlement to remain in their home. The rate at which homes went to sale was cut in half, comparing foreclosures before and after the mediation program implementation. The results appeared to be lasting: 80% of homeowners with mediated agreements were still in their homes almost two years later.

Collins and Urban[72] studied the mandatory mediation programs in Philadelphia and in three Florida districts (Pensacola, Miami and Daytona). Controlling for a variety of factors, they found that mortgage modifications were significantly higher in localities with mediation programs than in those without. They also found that redefaults on modified loans were lower in areas with mediation programs after the programs were adopted. They theorized that this resulted primarily from better information exchange between the homeowner and the mortgage servicer.

There is little clear evidence on the impact that mediation programs have on foreclosure timelines. Somewhat simplistic analyses have been offered on both sides of the debate. On one hand, advocates point out that mediations can speed up the loss mitigation process by focusing the parties' attention, accelerating information exchange and getting to a definitive answer. On the other hand, opponents assume that the mediation process is added to existing timelines, and in the case of unsuccessful mediation, needlessly increases delay. The Philadelphia study found the mean time in the mediation diversion program was 54 days.

The difficulty with measuring foreclosure delays in the current environment is the number of contributing causes. For example, most mediations experience frequent postponements because of servicers' failure to appear with settlement authority and complete documentary evidence. New York is experiencing lengthy delays to begin mediation, because foreclosure attorneys are currently unwilling to submit affidavits imposed as a result of the robo-signing scandal, verifying the accuracy of their pleadings. In fact homeowner attorneys

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[71] The Reinvestment Fund, Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report of Findings (June 2011) avail. at www.trfund.org. The research was funded by the William Penn Foundation and the Open Society Institute.

[72] J. Michael Collins and Carly Urban, Mandatory Mediation and Mortgage Contracts (working paper 2011, http://ssrn.com/abstract=1917410).

have filed a class action demanding that foreclosure plaintiffs be compelled to file the affidavits so that mediation and foreclosure delays can be reduced.[73] Cases may settle as a result of mediation in a shorter time than the full foreclosure timeline, so any added time attributable to the mediation process has to be balanced against the savings in time and money resulting from mediated settlements. In short, there is no good empirical evidence on the net impact mediation has on shortening or lengthening aggregate foreclosure timelines.

Research to date does support the usefulness of mediation in improving homeowner response and participation in loss mitigation, and in reducing foreclosures sales.

Links to Additional Resources:

Boston Federal Reserve Board staff study:

http://www.bostonfed.org/economic/neppc/researchreports/2011/neppcrr1103.pdf.

U.S. Department of Justice conference summary:

www.justice.gov/atj/foreclosure-mediation.pdf

RSI Foreclosure Mediation Resources:

http://courtadr.org/specialtopics.php?sec=6

[73] Andrew Keshner, Advocates Seek to Eliminate Foreclosure 'Shadow Docket', New York Law Journal (March 27, 2012).

Appendix – Sample Mediation Statutes

Connecticut Mediation Statute (Judicial Foreclosure State)

/Public Act No. 11-201/

*/AN ACT CONCERNING FORECLOSURE MEDIATION AND ASSISTANCE PROGRAMS, THE
HIGHLY COMPENSATED EMPLOYEE EXEMPTION FOR MORTGAGE LOAN ORIGINATORS,
GENERAL-USE PREPAID CARDS AND NEIGHBORHOOD PROTECTION. /*

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 49-31k of the general statutes is repealed and the following is substituted in lieu thereof (/Effective July 1, 2011/):

As used in this section and sections 49-31/l/ to 49-31o, inclusive, as amended by this act:

(1)**"Mortgagor" means: *[*the*]* (A) The owner-occupant of one-to-four family residential real property located in this state who is also the borrower under a mortgage encumbering such residential real property, which is the primary residence of such owner-occupant, or (B) a religious organization that is (i) the owner of real property located in this state, and (ii) the borrower under a mortgage encumbering such real property;

(2)**"Residential real property" means a one-to-four family dwelling occupied as a residence by a mortgagor;

(3)**"Mortgagee" means the original lender or servicer under a mortgage, or its successors or assigns, who is the holder of any mortgage on residential real property or real property owned by a religious organization securing a loan made primarily for personal, family, religious or household purposes that is the subject of a foreclosure action;

(4)**"Authority" means the Connecticut Housing Finance Authority created under section 8-244; *[*and*]*

(5)**"Mortgage assistance programs" means the mortgage assistance programs developed and implemented by the authority in accordance with sections 8-265cc to 8-265kk, inclusive, 8-265rr and 8-265ss; and

(6) "Religious organization" means an organization that meets the religious purposes test of Section 501(c)(3) of the Internal Revenue Code of 1986.

Sec. 2. Section 49-31/l/ of the general statutes is repealed and the following is substituted in lieu thereof (/Effective July 1, 2011/):

(a) Prior to July 1, *[*2012*]* 2014: (1) Any action for the foreclosure of a mortgage on residential real property with a return date during the period from July 1, 2008, to June 30, 2009, inclusive, shall be subject to the provisions of subsection (b) of this section, and (2) any action for the foreclosure of a mortgage on (A) residential real property with a return date during the period from July 1, 2009, to June 30, *[*2012*]* 2014, inclusive, or (B) real property owned by a religious organization with a return date during the period from October 1, 2011, to June 30, 2014, inclusive, shall be subject to the provisions of subsection (c) of this section.

(b)**(1)**Prior to July 1, 2012, when a mortgagee commences an action for the foreclosure of a mortgage on residential real property with a return date during the period from July 1, 2008, to June 30, 2009, inclusive, the mortgagee shall give notice to the mortgagor of the foreclosure mediation program established in section 49-31m, as amended by this act, by attaching to the front of the foreclosure complaint that is served on the mortgagor: (A) A copy of the notice of the availability of foreclosure mediation, in such form as the Chief Court Administrator prescribes, and (B) a foreclosure mediation request form, in such form as the Chief Court Administrator prescribes.

(2)**Except as provided in subdivision (3) of this subsection, a mortgagor may request foreclosure mediation by submitting the foreclosure mediation request form to the court and filing an appearance not more than fifteen days after the return *[*day*]* date for the foreclosure action. Upon receipt of the foreclosure mediation request form, the court shall notify each appearing party that a foreclosure mediation request form has been submitted by the mortgagor.

(3)**The court may grant a mortgagor permission to submit a foreclosure mediation request form and file an appearance after the fifteen-day period established in subdivision (2) of this subsection, for good cause shown, except that no foreclosure mediation request form may be submitted and no appearance may be filed more than twenty-five days after the return date.

(4)**No foreclosure mediation request form may be submitted to the court on or after July 1, 2012.

(5)**If at any time on or after July 1, 2008, but prior to July 1, 2012, the court determines that the notice requirement of subdivision (1) of this subsection has not been met, the court may, upon its own motion or upon the written motion of the mortgagor, issue an order that no judgment may enter for fifteen days during which period the mortgagor may submit a foreclosure mediation request form to the court.

(6)**Notwithstanding any provision of the general statutes or any rule of law to the contrary, prior to July 1, 2012, no judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered in any action subject to the provisions of this subsection and instituted by the mortgagee to foreclose a mortgage on residential real property unless: (A) Notice to the mortgagor has been given by the mortgagee in accordance with subdivision (1) of this subsection and the time for submitting a foreclosure mediation request form has expired and no foreclosure mediation request form has been submitted, or if such notice has not been given, the time for submitting a foreclosure mediation request form pursuant to subdivision (2) or (3) of this subsection has expired and no foreclosure mediation request form has been submitted, or (B) the mediation period set forth in subdivision (b) of section 49-31n, as amended by this act, has expired or has otherwise terminated, whichever is earlier.

(7)**None of the mortgagor's or mortgagee's rights in the foreclosure action shall be waived by the mortgagor's submission of a foreclosure mediation request form to the court.

(c)**(1)**Prior to July 1, *[*2012*]* 2014, when a mortgagee commences an action for the foreclosure of a mortgage on residential real property with a return date on or after July 1, 2009, or, with respect to real property owned by a religious organization, a return date on or after October 1, 2011, the mortgagee shall give notice to the mortgagor of the foreclosure mediation program established in section 49-31m, as amended by this act, by attaching to the front of the writ, summons and complaint that is served on the mortgagor: (A) A copy of the notice of foreclosure mediation, in such form as the Chief Court Administrator prescribes, (B) a copy of the foreclosure mediation certificate form described in subdivision (3) of this subsection, in such form as the Chief Court Administrator prescribes, *[*and*]* (C) a blank appearance form, in such form as the Chief Court Administrator prescribes, and (D) with respect to an action for the foreclosure of a mortgage on residential real property with a return date on or after October 1, 2011, a mediation information form and a notice containing contact information for authority-approved consumer credit counseling agencies, which form and notice shall be in such form as the Chief Court Administrator prescribes. Such mediation information form shall be designed to elicit current financial information and such other nonfinancial information from the mortgagor as the Chief Court Administrator, in consultation with representatives from the banking industry and consumer advocates, determines will be useful to the mediation process. The instructions to the mediation information form shall explain that the completed mediation information form, along with accompanying documentation reasonably requested from the mortgagor by way of such instructions, shall be delivered to the mortgagee's counsel not later than fifteen business days prior to the date of the initial mediation session, as identified in the notice provided pursuant to subdivision (2) of subsection (c) of section 49-31n, as amended by this act.

(2)**The court shall issue a notice of foreclosure mediation described in subdivision (3) of this subsection to the mortgagor not later than the date three business days after the date the mortgagee returns the writ to the court.

(3)**The notice of foreclosure mediation shall instruct the mortgagor to file the appearance and foreclosure mediation certificate forms with the court *[*no*]* not later than the date fifteen days from the return date for the foreclosure action. Such notice shall remind the mortgagor to deliver the completed mediation information form and the accompanying documentation described in subdivision (1) of this subsection and encourage such delivery in advance of the required date. The mediation information form and accompanying documentation shall not, without the explicit written instruction of the mortgagor, be publicly available. Such notice shall be accompanied by materials from the Department of Banking, as prescribed by the Chief Court Administrator, which shall describe the community-based resources available to the mortgagor, including authority-approved housing counseling agencies that may assist with preparation of the mediation information form and application for mortgage assistance programs. The foreclosure mediation certificate form shall require the mortgagor to provide sufficient information to permit the court to confirm that the defendant in the foreclosure action is a mortgagor, and to certify that said mortgagor has sent a copy of the mediation certificate form to the plaintiff in the action.

(4)**Upon receipt of the mortgagor's appearance and foreclosure mediation certificate forms, and provided the court confirms the defendant in the foreclosure action is a mortgagor and that said mortgagor has sent a copy of the mediation certificate form to the plaintiff, the court shall schedule a date for foreclosure mediation in accordance with subsection (c) of section 49-31n, as amended by this act. The court shall issue notice of such mediation date to all appearing parties not earlier than the date five business days after the return date or by the date three business days after the date on which the court receives the mortgagor's appearance and foreclosure mediation certificate forms, whichever is later, except that if the court does not receive the appearance and foreclosure mediation certificate forms from the mortgagor by the date fifteen days after the return date for the foreclosure action, the court shall not schedule such mediation.

(5)**Notwithstanding the provisions of this subsection, the court may refer a foreclosure action brought by a mortgagee to the foreclosure mediation program at any time, provided the mortgagor has filed an appearance in said action and further provided the court shall, not later than the date three business days after the date on which it makes such referral, send a notice to each appearing party scheduling the first foreclosure mediation session for a date not later than the date *[*fifteen business*]* thirty-five days from the date of such referral.

(6)**Notwithstanding any provision of the general statutes or any rule of law, prior to July 1, *[*2012,*]* 2014, (A) for the period of time which shall not exceed eight months from the return date, no mortgagee or mortgagor shall make any motion, request or demand with respect to the other, except those motions, requests or demands that relate to the mediation program described in section 49-31m, as amended by this act, and the mediation sessions held pursuant to such program, provided (i) a mortgagor seeking to contest the court's jurisdiction may file a motion to dismiss and the mortgagee may object to such motion to dismiss in accordance with applicable law and the rules of the courts, and (ii) if the mortgagor elects to make any other motion, request or demand with respect to the mortgagee, the eight-month limit shall no longer apply to either party; and (B) no judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered in any action subject to the provisions of this subsection and instituted by the mortgagee to foreclose a mortgage on residential real property or real property owned by a religious organization unless: *[*(A)*]* (i) The mediation period set forth in subsection (c) of section 49-31n, as amended by this act, has expired or has otherwise terminated, whichever is earlier, and, if fewer than eight months has elapsed from the return date at the time of termination, fifteen days have elapsed since such termination, or *[*(B)*]* (ii) the mediation program is not otherwise required or available. Nothing in this subdivision shall affect any motion made or any default or judgment entered on or before June 30, 2011.

(7) With respect to foreclosure actions with a return date on or after

July 1, 2011, notwithstanding any provision of the general statutes or any rule of law to the contrary, the mortgagee shall be permitted, on or before July 1, 2014, and following the eight-month or fifteen-day period described in subdivision (6) of this subsection, to simultaneously file, as applicable, (A) a motion for default, and (B) a motion for judgment of strict foreclosure or a motion for judgment of foreclosure by sale with respect to the mortgagor in the foreclosure action.

[(7)*]* (8)**None of the mortgagor's or mortgagee's rights in the foreclosure action shall be waived by participation in the foreclosure mediation program.

Sec. 3. Section 49-31m of the general statutes is repealed and the following is substituted in lieu thereof (/Effective October 1, 2011/):

*[*Not later than July 1, 2008, the*]* The Chief Court Administrator shall establish in each judicial district a foreclosure mediation program in actions to foreclose mortgages on residential real property or real property owned by a religious organization. Such foreclosure mediation shall (1) address all issues of foreclosure, including, but not limited to, reinstatement of the mortgage, assignment of law days, assignment of sale date, restructuring of the mortgage debt and foreclosure by decree of sale, and (2) be conducted by foreclosure mediators who (A) are employed by the Judicial Branch, (B) are trained in mediation and all relevant aspects of the law, as determined by the Chief Court Administrator, (C) have knowledge of the community-based resources that are available in the judicial district in which they serve, and (D) have knowledge of the mortgage assistance programs. Such mediators may refer mortgagors who participate in the foreclosure mediation program to community-based resources when appropriate and to the mortgage assistance programs.

Sec. 4. Section 49-31n of the general statutes is repealed and the following is substituted in lieu thereof (/Effective July 1, 2011/):

(a) Prior to July 1, *[*2012*]* 2014: (1) Any action for the foreclosure of a mortgage on residential real property with a return date during the period from July 1, 2008, to June 30, 2009, inclusive, shall be subject to the provisions of subsection (b) of this section, and (2) any action for the foreclosure of a mortgage on (A) residential real property with a return date during the period from July 1, 2009, to June 30, *[*2012*]* 2014, inclusive, or (B) real property owned by a religious organization with a return date during the period from October 1, 2011, to June 30, 2014, inclusive, shall be subject to the provisions of subsection (c) of this section.

(b)**(1)**For any action for the foreclosure of a mortgage on residential real property with a return date during the period from July 1, 2008, to June 30, 2009, inclusive, the mediation period under the foreclosure mediation program established in section 49-31m, as amended by this act, shall commence when the court sends notice to each appearing party that a foreclosure mediation request form has been submitted by a mortgagor to the court, which notice shall be sent not later than three business days after the court receives a completed foreclosure mediation request form. The mediation period shall conclude not more than sixty days after the return *[*day*]* date for the foreclosure action, except that the court may, in its discretion, for good cause shown, (A) extend, by not more than thirty days, or shorten the mediation period on its own motion or upon motion of any party, or (B) extend by not more than thirty days the mediation period upon written request of the mediator.

(2)**The first mediation session shall be held not later than fifteen business days after the court sends notice to all parties that a foreclosure mediation request form has been submitted to the court. The mortgagor and mortgagee shall appear in person at each mediation session and shall have authority to agree to a proposed settlement, except that (A) if the mortgagee is represented by counsel, the mortgagee's counsel may appear in lieu of the mortgagee to represent the mortgagee's interests at the mediation, provided such counsel has the authority to agree to a proposed settlement and the mortgagee is available (i) during the mediation session by telephone, and (ii) to participate in the mediation session by speakerphone, provided an opportunity is afforded for confidential discussions between the mortgagee and mortgagee's counsel, and (B) following the initial mediation session, if there are two or more mortgagors, only one mortgagor shall appear in person at each subsequent mediation session unless good cause is shown, provided the other mortgagors are available (i) during the mediation session, and (ii) to participate in the mediation session by speakerphone, provided an opportunity is afforded for confidential discussions among the mortgagors and such mortgagors' counsel. The court shall not award attorney's fees to any mortgagee for time spent in any mediation session if the court finds that such mortgagee has failed to comply with this subdivision, unless the court finds reasonable cause for such failure.

(3)**Not later than two days after the conclusion of the first mediation session, the mediator shall determine whether the parties will benefit from further mediation. The mediator shall file with the court a report setting forth such determination and mail a copy of such report to each appearing party. If the mediator reports to the court that the parties will not benefit from further mediation, the mediation period shall terminate automatically. If the mediator reports to the court after the first mediation session that the parties may benefit from further mediation, the mediation period shall continue.

(4)**If the mediator has submitted a report to the court that the parties may benefit from further mediation pursuant to subdivision (3) of this subsection, not more than two days after the conclusion of the mediation, but no later than the termination of the mediation period set forth in subdivision (1) of this subsection, the mediator shall file a report with the court describing the proceedings and specifying the issues resolved, if any, and any issues not resolved pursuant to the mediation. The filing of the report shall terminate the mediation period automatically. If certain issues have not been resolved pursuant to the mediation, the mediator may refer the mortgagor to any appropriate community-based services that are available in the judicial district, but any such referral shall not cause a delay in the mediation process.

(5)**The Chief Court Administrator shall establish policies and procedures to implement this subsection. Such policies and procedures shall, at a minimum, provide that the mediator shall advise the mortgagor at the first mediation session required by subdivision (2) of this subsection that: (A) Such mediation does not suspend the mortgagor's obligation to respond to the foreclosure action; and (B) a judgment of strict foreclosure or foreclosure by sale may cause the mortgagor to lose the residential real property to foreclosure.

(6)**In no event shall any determination issued by a mediator under this program form the basis of an appeal of any foreclosure judgment.

(7)**Foreclosure mediation request forms shall not be accepted by the court on or after July 1, 2012, and the foreclosure mediation program shall terminate when all mediation has concluded with respect to any applications submitted to the court prior to July 1, *[*2012*]* 2014.

(8)**At any time during the mediation period, the mediator may refer *[*the*]* a mortgagor who is the owner-occupant of one-to-four family residential real property to the mortgage assistance programs, except that any such referral shall not prevent a mortgagee from proceeding to judgment when the conditions specified in subdivision (6) of subsection (b) of section 49-31/l/, as amended by this act, have been satisfied.

(c)**(1)**For any action for the foreclosure of a mortgage on residential real property with a return date during the period from July 1, 2009, to June 30, *[*2012*]* 2014, inclusive, or for any action for the foreclosure of a mortgage on real property owned by a religious organization with a return date during the period from October 1, 2011, to June 30, 2014, inclusive, the mediation period under the foreclosure mediation program established in section 49-31m, as amended by this act, shall commence when the court sends notice to each appearing party scheduling the first foreclosure mediation session. The mediation period shall conclude not later than the date sixty days after the return date for the foreclosure action, except that the court may, in its discretion, for good cause shown, (A) extend, by not more than thirty days, or shorten the mediation period on its own motion or upon motion of any party, or (B) extend by not more than thirty days the mediation period upon written request of the mediator.

(2)**The first mediation session shall be held not later than fifteen business days after the court sends notice to each appearing party in accordance with subdivision (4) of subsection (c) of section 49-31/l/, as amended by this act. On and after October 1, 2011, the first mediation session shall be held not later than thirty-five days after the court sends notice to each appearing party in accordance with subdivision (4) of subsection (c) of this section. On and after October 1, 2011, not later than fifteen business days prior to the date of the initial mediation session, the mortgagee shall deliver to the mortgagor (A) an account history identifying all credits and debits assessed to the loan account in the immediately preceding twelve-month period, and (B) the name, business mailing address, electronic mail address, facsimile number and direct telephone number of an individual able to process requests to refinance or modify the mortgage loan at issue or otherwise take action to avoid foreclosure of the mortgage. Any updates to the information provided pursuant to subparagraph (B) of this subdivision shall be provided reasonably promptly to the mortgagor and such mortgagor's counsel. The mortgagor and mortgagee shall appear in person at each mediation session and shall have authority to agree to a proposed settlement, except that (i) if the mortgagee is represented by counsel, the mortgagee's counsel may appear in lieu of the mortgagee to represent the mortgagee's interests at the mediation, provided such counsel has the authority to agree to a proposed settlement and the mortgagee is available (I) during the mediation session by telephone, and (II) to participate in the mediation session by speakerphone, provided an opportunity is afforded for confidential discussions between the mortgagee and mortgagee's counsel, and (ii) following the initial mediation session, if there are two or more mortgagors, only one mortgagor shall appear in person at each subsequent mediation session unless good cause is shown, provided the other mortgagors are available (I) during the mediation session, and (II) to participate in the mediation session by speakerphone, provided an opportunity is afforded for confidential discussions among the mortgagors and such mortgagors' counsel. The court shall not award attorney's fees to any mortgagee for time spent in any mediation session if the court finds that such mortgagee has failed to comply with this subdivision, unless the court finds reasonable cause for such failure.

(3)**Not later than two days after the conclusion of the first mediation session, the mediator shall determine whether the parties will benefit from further mediation. The mediator shall file with the court a report setting forth such determination and mail a copy of such report to each appearing party. If the mediator reports to the court that the parties will not benefit from further mediation, the mediation period shall terminate automatically. If the mediator reports to the court after the first mediation session that the parties may benefit from further mediation, the mediation period shall continue. Either party's failure to comply with the documentation requirements of this section or section 49-31/l/, as amended by this act, shall not be grounds for terminating the mediation period before a second mediation session is conducted.

(4)**If the mediator has submitted a report to the court that the parties may benefit from further mediation pursuant to subdivision (3) of this subsection, not more than two days after the conclusion of the mediation, but no later than the termination of the mediation period set forth in subdivision (1) of this subsection, the mediator shall file a report with the court describing the proceedings and specifying the issues resolved, if any, and any issues not resolved pursuant to the mediation. The filing of the report shall terminate the mediation period automatically. If certain issues have not been resolved pursuant to the mediation, the mediator may refer the mortgagor to any appropriate community-based services that are available in the judicial district, but any such referral shall not cause a delay in the mediation process.

(5)**The Chief Court Administrator shall establish policies and procedures to implement this subsection. Such policies and procedures shall, at a minimum, provide that the mediator shall advise the mortgagor at the first mediation session required by subdivision (2) of this subsection that: (A) Such mediation does not suspend the mortgagor's obligation to respond to the foreclosure action beyond the limited time frame described in subdivision (6) of subsection (c) of section 49-31/l/, as amended by this act; and (B) a judgment of strict foreclosure or foreclosure by sale may cause the mortgagor to lose the residential real property or real property owned by a religious organization to foreclosure.

(6)**In no event shall any determination issued by a mediator under this program form the basis of an appeal of any foreclosure judgment.

(7)**The foreclosure mediation program shall terminate when all mediation has concluded with respect to any foreclosure action with a return date during the period from July 1, 2009, to June 30, *[*2012*]* 2014, inclusive.

(8)**At any time during the mediation period, the mediator may refer *[*the*]* a mortgagor who is the owner-occupant of one-to-four family residential real property to the mortgage assistance programs, except that any such referral shall not prevent a mortgagee from proceeding to judgment when the conditions specified in subdivision (6) of subsection (c) of section 49-31/l/, as amended by this act, have been satisfied.

Sec. 5. (/Effective from passage/)//(a) There is established a task force to review and evaluate loss mitigation programs administered by the Connecticut Housing Finance Authority.

(b) The task force shall consist of the following members:

(1) The Governor, or the Governor's designee;

(2) The speaker of the House of Representatives, or the speaker's designee;

(3) The majority leader of the House of Representatives, or the majority leader's designee;

(4) The minority leader of the House of Representatives, or the minority leader's designee;

(5) The president pro tempore of the Senate, or the president pro tempore's designee;

(6) The majority leader of the Senate, or the majority leader's designee;

(7) The minority leader of the Senate, or the minority leader's designee;

(8) The Banking Commissioner, or the commissioner's designee;

(9) The chief housing officer of the Connecticut Housing Finance Authority, or the officer's designee;

(10) The chairpersons of the joint standing committee of the General Assembly having cognizance of matters relating to banks, or the chairpersons' designee; and

(11) The chairpersons of the joint standing committee of the General Assembly having cognizance of matters relating to housing, or the

chairpersons' designee.

(c) The task force members shall elect a chairperson from among the members of the task force.

(d) The chairperson shall schedule the first meeting of the task force, which shall be held not later than sixty days after the effective date of this section.

(e) The administrative staff of the joint standing committee of the General Assembly having cognizance of matters relating to banks shall serve as administrative staff of the task force.

(f) Not later than January 1, 2012, the task force shall submit a report on its findings and recommendations to the joint standing committee of the General Assembly having cognizance of matters relating to banks, in accordance with the provisions of section 11-4a of the general statutes. The task force shall terminate on the date that it submits such report or January 1, 2012, whichever is later.

Sec. 7. (NEW) (/Effective from passage/) (a) In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property that has a return date on or after the effective date of this section, but not later than December 31, 2017, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to (1) the provision, by such successor in interest, of a notice to vacate to any bona fide tenant not less than ninety days before the effective date of such notice; and (2) the rights of any bona fide tenant, as of the date absolute title vests in such successor in interest (A) under any bona fide lease entered into before such date to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the ninety-day notice under subdivision (1) of this subsection; or (B) without a lease or with a lease terminable at will under state law, subject to the receipt by the tenant of the ninety-day notice under subdivision (1) of this subsection, except that nothing under this section shall affect the requirements for termination of any federally-subsidized or state-subsidized tenancy or of any state or local law that provides longer time periods or other additional protections for tenants.

(b) For purposes of this section, a lease or tenancy shall be considered bona fide only if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant, (2) the lease or tenancy was the result of an arms-length transaction, and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state or local subsidy.

(c) For purposes of this section, the term "federally-related mortgage loan" has the same meaning as in 12 USC 2602(1), the Real Estate Settlement Procedures Act of 1974. For purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust or security deed.

Sec. 8. (NEW) (/Effective from passage/) (a) On or before December 31, 2017, in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of a lease, vacating the property prior to sale shall not constitute other good cause for terminating the lease of a tenant who is a recipient of assistance under 42 USC 1437f(o), the federal Housing Choice Voucher Program, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner (1) will occupy the unit as a primary residence, and (2) has provided the tenant a notice to vacate at least ninety days before the effective date of such notice.

(b) On or before December 31, 2017, in the case of any foreclosure on any federally-related mortgage loan, as that term is defined in 12 USC 2602(1), the Real Estate Settlement Procedures Act of 1974, or on any residential real property in which a recipient of assistance under 42 USC 1437(o), the federal Housing Choice Voucher Program, resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subsection (a) of this section shall not affect any state or local law that provides longer time periods or other additional protections for tenants.

. . .

Sec. 13. Section 7-148hh of the general statutes is repealed and the following is substituted in lieu thereof (/Effective October 1, 2011/):

As used in sections 7-148ff, 7-148ii, as amended by this act, 7-152c, 19a-206, 47a-52, 47a-53, 47a-58 and 49-73b, as amended by this act:

(1)**"Registrant" means the owner of *[*vacant*]* residential property who is required to register such property pursuant to section 7-148ii, as amended by this act.

(2)**"Residential property" means a *[*one-to-four family*]* building containing one or more dwelling units and includes a commercial building containing one or more dwelling units.

(3)*[*"Vacant" means uninhabited. *] *"Dwelling unit" means any house or building, or portion thereof, which is occupied, designed to be occupied, or rented, leased or hired out to be occupied, exclusively as a home or residence of one or more persons.

(4)*[*"MERS" means the Mortgage Electronic Registration Systems. *] *"Mortgage" means a mortgage on residential real property that is held by a person other than a natural person.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

Sec. 14. Section 7-148ii of the general statutes is repealed and the following is substituted in lieu thereof (/Effective October 1, 2011/):

(a) Any person *[*in whom title to a residential property has vested after October 1, 2009, through a foreclosure action pursuant to sections 49-16 to 49-19, inclusive, or 49-26,*]* who, on or after October 1, 2011, commences an action to foreclose a mortgage on residential property shall register such property with the town clerk of the municipality in which the property is located *[*or with MERS (1) no later than ten days after the date title vests in such person if such residential property is vacant on the date title vests, or (2) if, as a result of an execution of ejectment pursuant to section 49-22 or a summary process action pursuant to chapter 832, such residential property becomes vacant before the date one hundred twenty days after the date title vests in such person, then no later than ten days after the date on which such property becomes vacant*]* at the time and place of the recording of the notice of lis pendens as to the residential property being foreclosed in accordance with section 52-325. Such registration shall be maintained by the municipality separate and apart from the land records.

(b)*[*If the registration is with the municipality, it*]* Registration made pursuant to subsection (a) of this section shall contain (1) the name, address, telephone number and electronic mail address of the *[*registrant*]* plaintiff in the foreclosure action and, if *[*the registrant*]* such plaintiff is *[*a corporation*]* an entity or an individual who resides out-of-state, the name, address, telephone number and electronic mail address of a direct contact in the state, provided such a direct contact is available; *[*and*]* (2) the name, address, telephone number and electronic mail address of the person, local property maintenance company *[*responsible for the security and maintenance of the vacant*]* or other entity serving as such plaintiff's contact with the municipality for any matters concerning the residential property; *[*, if such a management company has been engaged by the registrant*] *and (3) the following heading in at least ten-point boldface capital letters: NOTICE TO MUNICIPALITY: REGISTRATION OF PROPERTY BEING FORECLOSED. The *[*registrant*]* plaintiff in the foreclosure action shall indicate on such registration whether it prefers to be contacted by first class mail or electronic mail and the preferred addresses for such communications. *[*The registrant*]* Such plaintiff shall report to the town clerk of the municipality in which the property is located, by mail or other form of delivery, any change in the information provided on the registration *[*no*]* not later than *[*ten*]* thirty days following the date of the change of information. At the time of registration, *[*the registrant*] *such plaintiff shall pay a *[*one-hundred-dollar*]* land record filing fee to the municipality as specified in section 7-34a.

[(c)**If the registration is with MERS, it shall contain (1) the name, address, telephone number and electronic mail address of the registrant, and (2) the name, address, telephone number and electronic address of the local property maintenance company responsible for the maintenance of the property, if such a management company has been engaged by the registrant. *]*

(c) Any person in whom title to a residential property has vested on or after October 1, 2011, through a foreclosure action pursuant to sections 49-16 to 49-21, inclusive, or 49-26, shall register such property, in accordance with subsection (d) of this section, with the municipality in which such property is located not later than fifteen days after absolute title vests in such person. If such person is the plaintiff in the foreclosure action, such person shall, prior to the expiration of such fifteen-day period, update the registration with any change in registration information for purposes of complying with said subsection (d). The updated registration shall include the following heading in at least ten-point boldface capital letters: NOTICE TO

MUNICIPALITY: UPDATED REGISTRATION FOR PROPERTY ACQUIRED
THROUGH
FORECLOSURE.

(d) Registration made pursuant to subsection (c) of this section shall be mailed or delivered to the town clerk of the municipality in which the residential property is located and include (1) the name, address, telephone number and electronic mail address of the registrant and, if the registrant is an entity or an individual who resides out-of-state, the name, address, telephone number and electronic mail address of a direct contact in the state, provided such a direct contact is available; (2) the date on which absolute title vested in the registrant; (3) the name, address, telephone number and electronic mail address of the person, local property maintenance company or other entity responsible for the security and maintenance of the residential property; and (4) the following heading in at least ten-point boldface capital letters: NOTICE TO MUNICIPALITY: REGISTRATION OF PROPERTY ACQUIRED THROUGH FORECLOSURE. The registration, or updated registration, shall be accompanied by a land record filing fee payable to the municipality as specified in section 7-34a. The registrant shall report to the town clerk by mail or other form of delivery any change in the information provided on the registration not later than thirty days from the date of the change in information.

[(d)*]* (e)**If a registrant required to register pursuant to subsection (c) of this section fails to comply with any provision of the general statutes or of any municipal ordinance concerning the repair or maintenance of real estate, including, without limitation, an ordinance relating to the prevention of housing blight pursuant to subparagraph (H)(xv) of subdivision (7) of subsection (c) of section 7-148, the maintenance of safe and sanitary housing as provided in subparagraph (A) of subdivision (7) of subsection (c) of section 7-148, or the abatement of nuisances as provided in subparagraph (E) of subdivision (7) of subsection (c) of section 7-148, the municipality may issue a notice to the registrant citing the conditions on such property that violate such provisions. Such notice shall be sent by either first class or electronic mail, or both, and shall be sent to the address or addresses of the registrant identified on the registration. A copy of such notice shall be sent by first class mail or electronic mail to the person, property maintenance company *[*if such a company has been identified*]* or other entity responsible for the security and maintenance of the residential property designated on the registration. Such notice shall comply with section 7-148gg.

[(e)*]* (f)**The notice described in subsection *[*(d)*]* (e) of this section shall provide a date, reasonable under the

circumstances, by which the registrant *[*may*]* shall remedy the condition or conditions on such registrant's property. If the registrant, registrant's contact or *[*property management company*]* registrant's agent does not remedy the condition or conditions on such registrant's property before the date following the date specified in such notice, the municipality may enforce its rights under the relevant provisions of the general statutes or of any municipal ordinance.

[(f)*]* (g)**A municipality shall only impose registration requirements upon registrants and plaintiffs in foreclosure actions in accordance with this section, except that any municipal registration requirements effective on or before passage of public act 09-144 shall remain effective.

(h) Any plaintiff in a foreclosure action who fails to register in accordance with this section shall be subject to a civil penalty of one hundred dollars for each violation, up to a maximum of five thousand dollars. Each property for which there has been a failure to register shall constitute a separate violation.

(i) Any person in whom title to a residential property has vested on or after October 1, 2011, through a foreclosure action pursuant to sections 49-16 to 49-21, inclusive, or 49-26, and who has not registered in accordance with subsection (c) of this section within thirty days of absolute title vesting in such owner shall be subject to a civil penalty of two hundred fifty dollars for each violation, up to a maximum of twenty-five thousand dollars. Each property for which there has been a failure to register shall constitute a separate violation.

(j) An authorized official of the municipality may file a civil action in Superior Court to collect the penalties imposed pursuant to subsections (h) and (i) of this section, which penalties shall be payable to the treasurer of such municipality. Such penalties shall not create or constitute a lien against the residential property.

(k) Neither the registration by a foreclosing party nor the failure to register in accordance with subsection (a) of this section shall imply or create any legal obligations on the part of the foreclosing party to repair, maintain or secure the residential property for which a registration is required prior to the time that title passes to the foreclosing party.

Sec. 15. Subsection (h) of section 49-73b of the general statutes is repealed and the following is substituted in lieu thereof (/Effective October 1, 2011/):

(h)**The provisions of this section shall not apply to policies on single-family or two-family dwellings, unless such dwellings are *[*vacant*]* residential properties owned by a registrant subject to section 7-148ii, as amended by this act.

Approved July 13, 2011

EXHIBIT 15

CITATIONS TO SELECTED RELEVANT LAW REVIEW ARTICLES

Andrea Boyack, ***'Community Collateral Damage: A Question of Priorities'***, **43 Loy. U. Chi. L.J. 53 (2011)**

Timothy Davis, "***A Comparative Analysis of State and Local Government Vacant Property Registration Statutes***", 44 Urban Lawyer 399 (Spring 2012)

John Hunt, Richard Stanton, and Nancy Wallace '***Ten Dollars For 10,736 Mortgages: Should Nominal Consideration Supersede Real Property Recording Law?***' Electronic copy available at: http://ssrn.com/abstract=2117555