

**REPORT OF THE JANUARY 13 STAKEHOLDER MEETING AND
THE JANUARY 14 MEETING OF THE STUDY COMMITTEE
REGARDING A UNIFORM MORTGAGE FORECLOSURE
PROCEDURES ACT**

Note - The principal recommendation of the Study Committee - that the Uniform Law Commission should proceed with drafting – together with the Study Committee’s analysis of the several questions posed by the Executive Committee, begins on page 4 of this document.

I BACKGROUND

- 1. Initial Creation of Study Committee** At the Uniform Law Commission’s July, 2011 annual meeting in Vail, Colorado, the ULC Executive Committee approved the following resolution:

“RESOLVED, that, in view of the current foreclosure crisis, an expedited Study Committee on Mortgage Foreclosure be formed, and that the committee submit a report for consideration at the January 2012 midyear meeting. The report should identify which issues, including the following recommended by the JEB on Uniform Real Property Acts, should be addressed in a drafting project:

- Who can commence foreclosure?
- What evidentiary proof is required to commence a foreclosure?
- What pre-foreclosure notices must the mortgagee provide?
- What is the appropriate time and place in the foreclosure process for alternative dispute resolution?
- To what extent are statutory redemption periods warranted?
- To what extent do current foreclosure processes impose unwarranted costs that inhibit a borrower’s potential ability to redeem?
- To what extent may private actors fulfill the role of government officials in the foreclosure process?
- What post-sale court process, if any, is required to confirm the sale, and for what purpose?
- To what extent is the purchaser at a nonjudicial sale entitled to a presumption of the sale’s validity based on the trustee’s representations of compliance with the state’s nonjudicial foreclosure statute?

The report should also indicate how the committee proposes to relate the act to existing judicial and nonjudicial foreclosure procedures, and identify areas, without drafting, where any conforming changes to the Uniform Commercial Code would be necessary in conjunction with the project that the study committee is recommending.

The report should also address the issues of availability of funding for a drafting committee and potential challenges to enactability.”

- 2. Appointment of Study Committee Members** Thereafter, the President appointed the following commissioners to the Study Committee:

William Breetz, Chair
Thomas Buiteweg
Bruce Coggeshall
Barry Hawkins, Division Chair
Dale Higer
Rusty LaForge
Carl Lisman
Fred Miller
Linda Neuman
Connie Ring
Mike Rubin
Martha Walters

- 3. Initial Conference Call Meeting:** After its initial appointment, on August 31, 2011 the Study Committee held the first of several conference call meetings. In that call, the Committee discussed the five points raised in the Executive Committee’s charge, namely:

- What subjects should a drafting committee address in a proposed Act?
- How might such an Act ‘relate’ to existing state mortgage foreclosure statutes—both judicial and non-judicial?
- What aspects of this Act might also require ‘conforming’ changes to the UCC – most likely, Articles 3 and 9?
- What funding – if any – might be available to support this drafting effort?
- If the ULC were to promulgate an act in this field, would it satisfy the ‘enactability’ standards as stated in the ULC’s “*2010 Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts*”:

(c) Every act drafted by the ULC must conform to the following requirements:

(2) There must be a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly.”

- 4. Appointment of American Bar Association Advisor** Shortly after the Study Committee was organized, the ABA appointed Barry Nekritz, of Chicago, as its Advisor to the Study Committee. Msrs. Nekritz and Breetz currently serve together as co-chairs of the Joint Editorial Board on Uniform Real Property Acts. Mr. Nekritz’s appointment has proved very fruitful to the Study Committee’s deliberations.

- 5. ULC Staff Relations** John Sebert assigned Kieran Marion as the ULC legislative counsel to support the work of the Study Committee. Both John and Kieran have been extensively engaged in the Study Committee's efforts and have been conscientious, diligent and creative in their efforts.
- 6. Engagement with Other JEBURPA participants** The Study Committee sought and received the assistance of Professor Wilson Freyermuth, the Executive Director of the JEBURPA, and Professor Dale Whitman, an emeritus member of the JEBURPA and prominent scholar in the field. Both men participated in the activities leading up to the Stakeholder meeting and in both the January 13-14 meetings.
- 7. Subsequent Conference Call Meetings/Other Communications** The Study Committee met several additional times by conference call, the last being held on Wednesday, January 11, 2012, immediately before the Stakeholder's meeting of Friday, January 13, 2012. In addition, ULC staff distributed 3 separate reports bearing on the subject of the meeting, one prepared by the Federal Reserve, one by a consumer representative and one by a law professor who was also in attendance at the stakeholders meeting.

The principal value of these calls and materials, together with the many communications between the Study Committee chair, the ABA advisor and ULC staff and ULC leadership, was to ensure that the full Study Committee was consulted regarding the planned Stakeholder meeting, was prepared for the meeting and was able to fully engage both in the stakeholder meeting and the subsequent Saturday meeting of the Study Committee members.

II THE STUDY COMMITTEE MEETING

The meeting was held in Washington DC in a conference room of the national law firm of K&L Gates, thanks to the efforts of one of that firm's partners, Commissioner Ray Pepe of Pennsylvania. A majority of the Study Committee members were present¹; they were joined at the meeting by the following persons:

Michael Houghton, President, ULC
Harriet Lansing, Chair of the ULC Executive Committee
John Sebert, Executive Director, ULC
Barry Nekritz, ABA Representative
Wilson Freyermuth, Executive Director, JEBURPA
Dale Whitman, Professor of Law, University of Missouri School of Law
Ray Pepe, Commissioner and partner, K&L Gates

A considerable effort had been mounted by the Study Committee chair, the ABA Advisor, the staff and others before the meeting to identify appropriate stakeholders and encourage their

¹ Committee members Miller, Walters, and Neumann and Division Chair Hawkins were unable to attend the meeting.

attendance at the Stakeholder meeting. *Exhibit A* to this Report is a list of those invited to attend the meeting, while *Exhibit B* lists those individuals and groups that actually did attend.

Significantly absent from the meeting despite what may fairly be described as very substantial efforts to seek their participation were all the major national organizations that purport to represent debtors. Attached as *Exhibit C* is a letter to the Study Committee chair dated December 1, 2011 detailing the reasons why the National Consumer Law Center declined our invitation to participate in the Stakeholder meeting. Their posture was adopted by several other groups and individuals.

Further, the nearly unanimous opposition of consumer groups to any ULC drafting effort was echoed by four of the six law professors in attendance and by the one individual lawyer from Maine who works regularly representing low income homeowners in that State. Attorney Thomas Cox, on the day after the meeting, sent the committee chair an email describing his reaction to the meeting. That email is attached as *Exhibit D*. Mr. Cox and the chair have remained in contact.

A summary of the discussion at that meeting, prepared by Executive Director John Sebert, is attached as *Exhibit E*.

III RECOMMENDATIONS OF THE STUDY COMMITTEE

Most fundamentally, the near-unanimous consensus of those present at the Saturday meeting, including members of the Study Committee, ULC members in leadership positions, the ABA advisor and others present, was that the ULC should appoint a drafting committee to promptly proceed to drafting an act.

In addition to its fundamental recommendation, the Study Committee addressed the following issues as directed by the Executive Committee:

1. What subjects should a drafting committee address in a proposed Act?
 - a. The invitation to the Stakeholders' Meeting contained a comprehensive list of issues which the stakeholders discussed at the meeting; that list is attached as *Exhibit F*; the list incorporates all the issues in the original charge to the Study Committee and substantially expands them, particularly with regard to the details of proposed consumer issues. The Committee recommends that all of these issues be addressed during the drafting process, although it is premature to decide which of these issues would ultimately be incorporated into any act.
 - b. As a general matter, there was broad but not unanimous consensus within the Study Committee that the overall thrust of any act should incorporate meaningful and substantial provisions addressing the concerns of borrowers in the current housing market crisis, and that the act should not be limited to expediting the foreclosure process, however warranted that may be in those circumstances where there is no practical remedy for the borrower.

- c. Finally, several of those present recommended that other discrete issues, such as the extent to which a lender might rely on business records to establish facts during a foreclosure proceeding, be included in the act. The Study Committee recommends that, while there may be additional discrete subjects that a drafting committee might wish to address in an act, the incorporation of subjects beyond those listed in *Exhibit E* should require prior approval from the Committee on Scope and Program.
2. How might such an Act ‘relate’ to existing state mortgage foreclosure statutes- both judicial and non-judicial?
 - a. First, the Study Committee recommends that the act be drafted as an ‘overlay’ act that could be incorporated into the existing laws of any state, rather than drafted as a proposed wholesale replacement of existing state foreclosure law.
 - b. Second, the Study Committee recommends that the act be drafted in such a way that it would apply to all states, whether that state used only judicial foreclosure or both judicial and non-judicial foreclosure procedures.
 - c. Third, the Study Committee recommends that the act apply only to ‘residential’ foreclosures, rather than to both residential and commercial foreclosures. The Committee reasoned that, unlike the housing market situation, commercial foreclosures do not presently appear to be an area where additional statutory provisions are necessary to address perceived issues.
3. What aspects of an Act might also require ‘conforming’ changes to the UCC –most likely, Articles 3 and 9?
 - a. The original direction from the Executive Committee was that the Study Committee should “identify areas, without drafting, where any conforming changes to the Uniform Commercial Code would be necessary in conjunction with the project that the study committee is recommending.” This subject was discussed at length at the Saturday meeting of the Study Committee.
 - b. The Study Committee discussion of how UCC Articles 3 and 9 might be implicated in a drafting process focused on what we called the ‘who’ and ‘how’ issues, which are the first two topics identified in the Executive Committee charge to the Study Committee – that is: (i) ‘who can commence a foreclosure action?’ and (ii) how do they commence that action, or, in the words of the Executive Committee resolution, ‘what evidentiary proof is required to commence a foreclosure?’
 - c. Stated differently, the Study Committee noted that the question of ‘who can commence an action’ depends on whether the promissory note secured by the mortgage is negotiable or not – and therefore whether UCC Article 3 applies. If the note is negotiable, then under UCC Article 3, in general, only a person in possession of the note may enforce it or foreclose the mortgage securing it. In contrast, if the note is not negotiable, then UCC Article 3 does not apply to that note, and the

consumer protection provisions of UCC Article 3 limiting who may commence an action do not apply. Hence, anyone with a contractual assignment of a nonnegotiable note can presumably enforce it and foreclose the associated mortgage.

The application of these concepts is highly problematic in present market conditions, since there may be millions of secondary mortgage market investors and securitized trusts that do not have and have never had possession of the original promissory notes.

- d. The Study Committee identified two related issues: (i) the question of who may commence an action in those cases where the original note has been lost; and (ii) how to address those statutes and court rulings that require a chain of assignments of the mortgage to appear of record to demonstrate that the ‘holder’ of the note is also the present ‘assignee’ of the mortgage.

As to the first, an exception to the rule of UCC Article 3 requiring possession of the note exists if the party enforcing it can properly file a "lost note affidavit" and provide acceptable security. However, under the version of UCC Article 3 in effect in 40 of the 50 states, it is usually held that only a party who actually had possession of the note and lost it can file such an affidavit; in other words, one cannot file the affidavit if the note was lost by a predecessor. A 2003 amendment to UCC Article 3 changing this rule has been adopted by only 10 states.

As to the second, while the Restatement of Mortgages, as promulgated by the ALI, states the well-established common law rule that the ‘mortgage follows the note’, and while UCC § 9-203(g) agrees, it is not clear either that (i) this statement overrides state statutes that require a recorded chain of mortgage assignments in order to foreclose, or (ii) that the mortgage will follow the note if the note is negotiable but the original document – as opposed to a copy - is not delivered with the purported transfer.

- e. The significance of these issues is considerable. This is particularly so in light of the fact that the Study Committee agreed that the question of whether or not the FNMA/FHLMC Uniform Note – the overwhelmingly dominant form of note in the residential housing market – is or is not a ‘negotiable instrument’ under UCC Article 3 remains a critical and unanswered question.
- f. Having identified these issues, the Study Committee discussed various means of how and whether to address them in any proposed act. As to ‘whether’ they should be addressed, the prospect of not addressing these issues seems inappropriate, since they presently pose important and unresolved issues in the field. However, the Study Committee did not agree on the question of ‘how’ to address them. Among the proposals were these:
 - o Seek to harmonize the language of any new act with the language of existing UCC Articles 3 and 9 without changing any language in either 3 or 9. Such a

‘harmonization’ might require a complex drafting effort, and it is not certain that it could be accomplished. In any event, this approach would not resolve the present uncertainty over the negotiability of the FNMA/FHLMC Uniform Note.

- Address the ‘who and how’ issues directly but in a separate act so as not to delay resolution of the other significant issues in the field.
 - Inform the ALI of these concerns and seek the appointment of an ALI observer/participant in the drafting process as has been successfully undertaken in the Manufactured Housing drafting effort.
 - Exempt mortgage notes from UCC Article 3 by declaring them to be nonnegotiable and draft a separate set of rules governing mortgage notes.
- g. Finally, whatever approach is taken, the consensus of the Study Committee was that the issues of interaction between the UCC and state foreclosure law are difficult and complex, and will require close cooperation and consultation with the Permanent Editorial Board for the UCC.

4. What funding – if any – might be available to support this drafting effort?

- a. The committee chair and the ABA advisor have both discussed this subject directly with potential funders and have some reason to believe that funding may be forthcoming. However, the committee chair has also discussed the subject with representatives of consumer groups that have decried the appearance of a conflict of interest when industry representatives fund a project that is perceived as being of interest to the funder. The fact is that substantial funding is likely to be required for drafting in this complex field, both for purposes of supporting multiple drafting committee meetings outside of Chicago, potentially supporting consumer representative participation in the drafting process, and for a substantial post-drafting educational effort by ULC staff and others.
- b. Were funding to be available from non-industry sources, it would be appropriate for ULC to seek multiple sources, in order to deflect the allegations of conflict. At the same time, the Study Committee was informed, first, that the likelihood of identifying sources of non-industry funding were small and, second, that industry funding in the case of at least the Uniform Environmental Covenants Act clearly did not result in a skewed drafting effort favoring the funders. Therefore, the Study Committee recommends that the ULC continue to pursue its discussions regarding funding from whatever known sources may be available, while not discounting the possibility of identifying other sources of funding, and that ULC staff should develop a realistic budget for the entire drafting effort.
- c. Finally, the Study Committee recommends that substantial expenditures in support of a drafting effort should not be incurred until ULC has received either the funds or, at

minimum, firm funding commitments from funding sources, in amounts consistent with a realistic budget.

5. If the ULC were to promulgate an act in this field, would it satisfy the ‘enactability’ standards as stated in the ULC’s “2010 Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts”?

- a. This subject was extensively discussed at the Stakeholder meeting. The Study Committee is aware that consumer groups, in urging that ULC not draft in this area, assert that any act would not be enactable in many states, will not promote uniformity, and will be ‘controversial because of disparities in social, economic or political policies or philosophies among the states.’ During the Saturday meeting, several members of the Study Committee and others within the ULC acknowledged that, in the weeks leading up to the Stakeholder meeting, they had substantial doubt as to the advisability of proceeding to drafting.
- b. Notwithstanding those concerns, a clear majority of those present now feel that the criteria for enactability have been satisfied. In part, this conclusion reflected several positive statements of support from at least one consumer group (the National Community Reinvestment Coalition), the expressions of support from the general counsel for the Federal Housing Finance Agency, positive remarks from the representatives of the New York Federal Reserve Bank and from the Conference of State Bank Supervisors and the statement from the Freddie Mac representative who stated that he thought that some consumer protection provisions might be a fair trade off for other provisions is such an act that would address some of the GSE concerns in existing state foreclosure laws. We were also aware of the possibility that financial support for the project may be available, as well as the far less certain prospect that the GSEs could, if they chose to, require adoption of this act as a condition for purchasing mortgages in a particular state.

One member of the Study Committee with extensive experience with the ULC real property acts, however, said he was at best ‘ambivalent’ about the project, in part because of opposition to the project from some important constituents and his concerns that some of the constituents expressing support for the project may not actually provide as consistent support as their comments on Friday suggested.

6. Other subjects addressed by the Study Committee

- a. *Title of the Act* The Study Committee agreed that the name of the Act should be carefully considered. While we discussed a number of possibilities, the title likely remains in flux.
- b. *Tracking Efforts by States* The ABA advisor has been instrumental in securing a commitment from various parties in Illinois to track any ULC drafting efforts with the twin goals that, first, the drafting committee would be able to get ‘real time’ political feedback from an important State as to the wisdom of proposed drafts, and

second, if the process works well, ULC should be able to secure an early enactment of the act. The Study Committee believes that it would be fruitful to seek similar tracking efforts in other states. Commissioner Pepe offered to explore that possibility in Pennsylvania and similar efforts are underway in Nevada.

- c. *Follow-up Matters*- The chair's notes and those of John Sebert will contain a number of matters that should be pursued if and when the Executive Committee determines that a drafting effort is to be pursued. Principal among them are the need to:
 - 1. Explore the extent to which we might identify additional voices within the American Bankers Association to engage with the ULC;
 - 2. Reach out to the Mortgage Bankers Association to gather greater support;
 - 3. Engage with the New York Federal Reserve regarding regional meetings;
 - 4. Work with Commissioner Ferry from Missouri and others to assist in building consumer engagement.

Attached Exhibits

- A List of stakeholders invited to attend the January 13 stakeholder meeting,
- B – List of those individuals and groups that attended the Stakeholder meeting.
- C December 1, 2011 Letter to the Study Committee chair detailing the reasons why the National Consumer Law Center declined to attend the Stakeholder meeting
- D Post stakeholder meeting reaction from Attorney Thomas Cox.
- E A summary of the Stakeholder discussion prepared by Executive Director John Sebert,
- F List of issues to be addressed by the Drafting Committee