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ULSIa's Remedies on Default - Worth the Effort?

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Roger Bernhardt*

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The question of what remedies should be available to a mortgagee upon default of the mortgagor makes mortgage law unique, difficult, and important. If all mortgagors paid their debts or if all mortgagees were free to take any action their documents permitted, there would be neither a foreclosure process nor any restrictions placed upon it by courts or legislatures. Mortgage documents would be less than a page long, freedom of contract would prevail, and society would have little need for mortgage lawyers.

Mortgage law, however, is complicated by the competing interests of mortgagees, one the one hand, who want their documents to provide effective relief in cases of default, and judges and legislators, on the other hand, who do not want mortgagees strictly enforcing their con-

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1. In this article I use “mortgagee” and “mortgagor,” in contrast to “secured creditor” and “debtor” as used by the Uniform Land Security Interest Act (ULSIA), because the bar is generally accustomed to those terms—even in jurisdictions utilizing deeds of trust rather than mortgages—and because such traditional vocabulary may make the substance of the new Act easier to grasp on first reading. Because terms such as “lender” and “borrower” are not likely to confuse too much, I occasionally employ them without intending any significance—other than relief from monotony thereby.

I also employ the following conventions regarding pronouns: The mortgagee is “it” (an institutional lender); any junior mortgagee is “she”; the mortgagor is “he”; and finally, a tenant on the mortgaged property is also referred to as “she” whenever this will not cause confusion.
tracted-for rights after their mortgagors have defaulted. Most of the substantive law of mortgages thus consists of rules restricting the remedies that mortgagees have written for themselves in their mortgages.

It is therefore hardly surprising that the motivation behind the Uniform Land Security Interest Act (ULSIA or Act) is the improvement of the collection process in cases of default; indeed, most of the text and commentary of the Act deals with that topic. The Uniform Law Commissioners’ Introduction makes a token bow to other advantages of uniformity, but gets to the real point when it complains that “delays in completing real estate foreclosures . . . have increased the risks of vandalism, fire loss, depreciation, damages and waste . . . [and] plainly raised the cost of private mortgages, and have significantly eroded the economic value of many government subsidy programs involving real estate mortgages.” To correct these shortcomings, the Commissioners believe that “the availability of a uniform, less expensive, and more expeditious foreclosure procedure would ameliorate these conditions and would facilitate the sale and resale of secured real estate loans.” What ULSIA is all about is an improved foreclosure process; states considering its enactment should judge it in this context.

The arsenal of protections that the judiciary and legislatures have developed to protect mortgagors in distress has plainly irritated the lending industry. Starting five hundred years ago, from the Chancellor’s original refusal to let a mortgage deed operate according to its terms by giving the mortgagee a fee simple absolute automatically and immediately upon default, and running through the equity of redemption, the delays of foreclosure, the replacement of strict foreclosure by sale foreclosure, post-sale redemption, deficiency judgment limitations and moratoria, up to mandatory restructuring today, a mortgagee generally dreads enforcing its remedies on default. The prospect of taking the pound of flesh without shedding a drop of blood is too risky. Because these impediments are treated as “superior equities” of the mort-

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2. There are more code sections in part 5 (Default) than in any other part of ULSIA, and the number of pages that part occupies in the Official Pamphlet exceeds those of any other part.

I have not begun this Article with an explanation of the history of ULSIA or a general review of its contents, since those matters are covered elsewhere in this issue. Only with regard to the substantive rules in the Act actually covered in this Article are its provisions described, analyzed, and sometimes quoted.


4. Id.
gagor, they can rarely be waived by improved language in the documents; indeed, nonwaivability of protection becomes the main protective rule in mortgage transactions. Betterment, therefore, must come not from forcing mortgagors to agree to more onerous terms, but from appealing to the rulemakers to soften the rules.

This Act is one such appeal. There may be some perceived advantages to uniformity, but the real motive behind ULSIA is to quicken and cheapen the foreclosure process. Special protections are granted to one class of borrowers—"protected parties"—but in return the entire collection process is intended to be simpler, faster, cheaper, and more effective in all other respects. Speedy power-of-sale foreclosure is to replace inefficient judicial foreclosure, and self-help mortgagee in possession status is to replace judicial receivership to capture rental income from the property prior to foreclosure. In return for giving protected parties expanded redemption rights and extensive immunity from deficiency liability, other mortgagors will have fewer cushions after default than many jurisdictions now provide. This is the trade-off offered by ULSIA.

Overall, the strategy has had some success. ULSIA has the blessings of the American College of Real Estate Lawyers and the Real Property Section of the American Bar Association. However, though it was first promulgated in 1985, the Act has not yet been adopted in any jurisdiction, nor has it received much consideration in the law reviews or trade journals. As a result, state legislatures do not have much

5. Standard adages in this regard abound, e.g., "Once a mortgage always a mortgage," "No clogging the equity of redemption," "Necessitous debtors are not truly freemen," etc.
6. This point is candidly acknowledged by the Commissioners: "This Act is based on a major policy decision—to reduce the 'cost' of foreclosure." ULSIA § 503 cmt. 1 (1985).
7. Id. § 503(e); see also discussion infra part VIII.D.
8. The American College of Real Estate Lawyers (ACREL) Committee on Law Reform recommended that ACREL support the adoption of ULSIA nationally. See AMERICAN COLLEGE OF REAL ESTATE LAWYERS, REPORT OF THE COMMITTEE ON LAW REFORM ON THE UNIFORM LAND SECURITY INTEREST ACT ("ULSIA") 18 (undated) [hereinafter ACREL REPORT].
9. The Act was drafted by a Joint Editorial Board composed of representatives of the American Bar Association (ABA) and ACREL, along with the Commissioners.
10. Most of ULSIA was copied from the ill-fated Uniform Land Transactions Act (ULTA), promulgated ten years earlier in 1975, of which Article 3 covered mortgages. On the assumption that ULTA failed because it was too comprehensive, the section on mortgages was pulled out and recast as ULSIA.

However, ULTA itself did not receive much critical consideration in the literature, although a few summaries of that Act were written. See, e.g., James E. Murray, The Proposed Uniform Land Transactions Act, 7 REAL EST. REV. 64 (1977-78); James M. Pedowitz, Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended), 6 REAL EST. LJ 179 (1977-78). See also Robert Kratovil, The Uniform Land Transactions Act: A First Look, 49 ST. JOHN'S L
existing analysis to aid them.

This Article attempts to serve that critical function. I approached ULSIA from the point of view of a mortgagor confronted with a default by its mortgagor who intended to collect its debt by complying with ULSIA. I proceeded mentally through the steps the lender would have to take at each stage of the process, noting where the Act gave clear guidance to the parties and where its message was silent, unclear, ambiguous, or contradictory. Overall, I found that ULSIA did not present an easy road map to follow.

II. Default

Normally, prefacing an analysis of remedies on default with a discussion of the meaning of the term “default” would not be required—that being the sort of dry, semantic issue that is usually of interest only to nonpractitioners. ULSIA, however, compels such an effort by putting a special twist on the word. The Commissioners’ comment to section 501 states:

The rights and remedies in this Part are dependent on a “default.” This term is not defined in this Act: a “default” is the failure of the debtor to perform an obligation which the security agreement provides is to be regarded as a “default.” If this event has occurred, the remedies of this Part become

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11. Thus, the organization of this paper attempts to track the steps in an ordinary collection proceeding. Obviously, I could not cover actions on the security and actions on the debt simultaneously in the same fashion as they might occur in the real world. Additionally, the usual intermediate step of having a receiver collect the rents during the foreclosure process has been postponed to the end of the Article due to its conceptually special nature. See discussion infra parts XI.B.-X.I.C.

12. ULSIA § 501 cmt. 2 (emphasis added). The provision is intentional. The Commissioners’ comment goes on to give as an example “an amortized secured loan calling for payments on the first of each month and providing that nonpayment is a default.” Id. (emphasis added).
Customarily, the concept of default involves nonperformance of a duty; there is no additional requirement that the documents also label the situation as a default. Mortgage documents include numerous obligations to be performed (e.g., payment of the note, payment of taxes or insurance, care of the property), but assume rather than define their nonperformance as defaults. Under ULSIA, as interpreted by its drafters, such an assumption might be unwarranted. If nonpayment of an installment is a default only if the agreement specifies that it is a default, then it may be something else where the agreement does not so specify—a form of remediless breach.

It is difficult to believe, however, that courts would deny a mortgagor the right to foreclose on a mortgagor who has not paid his note merely because its mortgage did not include a provision that nonpayment was to be regarded as a default. The Commissioners’ rationale was to separate nonperformance from default in order to clarify various time periods prescribed in the Act governing foreclosure proceedings. Thus they say:

The minimum time is not stated as a minimum period after default but as a minimum period after an event specified in the statute. . . . By using non-payment as the point of beginning of time which must elapse rather than default, the Act does not penalize the lender who expresses a grace period in his security agreement or who takes informal action to have the non-payment cured before he determines to proceed to foreclose.14

However, there are easier ways to accomplish that result. Clocks can be set to start either on the mortgagor’s nonperformance or on the mortgagor’s election to act because of the previous nonperformance (and with or without grace period considerations) without requiring the security agreement to specify which event is the “default.”15

If ULSIA is enacted, lenders would be well advised to redraft

13. Id.
14. Id.
15. Certainly, good arguments can be made that “default” should retain its normal meaning, even under ULSIA. The Commissioners’ comment is not part of the official text of the Act. That text provides merely that “[i]f a debtor is in default under a security agreement, the secured creditor has the rights and remedies provided in this Part,” and does not include “default” in its definitional sections. See id. § 501(a).
their documents to guard against this risk. As a general precaution, there should be a provision in the security agreement to the effect that nonperformance of any obligation included in the security agreement (or in any other documents executed or given by the debtor as part of the transaction) is to be considered a default. More cautious drafting would add a clause to the statement of each individual obligation (in each document included in the loan package) providing that nonperformance equals default.

III. ACCELERATION OF THE DEBT

If the obligation involved is an installment one, the first step a mortgagee is expected to take upon default of the mortgagor is to accelerate the future payments into a present lump sum obligation. Under ULSIA, that occurs by the giving of a "notice of acceleration."  

A. The Notice of Acceleration

Section 502(a) provides that

[to exercise a right to accelerate against a debtor, a creditor must give written notice after the debtor's failure to perform that if the failure is not cured before a date stated, which may not be earlier than 15 days after the date the notice is given . . . the entire debt will be due."

A fifteen-day grace period is thus created. Nonprotected parties are permitted to waive this protection, although it is unclear as to
whether the permission to waive applies to the right to receive any notice whatsoever or only to the fifteen-day grace. 21

Section 502(a) provides for an unconventional grace period. The mortgagee is not held inactive for the first fifteen days after an installment has been missed. Rather, the mortgagee is permitted to take action immediately by way of written warning of pending acceleration if a cure is not made within the next fifteen days or longer. Because the fifteen days starts from the date of notice, not of nonpayment, a delay of—for instance—five days in giving notice creates an extended (twenty-day) grace period. 22 Furthermore, if the mortgage provides for an even longer grace period, this extension prevails over the fifteen-day period. 23

1. Failure to Send the Notice

ULSIA does not treat the effect of failure to send a notice of acceleration. Collection remedies are then presumably confined to arrearages rather than to the remaining unpaid balance of the note. This result might be precisely what the mortgagee desires. Indeed, where there is no prepayment penalty in the note or where the penalty does not apply to involuntary acceleration and the debtor is solvent, a suit for the missed installments may be the best course of action. The notice is not a prerequisite to any affirmative relief the mortgagee seeks, and a lender may start either foreclosure proceedings or an action on the note.
without having given any notice of acceleration first. The Commissioners assume that the notice of acceleration will precede any foreclosure notice, but they have not mandated that this order of procedure be followed.

2. Unanswered Issues

a. *Who Receives the Notice?*

ULSIA does not cover the question of who is to receive notice of acceleration. Junior creditors and other interested parties do not appear entitled to it. Section 502(a) provides only that the creditor "must give written notice" and that it may be waived by "a debtor other than a protected party," omitting any mention of juniors, guarantors or tenants. Nor do the sections that impose duties to notify these other interested parties as to other matters refer to an acceleration notice.

Non-notice of acceleration may have been regarded by the Commissioners as consistent with the statutory system, since none of these other parties have any right to undo an accelerated obligation. However, their inability to avoid acceleration once it has occurred is in fact an argument in support of enabling them to receive notice as early as possible; if they have only fifteen days to avoid an acceleration, they should be made aware of that immediately. Treating acceleration as an irrelevant matter to a junior creditor seriously prejudices her. A seller who has taken back a second mortgage frequently lacks the wherewithal to pay the entire first mortgage when it goes into default or to bid at the senior foreclosure sale. Her only hope may be to stave off the senior foreclosure by keeping it current while she forecloses on her own mortgage and resells the property. To do so, she must be able to keep the senior loan current on an installment basis, which may be impossi-

24. This would occur when a single payment note was involved.

25. Section 508(b) provides that the notice of intention to foreclose must state whether the debt has been accelerated and does not provide for incorporating the notice of acceleration into it. Because the notice of intention is permitted to include other required notices—as an alternative to sending them separately, see id. § 508(b)(10)—not mentioning the notice of acceleration suggests that such inclusion is not permitted here. In light of the fact that foreclosure may be implicitly delayed 15 days in these cases, as discussed below, see infra parts IV.C., V.A., that exclusion may have been intentional.

26. ULSIA § 502(a). Furthermore, comment 1 to this section refers to it as "basic notice protection for a debtor." The ACREL Committee concluded that there is no such notice requirement to nonprotected parties. See ACREL REPORT, supra note 8, at 11.

27. See, e.g., ULSIA §§ 507(f), 509(a).
ble, given the statutory absence of notice to her.28

b. What Should the Notice Say?

With regard to the contents of the notice of acceleration, ULSIA seems to require only that it include a date after which acceleration will occur if a cure has not been made.29 ULSIA is silent as to whether more information may be included. Lenders must decide whether to have the notice state that late or prepayment penalties are also imposed or whether other defaults besides the last missed payment must also be cured within the time allotted.30 There is no statutory form of notice of acceleration, meaning that lenders must await judicial construction or statutory amendment before they can be sure how best to draft this document.

3. Relationship to Other Provisions

a. Prepayment Charges

The Act is intentionally cautious on the question of prepayment penalties after an acceleration for default. A prohibition against such charges is included as an optional provision in ULSIA.31 The Commissioners were concerned about distinguishing between “deliberate” defaults (done to trigger an acceleration) and other defaults, and consequently elected to leave its adoption to the states “after careful consideration of the opportunities for its abuse in avoiding valid prepayment charges.”32 This is an odd point to leave to local option, since the sensitive nature of the issue justifies the utilization of expert analysis and nationally consistent treatment—the very reasons why a uniform act might be promulgated and adopted.

The Commissioners also suggest that if the optional prohibition is adopted, it might be limited to protected parties, thereby validating in-

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28. ULSIA is also silent on the question of how the notice of acceleration should be sent—mail is the preferred method for other statutory notices. See, e.g., id. §§ 508(a), 509(a). Moreover, there is no provision for recordation or publication of any notice.

29. Id. § 502(a). Section 112(f) requires that all notices sent to protected parties must recite (sometimes in other languages) “‘This is an important notice regarding your rights in real estate. Get it translated immediately.'”

30. There is no reason to believe that a notice of acceleration becomes invalid if it contains such additional warnings and there is always the risk that noninclusion of these items might be deemed to constitute a waiver of any rights involved. Thus, an expanded notice of acceleration seems warranted.

31. See id. § 502(b).

32. Id. § 502 cmt. 2.
voluntary prepayment penalty charges imposed on commercial mortgagors. 33

b. Late Charges

Nothing in section 502 requires the notice or act of acceleration to make any reference to the imposition of a late charge. A later section requires the debtor to pay "any other obligation" owed as a condition of undoing acceleration, 34 and a comment to that section indicates that the Commissioners intended it to refer to late charges. 35 As written, late charge penalties may be imposed independently of any grace period for acceleration (i.e., before the notice of acceleration is first sent, or during the fifteen-day waiting period, if the promissory note so provides), pursuant to the Commissioners' commitment to freedom of contract wherever possible. 36

The Commissioners have not shown the same deference to local option on this issue as was given to prepayment charges. In those states which have statutory or judicial restrictions on late charges, separate consideration will be required to determine how those limitations are to survive ULSIA and what modifications to this Act are therefore required.

B. De-acceleration

The debtor's right to de-accelerate—or undo the acceleration—is available only to a protected party mortgagor and not to any other interested party. 37 As to parties other than a protected party, the right to "cure" or "redeem" is limited to payment of the entire (accelerated)

33. Id. The prohibition against a prepayment penalty after acceleration was disliked by the ACREL Committee, which proposed that it be deleted. See ACREL REPORT, supra note 8, at 11.
34. Id. § 513(b)(2); see also id. § 402(a)(5) (allowing a creditor to receive the lesser of five dollars or five percent of the unpaid balance in addition to finance charges allowed under § 403 after a default).
35. Id. § 513 cmt. 2.
36. Id. § 501 cmt. 3.
37. In this Article, I use the term "de-acceleration" to refer to a debtor's curing of the default by paying only the arrearages (missed installments) rather than the entire unpaid balance of the debt. This is often referred to as a right of reinstatement as distinct from the right of redemption. ULSIA does not employ such a word but instead uses the phrase "avoid operation of any acceleration clause . . . in the security agreement." Id. § 513(b). Several references in that section to an acceleration clause should be taken to refer to a notice of acceleration instead.
38. Id. § 513(b).
39. Section 513 refers to a right to "cure default and redeem" but does not explain any difference intended between curing and redeeming. Neither term is defined in § 111. Section 513 uses
debt after the notice of acceleration has taken effect.

For a protected party to de-accelerate his obligation, section 513(b) requires that he not only pay the arrearages, but also “perform[] any other obligation the protected party would have been bound to perform in the absence of any acceleration clause.”40 This would cover tax and insurance payments. A comment to the section seems to indicate that it also refers to late charges.41 Additionally, the protected party must pay foreclosure expenses, “including reasonable attorney’s fees” if a notice of intention to foreclose was given.42

There are some limitations on the right to de-accelerate. It may be exercised only once a year.43 Furthermore, although it is transferable by the mortgagor,44 a transferee who proposes to de-accelerate may be required by the mortgagee to give “adequate assurance of due performance if the [mortgagee] in good faith believes that the prospect of further payment or performance would be impaired.”45

All other parties—unprotected debtors, junior creditors, tenants, etc.—have a right to de-accelerate an installment obligation, provided they act prior to the date when the notice of acceleration takes effect. As pointed out previously, even this action is made difficult for them by

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40. Id. § 513(b)(2).
41. See id. § 513 cmt. 2.
42. Id. § 513(b)(3). Because the implication is that attorney’s fees are not recoverable unless the notice of intention to foreclose was given, this will probably lead to the giving of both acceleration and foreclosure notices together. Although unstated, there is probably also a requirement that an attorney’s fees clause be included in the note before they will be awarded.
43. Id. § 513(c). This section refers to a protected party having cured after having “received a notice of acceleration,” which would prohibit a second cure even if the first one was made during the grace period and before acceleration had finally set in (as far as all other parties were concerned). This might create a greater incentive by the mortgagee to send notices of acceleration as quickly as possible to troublesome borrowers.
44. Id. § 513(d). A reference to § 208 makes the transfer subject to due-on-sale restrictions, however. Thus a mortgagor in default who is attempting to “protect his ‘equity’ ” by selling it to another, see id. § 513 cmt. 3, may be able to transfer the right to redeem but not the right to de-accelerate.
45. Id. § 513(d). The requirement quoted in the paragraph would apply only where a “protected party other than a protected party who defaulted proposes to cure.” Id. However, comment 3 refers to this person as “the assignee of a protected party.” Id. § 513 cmt. 3. There is no apparent reason why the section itself uses such an awkward and unnecessary phrase if that is all that was meant.

There is also a reference in the section to releasing the right to redeem. This is discussed in the section on deeds in lieu of foreclosure. See discussion infra part IX.
the failure of the Act to require that they receive such notice. ULSIA offers no justification for the limitation of the right to de-accelerate to the mortgagor, either in terms of how de-acceleration by other parties would inconvenience the senior mortgagee or how juniors and others are to adequately protect themselves without this remedy.46

IV. Money Actions

Section 501(a) states that a mortgagee's rights include "the right to reduce the personal obligation of the secured creditor's claim to judgment." The right to seek monetary relief in lieu of or in addition to foreclosing on the collateral is expressly reserved to the secured creditor, whether or not it is mentioned in the loan documents.47

A. Choice of Remedies

In their comments to section 501, the Commissioners announce that they have rejected the one-action rule followed in several western states.48 That rule not only limits a mortgagee to one lawsuit, it also confines that lawsuit to a foreclosure action, thereby prohibiting a suit on the note even when the creditor is willing to waive its security entirely and sue only on the note.49 The one-action rule is, therefore, both a security-first rule and a single-action rule. ULSIA rejects both aspects of the rule by authorizing the mortgagee to seek multiple relief simultaneously and by not requiring the mortgagee to exhaust the security first.50 The Act is silent on the right of the mortgagee to bring a

46. There seems to be no statutory obstacle to a nonmortgagor tendering the arrearages to the accelerating mortgagee in return for a voluntary de-acceleration of the obligation. Presumably, economic self-interest of the parties will work to make such arrangements effective where they occur.

47. Section 501(c) provides that a creditor who has foreclosed may not sue on its debt except pursuant to the Act, but that refers only to deficiency proceedings after the foreclosure has been completed. The Commissioners' comments indicate that there was no intent to interfere with simultaneous debt and security proceedings. See ULSIA § 501 cmt. 4.

48. They declare:
Under existing law in most states a lender may proceed concurrently or successively to foreclose the security interest and to proceed to judgment upon the note or other evidence of personal obligation. This section continues that option and it therefore rejects the so-called 'one-action' rule which exists in a few states.

Id.


50. See ULSIA § 501 cmt. 4. What protection the one-action rule gives to a mortgagor has never been apparent. Its stated policy is to avoid allowing the mortgagor to be harassed by multiple actions filed by the mortgagee, although no explanation is ever given why a mortgagor would find such a strategy effective or efficient. The rule is detrimental to the mortgagee by forcing it to
foreclosure proceeding after it has already obtained a money judgment. However, the scope of relief envisioned in the commentary to this section implies that the mortgagee is as free to foreclose on the collateral after it has obtained such a judgment as it is while suing for one, and that it need not show that execution on the money judgment was returned unsatisfied, as some states require. Only an actual double recovery is specifically prohibited.

B. Restrictions

The most important restriction on the right to seek monetary relief is not stated explicitly but is clearly intended. Section 511(b) provides that a protected party is not liable for a deficiency judgment on a purchase-money obligation. Although section 511 speaks only of deficiency liability, and the monetary action described in section 501 would not be treated as an action for a deficiency in many jurisdictions, the Commissioners have stated that the antideficiency policy restricts the freedom of remedy policy. As far as purchasing-protected parties are concerned, this becomes a one-action rule.

Finally, although the Act is silent on this point, the right to a money judgment may no doubt be waived, as when a nonrecourse note...
is employed.

C. **The Money Action**

No details are given in ULSIA regarding the nature of a mortgagee's action on its note, other than authorization to bring such a proceeding. No statutory notice need precede the filing of such an action, although utilization of a notice of acceleration is essential where the mortgagee intends to sue for the entire debt rather than merely for the missed installments. Apart from the fifteen-day delay built into the notice of acceleration, the suit on the note apparently may be commenced immediately after a default. Even protected parties are subject to such immediate action.

The money judgment resulting from the action has a special kind of priority. With regard to other assets, priority is assigned as of the date of recordation; however, with regard to the collateral, lien priority relates back to the priority of the security. Uniform Commercial Code lawyers are familiar with this notion of relation-back, and inclusion of this principle is consistent with ULSIA's rejection of the one-action rule. If one perceives no harm in permitting the creditor to sue first on its note, there is also no reason to penalize the money judgment thus obtained by giving it a lower priority as to the collateral than a judgment on the security instrument.

The Act does not discuss the relation of the judgment lien to the collateral where relation-back priority is not obtained. What happens when the mortgagee obtains a money judgment that does not refer back to the mortgage, and then executes on the collateral? Will the property be sold subject to or free of the mortgage lien, which is now

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56. This omission is consistent with the Commissioners' intention to leave procedural questions to local civil procedure rules. See id. § 510 cmt. 1.
57. Even the 15-day wait can be ignored, since this period relates only to acceleration and not to the right to sue. The complaint might have to be amended, however, after 15 days to change it from an action seeking an installment to an action seeking the entire debt.
58. The various grace provisions of § 507 apply only to foreclosure proceedings, not to actions on the note.
59. Section 501(b) provides:
   If a secured creditor reduces its claim to judgment before foreclosing under this Part, the judgment lien takes its normal priority as a judgment lien on the real estate unless the judgment specified that the obligation was secured by real estate under a recorded security agreement identified in the judgment.
61. The Act uses "the real estate" as the referent, but it clearly refers to the collateral. See, e.g., ULSIA § 501(b).
senior to the judgment? How should outsiders calculate their bids when the price they pay will satisfy not only the junior money judgment but the senior mortgage lien as well? By virtue of giving the money judgment optional relation-back priority, the Commissioners created two sets of situations but have provided the rules for only one of them.

V. THE NOTICE OF INTENTION TO FORECLOSE

A mortgagee begins the process of foreclosure by disseminating a “notice of intention to foreclose.” This notice is a precondition to either judicial or power-of-sale foreclosure. Thus, a mortgagee may send the notice of intention to foreclose before making the subordinate decision regarding the kind of foreclosure to employ. If either type of foreclosure is contemplated, the notice must go out. It must be sent whether or not a notice of acceleration was previously given; the acceleration notice does not render the foreclosure notice unnecessary.

A. Notice of Intention to Foreclose and Notice of Acceleration

The relationship between the notice of intention to foreclose and the notice of acceleration is ambiguous, and the timing of each is also unclear. Section 506(a) provides that—except for protected parties—“the notice of intention to foreclose may be sent at any time after default”; the notice of acceleration, on the other hand, is to be sent “after the debtor’s failure to perform.” Where a missed installment payment does constitute a default, the mortgagee may elect to send the notice of intention to foreclose at the same time, or before or after sending the notice of acceleration.

Where the notice of intention to foreclose is given at the same time

62. It is for these reasons that some states prohibit a mortgagee from both foreclosing and executing on the same property except under special circumstances. See, e.g., N.Y. Civ. Prac. L. & R. 5236(b) & 5230(a) (McKinney 1978 & Supp. 1992). This restriction is sometimes referred to as an election of remedies rule, but it confines the election only in one situation.

63. ULSIA § 506(a).

64. Where the decision is to sue instead of foreclose, this notice is clearly unnecessary. Indeed, no notice may be necessary under the former choice.

65. Id. § 502(a). In light of the statutory distinction between nonperformance and default made by § 501, it is thus possible that different triggering events may be involved for the two notices. Where default is defined in the loan documents as nonpayment of an accelerated debt (rather than an installment) the notice of acceleration would be a required preliminary to the notice of intention to foreclose.

66. The notice of intention to foreclose could even be given in lieu of a notice of acceleration if the creditor truly intended to have piecemeal foreclosure proceedings and successive sales of the security for each missed installment. How this would work under ULSIA is unknown.
as the notice of acceleration, judicial foreclosure proceedings may be commenced immediately against unprotected parties. 67 However, if an installment note is involved, the fifteen-day grace period will complicate the proceeding because the amount required to dismiss the action will change after two weeks—from one installment to the entire loan balance. Under these confusing circumstances, mortgagees will probably delay filing foreclosure actions until the debt has been fully accelerated. 68

The status of the time period after the notice of acceleration period has run or has been waived, and before any notice of intention to foreclose has been given or any action on the note has been filed, is also unclear. Has the entire debt come due even though the mortgagee has taken no steps to collect it? Until the mortgagee elects to foreclose or takes other action, there appears to be no reason why the mortgagor should not be permitted to undo the acceleration, but the Act is silent on this issue. The mortgagee who does not wish to give the mortgagor an extended period of de-acceleration should avoid that consequence by timely—or even early—filing of the notice of intention to foreclose. 69

1. Notice to Protected Parties

The notice of intention to foreclose may not be sent to protected parties residing on the secured property until "a payment of money has not been made when due and remains unpaid for five or more weeks." 70 In this case, the notice of intention to foreclose is clearly intended to be sent at a later time than the notice of acceleration. 71 When a protected party is involved, the fifteen-day grace period of the notice of acceleration is rather unimportant, because section 513(b) gives any protected party—whether or not residing on the property—up to the moment of disposition on foreclosure to reinstate the installment debt by paying

67. Id. § 507(b).

68. Although protected parties are allowed more time to pay only the arrearages by § 513(a), this right does not generate the same kind of confusion because it lasts throughout the entire foreclosure proceeding.

69. Comment 2 to § 507 refers to "a requirement that the creditor give the debtor 'reasonable notice' of an 'intention to foreclose,'" adding that "the reasonableness of the time" is a question of law except where it has been defined in the mortgage. However, since the Act has elsewhere provided that instant notice is proper in such cases, see id. § 507 cmt. 2, it is difficult to understand how reasonableness could ever be a factor.

70. Id. § 507(d).

71. The five-week foreclosure grace period precedes the notice of intention to foreclose, whereas the 15-day acceleration grace period follows the giving of the notice of acceleration.
only the arrearages.\textsuperscript{72} Sometime during the five-week notice of intention to foreclose waiting period, and probably at least two weeks before that period ends, a notice of acceleration should be sent, but there is no need to mark the calendar for the end of those fifteen days unless other parties are involved.\textsuperscript{73}

Because notice of intention to foreclose cannot be given until five weeks after a missed obligation, a protected party residing on the property has a five-week breathing space with respect to foreclosure. An action on the accelerated debt may be brought against him immediately after the default, but proceedings against the security are postponed because the notice of intention to foreclose is the first step and cannot be sent until five weeks later. Further delays may also follow, since additional five-week pauses are mandated by section 507(b) (for instituting judicial foreclosure proceedings against protected parties, whether or not they reside on the premises) and by section 509(a) (for conducting nonjudicial sales against all debtors).

Many policy issues are involved here for legislatures to consider: (1) Is five weeks an appropriate amount of time to accomplish the purposes motivating the grant of a delay period?; (2) Should the delay period apply to monetary actions as well as foreclosures?; (3) Should the delay be extended to all protected parties, even those not residing on the premises?; (4) Should the delay be extended to all mortgagors, even unprotected ones?; and (5) Since the delay involved is not the only delay built into the process, is it better to have longer or shorter delay periods later rather than here?

Uniformity will inevitably be lost if individual jurisdictions resolve these issues differently, as surely they will. In some instances—for example, five versus seven weeks—discrepancies will hardly matter, even to national lenders. Other variations will be more consequential, although that does not make them less likely to occur. Pro-debtor legislatures are simply not going to perceive fairness in the same terms as pro-creditor ones, and the two may arrive at very different foreclosure mechanisms. Only if the battle between these interests were waged in a national forum, such as Congress or some federal agency, could a uni-

\textsuperscript{72} The grace period, however, is important if a protected party has already exercised his redemption rights within the past 12 months; in this case, the right to cure under § 513(b) is no longer available. See id. § 513(c).

\textsuperscript{73} The Commissioners appear to intend that the two- and five-week periods overlap. For example, comments 4 and 5 to § 507 use examples of five and ten weeks (rather than seven and twelve weeks) for protected-party installment notes.
form compromise possibly be struck. The singular unifying accomplishment of the Commercial Code is not likely to be repeated in the mortgage field where homeowners and farmers, on the one hand, and small investors and institutional lenders, on the other hand, have clear and distinct interests at stake. The compromises they may work out in individual states might possibly be kept within the confines of an ULSIA-type procedure, but might well destroy any common features recognizable by other jurisdictions.

2. Persons Entitled to Notice

Under section 507(f), the notice of intention to foreclose is to be sent "to the person specified by the debtor . . . or . . . to the debtor or any one of two or more debtors, but notice must be given to all debtors having an interest in the property who are protected parties." Notice also goes to persons who the creditor intends to hold liable for a deficiency judgment. With regard to multiple (unprotected) debtors who have executed a single mortgage, each is apparently presumed to be the agent for the others as to receipt of notice, and the Act implies that only one agent may be so designated, unless the documents provide otherwise. Conversely, every debtor who may be held liable for a deficiency judgment must receive the notice, whether he is protected or not, so that the danger of non-notice from the agent applies only with regard to loss of the security and not to potential personal liability.

Section 507(f) also provides for notice "to any person in possession of the real estate from whom the creditor has received a written demand to receive notice of intention to foreclose." It is unclear why a party already in possession—to whom notice by mail can be sent more easily than to anyone else because his address is certainly known—must make a written demand for the notice. It is also unclear why the right to demand notice is given only to tenants and not to other parties as well. And there is no explanation as to why tenants under leases executed after the mortgage—who have a greater need for notice because their leases may be terminated by a foreclosure of their mortgagor/landlord's interest—are treated the same as tenants under leases executed before the mortgage—who may not be affected at all by the foreclosure. In particular, that the senior tenant can demand notice, whereas the junior creditor cannot, seems indefensible.

74. See id. § 507(f).
75. Id.
As indicated above, junior mortgagees have no entitlement to notice of intention to foreclose. They qualify neither for automatic notice nor for the right to make written demand for such notice. According to the Commissioners, because this notice is not given for the purpose of cutting off interests, notices serving that function are the ones they should receive. The distinction is hard to justify. The slight burden on the senior in having to mail to junior creditors of record hardly outweighs the latter's critical need for sufficient time to take the steps to protect their interests from being eliminated by a senior foreclosure.

Junior creditors, like debtors, need to receive notice as early as possible. Both will lose their interests following a senior foreclosure sale; both may wish to challenge the validity of the senior's claim; both may wish to cure the senior default to protect their own interest; and both generally need maximum time to do all this. Indeed, compared to a protected party who can cure without acceleration, the junior's need for early notice is greater. Since the statute requires giving notice to tenants in possession who have requested it (without having recorded their leases), the mortgagee is forced to keep a log of such requests in any event. It would hardly be troublesome to add junior requests to the list.

3. The Notice Mechanism

Section 508(a) requires that the notice be sent by mail to the mortgagor's specified address (or to a better one if the mortgagee knows of it) as well as to any other person known to the mortgagee to be a good conduit to the mortgagor. There is no provision for either recordation or publication of the notice. In light of the previously discussed inability of junior creditors to receive notice by mail, these omissions are all the more significant. The junior mortgagee cannot employ financial or credit services to keep her apprised of the condition of the senior loan if the public records and the newspapers are excluded from the process. In fact, it is possible for a junior to unwittingly make her loan and take a second mortgage while the first is already in

76. See id. § 507 cmt. 6.

77. The senior can be expected to credit bid no more than its own debt at its foreclosure sale, and the burden falls inevitably upon the junior to push the bidding up to an amount large enough to protect her own security. Because she cannot credit bid at the senior sale, she should have the time necessary to obtain enough cash to bid at the sale.

78. A mortgagor may obtain a "statement of account" from the mortgagee under § 209. Although no such right is given to any junior lender, she could probably require her mortgagor to request one from the senior as a condition of obtaining the junior loan.
B. Contents of the Notice

Section 508(b) provides that the notice of intention to foreclose must cover eleven matters. These are applicable to all mortgagors, not just protected parties. All subsections are discussed below, more or less serially, in appropriate groupings.

1. The Security

Section 508(b)(1) requires that the notice of intention to foreclose clearly identify in writing "the particular security interest foreclosed." There is no elaboration or commentary regarding this requirement. Where the mortgagor has posted his entire title in the collateral as security, a simple copying of the property description from the mortgage is probably sufficient. Where there are junior leases that the mortgagee desires to preserve, the terse wording of the section may permit the mortgagee to describe the interest as a fraction of the collateral (i.e., only the reversion) in order to avoid termination of the existing leases. For protection, the mortgage itself should permit the mortgagee to do this.

Where multiple security is involved and the mortgagee intends to reach only some of it at this time, the notice should omit the excluded properties. The wording of the section appears to permit such procedure. To avoid any risk of waiver, however, that notice probably should include a caveat that the rest of the security is not being released. Little in the Act covers piecemeal foreclosure sales, except for the reference that any personal property can be treated as real property and included in the Act's foreclosure procedure. One may surmise that additional notices of intention to foreclose should be sent when addi-

79. This point is reconsidered later under notice of sale. See discussion infra parts VII.B.2-3.
80. This conclusion seems justified given the fact that there is no special mention of protected parties in the section. On the other hand, the Commissioners' comment to § 507 interprets § 508 as mandating compliance with the 11 matters only for protected parties. See ULSIA § 507 cmt. 4. This reading seems plainly inconsistent with the text and official comments for § 508.
81. For further discussion on the survival of junior leases, see discussion infra parts XI.C.4.b-XI.E.
82. Another virtue of not including a one-action rule in ULSIA is that piecemeal foreclosure proceedings are generally more available. See supra part IV.A.
83. See ULSIA § 501(e). The section was written to coordinate ULSIA with the Uniform Commercial Code. Id. § 501 cmt. 5; see also id. § 102(c) & cmts. 1-2.
tional security is being sought, but the Act is silent on this matter.

2. Default and Cure

Sections 508(b)(2)-(4) require that the notice of intention to foreclose state “the nature of the default claimed” ((b)(2)), whether there has been an acceleration ((b)(3)), and “any right the debtor has to cure the default, the amount to be paid or other action necessary to cure, and the time within which the cure must take place” ((b)(4)). While these requirements are straightforward enough, they may have been forgotten when section 513—dealing with the actual process of curing the default and undoing acceleration—was drafted.

It should be easy for the notice to state that a monthly payment has been missed and that an election to accelerate has been made. However, it will be more complicated to inform the debtor of his cure rights. Once the debt has been accelerated, there is no right to de-accelerate merely by paying the arrearages, except where the debtor is a protected party. Furthermore, unpaid tax and insurance payments must be cured in order to redeem, whether or not they were specified in the notice, and probably whether or not a protected party is involved. The redemption provisions of section 513 are not made dependent on the notice requirements of section 508, meaning that the creditor may demand whatever is then due as a condition of cure, whether or not it was specified in the notice of intention to foreclose. A similar disparity applies to a protected party attempting to de-accelerate: section 513(b) requires that he make his loan absolutely current and does not indicate that this burden is contingent upon what was specified in any of the required notices.

The cure rights of section 513 should be taken into account when complying with the requirement that the notice state the amount necessary to cure. At the time of the original default, only one month’s payment is needed to cure if the fifteen-day notice of acceleration period

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84. The decision to accelerate is, however, to be made by a separate notice of acceleration. As has been noted, the notice of intention to foreclose is permitted to include a notice of sale and notice of judicial foreclosure, but not a notice of acceleration. It is unknown whether acceleration can be accomplished by a provision in the notice of intention to foreclose where there was no notice of acceleration (or defective notice of acceleration) or what the effect of inconsistencies between the two notices would mean.
85. ULSIA § 513(b).
86. Id. § 513(b)(2).
87. The notice is required only to disclose the debtor’s right to cure. Juniors and others apparently must figure out their rights for themselves.
has not elapsed or if the mortgagor is a protected party. If the notice states no more than this, the failure to say more may mean that the mortgagee cannot resist a tender of the one payment specified in its notice, even though more has since come due. Proper drafting of the notice, relating dates to amounts and providing for the contingency of other defaults (e.g., “plus tax and insurance payments if such have come due in the interim”), should be able to avoid these problems. Perhaps a clause listing “any other subsequent default or amount then due” would be effective.

3. Type of Foreclosure

Section 508(b)(5) requires that the notice of intention to foreclose state “the methods by which the debtor’s ownership of the real estate may be terminated.” This requirement should be satisfied by a simple enumeration of the choices contained in section 507. Indeed, quoting from comment 2 of that section may be the safest way to comply. Since this notice may precede any choice the creditor intends to make, there is no reason to expect that this subsection requires anything other than a laundry list. Section 508(b)(10) permits the mortgagee to make the choice of type of foreclosure in the notice of intention to foreclose. The mortgagee may include a notice of sale or notice of judicial foreclosure in the notice of intention to foreclose. Comment 5 to section 507 states that a clear indication of which method is being chosen can shorten the time by again permitting overlap, but it does not indicate why the notice of intention to foreclose might not include notices as to both kinds foreclosure, thereby starting the applicable periods for both running at once without the mortgagee having made any real election. Comment by the Commissioners fits more appropriately in § 508 than in § 507. Nothing in the Act’s policy of barring double recovery requires that an election of remedies be made at this stage or that the two remedies not proceed simultaneously until the last moment. A creditor expecting to sell by way of power of sale might still be constrained to file a lawsuit to get possession and—while it is at it—include a count for judicial foreclosure as a precaution. The Commissioners probably had in mind that the mortgagee would generally make a choice—their com-

88. These other notices will be discussed later when the relevant proceedings are considered. See discussion infra parts VI.A. (notice of judicial foreclosure) and VII.B. (notice of sale). For discussion purposes, I will assume that such notices are given separately.
89. This comment by the Commissioners fits more appropriately in § 508 than in § 507.
90. Even in one-action jurisdictions, a creditor is not required to choose between a judicial and nonjudicial foreclosure sale until the last minute.
ment assumes a duty to make one—but the text of the Act does not impose one. Indeed, the section permits the mortgagee to choose not to make an election at this time.

4. The Foreclosure Notice

Sections 508(b)(6)-(9) & (11) require that the notice of intention to foreclose include the following elements: (1) the debtor's right to transfer his equity of redemption after default ((b)(6)); (2) his risk of dispossession during or after foreclosure ((b)(7)); (3) his right to a surplus or risk of liability for a deficiency after a sale ((b)(8)-(9)); and (4) his right to seek judicial protection controlling the foreclosure ((b)(11)). These subsections call for boilerplate announcements and will rarely cause creditors much difficulty. The wording of the possession announcement under section 508(b)(7) may depend upon what clauses are in the mortgage and what decisions the mortgagee is making with regard to possession. Similarly, the deficiency judgment announcement under section 508(b)(8) will be controlled by whether or not a protected-party, purchase-money loan is involved.91

VI. JUDICIAL FORECLOSURE

Judicial foreclosure requires no enabling language in the mortgage, being a remedy available to the mortgagee as of right.92 A notice of intention to foreclose93 is required as a preliminary matter, but it

91. These matters are all considered elsewhere in this Article. See discussion infra parts VII.C.1 (debtor's right to transfer equity of redemption), VIII (risk of liability for deficiency after sale), X (right to surplus), X.B.-C. (right to judicial protection), and XI.A.-B. (risk of dispossession after foreclosure).

92. Conceivably, the right to judicially foreclose could be waived by appropriate language in the mortgage, much as the right to sue on the note or recover a deficiency judgment can be waived by utilization of a nonrecourse promissory note. Similarly, the right to foreclose by way of power-of-sale would be “waived” by mere noninclusion of a power-of-sale clause in the mortgage. It is hard to perceive any advantage to either party from a waiver of the possibility of judicial foreclosure, but this could change if impediments were added to the power-of-sale process, because a waiver of judicial foreclosure would then make mandatory those impediments attached to the power-of-sale. For example, if power-of-sale were elongated from 5 to 25 weeks in a jurisdiction where judicial proceedings generally took only 10 weeks to complete, a waiver of the right to judicially foreclose would amount to a waiver of the right to save 15 weeks.

93. See ULSIA § 507(b). A notice of acceleration would normally also be sent as a preliminary first step whenever an installment note was involved, since piecemeal foreclosure proceedings brought after each missed installment would be an intolerable alternative. It is unclear from the Act whether the 15-day grace period for undoing acceleration, see id. § 502(a), must be allowed to expire before commencing the judicial foreclosure action, or whether notice of acceleration and institution of judicial foreclosure can be done simultaneously with the foreclosure action being terminable in different ways before and after the 15-day period has expired. However, even after
may be sent immediately after any default by an unprotected party. 94

A. Notice of Judicial Foreclosure

Protected parties have additional entitlements as to both notices and time. In addition to the notice of intention to foreclose previously mentioned, the Act provides for a “notice of intention to commence the proceeding” in section 507(b). This provision appears from its context to refer to a judicial foreclosure action, although no such notice is included in the index of notices contained in section 506. It also appears to be the same as what is referred to in 508(b)(10) as a notice of “intention to institute judicial proceedings,” in light of the cross reference there to section 507(b). 95 If this latter interpretation controls, this notice need not be treated as a separate notice, but merely as a part of the information to be contained in the notice of intention to foreclose. If, however, a separate notice is intended, there is no statutory guidance as to when, where, and how it must be sent.

B. Time

A protected-party debtor is given additional time to save his property from a judicial foreclosure. Section 507(b) provides that “as against a protected party the judicial proceeding may not be commenced until five weeks after notice of intention to commence the proceeding has been given.” Furthermore, when the protected party is also residing on the premises, section 507(d) adds that “the notice of intention to foreclose (section 508) may not be given until a payment of money has not been made when due and remains unpaid for five or more weeks.” Because the notice of intention to commence the proceeding probably cannot be sent before the notice of intention to foreclose, it appears that occupying protected parties have ten-weeks grace before judicial foreclosure proceedings can be initiated against them: five

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94. See id. § 506(a).
95. The reference here is to the creditor’s ability to send this notice as part of the notice of intention to foreclose. The context suggests that the judicial foreclosure notice should always be given when that is the remedy chosen, but §§ 506(c) and 510(b)(2) essentially suggest that judicial foreclosure can occur without such a notice beforehand.
weeks from nonpayment to notice of intention to foreclose, including notice of intention to commence proceedings, and then five weeks thereafter before the complaint may be filed.96

C. Procedure

Most mechanical details of the judicial foreclosure action are omitted, pursuant to an express policy of the Commissioners that local civil procedure rules should guide the action.97 Such a policy is puzzling, since it guarantees that there will be little uniformity among the states on a key component of the collection process. Even with an attractive power-of-sale alternative available, foreclosure proceedings will be perforce judicial when there are legitimate disputes between the mortgagee and the mortgagor, junior lienors, guarantors or other third parties, because it will be safer to have these matters adjudicated in the main foreclosure proceeding rather than in a judicial action collateral to the power-of-sale proceeding, often occurring long after the sale. If lenders from one part of the country desire to know what they confront as to collection in another part of the country, an explanation that local procedure will govern the judicial foreclosure process is not likely to give them much help.98

Furthermore, one of the more common complaints of lenders, both resident and foreign, concerns the cost and time of judicial foreclosure. Not surprisingly, the desire to reform and economize the collection process was one of the motivating forces behind ULSIA.99 The worst features of many states' foreclosure processes, however, are left unchanged by the Act, forcing the reformers to engage in the very battles they probably hoped to avoid in urging the enactment of ULSIA.100

A few common procedural steps are mandated by ULSIA. The complaint must show that the notice of intention to foreclose and—for protected parties—the “notice of intention to institute judicial proceed-

96. This circumstance seems inconsistent with § 506(c), which provides that “[a]s against a protected party, a judicial proceeding to foreclose cannot be commenced until after the time specified by section 507(b).” The nonreference to the delay mandated by § 507(d) is puzzling.
97. See id. § 510 cmt. 1.
98. Such incorporation of local procedure probably also guarantees that out of state lenders will need local counsel to explain as well as to conduct judicial collection proceedings in the state.
99. See, e.g., id. § 503 cmt. 1 (“This Act is based on a major policy decision—to reduce the ‘cost’ of foreclosure.”).
100. However, ACREL said “ULSIA affords great flexibility to each jurisdiction and states unwilling to eliminate judicial foreclosure for residential mortgages may nevertheless permit power of sale for commercial mortgages.” ACREL REPORT, supra note 8, at 15.
ings” were given, and that a deficiency judgment is not barred (pro­
vided one is sought). ¹⁰¹ Service of process must be made on all parties
having inferior interests of record, whether or not they were entitled to
receive the notice of intention to foreclose under section 507(f). ¹⁰² On
the other hand, since the service entitlement is given only to persons
whose interests are of record, junior tenants whose leases were not re-
corded but whose possession would otherwise put creditors on notice of
their existence do not appear to qualify, unless they made a written
demand for notice of intention to foreclose. ¹⁰³

The possibility that such junior tenants may have their interests
terminated even without being included as parties in the foreclosure
action raises the perverse question of what the creditor must do if it
desires to preserve rather than terminate junior leases. Under a set of
rules that requires that such tenants be served before their leases are
terminated, nonservice would be the device for accomplishing
nontermination. But how does one omit a party whose presence was not
required in the first place? Mortgagees must draft their pleadings more
carefully to make clear that only reversionary interests are being
foreclosed.

Section 510(c) also contains provisions calling for a judgment de-
claring the amount due, ordering a sale, and naming the seller, who can
be anyone, including debtor or creditor. ¹⁰⁴ It provides that the sale
should be conducted in the same manner as are nonjudicial foreclosure
sales, pursuant to section 509. However, the next section, 510(d), im-
poses a requirement not mentioned in section 509: The seller must seek
buyers and bidders by reasonable means of communica-
tion—notwithstanding any service by publication—suggesting that
there may be some difference between these mechanisms and those pre-
scribed for nonjudicial sales. ¹⁰⁵ The section closes with mechanical pro-
visions for return and confirmation of the sale and clerical entry of a
deficiency judgment (section 510(e)), execution of a foreclosure deed

¹⁰¹. See id. § 510(b).
¹⁰². See id. § 510(c). For power-of-sale foreclosures, § 509(a) limits notice to parties of rec-
ord at least seven weeks prior to the date of intended sale. See infra part VII.B. That limitation is
not mentioned here, indicating that all recorded junior interest should be served.
¹⁰³. See § 507(f), which is incorporated into § 510(c) for service requirements.
¹⁰⁴. Clarity is not helped by lumping provisions relating to the judgment and the sale in the
paragraph dealing with service of process; still, the individual rules are easy enough to understand.
Adding to the sense of poor organization is the mislocation of the provision recommending that
the decree contain a date for the foreclosure sale; this provision is found in § 513(a), which other-
wise deals with redemption.
¹⁰⁵. See discussion infra part VII.D.
(section 510(f)), an order putting the buyer in possession where necessary (section 510(g)), and an allowance for strict foreclosure where it does exist (section 510(h)).

Overall, there is little in the judicial foreclosure features of ULSIA to cause one to support or oppose it. Where ULSIA is enacted, some clarifying amendments will be necessary, but that will not be difficult to accomplish. The failure of the Commissioners to take any real interest in the judicial foreclosure process is a serious drawback of the Act. Interested persons in those jurisdictions who have or want the judiciary involved in collection proceedings will achieve neither uniformity nor reform from ULSIA and will probably concentrate their energies elsewhere. Notwithstanding a strong desire to permit nonjudicial power-of-sale proceedings, the Commissioners may have been too inattentive to the necessary alternatives. Judicial foreclosure may well become the stepchild of the power-of-sale process, but it will still be a member of the family.

The mortgagor is permitted to redeem during the judicial foreclosure process. This is discussed later in the context of power-of-sale foreclosure proceedings.

VII. Power of Sale

Section 509(a) provides that a mortgagee who "is authorized to foreclose by power of sale . . . after the debtor's default and upon compliance with this section, may sell any or all of the real estate that is subject to the security interest." By this provision, ULSIA thus authorizes nonjudicial foreclosure sales by mortgagees. Disposition of the collateral becomes possible without the necessity of judicial foreclosure proceedings and its attendant costs and delays. Although not explicitly stated, the desire to make available such an alternative remedy is clearly a major motivation for the promulgation of the Act. Lenders from judicial foreclosure states have long looked enviously at the seeming convenience and cheapness of collection efforts open to their rivals.
in power-of-sale jurisdictions; understandably, they hope to have this procedure available throughout the country.

For a mortgagee to sell the mortgagor's property on foreclosure without judicial action, ULSIA requires three writings: (1) a power-of-sale provision in the mortgage; (2) a notice of intention to foreclose;\(^{109}\) and (3) a "notice of intended sale."

A. The Power-of-Sale Clause

Section 507(c) requires that the mortgage authorize a power-of-sale for the creditor to dispose of the collateral without a judicial foreclosure. The Act could have provided, as a few states do, that this remedy was available to any mortgagee, with or without such a clause in its mortgages, since there is no doubt that all mortgages will contain such provisions wherever the Act becomes law. Other rights are given by ULSIA to mortgagees without the need for boilerplate language,\(^{110}\) and the power-of-sale provision would have been another appropriate candidate for such treatment. In those jurisdictions where such a provision is available and efficacious, it is so universally employed that many mortgagors and mortgagees believe it to be the only way of foreclosing on the collateral.\(^{111}\) There is no statutory guidance as to how the power-of-sale clause must be worded: "Together with power to sell the collateral" is probably sufficient, but there would be no harm in describing what that remedy consists of, especially by language borrowed from the Act.

B. The Notice of Sale

Section 506(b) provides that no foreclosure under a power-of-sale can occur unless a "notice of intended sale" has been given, and refers readers to section 509(a) for the content of that notice. Section 509(a)

\(^{109}\) The following sections of this Article omit discussion of the notice of intention to foreclose which was treated earlier. See discussion supra part V. Recall, however, that this notice is a prerequisite to any form of foreclosure. It may include the notice of sale, see ULSIA § 506(b), discussed here as a separate notice merely for convenience. See discussion infra part VII.B.

\(^{110}\) See, e.g., the inclusion of rents as part of the security, discussed infra part XI.

\(^{111}\) There is the danger that putting the power-of-sale on a statutory rather than contractual basis might make it appear to be state action and therefore more subject to constitutional scrutiny on questions of notice and opportunity to be heard. While one federal circuit court has held that state action is not involved even in the presence of a statute authorizing powers of sale, see Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), it is nevertheless the case that the customary basis of denying state action in the power-of-sale is the fact that the power is granted by the mortgagor rather rather than the legislature.
provides that the creditor must give "reasonable written notice of the
time and place of any public sale or if a private sale is intended, rea­
sonable notice of intention to enter into a contract to sell and of the
time after which a private disposition may be made." Because the sec­
tion also provides that "sale may not be held until five weeks after the
sending of the notice," the notice is effectively required to set a sale
date at least five weeks in the future. That the notice of intention to
foreclose may not be sent until five weeks after a missed payment 112
likely means that sale will be delayed for ten weeks after the default,
because it is unlikely that the notice of sale can be given before the
notice of intention to foreclose.

The timetable for a public sale is easy to follow: a notice sent on
January 1 must set an auction date no earlier than February 5. It is
less clear how the calendar applies to a "private sale" or "private dispo­
sition." The five-week requirement applies to a "sale" and thus appears
to cover private as well as public sales, but the "time and place" re­
quirement relates only to the public sale, not the private sale, and it is
the "private disposition" rather than "contract to sell" which requires a
specified date. With regard to private sales, it is difficult to tell whether
the section means that no contract of sale may be entered into until five
weeks after the notice was given or that escrow for such a contract may
not close until five weeks after the notice.113 The latter (five weeks for
escrow to close) seems more realistic because it will be hard for the
mortgagee to predict when it can find a purchaser.114 It also may be
fairer to other parties whose interests in having the property sold for a
fair price are best protected by a notice advising them of the terms of
the actual sale.115

There is no statutory guidance as to how a creditor proceeds when
its plans are to sell the property at a public auction in a case where the
creditor has been unable to locate a private buyer before that time. It is
also unclear what a creditor should do when it receives an attractive
offer to purchase prior to the date previously noticed for public auction.
These situations seem not contemplated by the Commissioners.

112. See ULSIA § 507(d). Protected parties are also entitled to a special warning legend in
the notice pursuant to § 112(f).
113. Indeed, it may mean that five weeks must precede each of these two events.
114. Although the section could refer to the date when the property might be listed for sale.
115. This reading is rendered somewhat less probable by the failure of the statute to require
that a notice of intention to sell privately include the terms of that private sale.
1. When to Give the Notice of Sale

The notice of sale may—except in the case of a protected party—be given immediately after default. Section 506(b) provides that it may be included in the notice of intention to foreclose, or by way of a separate writing given at the same time as the notice of intention to foreclose, or at a later date. Section 509(e) adds that if the notice of sale is given as part of the notice of intention to foreclose, the five-week period starts from the date of the notice of intention to foreclose. That, however, requires the mortgagee to immediately set a time and place for sale. If the mortgagee intends to send its notice of sale at a later time, one would not expect the notice of intention to foreclose to say anything about the sale. For protected parties, the notice of sale may still be included in the notice of intention to foreclose, since it is the notice of intention to foreclose which is held up for five weeks after the missed installment. The Commissioners seem to have intended that the mortgagee not send out a notice of sale prior to a notice of intention to foreclose, thus imposing the ten-week delay for the final sale.

2. Who Receives the Notice of Sale

The Commissioners have provided for a different dissemination of the notice of sale than for the earlier notice of intention to foreclose. Although the notice of intention to foreclose need be sent only to some debtors and requesting possessors, the notice of sale must go to any party with a recorded interest in the property. The problems created by failing to communicate a notice of intention to foreclose to junior creditors already have been discussed. Because the mortgagee must now make a title search in order to determine who is entitled to receive the notice of sale, the only savings generated from not having had to make that search for the earlier notice of intention to foreclose occurs when the mortgagor cures the default in between the two notices.

116. See ULSIA § 508(b)(10).
117. The final sentence of § 506(b) provides that the notice of sale may be given simultaneously or at a later time; it makes no reference to the possibility of it being given before the notice of intention to foreclose.
118. See id. § 507(f).
119. See id. § 509(a).
120. This is noted by the Commissioners in comment 1 to § 509.
121. Furthermore, because the Commissioners have provided for inclusion of the notice of sale within the notice of intention to foreclose, it is clear that they did not contemplate such an interim period as a matter of course. Whenever the two notices are combined, junior creditors will surely receive both of them, since it would be highly uneconomic for a senior to prepare two different sets
A junior creditor is entitled to notice of sale only if she was of record seven weeks before the date set for sale, even though the notice of sale can set the sale for five weeks. No explanation is given for this peculiar timetable. Literally applied, a senior searching the records may actually see the recorded junior interest and yet be entitled to avoid giving her notice by pushing up the date of sale! A junior fearing this predicament can do nothing except have the junior loan funds impounded for two weeks. Because a loan condition request may not yet reveal a default, she cannot make a written demand for later notice and its existence on the records will not help her.

As for other parties, such as guarantors and judgment liensors, the Act does not say whether they are entitled to receive this notice. They, like junior mortgagees, also have no statutory guidance regarding what to do if they disagree with what the notice asserts.

3. Nonrecordation and Nonpublication

There is no requirement that either the notice of intention to foreclose or the notice of sale be recorded or published. This is inconsequential to interested parties who have learned of the sale from the mails, but seriously affects others who are not entitled to receive notice by mail. When combined with the fact that there is no provision for requesting notice of intention to foreclose or notice of sale, either by direct communication with the mortgagee or by recording such a request, the effect is that interested outsiders have no way of keeping themselves informed as to the status of the property or of the loan.

C. Redemption

During the notice-of-sale waiting period, section 513 gives the debtor and holder of any subordinate interest the right to "cure or re-

The fact that the two notices can be combined also disposes of any argument that the notice of intention to foreclose is not sent to the junior in order to spare the mortgagor from embarrassment if he is able to cure before a notice of sale goes out, because the existence of consolidated notices means that the juniors may well learn anyway.

122. Perhaps because of the lack of any recordation requirement, the definition of notice in § 112 does not include traditional constructive notice from the records.

123. Redemption is also applicable to judicial foreclosure sales. Because ULSIA refers to it as a right to "cure the debtor's default," this right to redeem should not arise until a default has occurred. Of course, the right to redeem does not arise in a meaningful sense until some notice has been sent to the party in jeopardy. During the 15-day notice-of-acceleration period, the right of all parties to de-accelerate should not be treated as a redemption at all within the statutory framework (although conventionally one might certainly refer to that as "curing" a default).
deem” the default. Redemption by way of de-acceleration of an acceleration installment obligation—a privilege available only to protected parties—has been covered previously;\textsuperscript{124} what is considered in this section is cure by way of payment of the entire obligation.\textsuperscript{126} That right is available to all parties.\textsuperscript{126}

Redemption requires tendering\textsuperscript{127} the full amount of the acceleration obligation, “plus reasonable expenses of proceeding to foreclosure incurred at the time of tender,”\textsuperscript{128} “including reasonable attorney’s fees of the creditor.”\textsuperscript{129}

1. Competing Redemptions

Section 513(e) creates a system of priorities for competing “tenders of redemption,” providing that a tender by the second “prevails” over a tender by the third, and that both prevail over a tender by the debtor. It thus attempts to avoid the problems of “scrambled” redemption and the uncertain status of a second lien after the holder of a third lien has redeemed from a foreclosure sale conducted by the first lienor. It is unlikely, however, that the Act accomplishes this goal because the priority of tender principal is not backed up by appropriate calendar periods giving a party with prior redemption rights the exclusive privilege of doing so. It is possible for the holder of the third lien to redeem immediately after default and before the holder of the second attempts to do the same. “Prevail” might mean to have the power to re-redeem

\textsuperscript{124} See discussion \textit{supra} part III.B.

\textsuperscript{125} I will refer to this right as one of redemption, in contrast to the previously discussed right of de-acceleration.

\textsuperscript{126} Even for a protected party, there is a right of redemption distinct from the right of de-acceleration, because he may de-accelerate a defaulted obligation only once every 12 months. ULSIA § 513(c). A second default in the same year would generate a right of redemption but not de-acceleration. Whether a protected party could elect to redeem by paying the obligation in full even though he was entitled to do so by paying only the arrearages is not covered by the Act. The Commissioners reflected concern about this possibility in their treatment of prepayment penalty clauses, but do not address it directly. Of course, if a prepayment penalty clause is permitted to apply to prepayment by way of redemption, the question of whether the mortgagor may redeem without de-acceleration (i.e. pay the entire debt) is moot.

\textsuperscript{127} A protected party undertaking to de-accelerate his debt may do so by “paying or tendering,” see ULSIA § 513(b)(1), whereas only “tendering” is used in § 513(a). It is unlikely that any significance was intended.

\textsuperscript{128} Id. § 513(a). Again, the phraseology changes slightly for the protected party, who must pay (or tender) “the costs of proceeding to foreclose reasonably incurred after notice of intention to foreclose.” Id. § 513(b)(3). This calculation can lead to a different amount, but was probably not intended to do so.

\textsuperscript{129} Id. § 513(a). See discussion \textit{infra} part X.C.
from a previous inferior redemptioner and to refuse subsequent re-
demption by an inferior redemptioner, but then the priorities appear
backwards, since redemption is always a right held by an inferior
against a superior.\footnote{Furthermore, if “prevailing” refers to re-redeeming, then the references should be to pri-
ority of redemptions, not tenders of redemption.} Finally, apart from stating that the mortgagor
has the lowest right of redemption, the section does not provide for the
consequences to the junior creditors when the mortgagor does redeem;
one would anticipate that their liens “reattach,” but the section does
not say.

The section permits the redemptioner\footnote{Comment 4 to § 513 refers to this right as the debtor’s, but the text of the section shows
clearly that it is a right of any party who is entitled to redeem. The opening sentence of § 513(e)
is made mysteriously conditional upon the debtor being entitled to redeem, but the rights of re-
demption thereafter conferred are not confined to the debtor.} to demand an assignment
of the defaulted mortgage either to him personally or to “any person
designated by the payer.” The Commissioners intended this latter pro-
vision to facilitate the debtor’s right of redemption by permitting him
to transfer the existing mortgage to his source of new funding.\footnote{See ULSIA § 513 cmt. 4.} However, it applies to any redemptioner who pays the entire obligation—as
all except protected parties must do after acceleration has taken ef-
fect—and thus formalizes the benefits they would otherwise have under
principles of subrogation.\footnote{The only time an assignment may not be demanded is “where the secured creditor owns
a subordinate security interest that is not to be assigned.” ULSIA § 513(e). This exception is not
explained in the comments to the section.}

2. Duration

There is no post-sale right of redemption.\footnote{See id. § 513 cmt. 1.} Thus, redemption
ends once the sale is completed. Section 513(a) provides for redemption
“[a]t any time before the earlier of the sale or a contract of sale under
a power of sale or before the time specified in a decree of judicial fore-
closure.” The reference to the contract of sale is probably to the date of
execution rather than the date of performance of that contract.\footnote{If the date of performance was intended, the contract itself would have to be made con-
tingent upon there being no redemption before the date set for closing.} The
date for a judicial foreclosure sale may move back when the sale is
postponed, although one can argue that the different ways of referring
to nonjudicial and judicial sales force a different result. In light of in-
creasing opposition to post-sale redemption because of its adverse im-

pact on bidding, it is not surprising that the fall of the hammer or the close of escrow is the absolute end of the mortgage relationship.

D. The Sale

Sale pursuant to a power-of-sale clause differs from sale following judicial foreclosure more with regard to the steps antecedent to the sale than with the sale itself. The final act of selling, whether conducted by a public official after a judicial foreclosure or by the mortgagee following the steps required for a power-of-sale, will look relatively similar. Not surprisingly, therefore, ULSIA prescribes similar steps for both judicial and power-of-sale foreclosure sales.\(^\text{136}\) The two most significant features of the Act are that first, the sale may be by private negotiation rather than public auction, and second, rather than prescribe details of either kind of sale, ULSIA instead mandates an across-the-board standard of reasonableness. Thus, section 509(a) provides that “[s]ale may be at a public sale or by private negotiation, by one or more contracts, as a unit or in parcels, at any time and place, and on any terms including sale on credit, but every aspect of the sale, including the method, advertising, time, place and terms, must be reasonable.”\(^\text{137}\) The section also permits the mortgagee to purchase at any public sale or at a private sale not conducted by it.

The private negotiation option is entirely new and it is difficult to predict how useful mortgagees will find this alternative to be. The lack of statutory guidance may, at least at the outset, be a considerable deterrent, since the burden of reasonableness is oppressive when no guidelines are available.\(^\text{138}\) The only rules ULSIA provides to the mortgagee who is contemplating a private rather than public foreclosure sale are: (1) that the notice of sale must include a statement of intent to enter into such a transaction; and (2) that the sale must be “conducted by a fiduciary or other person not related to the creditor.”\(^\text{139}\) The problems

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136. See id. § 510(c) & cmt. 4.

These ULSIA provisions are included in the same subsection and same paragraph as cover the question of pre-sale notice to debtors and juniors. Such separate topics would have been better assigned to distinct sections.
138. See discussion infra part VII.D.1.
139. ULSIA § 509(a).
with the first requirement have already been discussed.\textsuperscript{140} Regarding the second, it is hard to conceive of how a mortgagee can negotiate to purchase its mortgagor's property on foreclosure, even when a fiduciary represents the mortgagor.\textsuperscript{141} This entire arrangement is so novel that it will probably be greeted with considerable skepticism initially and will need time to convince doubters that it is truly a workable and fair procedure if it is that. In addition to the blanket authorization for it given by ULSIA, a lender intending to utilize such a procedure would be well-advised to provide for it specially in the mortgage documents, in order to make sure that the mortgagor cannot claim surprise if it occurs.\textsuperscript{142}

1. Reasonableness

The enormous latitude that section 509 affords lenders as to the details of sale is significantly tempered by the absence of any safe harbors. No standard is more terrifying to a lender than one of reasonableness, which too often is measured by what a judge or jury says about its conduct after the event is completed and the mortgagor has filed suit because of the unwanted consequences that followed. Reasonableness may be an attractive notion to plaintiff litigators, but not to real estate attorneys, whose task is to advise their clients how to behave ahead of time. A mortgagee much prefers a concrete directive, even if it is unreasonable, over freedom of action subject to a requirement of reasonableness.

Some aspects of foreclosure reasonableness seem fairly objective and hence trouble-free. The time requirement is one example: A public sale held at midnight on a weekend clearly would have been unreasonably scheduled.\textsuperscript{143} However, other aspects drift off rapidly into gray ar-

\textsuperscript{140} See discussion supra part VII.B.

\textsuperscript{141} "Fiduciary" is not defined in the Act, but it is most unlikely that the Commissioners intended that an agent or party in fiduciary relationship to the mortgagor act as foreclosure seller or auctioneer of the property on behalf of the mortgagee. The phrase is: "if the sale is conducted by a fiduciary or other person not related to the creditor." \textit{Id.} § 509(a).

\textsuperscript{142} There is some irony in requiring mortgagees to include power-of-sale clauses in their mortgages in order to have what is now the everyday remedy of a private auction sale in many jurisdictions, while not requiring that any further language be included in the instrument in order to obtain this new extraordinary remedy of a private negotiated sale. A "power of private negotiated sale clause" would be a far more sensible optional requirement than the conventional power-of-sale clause.

\textsuperscript{143} Another unhappy consequence of the failure to prescribe by statute a precise time and place for public foreclosure sales is that any opportunity for a functioning real estate market is thereby lost. Were ULSIA to mandate, for example, that all sales be held at noon on the first
eas. Was it reasonable, for instance, to locate the sale at the mortgaged premises rather than at the mortgagee's branch office or at city hall? Was it reasonable to advertise the property in the real estate section of the Sunday newspaper only, or should advertisements also have been placed in the various throw-away real estate papers found in racks on most street corners? Was a demand that all bids at the sale be in cash reasonable where that condition drove away persons who would have otherwise bid (if the selling creditor was not a lending institution who could extend credit)? Fixed legislative rules as to these details are preferable to post facto judicial resolution. As soon as one court has publicly upheld some feature of a sale as reasonable, it will probably become the universal norm for all future sales due to the natural, cautious conservatism of lenders and their counsel.

Reasonableness also poses problems with regard to decisions to sell "by one or more contracts, as a unit or in parcels." The mortgagee who elects to sell piecemeal must risk facing criticism that this action precluded the opportunity to obtain a larger bid for the property as a developable whole; conversely, one who sells in bulk must be prepared to defend against a claim that piecemeal sales would have left the mortgagor with some unsold parcels at the end, or would have better protected whatever marshalling rights the juniors may have had.

The elusive nature of a reasonableness standard is most threatening with regard to deciding on private sale disposition of the collateral. Was it reasonable, for instance, to have sold the collateral by private negotiation if the mortgagor subsequently produces a person who declares that he would have bid or outbid the actual purchaser had the Tuesday of the month at the courthouse, serious bidders, as well as bargain hunters and others, could attend more readily and sometimes generate prices more closely approximating market values.

144. The Commissioners' remark extensively on advertising in their comments to § 509. They conclude that a legal notice alone is not reasonable, but that an advertisement in the real estate or financial section of the newspaper would be reasonable. However, they then admonish that employment of a broker "may be the more reasonable method," which unavoidably leaves the reader with the impression that a newspaper ad alone might also be unreasonable.

This standard is supplemented somewhat by § 510(d), governing judicial sales. Although such sales are mandated to follow the same procedures as sales under the power-of-sale clause, see ULSIA § 509(c), this section adds that the person conducting the sale "must seek potential buyers and bidders through means of communication reasonable for the type of real estate involved" even though all parties with interest in the property have been served in the action. Comment 4 to § 510 claims that this requirement is a repetition of the same requirement for nonjudicial sales; the text, however, is clearly different.

145. Id. § 509(a).

146. Section 104 provides that ULSIA is not intended to displace local marshalling principles.
sale been public? Was it reasonable to advertise a public sale in the newspaper, but not to put the property into a multiple listing file for private sale, or vice versa? Was it reasonable to cancel—or not to cancel—a scheduled public auction once a private offer to purchase was received?¹⁴⁷

Since all of these questions are passed over by ULSIA, mortgagees must obtain statutory or judicial guidance on a state-by-state basis. National institutional lenders will know that, wherever their loans are, they will be subject to a standard of reasonable foreclosure, but in order to know the actual content of that standard, they must continue to ask local counsel despite the existence of a uniform statute. With regard to other aspects of the foreclosure process, the drafters of ULSIA were willing to go into significant detail.¹⁴⁸ It is regrettable that they did not apply that same attention to the foreclosure sale.

2. Achieving Fair Prices

The age-old problem of foreclosure sales for mortgagors is that such sales inevitably fail to generate prices close to the market values of the properties sold. Often, such disparities are merely a result of distressed times, when no real estate is equal to the value it had earlier. Even apart from those situations, it is rare to see bidding at a foreclosure sale approach the price a private voluntary negotiated sale would have achieved. An outstanding accomplishment for ULSIA would be to avoid such discrepancies. The power to sell privately may accomplish that, and if it does, both mortgagors and mortgagees may come to find that the preferred method of disposition. The auction sale alternative contains no innovations likely to offer much help. The requirement of reasonableness may serve to inform more persons of the impending sale, but the structural inconveniences of no preliminary title report, difficulties in inspecting the property, lack of a standardized and centralized place and time for sale, and the inability to make conditional bids will shrink the pool of potential buyers down to those informed, strong, and risk-minded enough to demand the high profits that come from underbidding. The elimination of these unnecessary cost-generating features of foreclosure sales would be welcomed by all observers.

¹⁴⁷. Even if the parties stipulate as to these details in the mortgage, the question of reasonableness will remain, along with the additional questions of whether such stipulations constitute impermissible attempts to waive the mortgagors' rights to reasonableness.

¹⁴⁸. See, e.g., the treatment of the duties of a mortgagee in possession, discussed infra part XI.A.
3. Bidding at the Sale

Section 509(a) also provides that the mortgagee may bid at its own sale. A comment to the section adds that the mortgagee may itself conduct the sale. Section 509(b) provides that the high bidder at the sale, unless he is the selling mortgagee, must deposit at least ten percent of his bid in cash or bank paper. It is regrettable that some arrangement to permit a junior to credit-bid her own claim—assuming she can find the cash necessary to cover the senior lien—was not made. The Act does not indicate whether it would be reasonable for a senior mortgagee to agree to permit a junior creditor to bid on credit, although any unreasonableness in making such an arrangement might be avoided by engaging in a private negotiated sale to the junior.

The successful bidder has five weeks to complete his purchase or else become subject to specific performance or forfeiture of the ten percent deposit. There is no provision for making the bid conditional on either a title report or a physical inspection. A bidder is thus forced to take his chances in this regard, and may be expected to reduce his bid accordingly to cover this risk.

Finally, after the deed is executed and delivered, the Act wisely insulates a bona fide purchaser from post-sale attack, even when the proceedings were defective. The deed recites that the proceedings were proper and the purchaser is not required to inquire further into those matters. Finality and insulation of the sale are created, according to the comments, in order to "further assure that the sale price at the foreclosure sale will be more closely related to the real market value of the property."

149. There is no such rule in the text of the section. While the lack of any prohibition against the mortgagee conducting the foreclosure sale should indicate that such procedure is permissible, it would always be open for the mortgagor or other party to contend that this arrangement was "unreasonable" under the circumstances.

150. Although the selling mortgagee may be expected to credit bid what it is owed, ULSIA does not specify whether any amount over that be in cash; surely this would be required.

151. Ten percent is a large amount to retain as liquidated damages; such a requirement may have to be reconciled with the jurisdiction's general rules on liquidated damages and penalty clauses in real estate contracts generally.

152. See ULSIA § 512(a).

153. See id. § 512 cmt. 1.
4. Improper Sales

Where the sale has been mishandled, creditor liability is provided for in section 514(b). Noncompliance with sale requirements is specifically listed as a basis for liability. Mortgagors and other parties who were entitled to notice may recover from the mortgagee for "any loss caused." A protected party may recover up to $500 without proof of harm, as well as attorney's fees and litigation costs. Liability would necessarily be confined to the foreclosing mortgagee, since the foreclosure purchaser is protected by the recitals in the foreclosure deed.

VIII. Deficiency Judgments

With the exception of nonrecourse notes and protected-party purchasers, ULSIA provides for general deficiency liability. Section 511(b) provides that "a person who owes payment of an obligation secured is liable for any deficiency." The comments to this section indicate that the liability applies after either a judicial or nonjudicial sale.

A. In Judicial Foreclosure Proceedings

Both the notice of intention to foreclose and the complaint in the action must cover the deficiency question. The notice of intention to foreclose must state the mortgagor's potential deficiency liability and the mortgagee's intent to seek a deficiency judgment, and must be served upon any party who may be held responsible for payment of it. The complaint in the foreclosure action must also cover it. The deficiency judgment is entered by the court in the action after the judge has confirmed the sale; the amount appears to be calculated simply by subtracting the sale price (less expenses and costs) from the

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154. Section 513(a) permits pre-sale injunctive relief where the problem is one that the mortgagor knows of beforehand.
155. See id. § 513(a)(3). Technically, bad procedures are listed only as grounds for injunctive rather than monetary relief, but it is unlikely that such a distinction was intended.
156. See id. § 511(b) cmt. 2.
157. Id. § 508(b)(8) ("[I]f the debtor is or may be liable for any deficiency, a statement of the circumstances under which the deficiency will be asserted.").
158. Id. § 508(b)(9) ("that no deficiency may or will be claimed if that is the case."). The Act does not impose any sanction for failing to include this statement or the one mentioned in the previous note. See supra note 157. Omission of such critical information should estop the mortgagee from thereafter seeking a deficiency judgment unless it is willing to start all over again.
159. See id. § 507(f).
160. Id. § 510(b)(2) ("[I]f a deficiency judgment is claimed, the secured creditor shall state that the prohibition against a deficiency judgment is not applicable.").
amount due (plus costs). Thereafter, it functions as an ordinary money judgment without any superpriority.

B. *In Power-of-Sale Proceedings*

The notice of intention to foreclose must state that a deficiency judgment may be sought. The notice of sale, however, is not required to do so, which means that those outsiders who receive only that notice will not be aware of the pending deficiency judgment. It is hard to contend that they have any need to know. Anyone who might be liable for the deficiency judgment was required to get the notice of intention to foreclose pursuant to section 507(f). Perhaps a junior mortgagee who knows that she will be wiped out by the senior sale might decide to sue on her note for a general money judgment and would then want to have priority over any deficiency judgment obtained by the senior mortgagee. But the senior must file its own money action in such a case, since the power-of-sale proceeding cannot generate a court judgment. The senior could, if it wanted, file such an action even before it began to proceed under its power-of-sale.

There is no statutory mechanism for entering a deficiency judgment after a nonjudicial sale, and the mortgagee will undoubtedly be required to file a lawsuit in order to obtain the requisite money judgment. It does not appear that the mortgagee seeking both to foreclose under its power-of-sale and also to obtain a money judgment for the balance must await the completed sale before filing the lawsuit. The power granted to the mortgagee by section 501(a) to "reduce the personal obligation . . . to judgment" applies to actions filed before or after the foreclosure occurs. There seems to be no reason why an action for the entire debt filed at the outset could not be amended into a deficiency action if a sale has occurred in the meantime. Alternatively, filing of the complaint could be postponed until the sale had occurred and an actual deficiency existed.

161. The amount subtracted is described in § 510(e). The total from which it is subtracted is described in § 510(c).

162. *Id.* § 510(e). The statutory provision for relation-back priority applies only to a money judgment obtained before a foreclosure sale and only with regard to the collateral itself, not to the mortgagor's general assets. *See id.* § 501(b).

163. Compare § 501(b) and (c) on this timing issue.

164. In this case, the amount recovered at the sale should certainly be credited against the debt. The Commissioners refer to a policy of preventing double recovery in § 501(c). *See also id.* § 501 cmt. 4. It is arguable whether the Act actually imposes such a rule, but usual rules of pleading and practice would probably prohibit it anyway.
As to a post-nonjudicial sale deficiency proceeding, the Act is singularly unhelpful. Section 501(c) provides that a mortgagee who has foreclosed "may not bring a judicial proceeding to recover the debt except as provided in this Part," but no provision for that proceeding appears to exist. Nowhere does the Act make any reference to an action filed to obtain a deficiency judgment after a nonjudicial sale has been held. Presumably, the complaint would allege both the original debt and the subsequent foreclosure sale and pray for a money judgment for the balance. Such judgment is probably measured in the same way as a deficiency judgment after a judicial sale is calculated and would take the same ordinary lien priority as a post-judicial sale deficiency judgment.

C. Antideficiency Protections

What is most significant with regard to the allowable deficiency judgment is that—when nonprotected parties are involved—it is devoid of any of the limitations that restrict such judgments in many jurisdictions. There is no provision for a pre-sale upset-price determination in judicial foreclosures, or for a post-sale fair-value or confirmation hearing in either judicial or nonjudicial proceedings. Nor is there any possibility of post-sale redemption to serve as a deterrent or sanction against creditor underbidding. Indeed, nothing in the Act formally prohibits a mortgagee, holding security worth significantly more than the debt, from making a privately negotiated nonjudicial foreclosure sale of it for significantly less than the debt and then obtaining a deficiency judgment for the difference. Only the pre-sale public notice provisions stand between mortgagors and such horror stories. Legislators

165. Comment 4 to § 501 repeats that the "subsequent action on the debt is controlled by this part primarily to protect the policy of restricting deficiency judgments, and to prevent double recovery."

166. See discussion supra parts VIIIA.-B.

167. The only indication that the Commissioners were concerned with valuation problems is the final sentence of § 511(b), which provides: "For purposes of calculating the amount of a deficiency a transfer of the real estate to a person who is liable to the creditor under a guaranty, endorsement, repurchase agreement, or the like, is not a sale." See also ULSIA § 511 cmt. 3. Every other kind of transaction, therefore, is a sale and establishes the amount of the deficiency judgment.

168. ULSIA § 513 cmt. 1.

169. In comment 2 to § 511, the Commissioners observe: "By eliminating deficiency judgments against protected parties, this Act also eliminates one of the primary reasons for judicial supervision of the foreclosure process, because the borrower need not be concerned with the adequacy of the purchase price paid at the foreclosure sale." That logic should apply with equal force to general debtors who, because they are subject to deficiency liability, need the protection of
long familiar with the underbidding that characterizes public foreclo­
sure sales, judicial or nonjudicial, may find the requirement of reasona­
bleness too dubious a protection.

D. Protected Parties

In contrast to the disregard of nonprotected parties, protected par­
ties are given broad insulation against deficiency liability. Section
511(b) provides that where the debtor is a protected party and the “ob­
ligation secured is a purchase-money security interest, there is no liabil­
ity for a deficiency, notwithstanding any agreement of the protected
party.” The protected party in this case is safeguarded against both
a post-foreclosure, sale-deficiency judgment and a pre-sale or indepen­
dent-money judgment on his note. It is truly a security-only situation
with regard to purchase money protected parties.

One may quarrel with the general notion of extending such broad
protection to one class of mortgagors while denying any protection to
all others. Charity to one group does not offset harshness to another.
The protection given to consumer-purchasers may defuse political op­
position to the Act, but the dramatic difference in treatment of other
mortgagors warrants serious examination.

Such differential treatment may also make some distinctions seem
arbitrary. The homeowner who puts $1 million of acquisition debt on
his mansion is given greater protection than the one who refinances his
$100,000 house in order to send his children to college. If refinancing
truly eliminates purchase-money status as the Commissioners be­
lieve, it would not be hard for lenders to move their loans from one
category to the other when the need arises. There is also the philo-

judicial supervision to guard against underbidding, but instead do not even have the protection of
a public auction sale.

170. See § 111(18) for the definition of “purchase money security interest.” The Commission­
ers believe that their definition of purchase money is so broad as to outlaw virtually all deficiency
judgments. See id. § 511 cmt. 2.

171. See id. § 501 cmt. 4. With regard to these protected parties, the Commissioners justify
nonjudicial foreclosure on the ground that the insulation from personal liability makes them indif­
ferent to the consequences of price inadequacy at the foreclosure sale. See id. § 511 cmt. 2. This is
certainly true where the property has a value equal to or below the debt, but would be subject to
different considerations where it may have a value in excess of the debt and the private sale
 technique is used to avoid generating the deserved surplus to the mortgagor or to juniors.

172. See id. § 511 cmt. 2.

173. Section 511(b) states that the protection is nonwaivable. However, ingenious money lend­
ers have never had great difficulty camouflaging their transactions to escape the scrutiny of the
courts. So long as there is a distinction between the consequences of purchase- and nonpurchase-
sophistical question of why homeowners should be protected only with regard to their purchase-money loans, which may well be the most discretionary form of borrowing they ever undertake. Homeowners who need to refinance in order to survive a recession when the breadwinner has been laid off work may be no less deserving.174

IX. DEEDS IN LIEU OF FORECLOSURE

Section 507(a) provides: “After a debtor’s default, the secured creditor and debtor may agree on an acquisition of the debtor’s interest in the real estate in lieu of foreclosure.” The comments to this section indicate that the Commissioners regarded the deed as a third form of foreclosure, along with judicial sale and power-of-sale foreclosures.176 Elsewhere in the Act, this is characterized as “a form of strict foreclosure where the secured creditor takes indefeasible title to the land.”

A. Unanswered Questions

The Act is silent on some important questions concerning such transactions. First, will a deed in lieu of foreclosure be upheld where it is to take effect only in the future—that is, only if the mortgagee does not pay his current mortgage obligation by then? Most jurisdictions

money loans, transactions will be structured to fall on one side or the other of that distinction when it is profitable to do so.

174. There is also the policy question of prohibiting a seller, especially one holding a junior mortgage, from recovering a deficiency judgment, after her security has been wiped out by a senior sale. At that stage, the politics of loss allocation between seller and buyer raise different issues than are involved when a senior institutional lender seeks money in addition to the property it may have already acquired at its own foreclosure sale.

175. See ULSIA § 507 cmt. 2. A more logical location for this provision would have been in § 501, entitled “Rights and Remedies,” rather than in § 507, which covers “Methods of Foreclosure and Notice.” A deed in lieu of foreclosure may be regarded as a possible remedy for a mortgagee, but it should not be considered a method of foreclosure. Furthermore, such an arrangement between mortgagor and mortgagee need not wait until “after a debtor’s default,” as the section seems to imply. A pre-default conveyance from the mortgagor to mortgagee is more likely to be upheld than is a post-default one, since there is less necessitousness involved, and it is therefore less likely that the mortgagor is merely bargaining for more time. Indeed, the Commissioners may have intended to say that a deed in lieu of foreclosure is valid even if it is executed after default. But see id. § 513 cmt. 3.

If the Commissioners instead intended only to prohibit the deed in lieu which was executed at the same moment as the mortgage (the contemporaneous deed), then they should have provided that a deed to the mortgagee is valid so long as given any time after the mortgage was executed (regardless of whether a default had occurred), and located the provision outside the foreclosure section.

176. Id. § 501 cmt. 6. True strict foreclosure is provided for in § 510(b) to correct mistakes made during a previous foreclosure proceeding. See id. § 510 cmt. 8.
treat such a deed as a mortgage rather than a deed and do not permit the mortgagee to take title according to its terms. Where time is the consideration, the mortgagor is not truly selling his property to the mortgagee, but continues to regard himself as an owner who can free the property from an encumbrance by discharging an obligation; he is a mortgagor rather than a grantor. The deed in lieu generally must take effect immediately and irrevocably to be treated as a deed rather than a mortgage. The failure to qualify what kind of deed is covered in this section makes it impossible to tell whether the Act preserves the majority rule or instead adopts the minority rule, which does uphold executory deeds in lieu of foreclosure. 177

Related to this issue is the question of whether the debt must be cancelled as part of the deed in lieu of a foreclosure transaction. Such an arrangement is customary, often done in order to ward off any inference that an executory transaction exists. Once title has passed to the mortgagee, foreclosure remedies are gone, but the Act does not clarify whether the deed in lieu has the effect of automatically eliminating further monetary relief, or whether that is true only if the parties so provide.

Another set of unanswered questions arises regarding the effect on a junior creditor of a deed in lieu of foreclosure. Is it the same as a deed delivered to the purchaser at a foreclosure sale, wiping the junior out, or is it the equivalent of a mortgagor's deed to a third party, passing title subject to the junior encumbrance? Generally, a senior mortgagee rejects offers of a deed in lieu unless a title search reveals the absence of any junior liens, because of the risk that the doctrine of merger will lead to its holding title subject to the junior lien. Absent a clearer pronouncement on this matter, it is unlikely that lenders in ULSIA jurisdictions will be inclined to accept deeds in lieu of foreclosure from their borrowers whenever juniors are in the picture.

X. POST-SALE MATTERS: COMPLIANCE AND NONCOMPLIANCE

After the sale is concluded the mortgagee or person who conducted the sale has two remaining tasks: (1) distribution of the proceeds; and (2) transfer of title to the purchaser. Section 511(a) governs distribution of the proceeds and applies entirely standard principles to that function: money is used successively to pay sale expenses, pre-sale

177. A puzzling sentence appears in § 507 cmt. 6 and adds to the confusion: “Later sections concerning notice of sale and intention to take title in satisfaction of the debt require notice to junior lienors whose interest in the collateral would be cut off by foreclosure.”
expenses (including the cost of obtaining possession, maintenance, and attorneys' fees),\textsuperscript{178} the debt, junior debts, and finally, if there is any left, the debtor.

A. \textit{The Foreclosure Deed}

With regard to transferring title, the person conducting the sale is to execute an appropriate deed. Section 512(b) provides: "Signature and title or authority of the person signing the deed as grantor and a recital of the fact of default and the giving of notices required by this is sufficient proof of the facts recited and the signer's authority to sign." The Commissioners comment that this was "intended to eliminate the necessity of a rigorous examination to determine whether the foreclosure transaction complies with the statutory requirements in meticulous detail . . . to further assure that the sale price at the foreclosure sale will be more closely related to the real market value of the property."\textsuperscript{179} This policy is carried further by section 512(a), which adds that a purchaser for value in good faith takes good title even though the seller "fails to comply with the requirements of this Part on default or of any judicial sale proceeding."

There are some matters needing clarification. Is the bona fide purchaser protected even without recitals of compliance in the foreclosure deed or is their absence a ground for putting him on notice, and therefore not in good faith? Is the selling mortgagee a bona fide purchaser on the ground that cancellation of its debt was the equivalent of payment of value? If not, is a sale to it voidable when defective, even though invalidation is not mentioned in the list of remedies included in section 514?\textsuperscript{180}

The scope of the recitals is not entirely clear either, since those mentioned relate only to "the fact of default and the giving of notices," which are only parts of the entire foreclosure sale process. There is no recital that the sale itself was conducted in compliance with the Act or the notices, which might permit an attack based on noncompliance as

\textsuperscript{178} Attorneys' fees are included "to the extent provided for in the agreement and not prohibited by law." ULSIA § 511(a). This language differs from the references to attorneys' fees in other sections. See, e.g., id. §§ 513(a) & (b)(3).

\textsuperscript{179} Id. § 512 cmt. 1.

\textsuperscript{180} There is a puzzling sentence at the end of § 512(b): "Further proof of the signer's authority is not required even though the signer is also named as grantee of the deed." Since this seems to refer to cases where the mortgagee is the purchaser at the foreclosure sale, this reference to the signature but not the recitals by the seller should indicate that those recitals do not help the mortgagee/purchaser. Perhaps they are to help the party who later purchases from the mortgagee.
to those features. The validating provisions of section 512(a) do not completely insulate the sale, since they too have limited scope. Although section 512(a) begins by referring to a sale under a power-of-sale or a judicial sale, it closes by protecting the purchaser only where the seller fails to comply with the statutory requirements “on default or of any judicial sale proceeding,” thus omitting noncompliance with the power-of-sale requirements included in the Act. 181 Finally, section 512(c) provides that a regularly conducted noncollusive transfer under a foreclosure sale “is not a fraudulent transfer even though the value given is less than” the mortgagor’s equity in the collateral. 182

A true policy question is presented as to whether it is desirable to give sales such immunity. Finality is appropriate for judicial foreclosure sales, where the mortgagee has had ample pre-sale opportunities to assert defenses. The power-of-sale process gives the mortgagor such an opportunity only in the negative sense, in that the mandatory delays following his receipt of notice of intention to foreclose give him time to employ an attorney and sue to enjoin the sale. But where notice is not received, even that opportunity is wanting. On the other hand, so long as potential purchasers at foreclosure sales must anticipate potentially successful attacks on their titles, they will be inclined to bid less, to the ultimate detriment of mortgagors as well as mortgagees. Whether a speedy and conclusive sale is in the long-term best interests of the mortgagor class is a political decision legislatures will confront.

Absent from the section is any reference to putting the purchaser into possession. An order compelling delivery of possession to the purchaser at a judicial foreclosure sale, made available by section 510(g), is not provided for in this section. 183 A separate possessory action must be filed where the former mortgagor refuses to leave, but its contours will be determined by state law rather than ULSIA.

B. Noncompliance by the Mortgagee

Section 514 deals with improper sales. Since judicial foreclosure proceedings are already under court supervision, the protection of this

181. This result is somewhat buttressed by the provision in § 507(f), which provides that failure to send the notice of intention to foreclose to a deserving party does not invalidate it with regard to those who did receive it.

182. This candid attempt to avoid the consequences of Durrett v Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), is discussed in another paper. See Krasnowiecki, supra note 137.

183. And the pre-sale possession sections, covered later, relate only to a creditor, not a foreclosure purchaser.
section is confined, as a practical matter, to nonjudicial sales. Section 514(a) gives the debtor and all other affected parties the right to have the sale enjoined if they can show: (1) the debt was invalid; (2) it was not in default; (3) the mortgagee was not complying with the statutory foreclosure procedures; or (4) the sale proceeds were being misapplied.\textsuperscript{184} This list fairly exhausts the possible delicts by the mortgagee, although a catch-all section permitting a party to enjoin on any other grounds that would render a sale invalid would also help.\textsuperscript{186}

The nature of the pre-sale relief is not described. Section 514(a) provides merely that “[a] sale or disposition of proceeds may be ordered or restrained on terms and conditions determined by the court.” The rest is left to conventional state law, since no special procedures are prescribed. Nor does the section prescribe what effect the lifting of any injunction will have—whether the clock is reset or is restarted from where it was stopped.\textsuperscript{186} Where the injunctive period has gone beyond the originally scheduled sale date, a new notice of sale seems required, but it is arguable whether the notice must use a date five weeks hence.

Finally, injunctive relief is made available to the junior creditor as well as to the mortgagor. Because her interest is strictly monetary, it is unclear whether the Commissioners intended to provide that equitable relief would lie only in extraordinary cases, or whether they intended to make the injunction a standard remedy for a junior.

C. \textit{Damages}

The balance of section 514 deals with monetary relief for parties aggrieved by an improper foreclosure sale. Section 514(b) states the general rule that any party entitled to notice “may recover from the creditor any loss caused by a failure to comply with this Part.” For the mortgagor, this should mean recovery of up to the amount of his equity in the property; for the junior, it should mean recovery of her lost junior lien, limited by the equity in the property after the senior lien. Of course, any plaintiff will be required to show that the noncompliance

\begin{itemize}
\item[184.] Except for protected parties, some defenses can be waived in advance by the mortgagor as against a holder in due course. \textit{See} ULSIA § 206(e) \& cmt. 5.
\item[185.] For instance, the following defenses may or may not be included in ULSIA: invalidity of the mortgage (versus the obligation), waiver, fraud, and improper claim of priority (asserted by a junior lienor).
\item[186.] Conceivably, a court can even treat the clock as having never stopped in the first place, where a temporary restraining order was granted and lifted in the middle of the five-week notice-of-sale period.
\end{itemize}
was a proximate cause of the loss.

Two further subsections govern special remedies of protected party mortgagors. Section 514(c) awards the protected party a “statutory penalty” of one percent of the “initial unpaid obligation” up to $500 against a mortgagee who “violates this Part.” The award is to be made “without proof of actual damages” and without reduction for any obligation owed by the mortgagor to the mortgagee. Because this subsection does not include a list of improprieties as does subsection (a), any violation is thus a candidate for the penalty. Furthermore, the penalty appears nondiscretionary as to amount; even an innocent transgression leads to a $500 award.

Finally, section 514(d) also awards the protected party attorney’s fees “in a judicial proceeding under this section.” As written, the award seems independent of whether the protected party wins or loses, but that interpretation is unlikely. The Act does not award attorney’s fees to the mortgagee in this situation, even if it prevails, but there is probably an attorney’s fees clause in the mortgage doing so.

XI. RENTS AND POSSESSION

In its definitions section, ULSIA states that “Real Estate” includes rents. With regard to the capture of rents, this sets the Act on an entirely different course than the one with which most mortgage lawyers are familiar. Elsewhere in this country, rents are usually not regarded as part of the ordinary security included in a mortgage unless there is special language in the document. Under ULSIA, however,

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187. It should also be noted that waivers of defenses by a protected party when a second mortgage is involved are invalid even if the promissory note was negotiable and was transferred to a holder in due course. See ULSIA § 206(d) & cmt. 4.
188. The phrase is confusing. The initial obligation is clearly the amount originally loaned; the unpaid obligation usually refers to the amount yet owing. Thus, the “initial unpaid obligation” could be either.
189. Where real damages are involved, the mortgagor must proceed under § 514(b).
190. Comment 3 to § 514 refers to awarding such fees only to a protected party “whose land has been sold in violation of Part 5.” ULSIA § 514 cmt. 3.
191. The Act does not uniformly assume such clauses are valid or necessary for the recovery of that item. Section 511(a) lets the mortgagee pay itself attorney’s fees out of the sale proceeds only if it has a clause which is valid under state law. But §§ 513(a) and (b) permit the mortgagee to demand such fees as a cost of curing a default even without an attorney’s fees clause.
192. ULSIA § 111(20).
193. In a lien jurisdiction, there is no right to rents except by way of an assignment of rents clause, separately pledging the rents to the mortgagee as additional security over and above the title. In a title jurisdiction, the mortgagee may demand rents from tenants, not because the rents are part of its security, but because its mortgage entitles it to possession and it may therefore...
"rents are part of the security unless excluded by the security agreement." 194

The inclusion of rents is meaningful to a mortgagee only if it can get to them, and that consequence does not follow automatically from the recharacterization of rents as part of the security. Just as the mortgagee cannot automatically reach out and take the mortgagor's title to the real estate, so also it does not automatically have the right to seize the rents. 195 The right to get them is provided for in section 505(a): "After a debtor's default, a secured creditor in possession of the real estate and any creditor who has an assignment of rents, even though not in possession, may notify a lessee to make payments of the rents to that creditor ... ." Thus the mortgagee actually obtains the rents either by going into possession or by having an assignment of rents from the mortgagor. 196

The role of an assignment of rents clause is best understood by first analyzing how rents relate to possession.

A. Possession

Section 503(b) provides that, except as against resident protected parties, "a secured creditor, on the debtor's default, may take possession of the real estate." It thus tracks title theory rather than lien theory. Only rents from senior tenants in title states may be regarded as automatically part of the mortgage security, because a mortgage executed after a lease is regarded as transferring the reversion—along with the right to rents—to the mortgagee. Rents are not regarded as ordinary personal property proceeds governed by the Uniform Commercial Code. U.C.C. § 9-1040 (1982). Part of the reason for reclassifying rents was to have the real estate rules of priority and recording apply to them, lest they otherwise fall between the cracks of the two Acts. See ULSIA § 102 cmt. 2.

194. Id. § 210 cmt. 3.

195. Whether or not this constitutes sufficient perfection of the right to rents as to prevail as against a bankruptcy trustee is covered in a separate article in this issue of the Connecticut Law Review. See Krasnowiecki, supra note 137.

196. A creditor desiring an assignment of leases or of rents as independent security, unrelated to the possibility of default on loan payments by the debtor, would take an "assignment of rents" from the debtor and instantly notify the tenants of that fact, just as a creditor does now without ULSIA. See ULSIA § 102 cmt. 2. The difference is that a clause like that is necessary in a non-ULSIA state in order to give the mortgagee any interest at all in the rents, whereas ULSIA gives the mortgagee an interest in them, but one which may be unenforceable without such a clause. Since the alternative route to rents—going into possession—is permitted only "after default," the creditor desiring an absolute assignment of rents independent of default has no choice but to have an assignment clause. The mortgagee who wants to reach the rents after default may improve its position by having a clause, but it is not indispensable since there is the alternative of possession.
ory with regard to the question of pre-sale possession. The Commissioners state that the right to possession arises “from the existence of the security agreement. Neither a clause in the security agreement nor title in the creditor is a prerequisite.” Thus, one way for a mortgagee to reach rents is to take possession under section 503(b) and then notify the tenants to pay future rents to it, pursuant to section 505(a).

Absent any special clauses in the mortgage, a mortgagee, “on the debtor’s default, may take possession of the real estate by judicial proceeding.” The nature of the judicial proceeding is not described. Since it is not a proceeding to obtain true possession of the property—otherwise tenants would be dispossessed and not likely to continue paying rent—ejectment seems inappropriate. Furthermore, a conventional ejectment action would probably take too long, although a somewhat leisurely proceeding does seem contemplated by the Commissioners, in light of the provision in section 503(d) stating that “[i]n a judicial proceeding to remove the debtor from possession before termination of the debtor’s interest, the debtor may assert claims and defenses against the secured creditor, including a claim that there has been no default.” Summary dispossession proceedings are apparently not intended by this section.

What saves the mortgagee from this obviously inept way to get rents is that ULSIA permits an alternative route to possession through the use of a “possession clause.”

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197. Because the mortgagee is not entitled to possession until after default, it is more accurately an intermediate theory treatment of possession.
198. ULSIA § 503 cmt. 2. However, the comment does not explain how or why the existence of the security agreement generates a right to possession. Rents were included within the definition of the security in § 111(20), but possession was not. It would probably be better to say that the right to possession arises from § 503(b), rather than from the security agreement.
199. In § 210 cmt. 3, the Commissioners state that rents may be reached by taking possession on default even if the security agreement excluded rents from the security! The language of the Act does not categorically refute such interpretation, but does make one wonder just what the parties must say if they really intend to exclude rents from the reach of the mortgagee.
200. ULSIA § 503(b).
201. In § 207 cmt. 1, the Commissioners state that “the right to take possession is basically a right to manage the collateral and to collect rent of the lessee who cannot be ousted.” Although the Commissioners would limit that observation to senior tenants, it appears applicable to junior tenants as well prior to the final foreclosure sale.
202. This same problem also exists with regard to post-sale possession whenever a nonjudicial foreclosure sale is involved.
203. The phrase is mine; I also refer to it as a “possession provision.”
1. Possession Clauses

Section 503(a) states: "[I]f the security agreement provides that the secured creditor may take possession without judicial proceeding, the secured creditor, on the debtor's default, may take possession if the secured creditor can do so without breaching the peace." There is no direct statutory authorization or description of such a mortgage provision, leaving drafters to their own devices in terms of creating one.204 There are clear advantages in having a possession provision in the mortgage. The right to self-help provided by the clause both reduces litigation costs and substantively improves the mortgagee's position, since self-help possession is not subject to mortgagor defenses.205 This advantage is considerably offset, however, by the fact that self-help is permissible only when it can be done peacefully, which is an unlikely situation when the mortgagor believes that he has defenses to the foreclosure.206

2. Restrictions on Possession

With regard to both possession provisions and actions for possession, protected parties and their relatives actually occupying their residences are safe and may not be "dispossessed."207 In this situation, lien theory applies and preserves a mortgagor's possessory rights until after the foreclosure sale, except in emergency situations. Insofar as possession is sought as a prerequisite to collecting rents, nothing has been lost, since in most cases a mortgagor cannot be charged for his own possession anyway.

Nonresident protected parties are not given that same security, but their possession of the property is good against all junior mortgagees; only the senior mortgagee may obtain pre-sale possession of protected

204. Such a provision is also described in § 503(c) as "a provision in a security agreement giving the secured creditor the right to take possession without judicial proceeding."

205. A provision that recites, for example, that "[u]pon default (as defined) the creditor may take possession without the need for a judicial proceeding" should suffice.

206. The Commissioners did desire to minimize collection costs. Thus, they observe in comment 1 to § 503: "This Act is based on a major policy decision—to reduce the 'cost' of foreclosure. A provision giving the creditor the right to take possession after default without the intervention of the expensive receivership process is one step in carrying out this policy." On the other hand, in comment 2 to § 503, they seem to recognize that the self-help remedy will probably only be of importance in cases of abandoned property. It is hardly surprising that the drive for economy had to give way to the public policy against breaches of the peace.

207. ULSIA § 503(c). The unoccupied balance of a protected party's property is not immune from pre-sale possession by the mortgagee. See id. § 503 cmt. 1.
party property.\textsuperscript{208} The senior mortgagee also has a priority right to possession as against junior mortgagees. Section 503(e) provides that "the secured creditor whose interest has priority also has priority of right to take possession." As explained in comment 3 to section 505, this means that a later action by the senior mortgagee for possession will displace a prior possession of the junior mortgagee, even though it was first lawfully obtained.

The possession of tenants is also protected until after the foreclosure sale,\textsuperscript{209} a matter considered later.\textsuperscript{210}

B. \textit{Rents via Possession}

The notion of reaching the rents by way of taking possession harkens back to an earlier time, before the drawbacks of being a "mortgagee in possession"\textsuperscript{211} led mortgagees to seek the more attractive alternative of receivership. The drafters of ULSIA do not share modern lenders' aversion to taking possession of defaulted property. It is their belief that the utilization of receivers to collect rents and manage the property during the default period is costly and unnecessary, and that it is preferable for the mortgagee itself to do so instead.\textsuperscript{212} Thus they have drafted provisions making the appointment of a receiver difficult and making mortgagee in possession status more tolerable.

With regard to receiverships, section 504 confines that remedy to situations where there is a "showing that a secured creditor cannot take possession or that possession by a secured creditor will not adequately take into account the interests of persons having a claim to the real

\textsuperscript{208} Id. § 503(e). Comment 1 to this section provides that "[t]he restriction on rights of junior secured parties applies to all protected party cases, whether or not the protected party is in possession." However, comment 2 states, "[T]he restriction on the use of the self-help remedy as to protected parties applies only as to protected parties ... who reside on the property. Therefore, if the security agreement contains a clause permitting self-help, self-help is available as to abandoned protected party real estate." The net effect appears to be that a junior creditor cannot get pre-sale possession of protected party real estate even though she has a possession clause in her mortgage and the property has been abandoned by the mortgagor.

No explanation is given for the different treatment given to senior and junior mortgagees with regard to pre-sale possession. Perhaps the Commissioners were familiar with cases of abuse involving junior creditors.

\textsuperscript{209} See ULSIA § 503(1) & cmt. 4.

\textsuperscript{210} See discussion infra part XI.E.

\textsuperscript{211} See id. § 505 cmt. 1.

\textsuperscript{212} "[E]conomic self interest of the secured creditor under a defaulted mortgage ought to lead him to prefer to control matters himself or with 'experts' selected by him rather than by a judge from a list which may or may not be based on competence in managing real estate." Id.
estate involved.” The comments to this section reveal a strongly held belief by the Commissioners that receivership should once again become an extraordinary and unusual remedy.

With regard to the mortgagee taking possession, section 505—the lengthiest operational section in the entire Act—describes the situation in minute detail. It is its purpose, according to comment 1, “to spell out the duties of a mortgagee in possession so that they are less severe and more certain and do not discourage the mortgagee taking possession.” To dispel the worries of the mortgagee, section 505(c) requires that it manage the property as a “prudent person, taking into account the effect of . . . management on the interest of the debtor,” but that if it delegates the managerial functions to a professional real estate manager who is independent, financially responsible and prudently selected, it has thereby satisfied its own obligation of prudent management. Thereafter, duties are specified with regard to insurance, maintenance, repairs, code-mandated improvements, and payment of expenses. Finally, section 505 insulates the mortgagee from responsibility for accidental loss or liability to third parties if it carried appropriate insurance.

With regard to powers of the mortgagee in possession, section 503(b) permits it to execute leases which may outlast the mortgagee’s possession of the premises—and even survive the foreclosure sale in some cases—if the terms of those leases are reasonable and custom-
ary. Thus, where the mortgagee believes that the mortgagor has been mismanaging the property, the right to take possession is intended to give it power to wrest managerial control away from the mortgagor.\textsuperscript{219}

With respect to disposition of the income from the property, section 505(h) directs the mortgagee to apply it to expenses\textsuperscript{220} and then (1) to senior liens;\textsuperscript{221} (2) to the mortgage in default; and finally (3) "to the persons who but for the creditor's taking possession would have been entitled to the moneys." Difficulties arise with regard to the payment of senior (1) and inferior (3) interests. The section appears to contemplate the ongoing disposition of currently collected rents, rather than an ultimate disposition of all of the rent that was accumulated between the date of entry and the completion of the foreclosure sale. Under those circumstances, there should be no need to apply the rents towards senior lienors who have not asserted their rights to possession under their own rents clauses. The property will be sold subject to such interests, and they should be paid only if the mortgagee in possession prefers to do so in order to avoid triggering a senior foreclosure. With regard to distributing surplus rents to the mortgagor, it is difficult to see how that can happen. The obligation in default has been accelerated, meaning that there should be no comparison between the rents collected and the installment payments due in any given period.\textsuperscript{222} Only in the relatively inconceivable situation where the current rents collected exceeded the entire balance due under the accelerated mortgage would such a residual disposition be made.

Is this new system sufficiently attractive to mortgagees so as to
induce them to lobby to have it replace the current technique of collecting rents through receivers enforcing assignment of rents clauses? Absence of a receiver will no doubt save some expenses, and a few safe harbors have been provided to eliminate some apprehensions lenders have about putting themselves into possession. Conversely, there are enough general requirements of reasonableness as to caution any mortgagee to take responsibility for meaningful decisions concerning the property. Finally, and perhaps most significantly, nothing in ULSIA protects a mortgagee from being held accountable for environmental response costs if the property turns out to be contaminated and the mortgagee is held to be an owner or operator by virtue of having exercised its statutory rights to possession.

1. Rents Clauses

For the mortgagee who does not wish to seek possession solely in order to reach the rents from the property, ULSIA offers it the alternative of having an appropriate clause in its mortgage. Tenants may be notified to pay their rents to either the mortgagee in possession or to "any creditor who has an assignment of rents, even though not in possession." As it did with possession clauses, ULSIA assumes the existence and validity of an "assignment of rents" without directly authorizing or construing it. The fact that the rents are already part of the security by virtue of the definition of real estate does not render a clause assigning them to the mortgagee superfluous, since they do not belong to the mortgagee until an additional step (possession or a rents clause) has occurred. The rents clause permits the mortgagee to demand rents from the tenants after the mortgagor has defaulted and thereby become "entitled to the rents accruing after the receipt of the notice."

223. Id. § 505(a).
224. Such a provision is referred to in comment 2 to § 505 as "a claim to rents by an assignment."
225. The Commissioners use the term assignment of rents even though they also believe that "under this Act, rents are automatically assigned to the secured creditor unless the security agreement specifically provides that they are not assigned." Id. § 505 cmt. 2. That sentence makes discussion about statutory and contractual assignments of rents as separate principles confusing, to say the least.

The references are not to absolute assignment of rent arrangements independent of default. See id. § 102(b) & cmt. 2 (treating various forms of rent assignment provisions). See also id. § 204 cmt.
226. Id. § 505(a). This assumes that the clause so provides. There could be an unconditional assignment of rents taking effect even prior to default or a conditional assignment postponing the
There are real advantages in reaching the rents by way of a rents clause rather than through possession, even when obtained under a possession clause. The utility of a possession clause depends upon lack of resistance by the mortgagor, whereas demand upon the tenants pursuant to a rents clause may be made notwithstanding debtor resistance. Furthermore, the right to rents does not require taking possession by self-help, suing for possession, or seeking to have a receiver appointed. Indeed, as worded, it appears to let the mortgagee collect and retain gross rents rather than being obliged to use any part of them to service the property during the foreclosure period. Indeed, in such a case the mortgagee may be free to disregard all obligations imposed by the lease on the mortgagor/landlord. For any mortgagee interested only in reaching the rents and not seeking any additional control over the property, this will be the indisputably preferred alternative. For an Act premised on the notion that substance should prevail over form, the fact that a boilerplate clause can work such a difference is surprising.

A system of priorities interrelating both rent clause and possession rights is included in section 505(a). “If more than one secured creditor entitled to rents has notified the lessee to make payment, the secured creditor in possession has priority or, if no creditor is in possession, the secured creditor having priority of secured interest has priority as to rents.” Consequently, a senior mortgagee acting under its rent clause will have a lower priority rank than does a junior mortgagee who has turnover until some other event.

227. Section 505 provides for proof to a skeptical tenant of the mortgagee’s superior claim to the rents.

228. Comment 2 to § 505 provides that utilization of a rents clause to collect the rents “does not result in the creditor taking possession, so the secured creditor as an assignee has no obligation to apply the rents to the expenses of property management.”

229. This conclusion was drawn by Professor Randolph with regard to the predecessor Uniform Land Transactions Act (ULTA), containing similar provisions. See Randolph, supra note 10, at 48. Randolph appears to be the only person who looked carefully at what the ULTA would do with regard to rents and receivers, and his trenchant criticisms are worth reviewing. See also Patrick A. Randolph, Jr., When Should Bankruptcy Courts Recognize Lenders’ Rents Interests?, 23 U.C. DAVIS L. REV. 833 (1990).

230. Conversely, a mortgagee who wants the right to manage and control the property cannot do so through use of a rents clause; a possession clause is far more useful to it for that purpose.

231. In their introductory comment, the Commissioners say “the traditional distinctions among security interests based largely on form or whether the creditor had ‘title’ to the real estate collateral are not retained . . . . The rights and duties of creditor and debtor prescribed by this Act, however, are made applicable to the transaction regardless of form.” ULSIA prefatory note at 7.

232. ULSIA § 505(a). This is elaborately worked out in comment 3 to § 505.
taken possession, which forces the senior to go into possession itself, if only to regain priority over the junior. Under these circumstances, a possession clause will do it more good than a rents clause.

To a mortgagor, the changes proposed by ULSIA regarding rents may seem insignificant. In lien states, the mortgagor is theoretically entitled to keep rents and possession until the final foreclosure sale, but always waives his rights by appropriate clauses in his mortgage. He signs a similar clause in title states, in order to let his mortgagee capture rents without having to take possession. Under ULSIA, his starting position is that the rents are part of the security he has given up and are subject to the mortgagee taking possession from him on default, even without enabling language in his mortgage. But the mortgagor will probably find that his mortgage still assigns the rents on default to the mortgagee and also permits the mortgagee to take possession by self-help on default. The clauses will likely be as much a part of the boilerplate language as are current rents, profits and receivership clauses now.233

C. Other Income Apart from Rents Paid by Tenants

Other forms of income arising from or in conjunction with the property are treated separately from rent. These include income received as a substitute for the property and “crops and profits from the real estate.”234

1. Substitute Income

Section 210 provides that “[a] security interest attaches without explicit agreement to” (1) damage claims the mortgagor has against his seller; (2) condemnation awards; (3) insurance payments; and (4) claims against third parties for damage to the collateral.

Condemnation awards and some damage claims are usually treated as replacement property, entitling the mortgagee to go after them even without enabling language in its mortgage. On the other hand, because an insurance award is the result of a separate contract between the mortgagor and his insuror, it would not come under the

233. Indeed, it is odd that ULSIA requires the mortgagee to include a rents clause in its mortgage in order to have a meaningful remedy. Having gone so far as to give the mortgagee a basic right to rents without a clause, why was the last, consistent step not also taken—giving the mortgagee a statutory right to notify the tenants to pay the rent to it after default with or without a clause?

234. Id. § 210(c).
security of the mortgage unless there was—as there always is—a special clause in the mortgage requiring the mortgagor to keep the property insured for the benefit of the mortgagee, and assigning the proceeds therefrom to the mortgagee. Thus, ULSIA works a change with regard to monies from the insurance company by automatically including them under the security umbrella.

It is not apparent what the difference is between these income items and ordinary rent. Rent is part of the real estate and thus subject to a security interest, whereas these items are subject to the creditor’s security interest although they are not defined as part of the real estate. The section seems to make utilization of clauses unnecessary, but it does not indicate whether in the absence of such clauses a mortgagee can reach these funds when there was no default in the mortgage note and whether it must take possession in order to do so, as is the case with rents absent enabling language. Until those questions are resolved, mortgagees would be wise to continue including the special provisions currently included in their mortgages dealing with this matter.

2. Crops and Profits

Section 203(c) provides: “A security interest in real estate attaches to crops and profits from the real estate only if the security agreement so provides.” Thus these items receive opposite treatment from the substitute income items discussed previously, for which the security interest attaches “without explicit agreement.” However, like the substitute income items, crops and profits are intended to be treated differently than rents. Other than requiring that the mortgage provide for them, the Act does not provide for any mechanism for collection of crops or profits, before or after default, and with or without

235. There is no official comment for this section.
236. Section 210(b) covers what the mortgagor must show to the payor to have the funds directed to it.
237. See id. § 210. Comment 3 to § 210 states:
   Subsection (c) states a basic rule to serve as the benchmark of drafting clauses in security agreements: The real estate secured creditor, whether he appears to have title or not is not entitled to crops or other profits unless his security agreement provides that they are additional collateral for the debt; on the other hand, the secured creditor is entitled to rents unless his security agreement specifically provides that rents are not part of the security. This distinction in the treatment of rents and of crops and profits is based upon the belief that such a distinction fits a developing belief of lenders and borrowers as to the rights of the lender.

Id. § 210 cmt. 3.
possession. Therefore, the mortgage itself must cover these considerations.\textsuperscript{238}

3. Survival of Leases

In the United States the effect of a foreclosure action upon existing leases depends upon a number of variables: (1) whether the lease is senior or junior to the mortgage; (2) whether the jurisdiction follows lien or title theory; (3) whether the foreclosure is in process or has been completed; and (4) whether the mortgage contains an assignment of rents clause.

a. Senior Leases

Where the lease is senior to the mortgage, the mortgagee has only a mortgage on the reversion and is never entitled to terminate the lease. It does not matter whether a lien or title theory is involved, or whether there has merely been a default or a completed foreclosure. Conversely, the senior tenant remains bound by the lease since the foreclosure is an irrelevant event with respect to its leasehold (except that if no one performs the landlord's covenants, she may be able to terminate the lease under a theory of constructive eviction).

b. Junior Leases

Where the lease is junior to the mortgage, it may be terminated by a completed foreclosure sale. Again, the jurisdiction does not matter since in every state the foreclosure purchaser acquires a complete title free of all inferior interests, including leases. On the other hand, a junior tenant not included in the foreclosure proceeding is not affected by it and her interest is therefore not terminated. Thus, intentional exclusion of junior tenants may be used by the mortgagee to preserve economically advantageous leases.\textsuperscript{239}

\textsuperscript{238} Section 210 makes no distinction between crops and profits and defines neither term. The official comments make clarification even more difficult by careless phraseology. For example:

As between secured creditor and debtor, this section states the rights to rents and profits accruing between the making of the mortgage and foreclosure. Prior law gave no clear answer to this problem, in part because of the mortgaging of rents and crops apart from the land is a late development. Basically prior law attempted to resolve the right of lender and debtor to rents and crops by asking who is entitled to possession.

\textit{Id. § 210 cmt. 1} (emphasis added). Comment 3 refers to "crops or other profits." The pairings seem unintentional.

\textsuperscript{239} In a nonjudicial sale, where the concept of party jurisdiction is inapplicable, this strategy may be more difficult to implement, but a similar outcome may be reached by offering to sell only...
c. **Pre-Sale Termination**

Only where pre-sale remedies are sought by the mortgagee does the lien/title distinction matter. In lien jurisdictions, there is no right to possession prior to the termination of the mortgagor’s title through a completed foreclosure sale. At that point, possession vests in the foreclosure purchaser, not the mortgagee, unless these happen to be the same entity. In title jurisdictions, the mortgagee is entitled to possession either immediately (pure title theory), or after default (intermediate theory), even though the foreclosure sale has not yet occurred. Under lien theory, therefore, no tenants, whether senior or junior, may be divested of possession during the foreclosure process; in title states, junior tenants may be dispossessed by entry of the mortgagee.\(^{240}\)

d. **Pre-Sale Termination and Rents**

In lien states, the absence of any pre-sale possessory rights render the mortgagee unable to demand rents from either senior or junior tenants. On the other hand, a mortgagee in a title state can indirectly reach rents from junior tenants by threatening to assert its paramount title rights and evict them if they do not pay their rents to it thereafter.\(^{241}\)

If there is an assignment of rents clause in the mortgage, both title and lien mortgagees are in a significantly better position. In a title state, the clause permits the mortgagee to have a receiver appointed—which does not constitute a dispossession of the tenant—and the rent reserved can be collected even though it is above market.\(^{242}\) In a lien state, appointment of a receiver under the assignment of rents clause has the same effect and eliminates the difficulties presented by the lack of any other pre-sale possessory right in the mortgagee.

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\(^{240}\) Such dispossession would constitute an eviction by paramount title.

\(^{241}\) The entitlement to rents from junior tenants thus arises from the act of *not* taking possession, rather than from taking possession, which would entitle the tenants to terminate their leases, quit, and cease paying rent due to the eviction. A tenant paying an above market rent might decide to ignore the mortgagee’s threat to take possession and get herself evicted and her leasehold terminated.

\(^{242}\) If rent reserved is below market, the mortgagee may threaten to take possession and thereby terminate the junior lease unless the tenant agrees to pay more.
e. **ULSIA**

Under ULSIA, outcomes are different. Lien and title distinctions no longer matter, but the other distinctions continue to play a role. Senior tenants remain unaffected by defaults; neither pre-sale nor completed foreclosure sales impair their tenancies or their rent liabilities. However, as to pre-sale termination of junior leases, section 503(f) provides that the mortgagee may take possession on default, but subject to existing leases, even junior ones. Thus, this section gives the mortgagee the theoretical right of a title theory creditor to pre-sale possession, but simultaneously incorporates lien theory in preserving junior leases until the foreclosure process is complete. Neither party is free to use the event of default as a ground for either terminating the lease or attempting to alter the rent schedule.

Under this arrangement, there is no theoretical need for an assignment of rents clause. The mortgagee is entitled to hold tenants to their leases and existing rent charges with or without one. There is also no need to have a receiver appointed in order to keep the tenants from leaving; a mortgagee taking possession does not thereby disturb or dispossess them.

**D. Post-Sale Termination of Leases**

Regarding this question, ULSIA again takes a new direction. While junior leases generally do not survive a completed foreclosure, there is an exception in that "a lease of residential real estate made in ordinary course by a debtor in possession of collateral is effective

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243. ULSIA § 503(f). This section technically only relates to pre-sale possession, but there is no language anywhere in the Act that would change the common law priority of senior tenants over junior foreclosure purchasers.

244. Comment 4 to § 503 states: "Protection of the debtor's right to redeem requires that the creditor cannot disturb his leases until the right to redeem is extinguished." Section 503(f) also contains an exception for terminating a junior lease in order to avoid deterioration or destruction.

245. Comment 1 to § 207 seemingly contradicts this conclusion:

If under priority rules the lease between a debtor as landlord and a tenant is superior to the security interest, the right to take possession is basically a right to manage the collateral and to collect rent of the lessee who cannot be ousted. See sections 210 and 505 as to the right to collect rents. If the lease is junior to the security interest then the present section is applicable. Under subsection (a) the creditor may exercise his possessory right by ousting the lessee.

Insofar as this comment suggests that a junior tenant may be evicted before a foreclosure sale, it is incorrect in light of § 503(f). Prior to a completed foreclosure, the right to possession as against both senior and junior tenants is merely a right to collect the rents and manage the property.

246. There may, however, be significant practical advantages in utilizing a rents clause or in having a receiver appointed. See discussion supra parts XI.B.1-XI.C.3.
against the secured creditor for not more than two years after the date
of the lease," provided it sets a reasonable rent, has no significant pre-
paid rent arrangement, permits the landlord to re-enter on default, and
grants the tenant prompt possession.247 Such a rule gives residential
tenants the kind of protection against senior mortgage foreclosures that
they usually have only in rent-control jurisdictions.248 Since almost all
residential leases automatically subordinate the tenants to future mort-
gages, this provision is a very significant and beneficial one to them.249
Except for this special case, junior leases are destroyed on foreclosure.
Section 207(a) provides:

[A] tenant under a lease executed by the debtor after a secur-
ity interest in the real estate has been perfected or under a
lease that has been subordinated thereto by written agreement
of the tenant has no greater right to remain in possession
under the lease term than has the debtor.250

E. Foreclosing Against Junior Tenants

The questions of whether a mortgagee may avoid terminating a
junior lease, or how it should proceed against a junior tenant where it
wishes to end her tenancy, are not explicitly treated by ULSIA. As a
possessor of the property, such a tenant is entitled to request receipt of
any notice of intention to foreclose.251 The failure to give her such no-
tice may have the effect of leaving her interest unaffected by the subse-

247. ULSIA § 207(b). The Commissioners observe that such leases should be treated as chattels
purchased by consumers from merchants and protected against creditor claims under principles
analogous to U.C.C. § 9-307(1). See id. § 207 cmt. 2.
248. Section 505(b) provides: "A creditor in possession may execute leases . . . extending
beyond the time of the creditor's possession which have the same priority as if made by the owner
of the real estate." But this provision does not have the same survival effect because junior non-
residential leases by a mortgagor do not outlive a senior foreclosure sale. See ULSIA § 207(a).
Comment 4 to § 505, however, seems to ignore this rule by saying that a three-year lease in an
apartment building would endure its entire term when made by a mortgagee in possession. This
would follow only if the lease executed by a mortgagee in possession had the priority of a senior
lease, and the Commissioners have nowhere indicated that they intended the mortgagee in posses-

249. Requisite offsetting protection for the mortgagee is given in other subsections invalidating
options to renew and purchase and exempting debtor bankruptcy proceedings from the application
of § 207.
250. The language of this section is peculiar. In fact, the landlord/debtor has no right at all to
remain in possession "under the lease term," and the section would read more clearly if those four
words were omitted.
A complementary arrangement validating nondisturbance agreements is found in § 207(e).
251. See ULSIA § 507(f).
quent sale, but this scenario does not explain the effect of non-notice to her if she has not requested it in the first place. She is also a proper party to be included in a judicial foreclosure proceeding, whether or not she requested notice of intention to foreclose, so long as her lease was recorded, and failure to serve her should again leave her tenancy unaffected. However, where her lease was not recorded, non-inclusion should not equal nontermination of her lease under the Act as worded. Most significantly, the validating language of section 512(a) may eliminate the junior tenant even when the foreclosure proceedings were definitely defective as to her. If so, it would only be by describing the collateral as a reversion subject to junior leases, rather than the entire fee originally mortgaged, that a mortgagee could preserve for its foreclosure purchaser the junior lease on the property.

Where the junior tenant is notified or served, it is not clear that there is anything she can do to stop the foreclosure. Sections 513(a) and 513(e) confer rights of redemption only on the mortgagor and "the holder of any subordinate security interest." There is no reference to the holders of subordinate interests in the collateral which are not security interests. Successors of the mortgagor may redeem only if that right has been released or assigned to them. Where the sale has been completed, the junior tenant who fails to quit may be made subject to a possession order if the foreclosure was judicial.

XII. Conclusion

The precondition for the political success of any proposed uniform law is recognition that the old system needs overhaul. This need certainly seems true for mortgage law in this country. Lenders, borrowers and their attorneys frequently complain of the complexity of both making mortgage loans at the outset and collecting on them when they become delinquent. Mortgage documents and mortgage foreclosures are too lengthy, complicated by unintelligible provisions and procedures, and generally overencumbered by restrictive state laws.

252. See id. § 510(c).
253. Section 512(a) states:

[A] purchaser for value in good faith acquires the debtor's and creditor's rights in the real estate, free of the security interest under which the sale occurred and any subordinate interest, even though the creditor or person conducting the sale fails to comply with the requirements of this Part on default or of any judicial sale proceeding.

254. See ULSIA § 513(d).
255. See id. § 510(g). The fact that it is unclear which procedure the purchaser at a nonjudicial sale must follow has already been discussed. See discussion supra part VII.
But a proposed reform act, especially a uniform one, cannot succeed by merely pointing to the deficiencies of the present system. Such an act should offer tangible improvements making the law, the documents, and the collection process simpler, more understandable, more efficient, fairer, and more consistent. I cannot conclude that ULSIA offers this help.256

A. Simplicity

The new concepts ULSIA introduces often add rather than reduce complexity. The redefinition of default, for instance, may well force attorneys to invent new words and rules for nondefault nonperformance and force mortgagees to lengthen their documents by adding previously unnecessary provisions specifying all nonperformance as a default. Similarly, the benefit of including rents as an automatic part of the security is offset by new provisions requiring new forms of rent clauses to be incorporated into mortgages in order to acquire any meaningful access to the rents.257 This requirement means that the parties must continue bargaining over wording in much the same way as they currently negotiate over rents and profits clauses in important cases. Therefore, in both default and rent situations, we may expect to find as much boilerplate258 as before and to see both sides still forced to incur significant costs for legal advice due to the complexities of the issues. Practitioners may find the new rules as to default and rent more elusive and difficult to comprehend than the old ones.

B. Fairness

ULSIA regrades the playing field for two important parties. We are likely to hear complaints from homeowner groups over “arbitrariness” in giving purchasers of four-unit residential properties complete

256. I do not propose in this Article to write my own version of a uniform mortgage act. I also have attempted to avoid criticisms based on mere policy disagreements with substantive rules, especially where reasonable minds can readily differ. Rather, my criticisms are more procedural or adjectival—the kind a technician levels against an early draft of a proposed new law in order that the policy makers may more directly treat the substantive concerns raised by it. Regrettably, this approach may make these inclusions appear too shallow and too negative at the same time.

257. New mortgages will also need to contain possession clauses to make ULSIA's possession rights meaningful. Also, new mortgages should include clauses dealing with other income generated by the property, in light of the fact that they are given different status than rents.

258. The power-of-sale system is also somewhat subject to the same criticism. On the one hand, it requires a mortgage to contain a power-of-sale clause, which should be unnecessary; on the other hand, it does not require further special enabling language for a negotiated private sale, which probably should always require the mortgagor's express consent.
deficiency protection while denying any protection to single-family homeowners who encumbered their properties to pay medical bills or their children’s tuition before the recession cost them their jobs. We are especially likely to hear such complaints when houses are sold at private non-auction sales for much less than they were worth—as well as for less than the balance of the mortgages—because there were no statutory safeguards against such harsh results. The ULSIA tradeoff of complete deficiency protection in some situations for no protection whatsoever in other situations is not a compromise for those who own only one kind of property.

Parties dealing in second mortgages are also likely to object on fairness grounds because the Act makes them too dependent on the good faith of senior creditors with regard to delinquent and potentially delinquent loans. That they are not entitled to receive notice of acceleration nor notice of intention to foreclose, nor even notice of sale, may put them at extreme risk. This risk is compounded because such borrowers cannot keep themselves independently informed by reading the newspapers or checking the records, and made more insulting because tenants can demand those same notices. Clearly these side effects of ULSIA will not make this system an attractive one to junior creditors.

C. Technical Difficulties

At a lower level, many of the particular proposals contained in ULSIA might be improved by corrections of a more mechanical nature.

1. Notices

The new notices prescribed are covered somewhat haphazardly: no details are given as to the notice of acceleration, almost too many details are given for the notice of intention to foreclose, some but not enough are given for the notice of sale, and readers are left in doubt as to whether there is a fourth notice of judicial foreclosure. All such no-

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259. Notice need be given only to juniors of record seven weeks before the foreclosure sale (which may be scheduled to occur in only five weeks).
260. The difficulty for juniors is further compounded by the fact that they are not permitted to cure defaults and de-accelerate accelerated loans.
261. Whether other parties involved, such as guarantors, will have similar objections cannot be predicted, because ULSIA says so little about them. But that fact alone should make the proposed Act unsatisfactory to those parties so long as their rights and liabilities are enumerated so vaguely.
ties are sensible components in a revised foreclosure system, but they would be better understood if each was described in comparable statutory terms as to timing, content and distribution. Statutory forms would also help. Additionally, each notice appears to have been conceived without much regard for the other notices; the Act would profit if more thought were devoted to reconciling and coordinating the notices with each other and with the other substantive provisions of the Act.262

2. Foreclosure Sales

The universal acceptance of a power-of-sale foreclosure process would be a great achievement for ULSIA—significant enough by itself to outweigh all other improvements ULSIA might offer. However, the Act may include too few details as to the conduct of such sales for those inexperienced with them. And by demanding reasonableness instead of offering specificity, it may frighten mortgagees away from utilizing this new device.264 By extending nonjudicial public auction sales into private negotiated sales as a method of foreclosure, the Act may invite the resistance of consumer protection groups for creating a procedure too susceptible to abuse. Reformers may also complain that nonjudicial foreclosure sales as proposed contain few innovations likely to eliminate the underbidding that so frequently accompanies distress sales. So long as the rules of law effectively limit foreclosure bidding to the creditor and to a few sophisticated insiders, sale prices are not likely to approach market values or preserve mortgagors’ and junior creditors’ equities in their properties.

3. Rents and Leases

The collection of rents from tenants without the mediation of receivers, and the survival of residential leases, are praiseworthy innovations by ULSIA, addressing widely perceived problems in the foreclo-

262. One example would be how the grace period in the notice of acceleration meshes with the provisions of the notice of intention to foreclose.

263. Examples include: how the notice of sale should describe a negotiated private foreclosure sale, and how the cure rights stated in the notice of intention to foreclose match up with the cure rights specified in § 513. Rights to cure also need reconsideration in terms of creating a workable priority system, assuming one is really desired.

264. Mere statutory authorization of a power-of-sale foreclosure is not enough to guarantee widespread public acceptance. New York has permitted nonjudicial foreclosure by advertisement for years, but the technique has nevertheless failed to impress lenders as a satisfactory alternative to the judicial process.
sure process. The appeal of both concepts would be improved by additional elaboration. If the drafters of ULSIA wish to encourage mortgagees to more readily take possession themselves rather than seek the appointment of receivers, they need to give the same attention to the mechanics of getting possession as they have given to conduct after possession has been obtained. Local ejectment proceedings generally take far too long, and local summary-dispossession statutes may well not cover the relief that ULSIA intends in this context. The mandatory survival of both residential leases after foreclosure and all (junior) leases until foreclosure is adequately covered, but leaves open the question of whether and how junior nonresidential leases may be preserved after sale, especially after a nonjudicial sale. Rules governing these matters would better originate from ULSIA's authors than from individual legislators in fifty states.

D. Other Topics Deserving Coverage in ULSIA

Since 1975, when ULSIA's predecessor, the Uniform Land Transactions Act, was drafted, we have witnessed three developments that have had a dramatic impact on conventional mortgage law and which deserve some treatment in ULSIA.

First, the secondary market and uniform forms and covenants in FNMA/FHLMC instruments have marched into the field. ULSIA's Commissioners noted this development, but none of the sections of the Act make any reference to it. At the least, ULSIA's commentary should inform readers and users of the overlap and, if any, inconsistency between its approach and that taken in the covenants.

Second, environmental protection has significantly affected real estate lending, with state and federal laws threatening to impose cleanup liability upon mortgagees who acquire their mortgagors' properties on foreclosure, or too heavily control their mortgagors' activities, or

265. The Act might also more fully address the use of rents to pay property expenses, which now appears to depend on whether the rents are acquired pursuant to a rents clause or by virtue of taking possession of the property. The Act should also deal with the question of disposition of surplus rents, which appears to be unworkable as presently described.

266. See ULSIA prefatory note at 6 (1985). Although, as noted, the new FNMA/FHLMC note does describe nonpayment as a default (as ULSIA requires as a precondition to relief), the uniform mortgage and deed of trust forms contain provisions regarding notices, condemnation proceeds, and acceleration and de-acceleration which may be at odds with the provisions of ULSIA and thus warrant investigation.

267. This omission is not necessarily a defect, however, because the standardized form defers to local law, except where there is overriding federal law. See Burke, supra note 16, § 1.3 (mortgage provision number 15); id. at 208-10 (same).
merely hold mortgages on contaminated real estate. Current uncertainty as to these questions may be the single most important impediment to real estate lending and certainly warrants statutory treatment. A state mortgage statute, even a uniform one, may not be capable of overriding adverse federal environmental law, but there are numerous subsidiary issues relating to the loan itself—once it is discovered that the collateral consists of contaminated property—that warrant state mortgage legislation.268

Third, bankruptcy law has intruded far more into mortgage lending than it did when ULTA was first promulgated. Mortgage attorneys pay constant attention to the Bankruptcy Code of 1978 and judicial decisions applying it to secured lending. ULSIA offers a response to the problem of foreclosure sales being treated as fraudulent conveyances, but this is only one of numerous impacts that bankruptcy has on mortgage lending. Issues relating to the automatic stay, adequate protection, cram-downs and preferences all may be affected by appropriate state legislation.269

There are at least three other areas of modern mortgage law which ULSIA ignores, though parties to mortgages dare not. First, notwithstanding the increasing use of arbitration clauses and the growing importance of the Federal Arbitration Act,270 there is no reference to arbitration or how it would fit within a mortgage foreclosure system.271 Second, there are no provisions governing guarantors, telling us how their rights and liabilities are affected by the substantive rules of ULSIA.272 Third, there is nothing in the Act governing choice of law clauses, an omission rather astonishing in a statute drafted to facilitate interstate lending.273

268. See, for example, California's new response to environmental indemnity agreements in CAL. CIV. PROC. CODE § 736 (West Supp. 1992).

269. See Krasnowiecki, supra note 137.


271. For instance, would arbitrators have the authority to order and/or vacate foreclosure sales? Would arbitration awards be binding on junior lienors who were not parties to the arbitration agreement?

272. Guarantors can be viewed as both debtors and creditors. As mortgage debtors, ULSIA ignores them by not providing for them to receive notices, assert cure rights, attack imperfect sales, or assert deficiency protections. As creditors (seeking to recover indemnification from their original mortgagors after having been forced to pay the debt), ULSIA again gives them no guidance.

273. Even if ULSIA were enacted immediately throughout the entire United States, there would still be ancillary and subsidiary questions requiring resolution under local law and justifying treatment in both mortgage documents and mortgage statutes whenever either the security or the parties have multistate contacts.
Other important matters are covered by ULSIA, but with less particularity than they warrant. The attention to detail that the Commissioners lavished upon the mortgagee in possession provisions in the Act should serve as a model for the other improvements they propose for the collection process. Instead of simply providing that judicial foreclosure is to be governed by state civil procedure law, or that all aspects of private sale foreclosures must be reasonable, ULSIA itself should furnish all of the necessary details for those proceedings. As has been previously observed,\textsuperscript{274} incorporation of existing state judicial procedures will serve to retain the worst features of the existing process in many jurisdictions, and an undefined standard of reasonableness will significantly reduce the attraction of the power-of-sale for detail-prefering, risk-averse lenders. As to these matters, far too little information is given to lenders or borrowers to permit them to determine whether ULSIA presents an attractive alternative to the existing rules in their jurisdiction.\textsuperscript{275}

Additional material topics might also be so enriched. The proceeding for obtaining a deficiency judgment after a nonjudicial foreclosure

\textsuperscript{274} See discussion supra part VII.

\textsuperscript{275} There is probably a natural temptation on the part of attorneys in judicial-foreclosure states to prefer that their statutes be broad and general, setting forth basic policies rather than trivial details. But such a statutory system works well only when the regulated transactions occur in court (e.g. judicial foreclosures) where all contested, lesser questions can be resolved promptly through judicial supervision without significantly impeding the overall process. When the process is taken out of the courts—as nonjudicial foreclosures would be under ULSIA—those matters cannot so easily be ignored because the consequences of error dramatically change.

For instance, if in a judicial foreclosure proceeding the mortgagor believes that the mortgagee should sell in parcels or in bulk, it is easy enough to get a ruling on that question ahead of time from the judge ordering the sale. Win or lose, the mortgagee can then go ahead with the sale as judicially prescribed. But if the foreclosure is out of the court and the same disagreement arises, how it is resolved? The mortgagee may go to court before the sale, assuming there is time, to enjoin what it sees as an impropriety, but that is improbable. More likely, the mortgagee will decide to go ahead with the sale as planned, ignoring the mortgagor's complaint, or else revise it to appease the mortgagor. Appeasement means that the mortgagor controls the sale, but rejection means that a court may, after the sale is over, decide that the mortgagor was right and nullify the sale. That is a high risk to run, not only for the mortgagee, but for any potential bidder at the sale listening to the mortgagor complain.

The lesson mortgagees have learned from this in nonjudicial-foreclosure jurisdictions is that the price to pay for elimination of the courts from the foreclosure process is extensive legislative guidance, resolving all the challenges which mortgagors may make. In California, for instance, the basic foreclosure statutes run over twelve thousand words, \textit{Cal. Civ. Code} §§ 2924-2924k (West 1974 & Supp. 1992), not counting many other statutes that also regulate this process. Lenders want to be told by the legislature whether to make two or three copies of documents because that is safer than learning the answer afterwards from the judiciary. Nitpicking becomes a way of life, as this Article may sadly demonstrate.
sale is omitted entirely, although the improved power-of-sale process, when combined with a declining real estate market makes it likely that such relief will frequently be sought.\textsuperscript{276} Multiple security and questions of piecemeal foreclosure also receive scant attention, although they are of obvious importance in many commercial loans.

E. \textit{Uniformity or Reform?}

There may be a need for more national uniformity than is now achieved by the Fannie Mae/Freddie Mac Uniform Covenants, but the greater need—with regard to state foreclosure laws—is probably for reform rather than for uniformity. Eastern lenders do not need to have foreclosure rules in other states consistent with those in their home states so much as they need to have a workable foreclosure process available in the states where they place their funds, even if the process differs from that at home. Most significantly, lenders probably want a power-of-sale foreclosure alternative available everywhere, whether or not the steps to be followed vary from state to state. The earlier political motivation that led to the division of ULTA into smaller pieces might effectively be carried on even further, down perhaps to a model power-of-sale foreclosure act, which creates a uniform structure, comprehensible to all, even though particulars such as dates and places could vary from jurisdiction to jurisdiction.\textsuperscript{277}

F. \textit{Architecture}

Working with ULSIA is often frustrating. Rules dealing with one issue appear in a section ostensibly relating to another issue, sending the user on searches back and forth across the Act for the appropriate provisions. Provisions governing the same topic often switch vocabulary, forcing readers to guess whether real differences are intended, or merely whether no staff person ever attempted to consolidate the varying texts and revisions submitted by different proponents into a single, cohesive form. The commentary is often at odds with the text, permitting rival and conflicting interpretations. And frequently there are gaps, ambiguities, and inconsistencies among and between the provi-

\textsuperscript{276} Also excluded is a statutory explanation or guide to the consequences of taking a money judgment before foreclosure without having it refer to the mortgage. Section 501(b), therefore, provides only half a rule.

\textsuperscript{277} In addition to criticizing ULSIA for the omissions already noted, the Act also attempts to cover an enormous range of issues; a narrower but more thorough act might be easier for all to accept at this time.
sions themselves. This is not an attractively presented act generating any emotional inclination to support it. Too often, I fear that the slogan will become "ULSIA? NIMBY!"