MEMORANDUM January 10, 2012

TO: ULC Study Committee on Mortgage Foreclosure Procedures

FROM: Thomas A. Cox, Esq.

RE: Commentary Responsive to "Issues to Address" Memorandum of December 7, 2011

I. Introduction.[1]

As the JEBURPA letter to the ULC Committee on Scope and Program dated May 30, 2011 (the "JEBPA Letter") asserts, there is a national "foreclosure crisis". The JEBURPA letter goes on to note that "substantial problems have emerged with servicers, law firms, and 'foreclosure processing' businesses."[2] Following these comments, the JEBURPA letter then makes the unwarranted and completely unsupported leap to the conclusion that

> [m]any of these problems reflect divergence, uncertainty, and variability not only between states with similar foreclosure methods, but also within states where (for example) different judges within the same state may establish different rules for foreclosure proceedings within their courtrooms.[3]

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[1] The author of this memorandum represented financial institutions and the FDIC during the Savings & Loan crisis of the late 1980s and early 1990s. There was a heightened level of foreclosure activity at that time, although nothing approaching the astonishing magnitude of today's crisis. The observations in this memorandum are drawn from that experience, the author's nearly thirty years of private legal practice in financial industry and bankruptcy work, and from has his full time work for the better part of the last four years in the Maine Attorneys Saving Homes (MASH) project that is jointly sponsored by the Maine Volunteer Lawyers Project and Pine Tree Legal Assistance. The observations set forth in this memorandum are those of the author alone and do not constitute policy statements of those organizations. The author practices in a judicial foreclosure state and does not presume to comment upon issues that relate to non-judicial foreclosures.

[2] It must be noted, however, that a major contributing force to the foreclosure crisis has nothing to do with the problems addressed by the JEBURPA report and by this memorandum, but are the direct result of the wild West lending and underwriting environment that prevailed until 2007.

[3] JEBURPA letter report dated May 30, 2011, 4th par.

Contrary to the unsupported conclusion in the JEBURPA Letter, Federal Reserve Governor Sarah Bloom Raskin, speaking just three days ago on January 7, 2012, did not find differing state foreclosure statues to be the cause of problems in the foreclosure process. Rather, she found that:

> These problems have included critical weaknesses in mortgage servicers' foreclosure governance processes, foreclosure document preparation processes and oversight and monitoring of third-party law firms and other vendors.

Raskin, www.federalreserve.gov/newsevents/speech/raskin20120107a.htm (last visited January 9, 2012). Similarly, the white paper of the Federal Reserve entitled "The U.S. Housing Market: current Conditions and Policy Considerations" http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf (lasted visited January 9, 2012) submitted by Fed Chairman Ben S. Bernanke to the House and Senate on January 4, 2012, noted that investigations of servicers found "critical weaknesses at all institutions examined, resulting in unsafe and unsound practices and violations of federal and state laws." The Federal reserve white paper goes on to note four factors which "might contribute to a more functional servicing system in the future, but not one of those factors was involves overriding the variation among state foreclosure statutes with new legislation.

The JEBURPA Letter fails to consider what the causes are of the "substantial problems" that it finds to exist. No consideration was given to the question of whether and to what extent the problems have been directly caused by the foreclosure industry itself, nor was consideration was given to whether the foreclosure industry itself has the ability and responsibility to correct many of the problems that have been noted before remedial legislation is considered.

Before there can be any determination made as to whether there is a need for a new uniform act dealing with foreclosure issues, there must be an honest accounting of (1) what the problems are that cause legislation to be considered, (2) what has caused those problems to occur, and (3) only then, whether the problems lend themselves to a legislative solution that would be offered by a new uniform act. Unfortunately, it appears that the JEBURPA letter of May 30, 2011 and all of the subsequent steps leading to this stakeholders' meeting have failed to conduct the step 2 analysis. Further, it appears that the assumption has been made that new legislation is the solution to the perceived problems without there having been analysis of whether other non-legislative solutions might be more appropriate.

An example of the lack of analysis of the causes of the problems under consideration appears with respect the issue raised by FHFA about asserted variations in evidentiary standards. Without any analysis of why that is occurring, it makes no sense to jump to the conclusion that a statute is needed to set evidentiary standards for foreclosure cases where statutory proof requirements already exist and rules of evidence are fully developed and in place. Foreclosures are controlled by statute and those statutes are generally clear about the proof required of a party seeking to foreclose. It is open to doubt that the addition of new statutory requirements will resolve variations among judges as to how they chose to interpret and/or enforce statutory requirements. Once a careful analysis is conducted as to the causes of the issues being raised, and once consideration is given to potential non-legislative solutions, the need for a new uniform foreclosure statute becomes murky at best.

The JEBUPA Letter gives no consideration to the fact that, since the inception of the United States, states have developed their various foreclosure statutes over a period of more than two hundred years, to meet the needs of their own citizens. The fact the development of these various statutes have produced different methods of foreclosure, should be considered to be one of the strengths of this country rather than an obstacle to be overcome for the benefit of the foreclosure industry whose problems are mostly of its own making.

The author respectfully suggests that the stakeholders' meeting on January 13, 2012 should first address these issues. It is further suggested that the expedited track of the Study Committee's work should be slowed to permit it to conduct a reasoned, full and fair analysis of the causes and other possible non-legislative solutions to the problems under consideration before moving to a decision on whether to recommend the commencement of a uniform act drafting project.

The reasons that the work of the Study Committee has been set on an "expedited" track by the July 21, 2011 letter to JEBURPA by ULC President Michael Houghton are not stated. It is known that a ULC process of drafting a new uniform act is generally a two to two and one half year process and that, even if a new uniform act is produced, the time to passage in the various states is an additional multi-year process of indeterminate length. The work of the Study Committee and a potential drafting committee, if they were to produce a new uniform foreclosure act, are not likely to produce a solution during the present foreclosure crisis. These important issues are deserving of a deliberate and careful review, not an expedited report produced in one day after an initial stakeholders' meeting is concluded.

II. Identification of the respective and differing interests of the foreclosure industry and homeowners.

A determination of whether there are problems and issues in the foreclosure process that require solution, and a determination of the nature and extent of those problems is very much a function of who is making those determinations and what their interests are in the foreclosure process. It has been troubling for the author to observe, both at the May 9, 2011 PEB Stakeholders Meeting and also in some of the materials leading to this meeting, the making of assertions that proposals being made would be in the best interests of homeowners, without the speakers showing any awareness of what the interests of homeowners truly are.

The mortgage industry is comprised of financial institutions, and corporations that provide services to them, whose prime interests lie in maximizing economic returns and minimizing economic costs. Making money is the reason for being of these enterprises. There is nothing pejorative in this observation; it is simply reality.

One the other hand, homeowners' interests are far more diverse and nuanced. Minimizing the costs associated with mortgage borrowing and minimizing economic losses in foreclosure are obviously of great interest to homeowners, but their interests extend well beyond that. They are emotionally attached to their homes and their homes represent places of safety and security for their families[4]. Losses of their homes produce emotional suffering, mental illness, impairment of children's' educations and other major life disruptions. As a consequence, it must be recognized that, among the legitimate interests of homeowners in the foreclosure process, are at least the following:

<u>Transparency</u>. Homeowners have a vital interest in a foreclosure process, including loan modification proceedings, where the rules are knowable and understandable, outcomes are sensible and predictable, and the identity and interests of the parties affecting the outcomes are known and comprehensible.

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[4] The individual and societal importance of individuals' homes has always been recognized in American law and policy. It is recognized in bankruptcy laws, income tax laws, property tax rates, federal mortgage lending standards, and a myriad of other contexts. In the *Ibanez* case, the court explicitly recognized this factor. It stressed that the securitization of mortgages does not justify carelessness in foreclosure procedures; those mortgages still convey "legal title to someone's home or farm, and must be treated as such."

Pitegoff & Underkuffer, *An Evolving Foreclosure Landscape, The Ibanez Case and Beyond,* American Constitution Law Society at *http://www.acslaw.org/publications/issue-briefs/an-evolving-foreclosure-landscape-the-ibanez-case-and-beyond*

Honesty. Homeowners have an interest in a foreclosure process that is conducted honestly, with parties in court proceedings presenting honest evidence, with servicers providing honest accountings of loan histories, with loan owners and servicers presenting honest statements about loan modification matters and honest statements about dual tracking measures.

Rationality. Homeowners have an interest in having the parties controlling their mortgages acting in a rational ways (for example, an interest in having loan owners and their servicers make logical decisions to modify loans when a net present value analysis shows that the loan owner will benefit from a loan modification rather than a foreclosure.)

Good faith. Homeowners have an interest in dealing with parties, such as loan servicers, whose economic self-interest does not motivate them away from the making of honest and rational decisions and whose economic self-interest does not conflict with the best interest of the parties who own the loans in question. Thus they have an interest in dealing with loan servicers whose decisions on the handling of first mortgage foreclosures are not affected by these same servicers' ownership of second mortgages on the same properties, and they have an interest in dealing with loan servicers whose fees structures do not motivate them toward foreclosures where loan modification are in the best interests of loan owners.

III. The problem needing attention from the perspective of the mortgage foreclosure industry.

It appears that Part III B, ¶¶ 1-7 and 9-12 of the "Issues to Address" memorandum of December 7, 2011 sets forth the problems that the mortgage industry wishes to see addressed by a legislative solution.

IV. The problems needing attention from the perspective of homeowners' representatives.

Paragraph 8 of Part III B of the Issues Memorandum addresses only very limited aspects of the problems experienced by homeowners in this foreclosure crisis. It thus appears that there has been minimal involvement of homeowner interests in the framing of the JEBURPA letter report of May 30, 2011 or the "Issues to Address" memorandum of December 7, 2011. A statement of additional issues, and a restatement of some of the issues stated in Part III. B. 8. of the Issues Memorandum, follows. This list represents only the observations of the author of this memorandum, and undoubtedly would expand with the input of other parties representing homeowner interests.

A. Deception of courts, mediators and homeowners as to identity of owners of loans being foreclosed.

1. Deception of homeowners, courts and mediators by the GSEs and their servicers, as to the true identity of the parties owning mortgage loans being foreclosed upon, has resulted in:

a. Inability of mediators to know what loan modification standards apply to any given loan coming before a mediator.

b. Inability of homeowners and their lawyers to know the identity of the party owning the loans and having the ultimate authority to modify the loans;

c. Wasted time for lawyers for homeowners and courts in pre-trial discovery disputes relating to determination of the identity of the true owners of mortgage loans being foreclosed upon.

2. The MERS System has been and continues to be a source of problems for courts, mediators and homeowners in determining the identity of the parties who own loans in foreclosure. [5] It was only under public pressure that MERS began to identify the owners of the mortgage loans registered on its system.[6] Even now, disclosure of "investor identity" information on the MERS system is voluntary with those investors

[5] It is useful to note that from its inception, the MERS system was not intended to provide information about the identity of owners of the notes secured by mortgages registered on its system. In a lengthy legal opinion letter dated September 1, 1997 from the law firm of Covington & Burling to William Hultman, Corporate Secretary of MERS, opining about the legality of the MERS system, the law firm stated in part as follows:

> Accordingly, there is no reason why, under a mortgage, the entity holding or owning the note may note keep the fact of its ownership confidential. . . the security agreement, when recorded, merely provides notice to the world that a lien has been placed upon the debtor's property as security for the note. The public has no significant interest in learning the identity of the holder of the note.

[6] About two years ago MERS began allowing any member of the public to look up a specific loan on the MERS website (https://www.mers-servicerid.org/sis/) and to determine the identity of the servicer and the investor in the loan. Within the last few months, MERS again narrowed access to this information by requiring the insertion of individual borrower social security numbers in order to determine the identity of the owner of a loan registered. This restriction of access nullified ongoing projects by legal researchers and scholars to study and catalog issues and inaccuracies created by the MERS system. Similarly, and in a further narrowing of mortgage industry transparency, MERS has recently removed public access on its website to the Merscorp, Inc. Rules of Membership, the MERS Terms and Conditions, the MERS Procedures Manual and other such documents which allowed the public, and courts to try to understand how MERS actually operates.

and thus is often unavailable, even to homeowners trying to determine the identities of the owners of their loans. Further, when a mortgage is registered on the MERS System, that system never identifies the actual trust that owns the loan. Contrary to the MERS claims that it accurately tracks the ownership of mortgage loans registered on its system, MERS does not obtain, record or track the identity of the trusts that own the loans registered on its system, The lack of this information makes it impossible to locate the pertinent pooling and servicing agreement which is needed to determine, among other things, whether there are investor restrictions which limit the ability of a servicer to modify loans in that trust.

B. Abuses by servicers and mortgage loan owners of the judicial foreclosure process.

1. There is a constant pattern of initiation of foreclosures by servicers where the foreclosing parties lack the right to enforce, or lack proof of the right to enforce, under UCC Section 3-301, resulting in extensive and wasteful litigation and waste of judicial resources when standing issues are contested.

2. In states with statutes and/or court decisions permitting foreclosures only to be conducted by owners (as opposed to mere holders) of mortgage loans, there are persistent failures of servicers and their lawyers to bring foreclosures in the names of the actual loan owners.

3. There is a pattern of frequent dismissals of judicial foreclosures when servicers' lawyers are confronted with valid legal defenses, followed by delays and re-filings driving up costs of foreclosure, all the while refusing to consider affected homeowners for loan modifications.

4. There are constant, pervasive and truly outrageous, abuses of the pre-trial discovery process by servicers and their lawyers by refusing to provide discovery of legitimate discovery materials such as original notes and other loan documents, payment histories, records accounting for payments by homeowners and charges to the homeowners' loan accounts for property inspections, forced place insurance, and other unidentified fees. One egregious example is the regular objection of servicer lawyers to produce relevant pooling and servicing agreements based upon claims that these documents contain information that constitute confidential trade secrets, even though these documents are publicly accessible on the SEC Edgar website.

5. There are constant and pervasive failures of lawyers hired by servicers to file legally sufficient summary judgment motions including repeated and ongoing failures to

comply with longstanding proof requirements of F.R .Civ. P. 56(e), and equivalent state rules, proof requirements.

6. There has been widespread irresponsibility and dishonesty of servicer witnesses in affidavits filed in support of summary judgment motions in foreclosure and bankruptcy cases and in proofs of claim and motions for relief from stay in bankruptcy cases.

7. There are constant failures of servicers' lawyers to attach accurate and complete copies of loan documents to foreclosure complaints, affidavits, and bankruptcy proofs of claims evidenced by late (often years late) production of differing versions of the same notes showing indorsements and mortgage assignments inconsistent with original filings.

8. There is substantial evidence of the fabrication by servicers of false note indorsements and false mortgage assignments during judicial foreclosure process.

9. There are constant refusals of servicers and their lawyers to produce original mortgage notes when seeking judgment in court proceedings as required by UCC Section 3-308(b).

C. Obstruction of court ordered foreclosure mediation programs and in efforts to modify loans.

1. There is widespread stonewalling by servicers in mediation proceedings by:

a. Failing to provide information and loan documents when and as required by mediation rules and statutes;

b. Falsely claiming failures to receive homeowner loan modification applications or repeated actual losses of such documents;

c. Failures to provide servicer representatives to participate in mediation who have reviewed the servicer records and who have actual authority to make decisions on loan modifications;

d. Failures to keep agreements reached in mediation proceedings.

2. There are constant failures by servicers to convert temporary payment plans to permanent loan modifications even where numbers show that loan should be modified.

3. There are constant failures and refusals by servicers to evaluate homeowner applications for HAMP and in-house modifications both within foreclosure mediation proceedings and outside of mediation.

4. There are problems with dishonesty of servicers in foreclosure mediation and other loan modification efforts with claims that investor restrictions prohibit modifications when such is not true or when such restrictions have been waived.

5. There is a major problem with failures of servicers to evaluate and respond in a timely manner to short-sale and deed-in-lieu applications and sale offers.

6. There are pervasive refusals of loan owners to modify loans that are substantially underwater.

7. There are constant refusals of second mortgage owners to modify loans where even first mortgage is underwater, thus forcing homeowners into otherwise unnecessary Ch. 13 cases to strip second mortgage liens.

D. Other problems.

1. Servicers regularly fail to conduct responsible foreclosure auction sale procedures designed maximize sale prices and minimize deficiency claims.

2. There are constant failures of servicers to give default and right to cure notice that comply with state statutes and/or with specific terms of Paragraph 22 of Uniform Instrument mortgages.

V. Causes of the problems leading to the foreclosure crisis.

The following are some of the causes of the problems encountered in the foreclosure process that have come to the attention of the author. No doubt other homeowner representatives would add to this list.

A. Servicer incentives as cause of problems.

1. The placement of authority to conduct foreclosures and to evaluate loans for modifications in hands of servicers where their financial incentives are not aligned with investors and favor foreclosures over loan modifications even where the best interests of mortgage securities investors would be to modify loans. See Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. Law Rev. 755; Levitan & Twomey, *Mortgage Servicing*, 28.1 Yale Journal on Regulation 2011.

2. The GSEs' allowing servicers to service GSE first mortgage loans while at the same time allowing the servicers to maintain ownership of second mortgages on the same properties, resulting in conflicts of interests for servicers who refuse to properly evaluate the GSEs' first mortgage for modification.

B. Causes of servicer and GSE misconduct in loan modifications.

1. Lack of oversight of servicers and enforcement of servicers' obligations is a major cause of problems. There has been an inadequate effort by Treasury to oversee servicers' implementation of HAMP requirements and little to no sanctioning of servicers who fail to comply.

2. Lack of a private right of enforcement of HAMP and other governmental loan modification programs, leaves little to no enforcement of servicer obligations to comply with the rules and guidelines of those programs.

3. The GSEs and the servicers fail to follow responsible practices in handling the short sale process. This results in constantly lost sales, declining property values, economic loss to the GSEs and unnecessary deficiency liabilities for homeowners. See December 30, 2011 story in the Tampa Bay Times at http://www.tampabay.com/news/business/realestate/frustrated-tampa-bay-realtor-gets-short-sale-miracle-from-freddie-mac/1208247

C. Causes of servicer and GSE misconduct in foreclosure procedures.

1. There is a pattern and culture of unethical and dishonest servicer conduct in foreclosures practices going back well before beginnings of foreclosure crisis. *See FNMA v. Bradbury*, 2011 ME 120, ___ A.3d ___, 2011 Me. LEXIS 120 where the Maine Supreme Court, facing a six year pattern of misconduct by the fifth largest loan servicer found its practices to be "reprehensible", that it was guilty of "fraudulent evidentiary filings" and that its conduct was "ethically indefensible" and constituted an "alarming lack of respect for the nation's judiciaries." *Id* ¶7*.* The dissenting justice in *Bradbury* concluded that "there was good cause to believe that such conduct was not limited to this case and that management of [the servicer] 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* ¶17. The conduct of this particular servicer has been found by foreclosure defense attorneys to be rampant throughout all of the major servicers and the default servicers hired by them. This servicer misconduct slows foreclosures, increases litigation costs for loan owners and homeowners, impairs the rational functioning of loan modification efforts and can often be one of the sources of inconsistent judicial rulings on evidentiary and foreclosure issues.

2. The hiring by loan servicers and GSEs of lawyers and law firms not competent and/or not motivated and/or not having sufficient professional responsibility to properly and responsibly conduct large volumes of foreclosures—for example the David Stern firm in Florida and the Steven Baum firm in New York. This leads to numerous

defective foreclosures and foreclosure titles. Further, these practices are the cause of many of the inconsistencies in evidentiary rulings complained of by FHFA.

3. The failure by GSEs to remedy practices by firms such as LPS, Promis, LOGS and similar back office default service providers to extract technical fees and similar charges from law firms and to tolerate other fee splitting practices. This diminishes foreclosing law firm revenues and correspondingly increases the tendency of such law firms to delegate foreclosure work to non-lawyers and inadequately trained and inadequately supervised personnel.

4. The failures of servicers and GSEs to adequately supervise the conduct of lawyers hired by them, and the GSEs systems of grading foreclosure lawyers for speed without regard to competency, accuracy and professional responsibility. This again leads to flawed foreclosure proceedings, unnecessary litigation and waste of judicial resources, and inconsistent evidentiary rulings. The irregular and improper practices of the Stern and Baum firms were widely known for many, many month before the GSEs took action to remove their work from these law firms. Responsible levels of GSE supervision would have prevented the development of these problems in the first instance

5. The determination by FHFA to allow the GSEs to continue their deceptive practice of concealing the extent of their roles in the foreclosure process by mandating that servicers not foreclose in the names of the GSEs[7] causes confusion of judges, homeowners and foreclosure mediators, and results in unnecessary litigation, and impairment of the efficacy of foreclosure mediation efforts. There is no apparent justification for this practice of the GSEs because it gains them no legal advantage in foreclosure proceedings. Thus, one is left to conclude that the purpose of these deceptive practices is to conceal from the public and from Congress the true scope of the role of the GSEs in the foreclosure crisis.

6. The establishment by servicers and default servicers of computerized communications systems with foreclosure lawyers prevents and/or discourages reasonable and necessary attorney/servicer communications necessary for foreclosure lawyers to conduct proper and honest foreclosures and leads to improper and/or flawed

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[7] For example, Freddie Mac Servicing Bulletin Number 2011-5 dated March 23, 2011 (http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1105.pdf) states on page 2 that "Servicers must prepare an assignment of the Security Instrument from MERS to the Servicer and instruct the foreclosure counsel or trustee to foreclose in the Servicer's name and take title in Freddie Mac's name."

foreclosure proceedings and the waste of judicial resources. *See In re Taylor*, 655 F.3d 274, 2011 U.S. App. LEXIS 17651 (3rd Cir., Aug. 24, 2011).

7. The use by GSEs and servicers of default servicers who maintain irresponsible and dishonest default servicing practices leads to improper and flawed foreclosures. *See* complaint filed December 15, 2011 in State *of Nevada v. Lender Processing Services, Inc. et al.,* pending in the District Court, Clark County Nevada as Case No. A-11-653289-B.

D. Causes of misconduct of lawyers hired by servicers and GSEs.

1. Due to the financial compensation and flat fee system set up by servicers and the GSEs, law firms are incentivized to constantly cut corners in the prosecution of judicial foreclosures. They avoid taking the necessary time to prepare proper motions for summary judgment. They avoid taking the necessary time and to spend the money necessary to obtain in advance, and verify the accuracy of, all documents necessary for the foreclosure process.

2. Again, due to the perverse financial incentives for the foreclosure law firms, the law firms when confronted with failed foreclosure cases, do not correct their defective practices, knowing that they face opposing lawyers in fewer than 10% of cases, and knowing therefore that the profits from doing all foreclosures on the cheap will outweigh the costs to them in the small number of cases where their defective and dishonest practices are challenged and cause additional expense.

3. The law firms hired by the GSEs and servicers often fail to provide adequate proof in foreclosure trials because they do not have lawyers who know how to offer proper evidentiary proof in contested litigation cases.

4. Because lawyers hired by the servicers have minimal financial incentives to do competent work, and seem to lack the professional responsibility to do such work even in the face of such perverse incentives, the presentation of their cases often lead to inconsistent and confused court decisions.

E. MERS causation of problems in mortgage foreclosures.

1. Until its Membership Rule 8 was changed effective July 21, 2011 (by MERS Policy Bulletin Number 2011-5), the MERS authorized the practices of servicers and loan owners to conduct foreclosures in the name of MERS, thereby concealing from homeowners and courts the identity of the mortgage loan owners having the real interest in the foreclosure action. This practice, encouraged by MERS and expressly approved by the GSEs, led to substantial confusion in court decisions and much unnecessary litigation and waste of judicial resources.

2. The MERS system for allegedly tracking ownership of mortgage loans, when such ownership is in fact not accurately tracked on the MERS System, has caused confusion in both non-judicial and judicial foreclosures and unnecessary and extensive litigation. The inadequacies of the MERS System has led to the filing of numerous foreclosure cases where the foreclosing parties lack the necessary proof of standing and/or the right to enforce the mortgage instruments.

3. The MERS system of appointing over 20,000 assistant vice secretaries and vice presidents who have no loyalty or responsibility to MERS, who are not supervised by MERS, and who are solely employees of servicers, default servicers, lawyers for servicers and other related parties has resulted in repeated filings of false and defective mortgage assignments. MERS and its founders, including the GSEs, could have set up an honest and transparent system using powers of attorney to enable servicer employees to execute mortgage assignments. Instead, its dubious practice of appointing thousands of certifying officers and purportedly granting them status of corporate officers, created and atmosphere of widespread judicial deception. With MERS' avoidance of the use of powers of attorney, MERS thereby evaded the proof that would have been required of those powers of attorney with each MERS assignment of mortgage and corresponding proof that the attorneys in fact were acting within the scope of the powers granted. By opting for the deceptive "certifying officers" scheme MERS deprived judges of proof that the so-called certifying officers really were appointees of MERS and that they really were acting within the scope of the authority granted to them. This scheme has led to the recording of many MERS mortgage assignments by persons who have never been appointed by MERS to act for it.

F. Judicial errors as cause of problems in mortgage foreclosures.

1. Overloaded and under-financed judicial systems where judges do not have the time to properly review judicial foreclosure filings have been one of the causes of inconsistent judicial standards of proof. The use of retired judges in the infamous Florida "rocket docket" is a clear example.

2. The large numbers of judges who have not had the benefit of judicial education and training in current foreclosure practice in order to develop an understanding of how the mortgage industry and securitization process functions, and the roles played by servicers, default servicers and MERS in that system. This also has been a cause of inconsistent rulings.

3. A perhaps small, but nevertheless disturbingly substantial, number of judges continue to believe that the nation's financial institutions will not lie to or deceive them, or that their lawyers will not try to cheat the judicial system and that all foreclosure

defense lawyers are being obstructive in insisting upon competent and adequate proof of the right to foreclose. Many of these judges disparagingly accuse foreclosure defense lawyers of seeking a "free house" for their clients and conclude that when a homeowner is indebted on a mortgage loan, judgment should be entered for any plaintiff asserting the right to enforce it without regard to normal standards of evidence and proof. Thus, the decisions of these judges will often conflict with the decisions of those judges who truly review and honestly decide each case on its merits and who are willing to recognize when parties enforcing mortgages present false, misleading or insufficient evidence. This disparity in judicial attitude in judicial foreclosures accounts for much of the inconsistency in evidentiary rulings complained of by FHFA.

VI. The Study Committee should recommend against the commencement of a drafting process for a new uniform mortgage foreclosure act.

A. Most of the problems complained of by the foreclosure industry are of its own making and it has the ability to resolve those problems without new legislation.

The litany of problems and related causes outlined above almost entirely flow from foreclosure industry acts of commission or omission. The industry has created processes for the handling of foreclosures that are deceptive, confusing, opaque, and even dishonest. At the May 9, 2011 PEB stakeholders' meeting one of the commentators perceptively noted that new laws would not prevent dishonest conduct. Similarly, here a new uniform foreclosure act will not solve problems in the present foreclosure environment until there is a reformation by the foreclosure industry itself of its practices and the implementation of the industry, especially the GSEs, to properly and responsibly supervise the servicers and lawyers employed by them. The foreclosure industry has the capacity to resolve most of the problems outlined in this memorandum, and it would be imprudent for the ULC to advance a proposed new foreclosure act until the foreclosure industry first reforms itself.

B. A uniform act regarding foreclosure practices and procedures would not satisfy the ULC Criteria for uniform acts.

While a potential uniform foreclosure act would meet ULC Criteria §1(a), in that foreclosure acts are clearly appropriate for state legislation, it would not meet any of the other ULC Criteria for New Projects.

Such a uniform act would not meet ULC Criteria §1(b) because it is not clear that residential foreclosure law is a subject where "uniformity is desirable and practical." The JEBURPA letter of May 30, 2011 asserts that uniformity is desirable and practical,

but provides no support for that assertion. A determination of whether uniformity is "desirable" is a matter of one's perspective and interests. (See Section II of this memorandum.) From the perspective of the mortgage and foreclosure industry, a uniform act may be desirable because it may believe that a uniform act will reduce costs and increase profits. No analysis has been presented as to why it would be desirable on a state-by-state basis to have a uniform act replace the various states' developed laws on foreclosures. Indeed, individual states are creating their own unique solutions to the foreclosure crisis and that where the development should be coming from.

Also, with respect to ULC Criteria §1(b), the JEBURPA report is equally silent on the issue of whether a uniform law on foreclosures is even a practical idea. The practicality of drafting a uniform act that will allow the various state foreclosure statutes to remain in place while overlaying new and additional requirements is highly doubtful. The ULC experience with the Uniform Nonjudicial Foreclosure Act, which has not been adopted in any state, strongly suggests that it is not at all practical to believe that now a uniform act can be created to apply to judicial and nonjudicial states alike with any reasonable prospect for enactment (also a requirement of ULC Criteria §1(c)(2)).

The JEBRUPA Letter asserts that ULC Criteria §1(c)(1) is met by asserting that the required "obvious need for an act" is established because the foreclosure crisis has revealed "structural weaknesses" in the foreclosure system. Much of this memorandum describes how problems in the foreclosure process are the direct result of failures of and refusals by the foreclosure industry to conduct itself responsibly and in accordance with state laws. The fact that the foreclosure industry does not like various state foreclosure laws or that it could increase profits by changing them are not signs of "structural weakness" in those laws. There is not an obvious need for an act as much as there is a need for the foreclosure industry to change its practices and to respect and act in accordance with state laws.

It is equally difficult to see how the requirements of ULC Criteria §(1)(c)(3) are met. A uniform foreclosure act will not meet the subpart (i) requirement to "facilitate interstate . . . relations". This situation is not one like the UCC or UETA or Uniform Child Custody Act where an act will facilitate the flow of transactions across state lines or will avoid conflict of laws among states where more than one state's laws might apply. Similarly, it is difficult to see how the subpart (ii) criteria are met as it is not apparent that there is any "need common to many states" which must be addressed. Neither are the various states expressing needs for uniform legislation, nor are the citizens of individual states expressing such needs; rather it is the mortgage and foreclosure industry that is expressing such a desire. And, under the subpart (iii) criteria there simply is no evidence that the diversity of foreclosure laws among states causes citizens

of one state to be mislead, prejudiced, inconvenienced or otherwise adversely affected in dealings in other states or with citizens of other states in moving from state to state, as a mortgage and a foreclosure function only within the single state where the mortgaged property is located.

C. Under the ULC Criteria §1(e)(2), the establishment of a drafting committee to prepare a proposed uniform foreclosure should be avoided.

The ULC should avoid taking on drafting projects that are "controversial because of disparities in social, economic, or political policies or philosophies among the states." ULC "Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts", §1(e)(2). The undertaking of a project to draft a proposed uniform foreclosure act would violate of this prohibition.

There are indeed "disparities in . . .political policies or philosophies among the states" regarding foreclosure as is most clearly evidenced by the fact some states have judicial foreclosure statutes and others allow non-judicial foreclosures. These differences are not mere variations among similar statutes that can be rendered consistent by a uniform act; rather, they are reflective of substantially differing viewpoints on what levels of protection differing states have, as matters of political development and philosophical approach, chosen to provide to the homeowners and mortgage holders in their respective states.

The variation among states in the foreclosure redemption periods is equally reflective of substantial political and philosophical approaches among the various states. There can be no clearer evidence of that then the facts cited in Section III. B. 6. of the Issues Memorandum—in some states there are no redemption periods while there are substantial redemption periods provided for in other states. Section III. B. 6. of the issues memorandum asks "[w]hat is the proper scope of statutory redemption periods". Any determination of what "proper" redemption period should be left to the states as legitimate exercises of their political powers.

The various foreclosure statutes among the states are the result of years of development, negotiation and legislative response to political policies and philosophies. There is no property more personal than one's home and the varying social and economic conditions among the states have played significant roles in the shaping of their respective foreclosure statutes. These statutes are integrated in the sense that their various provisions all represent trade-offs and agreements reached over time to arrive at comprehensive foreclosure schemes. For example, the existence or length of a redemption period in one state's statute my have been directly impacted by negotiations over the content and length of any pre-foreclosure notice period mandated by that

statute. It would be inappropriate for the ULC to presume to replace those judgments and compromises and other state inputs into the development of their own unique foreclosure statutes.

D. A new uniform act would deprive states of their traditional and unique roles in development and evolution of their own foreclosure procedures statutes pertaining to the homes of the residents of their states.

The body of state law regarding foreclosures in each state has developed along its own path. The similarities and differences have existed for well over two hundred years. Foreclosures have occurred under this variety of state laws without any huge uproar until recently. The mortgage finance industry originated and securitized the trillions of dollars of mortgages loans now in or at risk of foreclosure knowing full well the variety of legal landscapes from whence those mortgages were flowing. Indeed, the September 1, 1997 legal opinion letter to MERS from Covington & Burling referred to in footnote 5 above describes with care the law firm's effort to obtain of local legal opinions on the legality of the MERS system from lawyers in all fifty states. The variety of state mortgage statutes was not seen as any impediment to the implementation of the radical new MERS scheme for the tracking of ownership of mortgage loans.

Most of the "substantive issues" outlined in the December 7, 2011 "Issues to Address" memorandum really are serious foreclosure policy issues that are most appropriately left in the hands of the various states. For example with respect to the , Issue 6 question note above addressing "the proper scope of statutory redemption periods", the memorandum boldly asserts, without any adequate basis, that "[t]here is a need for harmonization with regard to statutory redemption."   This conclusion suggests that the stakeholders' meeting is starting off as window dressing for conclusions already reached. Further, it is not possible to understand why the ULC would presume to make, or to have the ability to develop, a determination of a single "proper" redemption period for any single state or for all states together. This is uniquely a part of individual state foreclosure law that should be left with the states

Valuable innovation in state laws in the area of residential foreclosure laws is exemplified by the various efforts of a number of states to develop foreclosure mediation programs. Some programs have been highly successful, and some not so much so. The states have created these programs largely in response to the failures of the servicers to open and maintain reasonable and responsible means for homeowners to seek and achieve loan modifications. Many if not most of these various mediation programs have all encountered substantial difficulty in achieving compliance from servicers. For example, Nevada's Supreme Court laid these problems bare in two recent decisions.

Pasillis v. HSBC Bank, USA, 255 P.3d 1281(Nev. 2011) and *Leyva v. National Default Serv. Corp.,* 255 P.3d 1275 (Nev. 2011). There is no reason at this early stage in the development of these state programs to suddenly pull away from the various states their abilities to continue to experiment with and develop the programs that are most effective in and suitable to their respective jurisdictions and which are most able to protect their homeowners against the ongoing failures of the servicers to be responsible participants in these programs.

F. The highly politicized nature of the debate over foreclosure issues, nationally and within specific states, makes it unlikely that a new uniform act would be enacted.

It is not possible to overstate the highly charged political climate that the ULC is entering in its consideration of a uniform foreclosure act. The financial industry brought the country's economy to its knees with its imprudent, irresponsible and often illegal and fraudulent lending practices. Having achieved that, it has attempted to collect these loans by foreclosures upon millions of homeowners through practices found to be "reprehensible", "fraudulent", and "unethical". *FNMA v. Bradbury*, 2011 ME 120, ¶6, ___A.3d ___. Courts, legislators, regulators, the media and the public have condemned the foreclosure industry's practices. Yet it continues to fail to act to correct the practices that are the cause of so many of the present problems. A suggestion from the ULC to state legislators that they should surrender their developed bodies of foreclosure statutes and case law, in favor of a new statute designed to benefit the foreclosure industry and to streamline its practices just does not make practical or political sense. Such an effort will unleash a firestorm of criticism. It is truly difficult to imagine that, in this climate, a proposed uniform foreclosure act would stand any reasonable chance of enactment.

VII. Conclusion.

A careful review of the ULC Criteria for New Projects establishes that the creation of a drafting committee to create a new uniform foreclosure act, to be applied alike to judicial and nonjudical foreclosure states, should be avoided. If the Study Committee is not prepared to make such a recommendation immediately following the January 13, 2011 stakeholders' meeting, then the Study Committee should avoid making any recommendation until it has conducted a thorough and non-expedited study of the problems and their causes that have led to the calls for a new uniform foreclosure act. Such a study will show that the problems in current foreclosure proceedings are predominately caused by the foreclosure industry itself and susceptible to resolution by the industry itself without the need for new legislation.