Uniform Law Commission Sets Foreclosure Stakeholders Meeting for January 13 in DC

Earlier this year the Uniform Law Commission (ULC) established a Study Committee to consider whether it would be beneficial to draft a uniform or model law dealing with mortgage foreclosure issues. Members of the Study Committee have conversed telephonically for the purpose of preparing a preliminary report for the ULC Scope and Program Committee, which oversees whether drafting projects should be undertaken by the ULC.

As part of its task and to discuss the possible drafting of a Uniform or Model Mortgage Foreclosure Act, the ULC has scheduled a stakeholders meeting for persons who are knowledgeable about mortgage foreclosure law and issues, including consumer, lender, regulatory, and other governmental parties. The meeting will be held Friday, January 13, 2012, at the Washington, DC offices of K&L Gates, 1601 K Street, NW.

The ULC Study Committee hopes to explore several issues at the stakeholders meeting, including the following:

1. Should a potential act cover only residential mortgage foreclosure, or should it cover commercial situations?

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

3. Who can commence foreclosure?

4. What issues relating to assignments should be considered?

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

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

7. What is the appropriate role in the foreclosure process for ADR (alternative dispute resolution)?

8. What is the proper scope of statutory redemption periods?

9. What additional borrowers’ or consumers’ rights provisions should be considered?
10. Are there areas in the Uniform Commercial Code that might be affected by any Mortgage Foreclosure Act, and if so, are there any conforming changes that might be necessary?

A ULC memorandum provides additional information and highlights other issues to be explored. Stakeholders are invited to identify additional issues.

According to the memorandum, “[u]ltimately, the Study Committee and the ULC are interested in your views as to a number of key overall issues:

(1) whether there is a need for a new act dealing with mortgage foreclosure issues;

(2) if there is a need, which issues should be addressed in an act; and

(3) whether you believe that, if an act were well-crafted, there is a reasonable possibility that a substantial number of states would enact the legislation.”

ABA Working Group on Mortgage Foreclosure. In order to provide input to the ULC Study Committee, ABA has formed an ABA Working Group on Mortgage Foreclosure. Our Group is composed of bankers, financial institution attorneys, and state bankers association professionals. We typically meet by conference call on an as-needed basis. The ABA Group will be having a call shortly. If you have an interest in joining our Working Group or know someone whose expertise would be valuable, please contact ABA’s L.H. Wilson at lwilson@aba.com or (202) 663-5030. Thanks!

Updated Draft of Asset Freezing Orders Act Released for Comment

As highlighted in the 11/18/11 issue of the News, a Uniform Law Commission Drafting Committee charged with creating an Asset Freezing Orders Act met for two days of discussions beginning November 11 in Nashville, TN. An updated draft reflecting changes made at the meeting was recently released for comment. If you would like to receive a copy of this updated draft, please contact ABA’s L.H. Wilson at (202) 663-5030 or lwilson@aba.com.

Any resulting act will be important to our industry because an asset freezing order might affect banks in different ways. Banks might be on both sides of the coin. For example, an order might be sought by a bank against another person to prevent the dissipation of assets. An order might also impact banks when they hold the assets of a party against whom an asset freezing order is entered.

The Prefatory Note to the earlier meeting draft highlights the significance and goals of the Act: “This Act creates a uniform process for the issuance of asset freezing orders which are in personam orders freezing the assets of a defendant and imposing collateral restraint on non-parties such as the defendant’s bank in order to preserve assets from dissipation pending judgment.”

It goes on to stress that “[a]n asset freezing order is, by its very nature, an extraordinary remedy with potentially significant impact on the debtor whose assets are frozen and on third-parties holding those assets. Accordingly, it is extremely important that there be rigorous standards which must be met before such an order can be issued. Those standards appear in Sections 4, 5 and 7.”

Section 6 of the draft is particularly critical to financial institutions. The meeting draft’s Prefatory Note emphasizes that “[s]ince asset freezing orders also impact non-parties, it is important that the obligations of non-parties be set out with specificity. Those obligations are set out in Section 6.”

In this connection, please give special attention to the wording of Section 6(b) of the updated draft. The language of Section 6(b) was revised in the updated draft and reads as follows:

Section 6(b). “A non-party served with an asset freezing order shall promptly freeze the assets of the party against which the order is issued which are held on behalf of the party, after having a reasonable
opportunity to act thereon, taking into account the manner and time of service, until further order of the

court.”

Please consider the above wording, as well as the language of the updated draft. Members of the ULC
Drafting Committee are striving to make this a workable act, and they welcome our input. This project is
nearing completion. If you have comments or desire a copy of the updated draft, please contact ABA’s
L.H. Wilson as soon as possible at (202) 663-5030 or lwilson@aba.com.

ULC Study Committee on Choice of Law for Fraudulent Transfer Meets Again; Your Input Needed

Please see the 10/24/11 issue of the News for background on this project, available at

As determined at its October meeting, this Uniform Law Commission Study Committee met by conference
call on November 18, 2011. ULC study committees are typically charged with gathering information and
comment about a particular subject and with preparing a report and recommendation as to whether a
drafting project should be undertaken.

This Committee’s task is to consider and make recommendations concerning the need for and feasibility
of drafting a uniform act on choice of law rules in actions involving fraudulent transfers. At its October
meeting the Committee considered a detailed paper authored by Professor Kenneth C. Kettering entitled
“Codifying a Choice of Law Rule for Fraudulent Transfer: A Memorandum to the Uniform Law

The initial paragraphs of Professor Kettering’s paper highlight the proposal: “The Uniform Law
Commission (‘ULC’) has had great success in codifying the law of fraudulent transfer. The current uniform
law on the subject, the Uniform Fraudulent Transfer Act (‘UFTA’), promulgated in 1984, has been enacted
by 43 states. The UFTA was a modernization of the Uniform Fraudulent Conveyance Act (‘UFCA’),
promulgated in 1918, which was widely enacted in its time and remains the law in two states.

Neither the UFTA nor the UFCA contains any choice of law rule. They therefore leave to other law –
which in every state appears to be common law – determination of which jurisdiction’s fraudulent transfer
law applies when a given transaction is challenged. The purpose of this paper is to propose that the ULC
institute a project to draft a uniform law on that subject, either as part of a revised UFTA or as a stand-
alone statute.” [footnotes omitted]

Drawing from his experience as a practicing lawyer, Professor Kettering notes that the subject is of
“eminent practical significance.” He cites illustrative circumstances in which “[c]hoice of law can determine
the outcome of litigation over an allegedly fraudulent transfer.”

Following the November conference call, the Committee chair developed a draft of a report to the ULC
Scope and Program Committee. Please contact ABA’s L.H. Wilson at (202) 663-5030 or
lwilson@aba.com if you would like to receive the latest draft.

The draft’s general recommendation provides in part that “[t]he Study Group recommends that a drafting
committee be formed to prepare a uniform law on conflict of laws for fraudulent transfer. [footnote omitted]
All participants acknowledge that the conflict of laws issue does not arise with sufficient frequency to
make statutory resolution a matter of urgency. However, the object is desirable, a rule on the subject
should be fairly easy to formulate, and the benefits of having the rule would, the Study Group believes,
justify the costs of a drafting project.”

The draft also addresses issues relating to form of implementation, enactability, drafting considerations,
evidentiary rules, and other subjects.

The report will likely be sent soon to the ULC Scope and Program Committee for consideration. If you
would like to receive a copy of the draft report or have comments, please contact ABA’s L.H. Wilson as soon as possible at (202) 663-5030 or lwilson@aba.com.

Help Send the Message

Hundreds of bankers will gather in Washington March 19-21 to show policymakers that in troubled times, banks are part of the solution. Registration for the ABA Government Relations Summit is free – bring your directors, senior management, and other staff members to help tell Capitol Hill about the many positive outcomes produced by your bank’s efforts in the community. **Register today** (see [http://www.aba.com/Events/GRS.htm](http://www.aba.com/Events/GRS.htm)).

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