GEORGETOWN UNIVERSITY LAW CENTER

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To the Permanent Editorial Board:

We are law professors at Albany Law School, Georgetown University Law Center, University of Illinois College of Law, University of Iowa School of Law, the University of Utah S.J. Quinney College of Law, and Valparaiso University Law School, where we teach courses in secured credit (Uniform Commercial Code ["UCC"] Article 9 and real property security), payment systems (including UCC Article 3), structured finance, bankruptcy, consumer finance, and contracts. We have testified repeatedly before Congress regarding mortgage foreclosures, including chain of title issues, and closely follow legal developments in mortgage foreclosures.

We are writing to express serious misgivings about the draft report on the *UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them* (the "Draft Report") authored by Permanent Editorial Board ("PEB") for the Uniform Commercial Code. The Draft Report is couched in the technicalities of the UCC, but is actually attempting to resolve pressing public policy questions arising out of the financial crisis. Attempting a *sub rosa* resolution of such controversial issues of law through a PEB report undermines the perceived independence and credibility of the PEB and damages the reputation of the American Law Institute and the National Conference of Commissioners on Uniform State Law.

The Draft Report's apparent purpose is to urge an authoritative interpretation of critical and controversial questions of public policy on the states and on courts. To the extent the PEB has the authority to issue interpretations, that power is limited to "the correct interpretation of" the U.C.C.[1] The PEB acknowledges that limitation on its authority by asserting that the Draft Report is limited to interpretation of the U.C.C. provisions on point and "does not address issues that are the particular province of real property law."

A prior, non-public version of the Draft Report repeatedly strayed over that line.[2] At key points, the prior version of the Report attempted to override state property law, including with respect

[1] Permanent Editorial Board for the Uniform Commercial Code, Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code at [5] (unnumbered), *at* http://www.ali.org/doc/03-PEB%20for%20UCC%2003.pdf.

[2] Regarding the prior, non-public version of the Draft Report, please see my letter to the PEB dated December 28, 2010.

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to important questions on which state courts are divided. Elsewhere, the Report affirmatively misstated the law by ignoring state and federal statutes that modify or curtail the holder-in-due course rule for certain residential mortgages.

The current public version of the Draft Report has been revised to be more circumspect in this regard. Unfortunately, the revised, public Draft Report now has the effect of being misleading because it addresses UCC issues in a vacuum when in fact they cannot be meaningfully separated from state procedural law, real property law, agency law, and trust law. In many instances, the result that would obtain if only the UCC were considered is opposite of the result that would obtain if all pertinent law were considered. The Draft Report is misleading because it ignores the non-UCC laws that also govern the enforceability of mortgage notes.

Even if the Report were not misleading in this respect, the PEB is simply the wrong body to resolve these issues. The Report's recommendations, if adopted, would directly affect the economic welfare of millions of Americans and the financial health of the nation. Its rigid prescriptions of law would further constrain the ability of state and federal governments to protect their citizens in times of economic crisis. Issues of this magnitude need to be resolved in an open and public forum where all affected constituencies can be heard and the complex public policy implications involved can be aired, rather than by a non-representative body like the PEB.

Strangely, the Report is virtually devoid of any reference to the financial crisis or the role that the UCC played in facilitating the financial structures the precipitated the global economic collapse. Instead, the Report seeks to impose a resolution on the courts to issues affecting the foreclosure crisis and the future structure of securitization purely as a matter of legal doctrine. This failure to grapple with the real-world implications of the problems the Report addresses or to acknowledge calls for reform on these issues seriously undermines the credibility of the Report.

A PEB report is not an appropriate vehicle for resolving the serious legal issues posed by MERS or chain of title problems in residential mortgage securitizations. Unfortunately, the Draft Report gives the impression of being an attempt, if not to resolve these issues, than at least to put a finger on the scale to tilt the law to help shield large financial institutions from the consequences of sloppy legal compliance in the name of efficiency.

In the remainder of this letter, we address several particular concerns with the Draft Report: (1) that the Draft Report is misleading because enforcement of mortgage notes other than through mortgage foreclosure is virtually meaningless; (2) the Draft Report is misleading because it focuses solely on the UCC issues when consideration of supplementary, contradictory, or superseding federal bankruptcy law, state procedural law, evidentiary law, real property law, trust law, and agency law might produce different outcomes; and (3) the Draft Report fails to recognize that UCC 9-203(g) may not be effective to transfer real property in title theory states.

1. The PEB Draft Report Is Misleading Because It Discusses *Note* Enforcement when the Issue Is *Mortgage* Enforcement, a Topic Beyond the PEB's Purview

The Draft Report purports to cover only the enforcement of mortgage notes under the UCC, not the enforcement of mortgages. Framing the report in this fashion, however, is fundamentally misleading, because mortgage notes are seldom enforced except by foreclosure of the mortgages. Most mortgages in the United States are either legally or practically non-recourse. Therefore it makes

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little sense to discuss solely enforcement of the note. What is being enforced is almost always the mortgage,[3] which is an issue that is beyond the authority of the PEB.

The Official Commentary to the UCC makes clear that the UCC takes no position on whether a mortgage is enforceable.[4] UCC section 9-308 Official Comment 6 states that:

> Under this Article, attachment and perfection of a security interest in a secured right to payment do not themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it….Similarly, this Article does not determine who has the power to release a mortgage of record. *That issue is determined by real-property law.* (Emphasis added.)

Unfortunately, the very title of the Draft Report claims an authority that the PEB lacks. The Draft Report is title states that it is on the *UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and <u>Enforcement of</u> Those Notes and <u>the Mortgages Securing Them</u>* (key words underlined). The enforcement of mortgages is outside the scope of the UCC and therefore not a topic that the PEB may properly address.

While the substance of the Draft Report does not veer into the enforcement of mortgages, the titling of the Draft Report furthers the problem that the Report is only addressing note enforcement, while giving the impression that enforceability of the note decides the enforceability of the mortgage. Given that the real issue of import is the enforcement of the mortgage, not the note, it is fundamentally misleading for the PEB to issue a report about the enforcement of the note. While the ability to enforce the note is usually required to enforce the mortgage,[5] a report that only addresses note enforcement is inherently misleading because it fails to address the ultimate question—whether a party has a right to deprive a family of its home.

2. The PEB Draft Report Is Misleading Because It Discusses UCC Issues in the Enforcement of Mortgage Notes Out of Their Broader Legal Context

The Draft Report is also misleading because the enforcement of mortgage notes via foreclosure or through a plain monetary judgment cannot be reduced to UCC issues. Instead, it inevitably involves state civil procedure and evidentiary law, and typically involves state real property law. Given the widespread use of both third-party mortgage servicers and the Mortgage Electronic Registration System (MERS), agency issues also come into play. Also, as the vast majority of mortgages are held by securitization trusts, trust law issues may also be relevant. The trusts may create transfer and enforcement requirements beyond those in the UCC and/or that conflict

[3] Technically, a recourse mortgage note could be enforced separate from a foreclosure action through a suit on the note itself and then attempts to collect on the judgment other than from the mortgaged realty. Such a situation is exceedingly rare and likely to occur only when the collateral has lost nearly all value and the debtor has substantial other non-exempt assets. Note that collection on a deficiency judgment is not an action on a mortgage note, as there is no mortgage following the foreclosure.

[4] UCC § 9-607(b) does not alter this conclusion. First, the provision only addresses nonjudicial enforcement of mortgages, making it facially inapplicable to judicial foreclosure proceedings. Second, it merely permits a filing in the furtherance of enforcement; it does not in and of itself create any rights to enforcement. *See* UCC § 9-607 Official Comment 8 (noting "Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.").

[5] A major exception to this being if the debt has been discharged in a bankruptcy, but the lien remains valid. In such a case, the mortgage may be enforced, but not the note.

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with the UCC. It is impossible to disentangle these issues, which are beyond the ken of the PEB, from UCC issues, but addressing only UCC issues without addressing the other issues creates a necessarily misleading Draft Report.

For example, the Draft Report places great emphasis on UCC § 9-203(g) as effecting the transfer of a mortgage if the associated note is transferred under UCC § 9-203(a)-(b). But state real property law may impose additional requirements for a transfer of real property, such as the state's Statute of Frauds or recordation requirements that go beyond attachment of a security interest. *See, e.g.,* Texas Local Govt. Code § 192.007 (providing that "To release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.").

This problem can be seen in regard to Question 1 ("Who is The Person Entitled to Enforce a Mortgage Note and to Whom the Obligation to Pay the Note is Owed?"). In modern commercial relationships, agency relationships abound, and common, shared agents such as document custodians and the Mortgage Electronic Registration System (MERS) are frequently used.[6] This complicates attempts to determine whether a party is a "nonholder in possession of the [note] who has the rights of a holder" and therefore entitled to enforce the note. If a party itself is not in possession of the note, but an agent is in possession of the note, does that make the party a "nonholder in possession of the [note] who has the rights of a holder" and therefore entitled to enforce the note?

UCC § 3-420, Comment 1 notes that "Delivery to an agent [of a payee] is delivery to the payee." But this statement is made in the Official Commentary in context of a discussion of conversion of a note, rather than transfer for the purpose of enforcing the note; it does not directly address the question of whether a party may enforce a note if the note is held by its agent.[7]

This raises a series of questions unaddressed by the Draft Report. Does the UCC require possession by the principal itself? Does this answer change if there is a common agent?[8] Does it depend on the scope of the agency agreement? These issues are, of course, well beyond the purview of the UCC. The Draft Report observes that the common law of agency might supplement the UCC, but this observation is buried in footnote 9 and not connected with any discussion.

An answer to Question 1 that fails to account for agency questions might well be incorrect. It is no defense to this charge that the Draft Report only addresses UCC issues. While that is the extent of the PEB's authority, the UCC does not exist in a vacuum. The danger is that litigants and courts that reference the Draft Report could easily fail to understand the artificial, constrained nature of the Draft Report's analysis and thus reach wrong conclusions about whether a family should be deprived of its home.

The misleading impact of the narrow UCC focus is also evident in regard to Question 4 ("May a Person to Whom an Interest in the Note Has Been Transferred, but Who Has Not Taken a

[6] *See, e.g,* Kemp v. Countrywide, 440 B.R. 624 (Bankr. D.N.J. 2010) (possession of note by document custodian, not by securitization trustee).

[7] Relatedly, the Draft Report does not address the question of whether the original note must be produced and entered by the party seeking to enforce the note. Arguably this is an evidentiary question, not a UCC question, but it again shows that the UCC can not be disentangled from other areas of law.

[8] *See, e.g.,* In re Gilbert, No. COA10-361 (N.C. Ct. of Appeals, May 3, 2011). In *Gilbert*, a note was endorsed to "Deutsche Bank as trustee." Deutsche Bank is trustee (and thus functionally an agent) for around two thousand RMBS trusts. The failure to endorse the note to Deutsche Bank as trustee for a specific RMBS trust was held insufficient to give the particular trust rights in the note. This situation has some analogies to common agent problems.

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Recordable Assignment of the Mortgage, Take Steps to Become the Assignee of Record of the Mortgage Securing the Note?"). The Draft Report's answer is "yes," with reference to UCC § 9-607(b). While this is the correct answer under the UCC itself, it may be the incorrect answer as a matter of law more generally. Taking steps to become the assignee of record could conflict with trust law, tax law, bankruptcy law, and agency law.

First, the vast majority of US mortgages are securitized and held by trusts. Most of these trusts are formed under New York law. The trust instrument is known as the Pooling and Servicing Agreement (PSA). PSAs are often particular in terms of specifying when and how transfers must be made. They do so in order to ensure the bankruptcy remoteness of the securitized assets and favored federal tax status as Real Estate Mortgage Investment Conduits (REMICs) or grantor trusts. Transfers that are made outside of the time frame and method specified by the PSA are in violation of the trust instrument and as such *void* under New York Trust Law. N.Y.E.P.T.L § 7-2.4 ("If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void."). Similarly, steps to become the assignee of record could imperil the trust's favored tax status if taken outside the limited timeframe for transfers to a REMIC or grantor trust provided by the Internal Revenue Code.

Second, the Draft Report ignores that steps taken to become the Assignee of Record might violate the federal bankruptcy automatic stay, 11 U.S.C. §362. If the putative transferor is in bankruptcy, the note is property of the bankruptcy estate, and attempting to become assignee of record of the note could be a violation of the stay. Similarly, if the obligor on the note is in bankruptcy, recording of the note could violate the stay by being an attempt to perfect a security interest postpetition.

Finally, to the extent that MERS is involved in with the mortgage, there may be agency issues that affect the question of whether there is authority to assign the mortgage. At the very least, the Draft Report should recognize that steps to become the assignee of record could create these possible complications.

The multitude of non-UCC problems that could arise from attempts to become transferee of record of a mortgage note illustrates a fundamental problem with the Draft Report. What might be the right answer in a world where the only law is the UCC might in fact be the wrong answer in the real world where other laws conflict with or supersede the UCC. Putting the PEB's official imprimatur on the answers to these questions could mislead a court that fails to recognize the artificial nature of the Report's analysis.

3. UCC 9-203(g) Is Not Always Sufficient to Effectuate the Transfer of a Mortgage

The Draft Report places great emphasis on UCC § 9-203(g) as effecting the transfer of a mortgage if the associated note is transferred under UCC § 9-203(a)-(b).[9] The PEB Draft Report notes that "while this matter has engendered some confusion, the law is clear, and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note." There is no basis whatsoever for this statement.

[9] In a previous letter to the PEB, one of us (Professor Levitin) has argued that UCC 9-203(g) is a particularly problematic provision…it has not been cited by *any* court for the mortgage-follows-the-note principle, which is a testament to its uniquely abstruse drafting.

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The law is not clear; were it so, the PEB Draft Report would be unnecessary. Indeed, the Draft Report is unable to cite any precedent for its point.

There are two problems with the Draft Report's interpretation. First, as noted above, there may simply be supplementary legal requirements for the transfer of a mortgage. *See, e.g.*, Texas Local Govt. Code § 192.007. The UCC does not supersede state statutory law or non-conflicting common law. Failure to acknowledge that compliance with UCC § 9-203(g) may not be sufficient to effectuate a transfer of a mortgage under state law leaves the Draft Report fundamentally flawed.

And second, the language of § 9-203(g) limits it to mortgages and liens, not deeds of trust or situations (regardless of the name of the security document) that the law deems to be a sale and repurchase (as in title theory states). The abstruse language of § 9-203(g) does not effectuate the "mortgage follows the note" policy that might have been intended; it is not drafted broadly enough to do so. The PEB, however, is limited by the language of the statute.

The PEB Draft Report understands UCC § 9-203(g) to mean that the transfer of any mortgage note transfers the associated mortgage. The Draft Report states that "UCC Section 9-203(g) explicitly provides that the mortgage automatically follows the note."[10] But UCC § 9-203(g) does no such thing. It states that:

> The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on persona or real property is also attachment of a security interest in the *security interest, mortgage, or other lien*. (Emphasis added.)

Similarly, Official Comment 9 to UCC § 9-203 states that:

> Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the *security interest or lien*. (Emphasis added.)

UCC § 9-203(g) means that the transfer of a note is accompanied by the transfer of the *lien*. It is hard to understand how this could apply to a deed of trust. The technical operation of a deed of trust is not a security interest, but a transfer of the deed to the property in trust for the benefit of the obligee on the associated note. The deed of trust operates as a sale and repurchase, rather than a lien. Interpreted strictly, then, a deed of trust should not qualify as a "security interest or other lien on personal or real property," so it would not fall within the ambit of § 9-203(g). Accordingly, reading § 9-203(g) to mean that a mortgage always follows a note would result in non-uniform state law because of the prevalence or even exclusive use of deeds of trust in some states.

Even if § 9-203(g) does apply to deeds of trusts, it still does not mean that the mortgage follows the note principle is not absolute. If the trust deed is seen as a security interest, not a sale and repurchase, then the trust deed is necessarily separated from the note. The deed of trust trustee holds the security interest and the obligee has the note. The question of who may claim the status of trust beneficiary is determined by reference to trust, agency, and real property law, not to the UCC, and under such law it might be possible for the beneficial interest in the trust deed to be sold without the note being sold, for example.

Moreover, irrespective of the form of the security document, roughly thirty of the fifty states do not understand a mortgage to be a lien. Instead, these states understand a mortgage or deed of trust to be a sale and repurchase and not a lien. This is because these states are "title theory" states, as

[10] Draft Report at 8.

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opposed to "lien theory" states. In title theory states UCC § 9-203(g) is ineffective to transfer a lien because there is no lien to transfer. While a sale and repurchase may be economically indistinguishable from a lien, their legal (and accounting) treatment may vary, and the UCC pointedly avoids taking any position on whether a transaction is a sale or a lien. Furthermore, because title theory states consider the mortgage or deed of trust as actual ownership of real property, specific requirements for the transfer of real property interests apply.

The Massachusetts Supreme Judicial Court's unanimous opinion in *Ibanez v. U.S. Bank*, 458 Mass. 637 (Mass. 2011), which is itself cited by the PEB Draft Report, makes exceedingly clear that the distinction between title theory and lien theory affects the requirements for transferring a mortgage; in a title theory state, such as Massachusetts, a mortgage is actually a sale of real property, which is subject to requirements beyond those of the UCC. Indeed, because of this distinction, *Ibanez* did not reference § 9-203(g), as the provision had no bearing on the case since it only addresses liens, not sales and repurchases.

Official Comment 3.b. to UCC § 9-202 clearly recognizes that title and lien theory may matter for purposes of applying Article 9:

> This Article does not determine which line of interpretation (e.g., title theory or lien theory, retained title or conveyed title) should be followed in cases in which the applicability of another rule of law depends upon whom has title.

State mortgage foreclosure law is another rule of law that may in fact depend on who has title. The Draft Report ignores this issue, which renders it misleading. By claiming that the transfer of a note effectuates the transfer of a mortgage in a title theory state, the UCC reaches beyond its proper ambit of commercial law and attempts to supersede state real property law. There is a difference between what § 9-203(g) might have been intended to accomplish and what the actual drafting is, and a PEB Draft Report is not the appropriate vehicle for purported "corrections" of the statute.[11]

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[11] Indeed, it is necessary to read the § 9-203(g) to preserve title theory. If § 9-203(g) accomplished what the Draft Report believes it did, it undermined title theory in 30 states in one fell swoop. It is implausible that *any* state legislator thought that was what he or she was doing in adopting the 2001 revisions to UCC Article 9. This is so for three reasons.

First, the UCC has *never* been understood to cover realty law. States pride themselves on realty law idiosyncrasies, and uniformity across states is of much less importance in realty than other areas of commercial law.

Second, the manner in which UCC § 9-203(a)-(b) accomplishes sales of promissory notes is itself one of the most opaquely drafted provisions in the UCC. Only a handful of UCC mavens know of its existence. A non-specialist attorney searching through a state code for promissory note sale provisions would never discover the statute, as it does not use sale language; the sale provisions are only effectuated through the UCC Article 1 definition of "security interest," which is hardly where an attorney would think to search for law governing the sale of promissory notes. Not surprisingly, there is no reported case law addressing it. Put differently, to the extent that UCC § 9-203(a)-(b) were meant to provide clear law on the sale of promissory notes, they are utter failures as provisions. Instead, their only accomplishment has been the facilitation of asset securitization, a narrow, special-interest use of the UCC.

And third, even to the extent that a state legislator understood the effect of § 9-203(a)-(b), the drafting of § 9-203(g) is sufficiently inarticulate that few would understand it as the PEB Draft Report does. If § 9-203(g) means what the PEB Draft Report says it does, it is an admission that the ALI and NCCUSL have carried out a program of stealth legislation for the benefit of the mortgage securitization industry.

Stealth legislation is diametrically opposed to the fundamental principles of law reform. State legislators should understand the laws they are adopting, particularly when they are model laws that bear the imprimatur of the ALI and NCCUSL. Stealth legislation in the service of large financial institutions in the furtherance of mortgage securitization would be a deep stain on the reputation of the ALI and NCCUSL. This is the inexorable conclusion from the interpretation of § 9-203 in the Draft Report.

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Conclusion

We strongly urge the PEB to withdraw the Draft Report and refrain from further efforts to clarify the law in regard to mortgage foreclosures. A UCC PEB report is simply an inappropriate form for addressing major policy issues. Doing so under the guise of a technical report does serious harm to the credibility and reputation of the ALI and NCCUSL.

While we appreciate the PEB's duty to clarify the UCC,[12] the PEB has a broader duty to ensure that the rule of law functions to produce correct outcomes. Even if the Draft Report correctly interpreted the UCC, a proposition with which we disagree, as noted above, the result would still be an inevitably misleading report because the ability to enforce a mortgage note is almost exclusively through mortgage foreclosure, and mortgage foreclosure involves numerous areas of law beyond the purview of the UCC. The results that obtain solely under the UCC may be diametrically opposed to those that would obtain if all applicable law is considered. We urge you to withdraw the Draft Report.

Yours,

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[12] While we are optimistic that the PEB will withdraw the Draft Report, in the event that it proceeds with the Report, we urge the PEB to include clear and unambiguous language explaining that the results that obtain under the UCC may be different than if all applicable law is considered. We also urge the PEB to amend the report to explicitly state that the burden of proof is on the party attempting to enforce a mortgage note under UCC § 3-309's lost note provision and that the proof required includes proof that the note has not been previously been sold or transferred by it or any of its alleged predecessors in title. The current language in the Report, noting that the person seeking to enforce the note under § 3-309 must show that the person was "formerly in possession of the note and entitled to enforce it when the loss of possession occurred and that the loss of possession was not as a result of transfer (as defined above) or lawful seizure" is insufficiently clear on this point.

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