

D R A F T

FOR DISCUSSION ONLY

UNIFORM ASSIGNMENT OF RENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

September 7, 2004

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ASSIGNMENT OF RENTS ACT

Prefatory Note

In the majority of American states that follow the lien theory of mortgages, a mortgage grants the mortgagee only a right of security, capable of being enforced via foreclosure in the event of the mortgagor's default. Under the lien theory, until such enforcement occurs, a mortgage does not by itself convey to the mortgagee the right to collect rents accruing from the mortgaged real estate. As a result, it has become customary that when a lender makes a mortgage loan on income-producing real estate, the lender requires the borrower to execute a document typically entitled an "Assignment of Leases and Rents."

This assignment can serve a number of practical purposes, but its most significant purpose is to provide the mortgagee with a security interest in rents that accrue prior to the time that the mortgagee can complete a foreclosure proceeding. In many states, the foreclosure process can be quite lengthy, and the mortgage lender faces a heightened risk that while a foreclosure proceeding is pending, the borrower may continue to collect project revenues and spend them other than to reduce the mortgage debt (a process often referred to as "milking" the rents). By taking the assignment, the lender makes clear its intention to have a lien upon all future rents produced by the real property, including those that accrue during the period between the mortgagor's default and the mortgagee's completion of a foreclosure proceeding. The assignment typically permits the lender to take steps following the borrower's default to collect rents and apply them to reduce the mortgage debt. These steps may include, *inter alia*, the lender's taking physical possession of the project (becoming a "mortgagee in possession"), obtaining the appointment of a receiver for the project, or notifying tenants to direct all future rent payment to the lender.

State law generally governs the creation and enforcement of security interests in rents. Unfortunately, most states do not have detailed statutory provisions dealing with the creation and enforcement of security interests in rents (by contrast to the comprehensive provisions in Uniform Commercial Code Article 9 for the creation and enforcement of security interests in personal property receivables). Thus, the creation and enforcement of security interests in rents tends to be governed by the common law of real property. Not surprisingly, this has produced undesirable variation in the rules governing the creation and enforcement of security interest in rents. Perhaps more significantly, disagreements regarding security interests in rents tend to be resolved in the federal bankruptcy courts, after the owner of mortgaged real estate has resorted to bankruptcy to obtain a stay from creditor collection efforts. Bankruptcy courts have proven exceptionally adept at creatively interpreting (or misinterpreting) state law principles — in some cases to disencumber a lender's security interest in rents altogether, or in other cases to exclude post-bankruptcy rents from the bankruptcy estate altogether.

To address some of these concerns, the Act seeks to bring consistency to commercial real estate transactions by establishing a comprehensive statutory model for the creation, perfection,

and enforcement of a security interest in rents. The Act addresses, *inter alia*, the following issues:

Security Interest in Rents is Distinct Form of Collateral. As stated above, the most significant purpose of an assignment of leases and rents is to provide the mortgagee with a security interest in rents that accrue prior to the time that the mortgagee can complete a foreclosure proceeding. Most courts have held that this security interest in rents constitutes a separate form of collateral, distinct from the mortgagee's lien on the land itself. Unfortunately, some court decisions have wrongly concluded that rents do not constitute separate collateral, but are "subsumed within the land." In reaching this conclusion, these courts have held that a bankrupt mortgagor/owner may use rents during the pendency of its bankruptcy, without regard to the lender's security interest in rents, so long as the mortgaged land itself is not decreasing in value. The Act rejects these decisions and confirms the prevailing view that a security interest in rents is a form of collateral that is separate and distinct from the a lien on the land that generates those rents. For further background, *see* Act § 4, Preliminary Comment 1.

"Perfection" of a Security Interest in Rents. The Act codifies the principle that an assignment of rents is perfected and effective against third persons upon its proper recordation. The Act thus establishes, as a matter of state law, that once a lender has recorded an assignment of rents, no further action is necessary to protect the enforceability and priority of the lender's security interest in rents against subsequent purchasers or creditors. The Act should thus resolve any remaining ambiguity regarding the enforceability of a lender's security interest in rents accruing during the pendency of a mortgagor/owner's bankruptcy case, as the Bankruptcy Code makes clear that the bankruptcy trustee/debtor-in-possession cannot use its "strong-arm" avoiding power [11 U.S.C. § 544(a)] to avoid a security interest that was properly perfected prior to bankruptcy. The Act would thus overrule case law suggesting that a security interest in rents was "inchoate" or ineffective until the lender takes affirmative action after default to obtain possession of the real property, impound the rents, secure the appointment of a receiver, or some other similar action. For further background, *see* Act § 5, Preliminary Comment.

"Absolute" Assignments of Rents. Often, an assignment of leases and rents will state that the assignor is making an "absolute" transfer of rents, even though the context of the transaction (and often the terms of the assignment itself) indicate that the assignor is making the assignment only as security for repayment of the mortgage obligation. Mortgage law has long established that instruments purporting to make an absolute conveyance of title to land nevertheless constitute equitable mortgages if the surrounding circumstances demonstrate that the parties are using title to land to secure payment of a debt. Consistent with this long-established principle, the Act establishes that an assignment of rents executed in conjunction with and as security for an obligation creates only a security interest in rents, even if the assignment purports to constitute an absolute transfer of the rents. For further background, *see* Act § 4, Preliminary Comment 2.

Appointment of a Receiver. In some states, there are comprehensive statutory provisions that address the circumstances in which a court should appoint a receiver for mortgaged real

property. In many states, however, there is little statutory guidance. As a result, standards governing the appointment of receivers in most states are defined judicially, and tend to vary somewhat from jurisdiction to jurisdiction — and, within many jurisdictions, from judge to judge. Some decisions require that the mortgagee’s security be inadequate or that the land is subject to existing or threatened waste; others require a showing of mortgagor insolvency. By contrast, many courts will appoint a receiver in any circumstance in which the mortgage contains a receivership clause authorizing such an appointment after default. The Act establishes consistent standards to govern the appointment of a receiver for mortgaged real estate, including the effectiveness of a receivership clause. For further background, *see* Act § 7, Preliminary Comments 1-5.

Characterization of Real Property Revenues. In many commercial real estate developments (*e.g.*, office buildings, retail shopping centers, apartment complexes), the owner and occupiers of the development stand in a landlord-tenant relationship, based upon the execution of leases covering portions of the development. Because the common law has treated unaccrued rents as an interest in land (an incorporeal hereditament), there is no question that in these cases, the sums paid by tenant occupiers constitute “rent.” Thus, a mortgage lender taking a security interest in those “rents” must comply with the provisions of real estate law in order to obtain and enforce that security interest — *i.e.*, the mortgage lender must have the mortgagor execute and deliver an instrument sufficient to convey an interest in “rents” and must record that instrument on the public land records. In many other developments, however, the occupiers are not “tenants,” but merely licensees (*e.g.*, nursing home residents, persons occupying garage spaces or marina slips, hotel guests, and the like). Court decisions involving security interest in the revenues paid by such occupiers have disagreed over the proper characterization of these revenues — with some treating them as “rents” in the nature of real property, and others treating them as “accounts” subject to the provisions of Uniform Commercial Code Article 9. These decisions have created uncertainty regarding both the proper way to create and perfect a security interest in these occupancy revenues, as well as the appropriate treatment of a security interest in those revenues generated during the pendency of a bankruptcy case. The Act establishes that rents include any sum paid by a tenant, licensee, or other person for the right to possess or occupy the real property of another for a period of one day or longer. For further background, *see* Act § 2, Preliminary Comment 10.

Enforcement by Demand to Assignor/Owner. The traditional weight of case authority required that an assignee of rents could enforce its security interest in rents only by taking steps sufficient to divest the assignor of control over those rents. Under this approach, it did not suffice for the assignee to make a demand upon the mortgagor/assignor to turn over rentals as they were collected. These decisions reflected a concern that as long as the mortgagor was collecting and retaining net rentals, third party claimants (such as trade creditors to whom the mortgagor might make payments) could be easily misled by the mortgagor’s control over those cash proceeds. The Act rejects this approach and permits an assignee to enforce its security interest in rents by giving a notification demanding that the assignor turn over any rents that it may collect following the notification — and thus an assignor who fails to turn over any such

rents to the assignee is liable for conversion of those rents. The Act protects third persons to whom the assignor pays cash that constitute proceeds of rents if the third persons are not acting in collusion with the assignor to violate the assignee's security interest in rents. For further background, *see* Act § 9, Preliminary Comment 1; § 14, Preliminary Comments 1-3.

Enforcement by Demand to Tenants. The Act seeks to facilitate the enforcement of a security interest in rents by allowing the assignee to give a notification to tenants demanding that the tenants make future rent payments directly to the assignee. The Act addresses the liability of the tenant for making payments to the assignor following receipt of such a notification, the need for a tenant to have adequate opportunity to seek counsel regarding the legal effect of the notification, and the possibility of a tenant receiving a notification from multiple rents assignees. The Act also provides a standard form notification suitable for use by assignees. For further background, *see* Act § 8, Comments 1 through 6.

Expenses of Operating and Preserving the Real Property. Often, commercial leases obligate the tenant to pay a sum characterized as "additional rent." This sum is typically based upon the tenant's pro rata share of the cost of real property taxes, insurance, and maintenance expenses (or the increase in such costs or expenses beyond an established baseline amount), and serves to reimburse the landlord for the payment of these expenses. Leases customarily characterize the tenant's obligation to pay these sums as "rent," and assignments of leases and rents typically require the landlord/assignor to grant a security interest in these sums. Based upon these customary practices, the Act treats such sums as "rents."

California's comprehensive assignment of rents statute places an affirmative obligation on the assignee to use whatever rents it collects to pay the reasonable expenses of operating and maintaining the real property. By contrast, under the traditional rule prevailing in most states, the landlord's obligation to pay these expenses — even if the obligation is expressed or implied into its tenant leases — does not bind the lender as a successor until the lender acquires possession or ownership of the land (by becoming a mortgagee in possession or purchasing the premises at foreclosure). A prudent lender may well choose to apply collected rents to the payment of real property taxes, insurance, and project maintenance in order to protect its own security. Nevertheless, under the traditional view, a lender that collect rents without taking actual or constructive possession of the real property may apply those rents to the mortgage debt without any obligation to apply such sums to the payment of taxes, insurance, or property maintenance.

If the assignor fails to pay real property taxes or insurance or fails to perform its obligations with respect to project maintenance, a tenant injured by such failure may have a claim or defense with respect to its continuing liability for rents. Although the assignee has no affirmative obligation to pay these real property-related expenses prior to obtaining possession or ownership of the real property, the Act does make clear that the assignee's ability to collect rents is subject to any such claim or defense that the tenant may have based upon the assignor's nonperformance (absent an enforceable agreement not to assert such a claim or defense). For further background, *see* Act § 13, Preliminary Comments 1-2.

1 **UNIFORM ASSIGNMENT OF RENTS ACT**

2

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Assignment of

4 Rents Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Assignee” means a person entitled to enforce an assignment of rents.

7 (2) “Assignment of rents” means a transfer of an interest in rents made in

8 connection with an obligation secured by real property located in this state, whether the

9 assignment is made as part of a security instrument covering the real property or in a separate

10 document.

11 (3) “Assignor” means a person that makes an assignment of rents or a successor in

12 interest to such person.

13 (4) “Day” means calendar day.

14 (5) “Deposit account” means a demand, time, savings, passbook, or similar

15 account maintained with a bank, savings bank, savings and loan association, credit union, or trust

16 company.

17 (6) “Document” means information that is inscribed on a tangible medium or that

18 is stored on an electronic or other medium and is retrievable in perceivable form.

19 (7) “Good faith” means honesty in fact and the observance of reasonable

20 commercial standards of fair dealing.

21 (8) “Notification” means a document containing information required under this

22 [act] and signed by the person required to provide the information.

1 (9) “Person” means an individual, corporation, business trust, estate, trust,
2 partnership, limited liability company, association, joint venture, public corporation, government,
3 or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

4 (10) “Rents” means:

5 (A) sums payable for the right to possess or occupy the real property of
6 another person for a period of one day or longer;

7 (B) the proceeds of rental interruption insurance payable to an assignor;

8 (C) claims arising out of a default in the payment of sums payable for the
9 right to possess or occupy the real property of another person;

10 (D) sums payable to terminate an agreement to possess or occupy the real
11 property of another person;

12 (E) sums payable to pay or reimburse an assignor for payment of:

13 (i) expenses incurred in operating and maintaining the real
14 property; or

15 (ii) expenses incurred in constructing or installing improvements
16 on the real property;

17 (F) a security deposit forfeited by a possessor or occupier of real property;
18 and

19 (G) any other sums that are defined as rents under the law of this state
20 other than this [act].

21 (11) “Secured obligation” means an obligation the performance of which is
22 secured by a security interest in real property.

1 (12) “Security instrument” means an agreement that creates or provides for a
2 security interest in real property, however denominated, whether or not it also creates or provides
3 for a lien upon personal property.

4 (13) “Security interest” means an interest in real property that arises by agreement
5 and secures performance of an obligation.

6 (14) “Sign” means, with present intent to adopt or accept a document:

7 (A) to execute or adopt a tangible symbol; or

8 (B) to attach to or logically associate with the document an electronic
9 sound, symbol, or process.

10 (15) “State” means a state of the United States, the District of Columbia, Puerto
11 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
12 jurisdiction of the United States.

13 (16) “Submit for recording” means to submit a document complying with
14 applicable legal standards, with required fees and taxes, to the appropriate governmental office
15 under [the recording act of this state].

16 (17) “Tenant” means a person that holds a right to possess or occupy the real
17 property of another person and has a corresponding obligation to pay rents.

18 **Preliminary Comments**

19 1. “Assignee.” The term “assignee” means the party entitled to enforce an assignment of
20 rents in the manner specified by this Act.

21
22 2. “Assignment of rents.” In many commercial transactions, it is customary for the lender
23 to require the borrower to execute multiple documents, including both a “mortgage” covering the
24 land and an “assignment of rents and leases” which assigns to the lender all leases covering the
25 mortgaged premises and all rents accruing under those leases. In some transactions, the lender

1 may simply incorporate into the mortgage language sufficient to assign to the lender all leases
2 covering the mortgaged premises and rents accruing under such leases, without a separate
3 assignment document. The Act uses the term “assignment of rents” to mean the actual transfer of
4 an interest in rents, whether that transfer occurs by virtue of the mortgage, a separate document
5 entitled “assignment of leases and rents,” or otherwise.
6

7 3. “Assignor.” The Act defines an “assignor” as the person who makes an assignment of
8 rents, or a successor in interest to the original assignor.
9

10 4. “Day.” The Act defines “day” as a calendar day.
11

12 5. “Deposit account.” This definition is similar to that contained in U.C.C. Section 9-
13 102(a)(29). The term uses the term “bank” in a fashion comparable to the definition contained in
14 U.C.C. Section 1-201(b)(4).
15

16 6. “Document.” The definition of “document” is media-neutral and comparable to the
17 definition used in Section 102(3) of the Uniform Residential Mortgage Satisfaction Act. Because
18 this Act uses the term “record” in its customary fashion under real estate law — *i.e.*, as a verb to
19 describe the act of filing an instrument of conveyance with the recorder’s office — the Act does
20 not use the term “record” as a noun, and instead uses the term “document.”
21

22 7. “Good faith.” This definition is identical to that contained in U.C.C. § 1-201(b)(20).
23

24 8. “Notification.” The Act permits an assignee to enforce an assignment of rents by
25 giving a notification to the assignor (Section 8) or by giving a notification to tenants of the
26 assignor (Section 7). In any circumstance in which the Act requires notification to be given to a
27 person, any such notification shall be in the form of a document, as defined in Section 2(6), and
28 shall contain the information required by the specific section authorizing that notification.
29

30 9. “Person” includes both natural persons (individuals) and all forms of legally
31 recognized public and private organizations.
32

33 10. “Rents.” In many commercial real estate developments (*e.g.*, office buildings,
34 industrial parks, retail shopping centers, and apartment complexes), the owner and occupiers of
35 the development stand in a landlord-tenant relationship, based upon the execution of leases
36 covering portions of the development. Because the common law has treated unaccrued rents as
37 an interest in land (an incorporeal hereditament), sums paid by tenant occupiers undoubtedly
38 constitute “rent” in the nature of real property. Thus, a mortgage lender taking a security interest
39 in “rents” must comply with the provisions of real property law in order to obtain and enforce
40 that security interest. In other words, the mortgage lender must have the mortgagor execute and
41 deliver an instrument sufficient to convey an interest in “rents” and must record that instrument
42 on the public land records in the county where the land is situated.
43

1 In many other developments, however, the owner and occupier of land do not have a
2 landlord-tenant relationship. In many commercial land developments, the user/occupier might be
3 only a licensee. Examples of this type of project include nursing homes, parking garages, golf
4 courses, landfills, marinas, stadiums/arenas, student dormitories, and hotels/motels. Where the
5 development's occupier is a licensee and not a tenant, a significant classification problem arises.
6 Are the development revenues "rents" governed by real estate law (such that the lender would
7 obtain and record an assignment of rents in the land records) or "accounts" governed by U.C.C.
8 Article 9 (such that the lender would obtain a security interest by creating a floating lien on
9 accounts and perfect that interest by filing a financing statement covering accounts in the U.C.C.
10 filing system)?

11
12 In theory, a lender could moot the resolution of this characterization question simply by
13 (a) making sure that its loan documents took a security interest in both "rents" and "accounts,"
14 and (b) properly recording/filing evidence of those interests in the respective filing systems. This
15 "belt and suspenders" approach would appear to give the lender a perfected security interest in
16 unaccrued project revenues regardless of how a court resolved the characterization question.
17 Here, however, one must consider the impact of Bankruptcy Code § 552(a). Section 552(a)
18 generally provides that any pre-petition security agreement covering after-acquired property does
19 not affect property that the bankruptcy estate acquires post-petition. By itself, section 552(a)
20 would suggest that a lender's security interest in pre-petition revenues would not attach to post-
21 petition revenues (which would, in turn, mean that those revenues would not constitute the
22 lender's cash collateral). Congress drew a careful distinction, however, between *property*
23 *received by the debtor post-petition* and *post-petition proceeds of pre-petition collateral*. This
24 distinction is reflected in section 552(b), which provides that a valid and properly perfected pre-
25 petition security interest in collateral will attach to any rents, profits, and proceeds of that
26 collateral that are received by the debtor post-petition.

27
28 The protection accorded to secured creditors by section 552(b) makes the resolution of
29 this classification question critical for the commercial real estate mortgage lender. If post-
30 petition project revenues are "rents," "profits," or "proceeds" of the land, the lender's security
31 interest attaches to those revenues. If not, then section 552(a) extinguishes the lender's interest
32 in post-petition project revenues.

33
34 Most of the bankruptcy cases addressing this characterization question involved hotels
35 and security interests in hotel room revenues. Prior to 1994, a few decisions sensibly treated
36 hotel room revenues as the functional equivalent of tenant rents and concluded that § 552(b)'s
37 protection for "rents" preserved a lender's properly perfected interest in post-petition hotel room
38 revenues. *See, e.g., In re S.F. Drake Hotel Assocs.*, 131 B.R. 156, 158-61 (Bankr. N.D. Cal.
39 1991), *aff'd*, 147 B.R. 538 (N.D. Cal. 1992); *In re Mid-City Hotel Assocs.*, 114 B.R. 634, 638-
40 642 (Bankr. D. Minn. 1990). Most courts, however, concluded that post-petition hotel room
41 revenues were accounts (personal property) and were neither "rents," "profits," or "proceeds" of
42 the land. *See, e.g., In re Northview Corp.*, 130 Bankr. 543, 548 (9th Cir. BAP 1991); *In re*
43 *Investment Hotel Properties, Ltd.*, 109 Bankr. 990, 994-97 (Bankr. D. Colo. 1990). These courts

typically applied the formalistic reasoning that room revenues could not be “rent” because hotel guests were not “tenants.” As a result, many bankruptcy courts routinely invalidated lenders’ claimed interests in post-petition hotel revenues. The formalistic invalidation of a hotel lender’s interest in post-petition room revenues was particularly inappropriate, as hotel room revenues are economically identical to the “rents” paid by tenants under apartment, office, or industrial leases. *See, e.g.,* R. Wilson Freyermuth, *Of Hotel Revenues, Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 UCLA L. Rev. 1461 (1993). Recognizing this unfairness, Congress amended section 552(b) in 1994 to preserve the lender’s interest in post-petition “fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties.”

This amendment provided a practical solution to the classification problem with respect to hotels and other “lodging properties.” Unfortunately, it did not address a wide variety of other income-generating projects. Courts have generally concluded that golf course green fees do not constitute “rents,” “profits,” or “proceeds” of the land. *See, e.g., In re McKim*, 217 B.R. 97 (Bankr. D.R.I. 1998); *In re GGVXX, Ltd.*, 130 B.R. 322 (Bankr. D. Colo. 1991). Likewise, courts have refused to characterize stadium/arena revenue as rents. *See, e.g., Klingner v. Pocono International Raceway, Inc.*, 433 A.2d 1357 (Pa. Super. 1981); *In re Zeeway Corp.*, 71 B.R. 210 (9th Cir. Bankr. 1987). By contrast, courts have treated revenue from parking garages as rents, *see, e.g., In re Ashford Apartments Ltd. Partnership*, 132 B.R. 217 (Bankr. D. Mass. 1991), and likewise have treated landfill dumping fees as being rents. *See, e.g., In re West Chestnut Realty of Haverford, Inc.*, 166 B.R. 53 (Bankr. E.D. Pa. 1993), *aff’d*, 173 B.R. 322 (E.D. Pa. 1994). Courts have split in the characterization of marina slip fees, with some characterizing these as “rents” depending upon the duration of use and others characterizing such fees as accounts subject to Article 9. *Compare In re Northport Marina Assocs.*, 136 B.R. 911 (Bankr. E.D.N.Y. 1992) (fees paid by marina users for assigned slip for periods of six months or more were in nature of “rents,” while fees paid by transitory users were “accounts”) *with In re Harbour Pointe Ltd. Partnership*, 132 B.R. 501 (Bankr. D.D.C. 1991) (fees generated by marina treated as “rents”) and *In re Hamlin’s Landing Joint Venture*, 77 B.R. 916 (Bankr. M.D. Fla. 1987) (same).

The Act takes the view that “rents” should include all sums paid by a person in order to acquire the right to possess or occupy the real property of another. A person “possesses” the land of another if that person has possessory interest in that land (*e.g.*, the interest of a tenant under a lease). A person “occupies” the land of another if that person has a contractual right that typically permits them to occupy the real property of another on an overnight or continuing basis. Thus, the Act defines the term “rents” to include all sums paid by a person in order to acquire the right to possess or occupy the real property of another for a period of one day or longer. The application of this definition is demonstrated by the following illustrations:

Illustration 1. ABC Life Insurance Company holds a mortgage and an assignment of rents on the Friendly Hotel. Heinsz is a guest of Friendly Hotel for three nights. The room occupancy charges that Heinsz incurs during his stay are “rents” within the meaning of the Act. Charges that Heinsz incurs for additional hotel-related services (such as room

1 service meals, dry cleaning or laundry services, or the like) would not constitute “rents,”
2 as they are not for incurred in exchange for the right to occupy the room.

3
4 *Illustration 2.* ABC Life Insurance Company holds a mortgage and an assignment of
5 rents on the Friendly Nursing Home. Heinsz is a patient at Friendly Nursing Home. The
6 room occupancy charges that Heinsz incurs during his stay are “rents” within the meaning
7 of the Act. Charges that Heinsz incurs for medical treatment, medication, physical
8 therapy, or the like would not constitute “rents,” as they are not incurred in exchange for
9 the right to occupy the room.

10
11 *Illustration 3.* First Bank holds a mortgage and an assignment of rents on the Friendly
12 Marina. Smith pays a monthly fee to maintain a docking slip at Friendly Marina for the
13 purpose of docking his yacht. The monthly fee Smith incurs is “rent” within the meaning
14 of the Act. However, fees that Friendly Marina may collect from boaters who may use
15 slips for less than a day would not constitute rents, unless the law of this state other than
16 this Act defines those fees as “rent.”

17
18 *Illustration 4.* First Bank holds a mortgage and an assignment of rents on Friendly Golf
19 Course. Smith pays greens fees to play at Friendly Golf Course. The fees that Smith
20 pays do not constitute “rents” within the meaning of the Act, as Smith does not “occupy”
21 the land but is merely using it in a temporary fashion.

22
23 *Illustration 5.* First Bank holds a mortgage and an assignment of rents on Friendly
24 Parking Garage. Smith pays \$150 per month for a reserved parking space. The \$150
25 monthly fee constitutes “rent” within the meaning of the Act.

26
27 In addition, the Act defines rents to include a number of other charges that are often
28 characterized as “rent” under leases or occupancy agreements, as well as sums that constitute an
29 economic substitute for rents that might otherwise have accrued or been collected. These sums
30 include the proceeds of rental interruption insurance payable to the assignor; claims arising out of
31 a default in the payment of rents (e.g., liquidated damages); sums payable in order to terminate a
32 lease or occupancy agreement; sums payable for the purpose of paying or reimbursing the
33 assignor’s payment of expenses incurred in operating and maintaining the real property (such as
34 taxes or insurance) or in constructing or installing improvements; and any security deposit
35 forfeited by a possessor or occupier of the real property.

36
37 Under the Act’s definition of “rents,” the Act would generally exclude from its scope
38 sums paid by a user for the temporary use of another’s land (e.g., greens fees, ticket charges at an
39 arena or theater). Nevertheless, the Act does provide that these charges or fees will constitute
40 “rent” within the meaning of this Act if state law other than this Act so provides.

41
42 11. “Secured obligation.” The term “secured obligation” covers any obligation the
43 performance of which is secured by a security interest.

1 12. “Security instrument.” This definition is identical to that used in Section 102(19) of
2 the Uniform Nonjudicial Foreclosure Act, and recognizes that the title given to a document by its
3 parties is not dispositive of whether the document is a security instrument. Instead, the key issue
4 is whether the document creates a security interest. For purposes of the Act, a “security
5 instrument” must cover real property, although it may additionally cover personal property.
6

7 13. “Security interest.” Under the Act, a security interest arises in any transaction,
8 regardless of its form, in which a person receives or retains an interest in real property for the
9 purpose of securing an obligation owed to that person.
10

11 14. “Sign.” This definition is media-neutral and comparable to that contained in
12 Uniform Commercial Code § 2-103(1)(p).
13

14 15. “Submit for recording.” This definition is comparable to that contained in Section
15 102(21) of the Uniform Residential Mortgage Satisfaction Act. To “submit for recording” means
16 that the person has submitted a document that has complied with the appropriate legal
17 requirements for the document submitted, along with required fees and taxes, to the appropriate
18 recording official. Whether an assignment of rents that is submitted for recording is actually
19 recorded is determined by the recording act of the state.
20

21 16. “State.” This definition is the boilerplate definition of the term as used in uniform
22 acts.
23

24 17. “Tenant.” For purposes of this Act, a “tenant” is any person that holds a right to
25 possess or occupy the land of another and is thereby obligated to pay rents. The Act defines
26 “rents” to include sums payable by licensees and other occupants of land who do not have a
27 possessory interest in the land and thus do not stand in a landlord-tenant relationship with the
28 assignor. While the Act treats such a licensee as a “tenant” for the purposes of this Act, it does
29 not render such a licensee a tenant within the meaning of the state’s law of landlord-tenant law.
30 Thus, for example, nothing in this Act would grant a licensee the benefit of the state’s forcible
31 entry and detainer statutes, an implied warranty of habitability, or any other right recognized
32 under the state’s general law of landlord and tenant. *See* Section 16.
33

34 **SECTION 3. MANNER OF GIVING NOTIFICATION.**

35 (a) Except as otherwise provided in subsections (c) and (d), a person gives a
36 notification or a copy of a notification under this [act] by

37 (1) handing it to the recipient; or

38 (2) depositing it with the United States Postal Service or with a

1 commercially reasonable delivery service, properly addressed to the intended recipient's address
2 as specified in subsection (b), with postage or cost of delivery provided for.

3 (b) The following rules govern the proper address for giving a notification under
4 subsection (a)(2):

5 (1) A person giving a notification to an assignee shall use the address for
6 notices to the assignee provided in the assignment of rents, but if the assignee has provided the
7 person giving a notification with a more recent address for notices, the person giving the
8 notification shall use that address.

9 (2) A person giving a notification to an assignor shall use the address for
10 notices to the assignor as provided in the assignment of rents, but if the assignor has provided the
11 person giving a notification with a more recent address for notices, the person giving the
12 notification shall use that address.

13 (3) A person giving a notification to a tenant shall use the address of the
14 leased premises. However, if the tenant's lease provides an address for notices, and the person
15 giving notification has received a copy of the lease or otherwise knows the address for notices
16 specified in that lease, the person giving the notification shall use that address.

17 (c) If a person giving a notification pursuant to this [act] and the recipient have
18 agreed as to the methods for giving a notification, that agreement is enforceable.

19 (d) If a notification is not given in accordance with subsection (a) but is received
20 by the recipient within the time it would have been received if properly given, it is given as of the
21 time of receipt.

22 Preliminary Comments

1 1. *Methods of giving notification.* This section specifies the methods for giving any
2 notification required by this Act. Under subsection (a)(2), notices required by the Act may be
3 transmitted by registered or certified mail, regular mail, or commercial delivery services. Proper
4 dispatch, not receipt, satisfies the obligation to give notification. Subsection (a)(1) also permits a
5 person to give notification by personal service upon the recipient. The person asserting that
6 notification was given has the burden of proof that notification was given in accordance with the
7 provisions of this section.
8

9 A notification given in a manner not authorized by subsection (a), but received by the
10 recipient within the time it would have been received if given properly, is treated as given as of
11 the time of receipt.
12

13 Subsection (c) provides that if an agreement between the person giving a notification and
14 the recipient dictates a method of notification other than the methods permitted under subsection
15 (a), that agreement is enforceable.
16

17 2. *Identifying the address for notification.* Typically, an assignment of rents contains a
18 provision specifying addresses for notices to the assignor and the assignee. Subsection (b)
19 provides that the respective addresses for notice contained in an assignment of rents will be the
20 default addresses for any notification to the assignor or assignee under this Act. If the intended
21 recipient has provided the person giving a notification with a more recent address, then the Act
22 requires the person giving the notification to use that address. For example, if an assignee gives
23 a notification to the assignor enforcing its interest in rents under Section 9 (which governs
24 enforcement by notification to the assignor), and that notification specifies a new address for
25 future notices to the assignee, the assignor would thereafter be obligated to use that new address
26 in giving any notification required by the Act.
27

28 Subsection (b)(3) provides that a tenant's address for notification will be the address of
29 the leased premises, unless the lease provides an alternative address for notification to the tenant
30 and the notifier either has a copy of the lease or otherwise knows of the alternative address.
31

32 3. *Obligations under the Act triggered by receipt.* While a person obliged to give a
33 notification under the Act satisfies its obligation to give that notification by dispatch in
34 accordance with subsection (a)(1), several substantive provisions of the Act effectively require
35 that the intended recipient actually receive notification. For example, although an assignee may
36 give notification to a tenant by mail directing that tenant to pay rents to the assignee, the Act does
37 not legally obligate the tenant to pay rents to the assignee until the tenant receives the
38 notification. *See* Section 8(b).
39

40 **SECTION 4. ASSIGNMENT OF RENTS CREATES SECURITY INTEREST.** An
41 assignment of rents creates a presently effective security interest in all accrued and unaccrued

1 rents arising from the real property described in the assignment, whether the assignment is
2 denominated an absolute assignment, an absolute assignment conditioned upon default, an
3 assignment as additional security, or otherwise. The security interest created by an assignment of
4 rents is separate and distinct from any security interest held by the assignee on the real property
5 described in the assignment.

6 Preliminary Comments

7 Source: Cal. Civ. Code § 2938(a); Restatement (Third) of Property — Mortgages §
8 4.2(b).
9

10 1. *Rents as a distinct source of collateral.* An assignment of rents permits the assignee to
11 collect rents that accrue between the date of the assignor’s default and the date that the assignee
12 can complete a mortgage foreclosure on the underlying land. In many states, this foreclosure
13 process can be quite lengthy. In these states, a mortgagee faces a heightened risk that the
14 mortgagor may collect project revenues and expend them other than to reduce the mortgage debt
15 (a process often referred to as “milking” the rents) while a foreclosure proceeding is pending. By
16 taking an assignment of rents, the assignee demonstrates its intention to have a lien upon all
17 future rents produced by the project, including those that accrue between default and the
18 completion of a foreclosure sale — a period that may be extended if the assignor files a
19 bankruptcy petition that stays the foreclosure.
20

21 Traditionally, state law has governed the creation and enforcement of security interests in
22 rents. Most frequently, however, disagreements regarding security interests in rents arise in the
23 federal bankruptcy courts. On its face, the Bankruptcy Code appears to recognize that state law
24 has traditionally treated “rents” that accrue between default and foreclosure as a source of
25 collateral that is separate and distinct from the land that generated those rents. The Bankruptcy
26 Code characterizes rents from mortgaged property as “cash collateral,” 11 U.S.C. § 363(a), and
27 preserves a secured creditor’s pre-bankruptcy lien on rents that the debtor receives after it files a
28 bankruptcy petition, *id.* § 552(b). These provisions appear to acknowledge that a pre-bankruptcy
29 assignment of rents creates a separate security interest in the rents (*i.e.*, separate from the
30 underlying mortgage lien against the land itself).
31

32 Most bankruptcy court decisions have treated post-petition rents as a separate and distinct
33 source of collateral, but a few bankruptcy court decisions have instead concluded that post-
34 petition rents do not constitute separate collateral because the post-petition rent stream is in fact
35 “subsumed” within the valuation of the land itself. *See, e.g., In re Wrecclesham Grange, Inc.*,
36 221 B.R. 978 (Bankr. M.D. Fla. 1997); *In re Embassy Properties N. Ltd. Partnership*, 196 B.R.
37 172 (Bankr. D. Kan. 1996); *In re Citicorp Park Assocs.*, 180 B.R. 15 (Bankr. D. Me. 1995); *In re*

1 Barkley 3A Investors, Ltd., 175 B.R. 755 (Bankr. D. Kan. 1994); *In re Mullen*, 172 B.R. 473
2 (Bankr. D. Mass. 1994). These courts have thus concluded that a debtor can use post-petition
3 rents without regard to a pre-bankruptcy assignment of rents as long as the mortgage lender's
4 interest in the mortgaged land is adequately protected (*i.e.*, as long as the land itself is not
5 declining in value), even if the land was worth less than the mortgage debt.
6

7 The Act rejects the view of state law expressed in these cases that rents accruing prior to
8 foreclosure are subsumed within the land. The Act instead confirms that all rents accruing prior
9 to the completion of a foreclosure constitute a source of collateral that is separate and distinct
10 from the land from which those rents accrued.
11

12 2. *The "Absolute Assignment of Rents."* As many American states adopted the lien
13 theory of mortgages, some mortgagees began requiring the mortgagor to make an "absolute"
14 assignment of rents. Under a so-called "absolute" assignment of rents, the assignor purported to
15 transfer "title" to unaccrued rents to the assignee, ostensibly placing the assignee in the same
16 legal position as it would have occupied under the title theory of mortgages. Frequently, a so-
17 called "absolute" assignment will specify that it is "not merely for purposes of security" and that
18 the assignor has no interest in unaccrued rents other than a revocable license (*i.e.*, not a
19 "property" right) to collect such rents prior to default.
20

21 Mortgagees have argued that the so-called "absolute" assignment of rents strengthens
22 their position with respect to rents in the bankruptcy context. When a debtor files for
23 bankruptcy, all of the debtor's property becomes property of the bankruptcy estate. 11 U.S.C. §
24 541(a). The debtor generally may use property of the estate in the course of its bankruptcy
25 proceeding, subject to the obligation to provide adequate protection to a secured creditor holding
26 a lien upon that property. 11 U.S.C. § 363(b). Moreover, a secured party holding a security
27 interest in property of the estate is subject to the automatic stay and cannot enforce its lien or
28 otherwise collect the debt outside the context of the bankruptcy proceeding. *Id.* § 362(a). As a
29 result, a debtor that owns an income-producing real estate project gains significant leverage if the
30 project's post-petition rents constitute property of the bankruptcy estate. By contrast, the
31 mortgagee/assignee would prefer that the law characterize the post-petition rents as property that
32 is *not* part of the bankruptcy estate. If the project's post-petition rents are not property of the
33 estate, the automatic stay would place no limitation upon the mortgagee's ability to collect those
34 rents and apply them to the debt.
35

36 Obviously, if a mortgagee had already completed a foreclosure sale prior to bankruptcy,
37 the land belongs to the foreclosure purchaser and thus unaccrued rents from that land would not
38 constitute property of the bankruptcy estate. But if no foreclosure has yet occurred — and thus
39 equitable ownership of the land remains in the debtor — unaccrued post-petition rents would
40 seem to fit squarely within the broad concept "property of the estate" as articulated in § 541(a).
41 Nevertheless, in an attempt to boost their leverage in context of bankruptcy, mortgage lenders
42 have argued that under a so-called "absolute" assignment of rents, "title" to the post-petition
43 rents is in the lender and such rents therefore do not constitute property of the bankruptcy estate.

1 A number of courts have accepted this argument *See, e.g.,* First Fidelity Bank v. Jason Realty,
2 L.P. (*In re* Jason Realty, L.P.), 59 F.3d 423 (3d Cir.1995); *In re* Kingsport Ventures, L.P., 251
3 B.R. 841 (Bankr. E.D. Tenn. 2000); *In re* Robin Associates, 275 B.R. 218 (Bankr. W.D. Pa.
4 2001); *In re* Carretta, 220 B.R. 203 (D.N.J. 1998); *see also* NCNB Texas Nat'l Bank v. Sterling
5 Projects, Inc., 789 S.W.2d 358 (Tex. App. 1990) (“The absolute assignment does not create a
6 security interest but instead passes title to the rents. An absolute assignment of rents is not
7 security but is a pro tanto payment of the obligation.”).
8

9 The Restatement (Third) of Property — Mortgages and most commentators have rejected
10 this view. In the typical transaction, the assignor executes an assignment of rents and leases
11 contemporaneously with its execution of the mortgage. The assignee does not immediately begin
12 collecting rents from tenants as soon as it takes the assignment, and typically has no intention to
13 do so at any time prior to the assignor’s default — indeed, the typical assignment expressly
14 acknowledges the assignor’s right to collect and expend the rents prior to default. Under such an
15 “assignment,” the circumstances demonstrate that the parties intend for the rents to secure the
16 repayment of the mortgage debt. In other words, the “absolute” assignment is merely a security
17 device, regardless of its “absolute” characterization.
18

19 Mortgage law has long established that instruments purporting absolutely to convey an
20 interest in land nevertheless constitute equitable mortgages when the circumstances demonstrate
21 that the parties are using an interest in land to secure payment of a debt. *See, e.g.,* Restatement of
22 Property (Third) — Mortgages § 3.2 (absolute deed intended to secure an obligation constitutes a
23 mortgage); *Smith v. Player*, 601 So.2d 946 (Ala. 1992) (same); *Steckelberg v. Randolph*, 404
24 N.W.2d 144 (Iowa 1987) (same). Under this same principle, courts should treat a typical
25 “absolute” assignment of rents as an assignment for security purposes, and the weight of modern
26 judicial authority so provides. *See, e.g., In re* Cavros, 262 B.R. 206 (Bankr. D. Conn. 2001); *In*
27 *re* 5877 Poplar, L.P., 268 B.R. 140 (Bankr. W.D. Tenn. 2001); *National Operating, L.P. v.*
28 *Mutual Life Ins. Co. of New York*, 630 N.W.2d 116 (Wis. 2001); *In re* Guardian Realty Group,
29 L.L.C., 205 B.R. 1 (Bankr. D.D.C. 1997); *In re* RV Centennial Partnership, 202 B.R. 774 (Bankr.
30 D. Colo. 1996); *In re* Lyons, 193 B.R. 637, 644 (Bankr. D. Mass. 1996). Under this view, where
31 the underlying land is property of the bankruptcy estate, post-petition rents from that property
32 would likewise constitute property of the bankruptcy estate. However, the assignee of those rents
33 would continue to have a security interest in those rents by virtue of Bankruptcy Code § 552(b),
34 and the debtor/assignor would be obliged to provide adequate protection of the assignee’s interest
35 in those rents under Bankruptcy Code § 363.
36

37 The Act adopts the view that any “assignment of rents” as defined in this Act (Section
38 2(2)) creates a security interest in rents, regardless of whether it is in form denominated an
39 “absolute” assignment. The term “assignment of rents” includes only an assignment of rents
40 made in conjunction with a secured loan, and any such assignment creates a security interest
41 governed by this Act. By contrast, nothing in the Act precludes an owner of land from making a
42 truly absolute transfer of rents in a transaction that is not a security transaction, such as a “true
43 sale” of rents (in which the owner of the land transfers full legal, equitable ownership and control

1 of unaccrued rents immediately upon execution and delivery). Such a transfer, however, is not
2 an “assignment of rents” as defined in this Act (unless applicable state law dictates otherwise),
3 and thus the provisions of this Act governing the enforcement of an assignment of rents would
4 not apply to such a transfer.

5
6 3. *Conveyancing formalities.* The Act is not intended to effect any change in the
7 underlying law of states adopting the Act with respect to the formalities necessary to effect a
8 conveyance of an interest in real property. If a document entitled “Assignment of Rents” is not
9 executed in accordance with the formal requirements for an effective conveyance of an interest in
10 real property, it does not effect a “transfer” of an interest in rents and thus the document would
11 not constitute an “assignment of rents” as defined in Section 2(3). The Act does not specify
12 precisely what formalities are necessary for a document to constitute an effective assignment of
13 rents, but leaves this question to other state law.
14

15 **SECTION 5. RECORDATION OF ASSIGNMENT OF RENTS; EFFECT OF**
16 **RECORDATION.** An assignment of rents may be submitted for recording in the [appropriate
17 governmental office under the recording act of this state] in the same manner as any other
18 conveyance of an interest in real property. Whether an assignment of rents is recorded and thus
19 provides constructive notice of its contents is determined by [the recording act of this state].
20 Upon recording, the security interest in rents created by the assignment is fully perfected and
21 takes priority over the rights of any person thereafter acquiring an interest in such rents,
22 notwithstanding any provision of the assignment or other law of this state which would preclude
23 or defer enforcement of the security interest until the occurrence of a subsequent event, including
24 a subsequent default of the assignor, the assignee’s obtaining possession of the real property, or
25 the appointment of a receiver.

26 **Preliminary Comment**

27 Source: Cal. Civ. Code § 2938(b); Restatement (Third) of Property — Mortgages §
28 4.2(b).
29

30 Under Bankruptcy Code § 544(a) and its “strong-arm” clause, a debtor-in-possession can

1 invalidate (or, in bankruptcy parlance, “avoid”) any security interest that a judgment lien creditor
2 or bona fide purchaser could have avoided under state law as of the petition date.

3
4 In the 1980s and early 1990s, bankruptcy courts struggled with the proper impact of §
5 544(a) upon a mortgagee’s right to post-petition rents under an assignment of rents. This
6 struggle derives in part from the confusion generated by the differing terminologies of mortgage
7 law and Article 9 of the Uniform Commercial Code. Under Article 9, a secured party obtains a
8 security interest in collateral by having the debtor execute a security agreement describing that
9 collateral, and “perfects” that security interest by filing an Article 9 financing statement
10 describing the collateral. By “perfecting” its security interest, the Article 9 secured party makes
11 that interest enforceable against subsequent creditors, including judicial lien creditors. U.C.C. §
12 9-317(a). Because Bankruptcy Code § 544(a) provides the bankruptcy trustee/debtor-in-
13 possession with the status of a hypothetical judicial lien creditor under state law, the
14 trustee/debtor-in-possession takes property of the estate subject to any security interest that was
15 properly perfected under Article 9 prior to the filing of the bankruptcy petition. If the secured
16 party has a properly perfected security interest prior to the petition date, it is irrelevant whether
17 the secured party had taken any steps to enforce that security interest prior to bankruptcy — the
18 perfected security interest continues to remain effective against the collateral and the
19 trustee/debtor-in-possession cannot avoid that security interest using its § 544(a) avoidance
20 power.

21
22 By contrast, mortgage law did not customarily use the term “perfection.” Under
23 mortgage law, recording of a mortgage interest served to make that interest valid as against
24 subsequent creditors and bona fide purchasers of the land. Analytically, of course, “recording” in
25 this sense is similar to the Article 9 concept of perfection. By analogy, one could argue that if a
26 mortgage lender had taken and properly recorded an assignment of rents prior to bankruptcy, that
27 mortgage lender should have a security interest in rents that was “perfected” and thus enforceable
28 against third parties. Under this analysis, the trustee/debtor-in-possession could not avoid the
29 mortgage lender’s security interest in rents under § 544(a), and thus the mortgage lender would
30 retain its security interest in post-petition rents under § 552(b). A number of courts in fact
31 adopted this analytical approach, treating post-petition rents as the lender’s cash collateral so
32 long as the mortgagee had properly recorded its assignment of rents prior to bankruptcy. *See,*
33 *e.g., In re Millette*, 186 F.3d 638 (5th Cir. 1999); *Steinberg v. CrossLand Mortgage Corp. (In re*
34 *Park at Dash Point L.P.)*, 985 F.2d 1008, 1011 (9th Cir. 1993); *Vienna Park Properties v. United*
35 *Postal Sav. Ass’n (In re Vienna Park Properties)*, 976 F.2d 106, 112-15 (2d Cir 1992).

36
37 Unfortunately, some bankruptcy courts held that § 544(a) permitted the trustee/debtor-in-
38 possession to invalidate a security interest in post-petition rents if the secured party had not taken
39 sufficient steps to *enforce* that interest (*e.g.,* actually collect the rents) prior to bankruptcy. To
40 understand how these decisions confused “perfection” or “enforceability” with “enforcement,” it
41 is helpful to review the distinction between the lien and title theories of mortgage law. Under the
42 title theory, the mortgagee held “title” to the land (and thus title to unaccrued rents) by virtue of
43 the mortgage, even prior to default. By contrast, under the lien theory, a mortgage gave the

1 mortgagee only a security interest in the land rather than “title” — and thus a mortgage by itself
2 gave the mortgagee no interest in unaccrued rents until such time as the mortgagee completed a
3 foreclosure, became a mortgagee in possession, or obtained the appointment of a receiver for the
4 land.

5
6 If a mortgagee claims a security interest in rents by virtue of a separate assignment of
7 rents, however, any legal constraints on the mortgagee’s right to collect rents *by virtue of the*
8 *mortgage itself* should be irrelevant. Nevertheless, a number of older state court decisions
9 conflated these two situations, holding that even a separate assignment of rents was not effective
10 until the mortgagee took affirmative steps after default to enforce that assignment, such as by
11 obtaining the appointment of a receiver, becoming a mortgagee in possession, or impounding the
12 rents. *See, e.g.,* Taylor v. Brennan, 621 S.W.2d 592, 593-94 (Tex. 1981); Bevens v. Peoples
13 Bank & Trust Co., 671 P.2d 875, 879 (Alaska 1983), Martinez v. Continental Enters., 730 P.2d
14 308, 316 (Colo. 1986); Sullivan v. Rosson, 119 N.E. 405 (N.Y. 1918). Based upon these old
15 state law decisions, numerous bankruptcy courts concluded that an assignment of leases and rents
16 created only an “inchoate” lien upon rents that was ineffective against third parties if the
17 mortgagee had not taken affirmative steps prior to bankruptcy to activate that lien. These courts
18 concluded that if a mortgagee had not taken action to divest the mortgagor of control over the
19 property and its rents prior to bankruptcy — such as by obtaining the appointment of a receiver,
20 taking possession of the land, or notifying tenants to begin paying rents directly to the mortgagee
21 — the mortgagee’s security interest in post-petition rents was “unperfected” and subject to
22 avoidance under § 544(a). *See, e.g., In re* Century Inv. Fund VIII L.P., 937 F.2d 371, 377 (7th
23 Cir. 1991); *In re* 1301 Conn. Ave. Assocs., 126 B.R. 1, 3 (D.D.C. 1991); First Federal Sav. &
24 Loan Ass’n v. Hunter (*In re* Sam A. Tisci, Inc.), 133 B.R. 857, 859 (N.D. Ohio 1991); Condor
25 One, Inc. v. Turtle Creek, Ltd. (*In re* Turtle Creek, Ltd.), 194 B.R. 267, 278 (Bankr. N.D. Ala.
26 1996); *In re* Mews Assocs., L.P., 144 B.R. 867, 868-69 (Bankr. W.D. Mo. 1992). Under this
27 view, the debtor-in-possession could use post-petition rents free and clear of any claim by the
28 mortgagee while the debtor remained in bankruptcy.

29
30 These diverse interpretations of state mortgage law produced substantial nonuniformity in
31 the treatment of security interests in rents, both from state to state and even from district to
32 district within a particular state. This nonuniformity produced significant criticism among
33 academics, real estate practitioners, and commercial mortgage lenders. *See, e.g.,* R. Wilson
34 Freyermuth, *The Circus Continues — Security Interests in Rents, Congress, the Bankruptcy*
35 *Courts, and the “Rents Are Subsumed in the Land” Hypothesis*, 6 J. Bankr. L. & Prac. 115, 118
36 (1997); Julia Patterson Forrester, *A Uniform and More Rational Approach to Rents as Security*
37 *for the Mortgage Loan*, 46 Rutgers L. Rev. 349 (1993); Patrick A. Randolph, Jr., *Recognizing*
38 *Lenders’ Rents Interests in Bankruptcy*, 27 Real Prop., Prob. & Trust J. 281 (1992).

39
40 In response to this criticism, Congress amended Bankruptcy Code § 552(b) in 1994 in an
41 apparent attempt to provide more uniform treatment of assignments of rents. Prior to 1994, §
42 552(b) provided that a pre-petition security interest in land and rents from that land extended to
43 post-petition rents “to the extent provided by [the] security agreement and by applicable

1 nonbankruptcy law.” By focusing upon the term “applicable nonbankruptcy law,” many courts
2 (as noted above) concluded that § 552(b) did not permit the mortgagee to claim a security interest
3 in post-petition rents where the mortgagee had failed to take the necessary steps to obtain actual
4 or constructive possession of the land and its rents prior to bankruptcy. In 1994, however,
5 Congress amended § 552(b) to remove this reference to “applicable nonbankruptcy law.”
6

7 Many commentators concluded that the amended § 552(b) established a federal standard
8 for the enforcement of an assignment of rents, thus rendering state rent assignment law irrelevant.
9 *See, e.g.,* 5 Collier on Bankruptcy ¶ 552.03[1], at 552-17 (“[Section 552(b)(2)] does not refer to
10 applicable nonbankruptcy law and is intended to provide a creditor with a valid post-petition
11 interest in rents notwithstanding the creditor’s failure to perfect its security interest in rents under
12 applicable state law ...”). Unfortunately, while legislative history suggests that Congress
13 intended to preempt contrary state laws limiting the post-petition effectiveness of an assignment
14 of rents, the text itself provides no express statement of preemptive intent. Further, § 552(b)’s
15 protection for a security interest in post-petition rents is expressly subject to § 544’s strong-arm
16 clause — *which implicitly incorporates underlying state law regarding the enforceability of a*
17 *security interest versus third parties*. Under § 544(a), there is no question that the debtor-in-
18 possession may avoid a security interest in rents if a bona fide purchaser of the land could have
19 avoided that interest under state law as of the petition date. Thus, if state law *actually provides*
20 that a security interest in rents is ineffective against third parties until the mortgagee has taken
21 affirmative action to enforce that security interest, § 544(a) would appear to permit the debtor to
22 avoid the security interest of such a mortgagee — notwithstanding the amendment to § 552(b) —
23 if the mortgagee failed to take such action prior to bankruptcy.
24

25 Roughly one-third of the states have enacted statutes making clear that an assignment of
26 rents is perfected and effective against third persons upon its recordation, without regard to
27 whether the mortgagee has taken any steps to “activate” or “enforce” that assignment. Cal. Civ.
28 Code §§ 2938, 2938.1; Del. Code tit. 25, § 2121; Fla. Stat. Ann. § 697.07; 765 Ill. St. § 5/31.5;
29 Ind. Code Ann. § 32-21-4-2; Kan. Stat. Ann. § 58-2343; La. Rev. Stat. Ann. § 9:4401; Md. Real
30 Prop. Code Ann. § 3-204; Neb. Rev. Stat. § 52-1704; N.C. Gen. Stat. § 47-20(c); Or. Rev. Stat. §
31 93.806; S.C. Code § 29-3-100; Tenn. Code Ann. § 66-26-116; Va. Code Ann. § 55-220.1; Wash.
32 Rev. Code Ann. § 7-28-230(3); Wis. Stat. Ann. § 708.11. The Act adopts this approach.
33

34 **SECTION 6. ENFORCEMENT OF SECURITY INTEREST IN RENTS.**

35 (a) Upon the assignor’s default or as otherwise permitted in an assignment of
36 rents, the assignee may enforce the assignment in accordance with its terms, using one or more of
37 the methods specified in Sections 7, 8, 9, and 10, or any other method sufficient to enforce the
38 assignment under the law of this state other than this [act].

(b) From the date of enforcement, the assignee or, in the case of enforcement by appointment of a receiver under Section 7, the receiver, may collect:

(1) all rents that have accrued but remain unpaid on that date; and

(2) all rents that accrue on or after that date, as those rents accrue.

Preliminary Comments

Source: Cal. Civ. Code § 2938(c); Restatement (Third) of Property — Mortgages § 4.2(c).

1. *Nonexclusive method of enforcement.* Section 6 provides that upon default by the assignor or as otherwise permitted in an assignment of rents, the assignee may enforce the assignment in accordance with its terms. The Act specifies several methods of enforcement of an assignment of rents in Sections 7 (appointment of a receiver), 8 (notification to tenants), 9 (notification to the assignor), and 10 (taking possession of the land described in the assignment of rents and thus becoming a “mortgagee in possession”). The Act also permits enforcement of an assignment of rents by any other method recognized under other law of this state.

Moreover, the various methods that the Act provides for enforcement of an assignment of rents are not mutually exclusive. An assignee may in appropriate circumstances enforce an assignment of rents by multiple methods. For example, the assignee may choose to enforce its security interest by providing simultaneous notification to tenants (under Section 8) and to the assignor (under Section 9). Likewise, the assignee’s decision to do so would not limit the assignee’s right to later obtain the appointment of a receiver under Section 7.

2. *Rents collectable under this Act.* Upon enforcement, an assignee may collect (1) accrued but unpaid rents, and (2) unaccrued rents as they accrue in the future. Section 6 does not authorize the assignee to collect the cash proceeds of rents that the assignor had already collected prior to enforcement.

However, this Act does not prevent the assignee from using another legal mechanism to obtain and enforce a security interest in the cash proceeds of rents that the assignor has already collected prior to enforcement. For example, the express terms of an assignment of rents could (1) require the assignor to deposit the cash proceeds of rents in a particular deposit account, and (2) grant the assignee a security interest in that deposit account under Article 9 of the Uniform Commercial Code. If the assignment of rents so provided, the assignee could exercise its available remedies under Article 9 to collect any sums within that deposit account, including the cash proceeds of rents collected by the assignor prior to the assignee’s enforcement of its assignment of rents.

1 3. *Date of enforcement.* The assignee may collect rents beginning on the date of
2 enforcement. The date of enforcement will depend upon the method of enforcement used by the
3 assignee. If the assignee enforces the assignment by appointment of a receiver, the date of
4 enforcement will be the date that the court appoints the receiver. Section 7(c). If the assignee
5 enforces the assignment by notification to a tenant, the date of enforcement with respect to rents
6 payable by that tenant is the date that the tenant receives the notification. Section 8(b). If the
7 assignee enforces the assignment by notification to the assignor, the date of enforcement will be
8 the date that the assignor receives the notification. Section 9(b). If the assignee enforces the
9 assignment by becoming a mortgagee in possession, the date of enforcement will be the date on
10 which the assignee takes possession. Section 10.
11

12 **SECTION 7. ENFORCEMENT BY APPOINTMENT OF RECEIVER.**

13 (a) An assignee is entitled to the appointment of a receiver for the real property
14 described in the assignment if:

15 (1) the assignor is in default under the assignment of rents and:

16 (A) the assignor agreed in the security instrument, the assignment,
17 or another signed document to the appointment of a receiver after default;

18 (B) it appears likely that the real property may not be sufficient to
19 satisfy the secured obligation; or

20 (C) the assignor has failed to turn over to the assignee rents that
21 the assignee is entitled to collect; or

22 (2) other circumstances exist that would justify the appointment of a
23 receiver under the law of this state other than this [act].

24 (b) An assignee may file a petition for the appointment of a receiver with a court
25 before which is pending an action:

26 (1) to foreclose a security interest in the real property described in the
27 assignment of rents;

(2) for specific performance of the assignment;

(3) seeking a remedy on account of actual or threatened waste of the real property described in the assignment; or

(4) to otherwise enforce the secured obligation or the assignee's remedies under the assignment.

(c) If an assignee enforces an assignment of rents under this section, the date of enforcement is the date on which the court enters an order appointing a receiver for the real property described in the assignment.

(d) From the date of its appointment, a receiver appointed under this section has the authority provided in Section 6(b), the law of this state other than this [act], and the order of appointment.

Preliminary Comments

1. *Actions to which receivership is ancillary.* Traditionally, a receivership of mortgaged property is a remedy that is ancillary to some action to enforce either the mortgage debt or the mortgage lien. In states that recognize only judicial foreclosure, the existence of a judicial foreclosure proceeding provides the action to which a receivership may be ancillary. In states that authorize power of sale foreclosure, however, a mortgagee may choose to foreclose privately without any judicial proceeding. In these states, the lack of any pending action raises a concern regarding whether the mortgagee can obtain the "ancillary" remedy of a receivership.

The Act addresses this concern by authorizing the assignee to file an action for specific performance of the assignment of rents. The pendency of this action would provide a sufficient jurisdictional predicate for the appointment of a receiver, even if the assignee chose to proceed with its foreclosure by power of sale.

2. *Traditional standards for appointment of a receiver.* Traditionally, courts have appointed a receiver for mortgaged land if the value of the land was insufficient to satisfy the mortgage debt (*i.e.*, where the mortgagee's security was inadequate) or whether the owner of the mortgaged land was committing waste (thereby threatening the value of the mortgagee's security). *See, e.g.*, Restatement (Third) of Property — Mortgages §§ 4.3(a)(2), 4.3(a)(3); 1 G. Nelson & D. Whitman, Real Estate Finance Law § 4.34 (3d ed. 1993). Consistent with this

1 traditional approach, Section 6(a)(1)(B) authorizes the appointment of a receiver if the real
2 property appears insufficient to satisfy the secured obligation. Likewise, Section 6(a)(2)
3 authorizes the appointment of a receiver where there are “other circumstances” justifying the
4 appointment of a receiver under the law of this state other than this Act. Such “other
5 circumstances” would include waste as defined under state law other than this Act. Thus, for
6 example, if the law of this state other than this Act treats nonpayment of real property taxes as
7 actionable waste, the assignor’s nonpayment of taxes would provide a justification for the
8 appointment of a receiver.

9
10 A few court decisions have required a mortgagee seeking appointment of a receiver to
11 show that the mortgagor was insolvent. *See, e.g.,* Mutual Benefit Life Ins. Co. v. Frantz Klodt &
12 Son, Inc., 237 N.W.2d 350 (Minn. 1975); Chase Manhattan Bank v. Turabo Shopping Center,
13 Inc., 683 F.2d 25 (1st Cir. 1982). The Restatement (Third) of Property — Mortgages and most
14 commentators have rejected this view. The Act does not require the assignee to demonstrate the
15 assignor’s insolvency as a predicate to obtaining the appointment of a receiver. However,
16 Section 6(a)(2) would permit an assignee to use the assignor’s insolvency as grounds for
17 appointment of a receiver where other state law has recognized the assignor’s insolvency as
18 sufficient grounds for a receivership.

19
20 3. *Receivership Clauses.* The modern commercial mortgage typically contains a
21 provision in which the mortgagor consents to the appointment of a receiver for the real property
22 following default. Often, receivership clauses provide that the mortgagor consents to the
23 appointment of a receiver following default as a matter of contract, without regard to whether the
24 mortgagor is insolvent or whether the physical condition of the real property would otherwise
25 justify the appointment of a receiver.

26
27 Because the appointment of a receiver has traditionally originated from within the court’s
28 equitable discretion, some courts have refused to appoint a receiver — despite the presence of a
29 receivership clause — in cases where they would have denied appointment of a receiver
30 otherwise. *See, e.g.,* Dart v. Western Sav. & Loan Ass’n, 438 P.2d 407 (Ariz. 1968); Chromy v.
31 Midwest Fed. Sav. & Loan Ass’n, 546 So.2d 1172 (Fla. App. 1989); Sazant v. Foremost
32 Investments, N.V., 507 So.2d 653 (Fla. App. 1987) (receivership clause not binding on court
33 where mortgagor had not committed waste and default did not place mortgagee at serious risk of
34 noncollection); Gage v. First Federal Sav. & Loan Ass’n, 717 F. Supp. 745 (D. Kan. 1989);
35 Barclays Bank, P.L.C. v. Davidson Ave. Assocs., Ltd., 644 A.2d 685 (N.J. Super. 1994)
36 (receivership clause “usurps the judicial function” and thus violates public policy). In other
37 states, courts have treated receivership clauses as presumptively but not conclusively enforceable.
38 For example, in Barclays Bank v. Superior Court, 137 Cal. Rptr. 743 (Cal. App. 1977), the court
39 held that a receivership clause presented a prima facie (but rebuttable) evidentiary showing of the
40 mortgagee’s entitlement to the appointment of a receiver. *See also, e.g.,* Riverside Properties v.
41 Teachers Ins. & Annuity Ass’n, 590 S.W.2d 736 (Tex. App. 1979); Okura & Co. v. Careau
42 Group, 783 F. Supp. 482 (C.D. Cal. 1991); Wellman Sav. Bank v. Roth, 432 N.W.2d 697 (Iowa
43 App. 1988).

1 Consistent with the position adopted by Restatement (Third) of Property — Mortgages §
2 4.3(b) and significant recent judicial authority, the Act establishes that a receivership clause
3 alone provides a sufficient basis for the appointment of a receiver following mortgagor default.
4 *See, e.g.,* Bank of America Nat’l Trust & Sav. Ass’n v. Denver Hotel Ass’n Ltd. Partnership, 830
5 P.2d 1138 (Colo. App. 1992) (upholding appointment of receiver under receivership clause,
6 without regard to adequacy of security or solvency of mortgagor, under abuse of discretion
7 standard); Fleet Bank v. Zimelman, 575 A.2d 731 (Me. 1990) (freely bargained-for receivership
8 clause should be enforced); Metropolitan Life Ins. Co. v. Liberty Center Venture, 650 A.2d 887
9 (Pa. Super. 1994); Federal Home Loan Mortgage Corp. v. Nazar, 100 B.R. 555 (D. Kan. 1989).
10 Statutes in several states provide that a receivership clause is enforceable as a matter of right.
11 *See, e.g.,* Ind. Code § 32-30-5-1; Minn. Stat. Ann. § 559.17(2) (mortgages of \$100,000 or more);
12 N.Y. Real Prop. Law § 254(10) (receivership clause enforceable “without notice and without
13 regard to adequacy of any security of the debt”); Okla. Stat. Ann. tit. 12, § 1551(2)(c) (court shall
14 appoint receiver when “a condition of the mortgage has not been performed and the mortgage
15 instrument provides for the appointment of a receiver”). Finally, federal courts have routinely
16 held receivership clauses in federally insured mortgages sufficient to justify the appointment of a
17 receiver. *See, e.g.,* United States v. Berk & Berk, 767 F. Supp. 593 (D.N.J. 1991); United States
18 v. Drexel View II, Ltd., 661 F. Supp. 1120 (N.D. Ill. 1987).

19
20 By expressing the circumstances justifying the appointment of a receiver in the
21 disjunctive, Section 6(a)(1) adopts the view that a receivership clause is enforceable by the
22 assignee without regard to the condition of the real property, the solvency of the assignor, or the
23 adequacy of the security for the secured obligations.

24
25 4. *Ex parte appointment of a receiver.* Many assignments of rents contain a clause
26 entitling the assignee to the appointment of a receiver on an *ex parte* basis, without notice to the
27 assignor. The Act does not establish that the assignee is entitled to a receivership on an *ex parte*
28 basis, and instead leaves to other state law the question of whether (and in what circumstances)
29 prior notice to the assignor is excused.

30
31 5. *Receiver’s power to terminate or disaffirm existing leases.* In many states, statutory or
32 case law regarding receiverships has generally established (or limited) the receiver’s power to
33 terminate leases in default or to disaffirm leases not in default. Likewise, the court order
34 appointing a receiver will often specify the extent to which a receiver can take these steps with or
35 without the approval of the court and/or the assignee.

36
37 As a result, subsection (d) addresses the receiver’s power to terminate and/or disaffirm
38 leases by leaving this question to the terms of the court order appointing the receiver and other
39 state law.

40 41 **SECTION 8. ENFORCEMENT BY NOTIFICATION TO TENANT**

1 (a) Upon the assignor's default or as otherwise permitted in an assignment of
2 rents, the assignee may give to a tenant of the real property a notification demanding that the
3 tenant pay to the assignee all unpaid accrued rents and all unaccrued rents as they become due.
4 The assignee shall give a copy of the notification to the assignor and to any other person that, 10
5 days before the notification date, held a recorded assignment of rents relating to the real property.

6 The notification must:

7 (1) identify the tenant, assignor, assignee, premises covered by the lease,
8 and assignment of rents being enforced;

9 (2) provide the recording data for the assignment or other reasonable proof
10 that the assignment has been made;

11 (3) state that the assignee has the right to collect rents in accordance with
12 the terms of the assignment;

13 (4) state that the tenant is directed to pay to the assignee all unpaid accrued
14 rents and all unaccrued rents as they come due;

15 (5) describe the manner in which subsections (c) and (d) affect the tenant's
16 payment obligations;

17 (6) provide the name of a contact person and an address to which the
18 tenant can direct payment of rents and any inquiry for additional information about the
19 assignment of rents or the assignee's right to enforce the assignment;

20 (7) contain a statement that the tenant may consult an attorney if the tenant
21 has questions about its rights and obligations following receipt of the notification; and

22 (8) be signed by the assignee.

1 (b) If an assignee enforces an assignment of rents under this section, the date of
2 enforcement is the date on which the tenant receives a notification substantially complying with
3 subsection (a).

4 (c) Subject to subsection (d) and any other defenses that a tenant may have under
5 the law of this state other than this [act], following receipt of a notification substantially
6 complying with subsection (a):

7 (1) a tenant is obligated to pay to the assignee all unpaid accrued and all
8 unaccrued rents as they come due, unless the tenant has previously received a notification from
9 another assignee of rents given by that assignee in accordance with this section and the other
10 assignee has not canceled that notification;

11 (2) a tenant that pays rents to the assignor is not discharged of the
12 obligation to pay rents to the assignee, unless the tenant occupies the premises as the tenant's
13 primary residence and pays the assignor in good faith;

14 (3) a tenant's payment to the assignee in good faith of rents then due
15 satisfies the tenant's obligation under the lease to the extent of the payment made; and

16 (4) a tenant's obligation to pay rent to the assignee continues until the
17 tenant receives a court order directing the tenant to pay the rent in a different manner or a signed
18 document from the assignee canceling its notification, whichever occurs first.

19 (d) A tenant that has received a notification under subsection (a) may not be held
20 in default of the lease for nonpayment of rents accruing after the date notification is given before
21 the earlier of:

22 (1) 10 days after the date that the next regularly scheduled rental payment

would be due under the lease; or

(2) 30 days after the date of the notification.

(e) Upon receiving a notification from another creditor that is entitled to priority under Section 5 that the other creditor has enforced its interest in rents, an assignee that has previously given notification to a tenant under subsection (a) shall immediately give a new notification to the tenant canceling the earlier notification.

(f) An assignee's failure to give a notification under subsection (a) to any person holding a recorded assignment of rents on the real property does not affect the effectiveness of the notification as to the assignor and those tenants receiving the notification. However, the person entitled to the notification is entitled to any relief permitted by the law of this state other than this [act].

(g) No particular phrasing is required for the notification specified in subsection (a). However, the following form of notification, when properly completed, is sufficient to satisfy the requirements of subsection (a):

NOTIFICATION TO PAY RENT TO PERSON OTHER THAN LANDLORD

Tenant: [Name of Tenant]

Property Occupied by Tenant (the "Premises"): [Address]

Landlord: [Name of Landlord]

Assignee: [Name of Assignee]

Address of Assignee and Contact Person: [Address for Payment
of Rent to Assignee and Contact Person for Further
Information]:

1 1. The Assignee named above is the assignee of
2 rents under [name of document] (the “Assignment of Rents”)
3 dated _____, and recorded at [recording data] in the
4 [appropriate governmental office under the recording act of this
5 State]. You may request a copy of the Assignment of Rents
6 from the Assignee at the address listed above.

7 2. The Landlord is in default under the Assignment
8 of Rents. Under the Assignment of Rents, the Assignee is
9 entitled to collect rents from the Premises.

10 3. This notification affects your rights and
11 obligations under the lease or rental agreement (the “Lease”) by
12 which you occupy the Premises. In order to provide you with an
13 opportunity to consult with an attorney, neither the Assignee nor
14 the Landlord can hold you in default under the Lease for
15 nonpayment of your next scheduled rental payment until the
16 earlier of 10 days after the due date of that payment or 30 days
17 following the date of this notification. You may consult an
18 attorney promptly concerning your rights and obligations under
19 the Lease and the effect of this notification.

20 4. You must pay to the Assignee at the address
21 listed above all rents under your Lease which are due and
22 payable on the date you receive this notification and all rents

1 accruing under the Lease following the date you receive this
2 notification. If you pay rents to the Assignee in good faith after
3 receiving this notification, the payment will satisfy your rental
4 obligation under the Lease to the extent of that payment.

5 5. If you pay any rents to the Landlord after
6 receiving this notification, your payment to the Landlord will not
7 discharge your rental obligation under your Lease, and the
8 Assignee may hold you liable for that rental obligation
9 notwithstanding your payment to the Landlord, unless you
10 occupy the Premises as your primary residence and you in good
11 faith make payment to the Landlord.

12 6. If you have previously received a notification
13 from another person who also holds an assignment of the rents
14 due under your Lease, you should continue paying your rents to
15 the person that sent that notification until that person cancels
16 that notification. Once that notification is canceled, you must
17 begin paying rents to the Assignee in accordance with this
18 notification.

19 7. Your obligation to pay rents to the Assignee will
20 continue until you receive either:

21 (a) a written order from a court directing you to
22 pay the rent in a manner specified in that order; or

1 (b) written instructions from the Assignee

2 canceling this notification.

3 [Name of Assignee]

4 By: [Officer/Authorized Agent of Assignee]]

5
6 **Preliminary Comments**

7 Source: Cal. Civ. Code §§ 2938(c)(3), 2938(d), 2938(k); U.C.C. §§ 9-406(a).

8
9 1. *Enforcement by notification to tenants.* Section 8 provides that an assignee may
10 enforce its security interest in rents by notification to tenants either following default or
11 otherwise in accordance with the assignment. Because the typical assignment of rents does not
12 authorize the assignee to collect rents prior to the assignor's default, enforcement by Section 8
13 will usually arise only after the assignor's default.

14
15 Subsection (a) specifies the required contents of the notification. Although the Act does
16 not require that the notification be in any particular form, subsection (g) provides a form
17 notification that is sufficient to satisfy subsection (a) if properly completed.

18
19 2. *Effect of notification.* Once the tenant receives notification from the assignee
20 demanding payment of rents pursuant to the assignment, the tenant must pay accrued but unpaid
21 rents and rents accruing in the future to the assignee in order to satisfy its rental obligation. In
22 this respect, the Act's provisions operate similarly to the provisions of U.C.C. § 9-406(a), which
23 govern the circumstances under which an account debtor can discharge its obligation following
24 notification and demand by an assignee of that account. Following receipt of a notification, a
25 tenant cannot discharge its rental obligations by payment to the assignor. Thus, a tenant that pays
26 its landlord following receipt of a notification under this section faces the risk of having to make
27 double payment of the sums necessary to discharge its rental obligation. Under subsection (c)(2),
28 however, a residential tenant that pays the assignor in good faith would still be discharged of its
29 rental obligation to the extent of the payment.

30
31 The tenant's obligation to direct payment of rents to the assignee following receipt of a
32 notification under subsection (a) is subject to one other caveat: the tenant need not comply if it
33 has previously received a notification from another assignee of rent given by that assignee in
34 accordance with this section, and the other assignee has not cancelled that notification. Until
35 such a tenant receives instructions canceling that prior notification, the tenant may continue to
36 pay the other assignee in accordance with the prior notification.

1 3. *Notification to other rents assignees.* Subsection (a) requires that the enforcing
2 assignee give notification to any person from which the assignee has received a signed document
3 claiming a security interest in the rents or that, 10 days prior to the notification date, held a
4 recorded assignment of rents on the real property. Under this provision, an enforcing assignee
5 must search the public records to identify any other creditors holding a recorded assignment of
6 rents and provide notification of enforcement to such creditors. Notification will alert another
7 person holding a recorded assignment of rents as to the pending enforcement effort and permit
8 that person to take whatever steps it considers justified in protecting its secured position with
9 respect to the rents. For example, if the enforcing rents assignee holds a junior assignment of
10 rents, notification to the senior would permit the senior to take steps to enforce its senior interest
11 in rents immediately (assuming its assignment permitted immediate action under the
12 circumstances) — thereby avoiding the risk that the junior might by collection acquire effective
13 priority as to the following period's rents. By contrast, if the enforcing rents assignee holds a
14 senior assignment of rents, notification to the junior would alert the junior as to the need to
15 investigate the status of the senior obligations.

16
17 Failure to give notification to another rents assignee under this section does not defeat the
18 effectiveness of the notification as to the assignor and tenants receiving the notification. If a
19 rents assignee fails to give a required notification to another creditor entitled to notification,
20 subsection (e) entitles the other creditor to any relief provided by law other than this Act. This
21 would permit the other creditor to plead and prove any damages proximately caused by the
22 failure to give notification.

23
24 4. *Tenant protected for good faith payment to assignee.* Subsection (c)(3) provides that a
25 tenant that in good faith pays rents to the assignee following receipt of a notification under this
26 section discharges its rental obligation to the extent of such payment. Even if the assignor
27 subsequently established that the assignee's notification was wrongful, the assignor would not be
28 able to declare a tenant in breach for nonpayment of rent if that tenant paid the assignee in good
29 faith pursuant to the notification.

30
31 5. *Extension of time for payment of next rental payment following notification.* If a tenant
32 receives a notification directing payment of rents to an assignee, the tenant reasonably may wish
33 to obtain counsel regarding the effect of the notification. However, if the notification arrives
34 shortly before the tenant's rental due date, the tenant may find it difficult to obtain that advice
35 before its rental obligation would become past due. In order to permit the tenant a reasonable
36 opportunity to obtain counsel, subsection (d) provides that neither the assignor nor the assignee
37 may hold a tenant in default of a lease solely for nonpayment of rents that accrue after the
38 notification is given until the earlier of 10 days after the next regularly scheduled rental payment
39 would be due under the lease or 30 days after the date of the notification. Subsection (d) would
40 not in any way protect a tenant from the consequences of a breach of the lease on grounds other
41 than nonpayment of rent, or for nonpayment of rents that had accrued prior to the notification.

42
43 The application of subsection (d) is demonstrated by the following illustrations:

1 *Illustration 1.* Tenant's rent is due and payable to Assignor monthly, on the first of each
2 month. On March 28, Tenant receives a notification from Assignee demanding that Tenant pay
3 future rents to Assignee. Neither Assignor nor Assignee may declare Tenant in default of the
4 April 1 rent payment until after April 11.

5
6 *Illustration 2.* Tenant's rent is due and payable to Assignor monthly, on the first of each
7 month. On March 3, Tenant receives a notification from Assignee demanding that Tenant pay
8 future rents to Assignee. Neither Assignor nor Assignee may declare Tenant in default of the
9 April 1 rent payment until after April 3.

10
11 *Illustration 3.* Tenant's rent is due and payable to Assignor quarterly, on the first of
12 January, April, July, and October. On February 28, Tenant receives a notification from Assignee
13 demanding that Tenant pay future rents to Assignee. Under subsection (c), Tenant receives no
14 extension of the time for his April 1 quarterly rent payment.

15
16 6. *Enforcement by multiple rent assignees.* In some circumstances, multiple creditors
17 may seek to collect rents directly from tenants pursuant to this Act. If a subordinate rents
18 assignee collect rents under this section, the Act provides that the subordinate rents assignee may
19 keep the rents collected and apply those rents to its secured obligations notwithstanding its
20 subordinate position, until such time as the senior rents assignee enforces its superior collection
21 rights. *See* Section 15(e).

22
23 Once a subordinate rents assignee that has enforced its security interest in rents under this
24 section receives a notification that a senior assignee has enforced its interest in rents, subsection
25 (e) obligates the subordinate rents assignee to give an immediate notification to tenants canceling
26 its previous payment instructions.

27 28 **SECTION 9. ENFORCEMENT BY NOTIFICATION TO ASSIGNOR.**

29 (a) Upon the assignor's default or as otherwise permitted in an assignment of
30 rents, the assignee may give to the assignor a notification demanding that the assignor pay over
31 all rents that the assignee is entitled to collect under Section 6. The assignee shall also give a
32 copy of the notification to any other person that, 10 days before the notification date, held a
33 recorded assignment of rents relating to the real property.

34 (b) If an assignee enforces an assignment of rents under this section, the date of
35 enforcement is the date on which the assignor receives a notification under subsection (a).

1 (c) An assignee’s failure to give notification under subsection (a) to any person
2 holding a recorded assignment of rents on the real property does not defeat the effectiveness of
3 the notification as to the assignor, but the other person is entitled to relief as permitted under the
4 law of this state other than this [act].

5 Preliminary Comments

6 Source: Cal. Civ. Code §§ 2938(c)(4); Restatement (Third) of Property — Mortgages §
7 4.2(c), (d).
8

9 1. *Enforcement by notification to assignor.* An assignment of rents typically requires the
10 assignor to pay rents to the assignee following default, either immediately or upon demand by the
11 assignee. As discussed in the Preliminary Comments to Section 5, however, many bankruptcy
12 courts concluded that applicable state law required certain affirmative conduct by the lender,
13 post-default, in order to render an assignment of rents enforceable. Many of these courts required
14 conduct of greater intensity than merely making a formal demand to the assignor for payment of
15 the rents — instead requiring such steps as the appointment of a receiver, judicial sequestration
16 of rents, acquiring possession of the land, or providing notification to tenants to pay rent to the
17 assignee.
18

19 The Restatement (Third) of Property — Mortgages adopted the view that notification to
20 the assignor following default is sufficient to enforce a perfected security interest in rents and to
21 give the assignee the legal right to possession of the rents. *See* Restatement (Third) of Property
22 — Mortgages § 4.2(c). This position effectively places an obligation on the assignor to pay over
23 to the assignee any rents thereafter collected by the assignor; the assignor’s collection and
24 retention of rents following such notification would constitute waste that would potentially
25 subject the assignor to liability for damages. *Id.* §§ 4.6(a)(5), 4.6(b)(3).
26

27 The Act likewise adopts this approach, authorizing the assignee to enforce an assignment
28 of rents by means of a notification to the assignor following default under the assignment. As
29 provided in Section 14(c), the assignor’s failure to pay any rents it collects following receipt of
30 such notification would subject to the assignor to liability to the assignee for the rents collected
31 but not turned over to the assignee.
32

33 2. *Notification to other record rents assignees.* Subsection (a) provides that an assignee
34 enforcing an assignment of rents must give notification not only to the assignor, but also to any
35 other person from which the assignee has received a signed document claiming a security interest
36 in the rents or that, 10 days before the notification date, held a recorded assignment of rents
37 covering the real property. Notification will alert another person holding a recorded assignment
38 of rents as to the pending enforcement effort and permit that person to take whatever steps it

1 considers justified in protecting its secured position with respect to the rents. For example, if the
2 enforcing rents assignee holds a junior assignment of rents, notification to the senior would
3 permit the senior to take steps to enforce its senior interest in rents immediately (assuming its
4 assignment permitted immediate action under the circumstances) — thereby avoiding the risk
5 that the junior might by collection acquire effective priority as to the following period's rents.
6 By contrast, if the enforcing rents assignee holds a senior assignment of rents, notification to the
7 junior would alert the junior as to the need to investigate the status of the senior obligations.
8

9 Subsection (c) provides that the failure of the enforcing assignee to give notification to
10 other rents assignees does not negate the effectiveness of the notification as to the assignor. If
11 the assignor received the notification and subsequently collected rents but failed to turn those
12 over to the assignee, the assignor would face liability under Section 14(c) regardless of whether
13 the enforcing assignee had given notification to other rents assignees. If a rents assignee fails to
14 give a required notification to another creditor entitled to notification, subsection (c) entitles the
15 other creditor to any relief provided by law other than this Act. This would permit the other
16 creditor to plead and prove any damages proximately caused by the failure to give notification.
17

18 3. *Nonexclusivity of means of enforcement.* As expressed in Section 6, the Act specifies
19 methods of enforcement that are not exclusive in nature. The primary benefit associated with
20 enforcement by notification to the assignor under Section 9 may be that such enforcement
21 quickly triggers the assignor's liability under Section 14 for turning over any rents thereafter
22 collected. By contrast, an assignee that wants more immediate control over actual collection of
23 rents as they accrue may simultaneously choose to enforce its assignment of rents by means of
24 appointment of a receiver (Section 7) or notification to tenants (Section 8). Nothing in the Act
25 limits the ability of an assignee to enforce its interest in rents by multiple methods.
26

27 **SECTION 10. MORTGAGEE IN POSSESSION.** Upon the assignor's default as
28 defined in an assignment of rents, the assignee may enforce the assignment by taking possession
29 of the real property described in the assignment to the extent permitted by law of this state other
30 than this [act]. If an assignee enforces an assignment of rents under this section, the date of
31 enforcement is the date on which the assignee obtains possession as determined by the law of this
32 state other than this [act].

33 **Preliminary Comment**

34 At common law, a mortgagee holding an assignment of rents could enforce that
35 assignment by means of taking steps sufficient to constitute the mortgagee as a "mortgagee in

possession” pending completion of a foreclosure or redemption by the mortgagor. Generally speaking, mortgage lenders are loathe to assume the status of a mortgagee in possession for a variety of reasons, including potential tort liability to third parties, the obligation to account for rentals collected, and the assumption of a duty to maintain the physical condition of the premises. *See, e.g.*, 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.24 - 4.29, at 213-230 (3d ed. 1993).

Because in rare cases a mortgagee may voluntarily choose to enforce an assignment of rents by becoming a mortgagee in possession, the Act is not intended (either explicitly or implicitly) to eliminate or overrule the mortgagee-in-possession doctrine. Thus, the Act provides that an assignee can choose to enforce an assignment of rents by becoming a mortgagee in possession, to the extent such an act is permitted by applicable law other than this Act and by the terms of the parties’ loan documents. Furthermore, the Act does not specify what constitutes “possession” for purposes of mortgagee-in-possession status; the Act leaves this question to other law.

SECTION 11. EFFECT OF ENFORCEMENT; NO AGENCY OR STATUS AS MORTGAGEE IN POSSESSION; ENFORCEABILITY OF SECURED OBLIGATION.

The enforcement of an assignment of rents by one or more of the methods identified in Sections 7, 8, and 9, the application of rents by the assignee under Section 12 after enforcement, the payment of expenses under Section 13, or a civil action under Section 14(c) does not:

- (1) make the assignee a mortgagee in possession of the real property;
- (2) make the assignee an agent of the assignor;
- (3) constitute an election of remedies that would preclude a later action to enforce the secured obligation;
- (4) make the secured obligation unenforceable[; or][;]
- (5) limit any right available to the assignee with respect to the secured obligation[.][;]
- [(6) violate any “one action” provision existing under the laws of this state; or

(7) bar a deficiency judgment pursuant to any law of this state governing or relating to deficiency judgments following the enforcement of any encumbrance, lien, or security interest.]

Legislative Note: A state that does not have a “one action” statute or anti-deficiency legislation may wish to omit subsections (6) and (7).

Preliminary Comments

Source: Cal. Civ. Code §§ 2938(e); Restatement (Third) of Property — Mortgages § 8.2

1. *Mere enforcement of security interest in rents does not trigger mortgagee-in-possession status.* A number of common law decisions suggest that a mortgagee can become a “mortgagee in possession” — with the legal responsibilities attendant to that status — without physical occupation of the mortgaged premises. *See, e.g.,* 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.25, at 218 & nn. 1-9 (3d ed. 1993) (collecting cases). This result is not surprising, given the factual and legal uncertainty attendant to the term “possession.” This ambiguity can produce concern for the assignee that wishes to protect its security interest in rents without assuming the duties and liabilities attendant to mortgagee-in-possession status.

The commentary to the Restatement (Third) of Property — Mortgages took the view that mere collection of rents “does not constitute the mortgagee a ‘mortgagee in possession,’ with the duties and liabilities attendant to that status.” Restatement (Third) of Property — Mortgages § 4.2 cmt. c. California’s rent-collection statute is more explicit, making clear that no enforcement action authorized by the statute will constitute the assignee as a mortgagee in possession, short of the assignee taking *actual possession* of the premises. In an effort to provide clarity, the Act adopts the approach taken by the California statute and provides that an assignee’s mere exercise of remedies authorized by this Act does not render the assignee a mortgagee in possession.

2. *Cumulative nature of mortgagee’s remedies.* Under the traditional rule, the mortgagee holding an assignment of rents could proceed after default to enforce its right to collect rents without concern about the impact that action might have on the mortgagee’s other remedies. The traditional approach treated the mortgagee’s remedies as cumulative; the mortgagee’s selection of one remedy did not preclude the mortgagee from subsequently seeking another remedy (*e.g.,* initially suing on the mortgage note, and later foreclosing on the mortgage). *See, e.g.,* Restatement (Third) of Property — Mortgages § 8.2 Reporters’ Note (collecting cases).

The Act adopts this view, and makes clear that the assignee’s enforcement of its assignment of rents does not constitute an election of remedies that would preclude a later action

1 to enforce the secured obligation, render the secured obligation unenforceable, or otherwise limit
2 any rights available to the assignee with respect to the secured obligation. Thus, for example, if
3 an assignee enforces its security interest by obtaining the appointment of a receiver under Section
4 7, and the appointment is ancillary to an action by the assignee for specific performance of the
5 assignment of rents, the assignee's enforcement action does not preclude the assignee from
6 subsequently asserting any other remedies it may have to enforce the secured obligation or any
7 other collateral it may hold securing that obligation.
8

9 3. *"One action" rules and anti-deficiency provisions.* In some states, "one action" rules
10 provide that there can be only one form of action for the recovery of any debt secured by real
11 property. *See, e.g.,* Cal. Code Civ. Pro. § 726(a); Idaho Code § 6-101(1); Mont. Code Ann. § 71-
12 1-222(1); Nev. Rev. Stat. § 40.430(1); Utah Code § 78-37-1; *see also* First State Bank of
13 Cooperstown v. Ihringer, 217 N.W.2d 857 (N.D. 1974). Under this approach, for example, a
14 mortgagee's decision to sue on the mortgage note would constitute an "action" that subsequently
15 barred the mortgagee from foreclosing the mortgage.
16

17 Ambiguity over the scope of a "one action" rule — and whether it would treat an attempt
18 to enforce an assignment of rents as an "action" that would prevent other collection efforts —
19 could create significant confusion with respect to the enforcement of an assignment of rents. For
20 this reason, the Restatement (Third) of Property — Mortgages, while generally rejecting the one-
21 action approach, further argued that any limitation on the mortgagee's remedies with respect to
22 foreclosure of the mortgage should not limit the mortgagee's enforcement of its security in rents:
23

24 [Section 8.2] does not affect the mortgagee's right to enforce a mortgage on rents under §
25 4.2 or to the appointment of a receiver under § 4.3. This is because, under § 4.2, the
26 mortgagee is proceeding against separate security and, under § 4.3, a receivership is an
27 interim remedy ancillary to the remedies delineated in [Sections 8.2(a) and (b)]. Nor
28 does this section limit the mortgagee's remedies for waste under § 4.6 or the recovery of
29 sums expended by the mortgagee for the protection of the security under § 2.2.
30 [Restatement (Third) of Property — Mortgages § 8.2, cmt. b]
31

32 Consistent with this approach, the rent-collection statute in California (a one-action rule state)
33 specifically provides that enforcement of a security interest in rents and collection of rents does
34 not constitute an "action" for the purposes of the one-action rule or a "deficiency" action for the
35 purposes of the state's anti-deficiency statutes. In order to make the Act workable in states with
36 one-action rules and deficiency legislation, the Act follows the California approach.
37

38 4. *Marshaling requirements.* Nothing in this section limits a court's equitable discretion
39 to order lien marshaling in appropriate cases. For example, assume that Debtor owes Bank \$2
40 million, secured by a mortgage and an assignment of rents on Blackacre and a separate mortgage
41 on Whiteacre. Debtor also owes Henning \$1 million secured only by a mortgage on Whiteacre.
42 Nothing in Section 11 is intended to constrain a court's equitable discretion to order Bank to
43 proceed against Blackacre and its rents first before foreclosing against Whiteacre.
44

1 **SECTION 12. APPLICATION OF RENTS COLLECTED.** Unless otherwise agreed
2 in the assignment of rents or another document signed by the assignor, an assignee that collects
3 rents under this [act] or collects upon a judgment in a civil action under Section 14(c) shall apply
4 the sums collected in the following order to:

5 (1) the assignee’s reasonable expenses of enforcing its assignment of rents,
6 including, to the extent provided for in the assignment and not prohibited by applicable law other
7 than this [act], reasonable attorney’s fees and court costs incurred by the assignee;

8 (2) satisfaction of the secured obligation;

9 (3) satisfaction of any obligation secured by a subordinate security interest or
10 other lien on the rents, if the assignor and assignee receive a notification from the holder of the
11 interest or lien demanding payment of the rents before distribution of the rents; and

12 (4) the assignor.

13 **Preliminary Comments**

14 Source: Cal. Civ. Code §§ 2938(c), (e); U.C.C. § 9-607.

15
16 The term “reasonable attorney’s fees and costs” in subsection (1) includes those fees and
17 costs incurred by the assignee in enforcing its assignment of rents. This would include, *inter*
18 *alia*, the fees and costs incurred in obtaining the appointment of a receiver, providing a
19 notification under Section 9, or collecting rents from tenants following notification to tenants
20 under Section 8. Unlike U.C.C. § 9-607(d) — under which an assignee’s right to recover these
21 expenses from collected receivables arises automatically — the assignee may recover reasonable
22 attorney’s fees under this Act only to the extent such fees are provided for in the assignment of
23 rents and are not prohibited by applicable law other than this Act.

24
25 The assignee may also incur other attorney’s fees and legal expenses in proceeding
26 against the assignor, such as expenses incurred in foreclosing the mortgage or seeking a
27 deficiency judgment. Whether the assignee has a right to collect those fees and expenses
28 depends on the parties’ agreement and the provisions of law other than this Act.
29

1 **SECTION 13. APPLICATION OF RENTS TO EXPENSES OF PROTECTING**
2 **REAL PROPERTY; CLAIMS AND DEFENSES OF TENANT.**

3 (a) Unless otherwise agreed in the assignment of rents or another signed
4 document, an assignee that collects rents following enforcement under Sections 8 or 9 may apply
5 those rents in accordance with Section 12 and has no duty to apply those rents to the payment of
6 expenses of protecting or maintaining the real property described in the assignment.

7 (b) Unless a tenant has made an enforceable agreement not to assert defenses or
8 claims, the right of the assignee to collect rents from the tenant is subject to the terms of the
9 agreement between the assignor and tenant and any defense or claim arising from the assignor's
10 nonperformance of that agreement.

11 (c) Nothing in this [act] limits the ability of a court to appoint a receiver for the
12 real property described in the assignment upon motion by a tenant that the assignee's
13 nonpayment of expenses of protecting or maintaining the real property has caused or threatened
14 harm to the tenant's interest in the property. Whether the tenant is entitled to the appointment of
15 a receiver is governed by the law of this state other than this [act].

16 **Preliminary Comments**

17 1. *Expenses of operation and preservation of the real property.* Typically, a tenant's
18 payment of rents enables the assignor to defray the expenses of operating and preserving the real
19 property (such as real property taxes, insurance, and maintenance). In many commercial leases,
20 the tenant pays a sum designated as "additional rent," specifically to reimburse the assignor for
21 the tenant's pro rata share of real property taxes, insurance, and maintenance expenses.

22
23 If an assignor defaults and an assignee enforces its assignment of rents, the assignor may
24 be unable to collect rents that it needs to pay the expenses of operating and preserving the real
25 property on a going-forward basis. Potentially, the assignor's nonpayment of these expenses or
26 the nonperformance of its obligation to maintain the real property poses a threat to the interests
27 of the tenants.

1 In some circumstances, an assignee's enforcement of an assignment of rents will result in
2 little or no disruption of the operation and preservation of the real property. For example, if an
3 assignee enforces an assignment of rents by obtaining the appointment of a receiver under
4 Section 7, the receivership order will authorize the receiver to apply collected rents to the costs of
5 operating and preserving the real property. Likewise, if an assignee enforces an assignment of
6 rents by becoming a mortgagee in possession, the mortgagee-in-possession rule imposes upon the
7 assignee a duty to apply collected rents to the operation and preservation of the real property.
8

9 However, the assignor's obligation to pay taxes, insurance, or maintenance expenses
10 (whether expressed or implied in tenant leases) does not generally bind the assignee as a
11 successor if the lender has not yet acquired possession or ownership of the land. If a lender
12 purchases mortgaged premises at foreclosure, the lender would become obligated to fulfill the
13 assignor's responsibilities under the tenant leases, as the landlord's covenants in those leases
14 would run with the land to bind the lender. However, if the lender collects rents prior to
15 completing foreclosure without taking either actual or constructive possession of the land, the
16 lender may collect those sums and apply them to the mortgage debt and has no legal obligation to
17 apply them to the payment of taxes, insurance, or property maintenance expenses. Such a lender
18 is not a successor that is bound to perform the landlord's covenants under tenant leases; further,
19 courts have not generally treated such sums as being impressed with a "trust" that obligates the
20 lender to apply such sums to the payment of taxes, insurance, or property maintenance.
21

22 As a result, if the assignee enforces its assignment of rents by means of Section 8
23 (notification to tenants) or Section 9 (notification to the assignor), the assignor effectively
24 remains in day-to-day possession and control of the real property. In such a case, the assignee's
25 collection of rents and payment of property-related expenses does not place day-to-day
26 operational and management responsibility upon the assignee, and that responsibility remains
27 upon the assignor. Such an assignee may apply the collected rents to the mortgage debt in
28 accordance with Section 12, and need not apply such rents to property-related expenses (such as
29 taxes, insurance, and/or maintenance), absent a contrary agreement by the assignee. A prudent
30 assignee may choose, however, to apply collected rents to the payment of such expenses, both to
31 protect its own interest in the premises and to avoid any possible claim or defense that a tenant
32 have to payment of rent based upon the assignor's nonperformance of the lease agreement.
33

34 *2. Tenant's defenses or claims.* Subsection (b) provides that the assignee's ability to
35 collect rents is subject to the agreement between the assignor and the tenant and any defense or
36 claim that the tenant may have arising from the nonperformance of that agreement, unless the
37 tenant has made an enforceable agreement not to assert such defenses or claims. *Cf.* U.C.C.
38 Section 9-404(a)(1).
39

40 In some cases, an assignor's failure to perform its lease covenants (such as a covenant to
41 maintain the premises or common areas) will permit the tenant to raise a defense to subsequent
42 payment of rent or to assert a right of recoupment or set-off in reduction of its subsequent rental
43 obligation. This Act recognizes that unless the tenant has made an enforceable agreement not to

1 assert such a claim or defense, the tenant may raise such a claim or defense in the event that the
2 assignee attempts to collect rents from the tenant under this Act.

3
4 In many transactions, mortgage lenders may require tenants to execute a subordination,
5 nondisturbance and attornment agreement (SNDA) agreement in which the tenant agrees not to
6 assert against the lender any claims or defenses arising out of the landlord's nonperformance.
7 Subsection (b) recognizes the enforceability of such waiver agreements.
8

9 3. *Receivership.* A tenant that pays rents expects that the assignor/landlord will apply
10 some portion of those rents to the payment of real property taxes, insurance, and property
11 maintenance. If the assignee begins collecting rents from tenants after the assignor's default
12 (without obtaining the appointment of a receiver or becoming a mortgagee in possession),
13 subsection (a) does not impose a general obligation on the assignee to apply such rents to the
14 costs of operating and preserving the property. Nevertheless, the assignor may fail to pay such
15 costs, especially if enforcement of the assignment of rents has divested the assignor of control
16 over the rents. In this circumstance, the expectations of a tenant can be significantly frustrated.
17 Subsection (c) recognizes that a tenant in these circumstances could seek the appointment of a
18 receiver if the tenant can demonstrate that the nonpayment of expenses of operating and
19 preserving the real property has threatened the tenant's interest in the real property.
20

21 **SECTION 14. TURNOVER OF RENTS; COMMINGLING AND**
22 **IDENTIFIABILITY OF RENTS; LIABILITY OF ASSIGNOR.**

23 (a) If the assignor collects rents that the assignee is entitled to collect or receive
24 under this [act]:

25 (1) the assignor shall turn over the rents to the assignee, less any amount
26 representing payment of expenses authorized by the assignee; and

27 (2) the assignee continues to have a security interest in the rents so long as
28 they are identifiable.

29 (b) For purposes of this [act], rents are identifiable if they are maintained in a
30 segregated account or, if commingled with other funds, to the extent the assignee can identify
31 them by a method of tracing, including application of equitable principles, that is permitted under

1 law of this state other than this [act] with respect to commingled funds.

2 (c) In addition to any other remedy available to the assignee under the law of this
3 state other than this [act], if the assignor fails to turn over rents to the assignee in violation of
4 subsection (a), the assignee may recover from the assignor an amount equal to:

5 (1) the rents that the assignor was obligated to turn over under subsection
6 (a); and

7 (2) reasonable attorney's fees and court costs incurred by the assignee to
8 the extent provided for in the assignment of rents and not prohibited by the law of this state other
9 than this [act].

10 (d) The assignee may maintain an action under subsection (c) without bringing an
11 action to foreclose any security interest that it may have in the real property. Any sums recovered
12 in the action must be applied in the manner specified in Section 12.

13 Preliminary Comments

14 Source: Cal. Civ. Code §§ 2938(f); U.C.C. §§ 9-315(a), 9-315(b); Restatement (Third) of
15 Property — Mortgages §§ 4.6(a)(5), 4.6(b)(3).
16

17 1. *"Milking" of rents and existing law.* The owner of a distressed real estate project may
18 sometimes engage in "milking" of rents — *i.e.*, collecting rents from the project and using those
19 rents to pay expenses other than the mortgage debt and expenses of preserving or maintaining the
20 mortgaged premises. Milking of rents that have been assigned as security poses a significant
21 threat to an undersecured mortgagee, who cannot expect to obtain full recovery of the mortgage
22 debt via foreclosure. This threat is even more severe where the mortgagee holds a nonrecourse
23 mortgage debt and the mortgagor thus has no personal liability for a deficiency judgment. Such a
24 threat typically prompts the mortgagee to take prompt action following default to enforce its
25 security interest in rents and thereby divest the mortgagor of control over project rents.
26

27 Between the time that the mortgagor goes into default and the time that the mortgagee
28 finally enforces its security interest in rents, the mortgagor has often collected and disposed of
29 rents. In this situation, an undersecured mortgagee may desire to recover damages that it suffered
30 because the mortgagor collected and disposed of rents that might otherwise have reduced the

1 mortgage obligations.

2
3 All authorities agree that the mortgagee has no basis for recovering cash proceeds of rent
4 paid in the ordinary course to third parties acting in good faith; such parties would take those
5 cash proceeds free of the mortgagee's claims by virtue of the common law negotiability of
6 money. The mortgagee might have a damage claim against the mortgagor, however, on account
7 of the mortgagor's disposition of rents. The common law of mortgages treated this conduct as a
8 species of legal waste — consistent with its treatment of "rents" as an incorporeal hereditament
9 in the nature of real property. The common law generally imposed liability upon a mortgagor
10 who took any action that damaged or destroyed the mortgaged property, thereby reducing its
11 value. [In title theory jurisdictions, this liability extended to the full reduction in the collateral's
12 value; under the lien theory, this liability existed only to the extent that the waste actually
13 impaired the mortgagee's security.] In the context of rents, the weight of available authority
14 suggests that the mortgagor's diversion of rents would constitute legal waste, at least where the
15 mortgagee had taken sufficient steps to enforce its security interest in rents. *See, e.g.,* Taylor v.
16 Brennan, 621 S.W.2d 592 (Tex. 1981) (mortgagor's collection and disposition of rents following
17 mortgagee's enforcement of security interest in rents would constitute waste, but holding that no
18 waste occurred because mortgagee had not taken sufficient steps post-default to enforce its
19 security interest in rents); Ginsberg v. Lennar Florida Holdings, 645 So.2d 490 (Fla. App. 1994).
20 The Restatement (Third) of Property — Mortgages adopts this view in § 4.6(a)(5) which
21 provides that "[w]aste occurs when, without the mortgagee's consent, the mortgagor ... retains
22 possession of rents to which the mortgagee has the right to possession....").
23

24 The Act does not precisely duplicate the Restatement approach, as it does not specifically
25 use the term "waste" to identify the basis of the assignor's liability for milking rents. In lien
26 theory states, courts traditionally held that the mortgagor was liable for waste only to the extent
27 that its conduct impaired the mortgagee's security. Rather than focusing upon impairment of
28 security — which would require proof regarding the value of the mortgaged premises — the Act
29 instead takes a more straightforward approach. If the assignor is obligated to turn over rents to
30 the assignee under Sections 6 and 14(a), but fails to do so, the assignor is liable for damages
31 equal to the full amount of the rents not turned over. Any such recovery must be applied by the
32 assignee in the manner specified by Section 12, so the assignee's total recovery could not exceed
33 the loss actually suffered by the assignee. Any surplus proceeds remaining after full satisfaction
34 of the secured obligation would be returned to the assignor or to subordinate lienholders in
35 accordance with Section 12.
36

37 2. *Assignor's liability to turn over rents.* The Act provides that upon default or as
38 otherwise permitted by an assignment of rents, an assignee may collect (1) accrued but unpaid
39 rents and (2) unaccrued rents as they accrue in the future. If the assignor collects any such sums
40 following enforcement by the assignee, the assignor must turn over such sums to the assignee
41 under subsection (a), or face personal liability for failure to do so by virtue of subsection (c).
42

43 In cases involving nonrecourse obligations (either by virtue of specific contractual

1 nonrecourse provisions or the intervention of antideficiency legislation), mortgagors who have
2 milked rents often argue that the mortgagee's action is in the nature of a deficiency judgment and
3 should therefore be dismissed. The weight of authority rejects this view and concludes that an
4 action for damages for waste of rents or conversion of the proceeds of rents is not in the nature of
5 a deficiency action. *See, e.g.,* Hoelting Enters. v. Nelson, 929 P.2d 183 (Kan. App. 1996);
6 International Business Machines Corp. v. Axinn, 676 A.2d 552 (N.J. Super. 1996). *See also* In re
7 Evergreen Ventures, 147 B.R. 751 (Bankr. D. Ariz. 1992) (distinguishing deficiency action and
8 waste action). The Act follows this approach.
9

10 Subsection (c) makes clear that an assignee may bring an action to recover damages on
11 account of the assignor's failure to turn over rents, without first having to foreclose on the
12 underlying real property or pursue other legal remedies. Requiring the assignee to pursue
13 foreclosure first "would probably result in more foreclosures." Restatement (Third) of Property
14 — Mortgages § 4.6 cmt. f. Moreover, as provided in Section 11 of the Act, the assignee's action
15 under Section 14(c) would not constitute an election of remedies thereby precluding later action
16 to enforce the secured obligation, or an action to enforce the debt within the meaning of a state's
17 one-action law.
18

19 3. *Commingling.* An assignor that collects rents following enforcement of an assignment
20 of rents may commingle those funds with other funds that are not rents or the proceeds of rents.
21 For example, an assignor hotel operator might receive a notification of enforcement from the
22 assignee under Section 9, and thereafter might generate a day's worth of revenues comprised in
23 part of rents (room revenues) and in part of nonrents (food and beverage revenues). Subsections
24 (a) and (b) make clear that the assignor's commingling of these funds into does not automatically
25 deprive the assignee of its security interest in the rents. As long as the rents are "identifiable,"
26 the assignee's interest remains enforceable against the rents. In this context, "identifiable" has
27 the same meaning as it does in U.C.C. § 9-315(a), under which a secured party has a security
28 interest in the identifiable proceeds of its original collateral. As a result, if the assignor has
29 commingled the proceeds of collected rents with other operating funds of the assignor, those
30 proceeds will remain identifiable only if the assignee can identify them by a method of tracing
31 (such as the lowest intermediate balance rule) that is recognized by law other than this Act with
32 respect to commingled property.
33

34 **SECTION 15. PRIORITY AMONG COMPETING SECURITY INTERESTS IN** 35 **RENTS; PRIORITY AMONG RECEIVERS.**

36 (a) Except as otherwise provided in this [act], the priority of liens among
37 creditors concerning rents is governed by [the recording act of this state].

38 (b) Except as otherwise provided in this section, if an assignment of rents was

1 recorded, the assignee's security interest in identifiable rents remains perfected and enforceable
2 even if another person has collected those rents.

3 (c) A transferee of money that is identifiable proceeds of rents takes the money
4 free of the assignee's security interest, unless the transferee acted in collusion with the assignor
5 in violating the rights of the assignee.

6 (d) A transferee of funds from a deposit account containing identifiable proceeds
7 of rents takes the funds free of the assignee's security interest, unless the transferee acted in
8 collusion with the assignor in violating the rights of the assignee.

9 (e) If an assignee entitled to priority under this [act] enforces its interest in rents
10 after another creditor holding a subordinate security interest in rents has enforced its interest
11 under Section 8, 9, or 10, the assignee may collect rents that are accrued but unpaid as of the date
12 of the assignee's enforcement and rents that accrue thereafter, but the creditor holding the
13 subordinate security interest in rents is not obligated to turn over any rents collected in the
14 ordinary course of business before the senior assignee enforces its interest in rents.

15 (f) Priority among receivers is governed by the following rules:

16 (1) If more than one assignee qualifies for the appointment of a receiver
17 under Section 7, a receivership request by an assignee entitled to priority in rents under this [act]
18 has priority over a receivership request by a subordinate assignee, even if a court has previously
19 appointed a receiver for the subordinate assignee.

20 (2) If a subordinate assignee obtains the appointment of a receiver, that
21 receiver has the right, until a receiver is appointed under a senior assignment of rents, to collect
22 the rents and apply them in the manner specified in the order appointing the receiver. The

1 receiver for the subordinate assignee need not turn over collected rents to the receiver for the
2 senior assignee, even if those rents are otherwise identifiable.

3 Preliminary Comments

4 Source: Cal. Civ. Code § 2938(h); U.C.C. § 9-332(a), (b); Restatement (Third) of
5 Property — Mortgages § 4.5
6

7 1. *Priority between competing assignees.* As a threshold matter, priority between
8 conflicting rent assignments is resolved by reference to the state’s recording act. See Section 5.
9

10 2. *Enforceability of security interest in rents vs. third parties.* Section 14(b) makes clear
11 that the assignor’s failure to turn over rents collected following enforcement by the assignee does
12 not automatically deprive the assignee of its perfected security interest in the cash proceeds of
13 those rents, and thus the assignee can continue to enforce that interest as against the assignor and
14 third parties (such as the trustee in bankruptcy following the assignor’s filing of a bankruptcy
15 petition).
16

17 The Act recognizes several limitations, however, upon the assignee’s right to enforce the
18 security interest against third parties. First, any such cash proceeds of rents must be
19 “identifiable.” See Section 14, Preliminary Comment 3. Second, subsection (c) recognizes the
20 negotiability of money and provides that a third party transferee of cash that is proceeds of
21 collected rents will be protected so long as the transferee has not acted in collusion with the
22 assignor to deprive the assignee of its interest in the funds. *Cf.* U.C.C. § 9-332(a). Likewise,
23 subsection (d) provides similar protection for a transferee of funds from a deposit account
24 containing cash proceeds of rents. *Cf.* U.C.C. § 9-332(b).
25

26 3. *Priority as to rents collected by a subordinate assignee.* The Act provides that if a
27 senior assignee enforces its right to rents after a subordinate assignee has already enforced its
28 rights, then the senior assignee will have priority as to unaccrued rents and accrued but unpaid
29 rents. However, subsection (e) provides that this priority will not extend to rents already
30 collected by the subordinate assignee. The subordinate assignee may retain already collected
31 rents and apply them in accordance with Section 12, without regard to any turnover demand by
32 the senior assignee. This provision places the subordinate assignee in the same position, vis-a-
33 vis the senior assignee, as any other third party creditor that received payment of rents from the
34 assignor — such third party creditors would take the proceeds of those rents free of the senior
35 assignee’s security interest so long as they were not acting in collusion with the assignor to defeat
36 the senior assignee’s rights.
37

38 4. *Priority between conflicting receivers.* Subsection (f), which is modeled upon § 4.5 of
39 the Restatement (Third) of Property — Mortgages, provides the same basic priority rule with
40 respect to conflicting receivers. If the senior assignee is entitled to the appointment of a receiver

1 under Section 7, the court’s appointment of that receiver will take priority over and displace a
2 prior receivership obtained by a subordinate assignee. Any rents actually collected by the
3 receiver for the subordinate assignee, however, need not be turned over to the receiver for the
4 senior assignee; instead, the receiver for the subordinate assignee shall apply those sums in the
5 manner specified in its order of appointment.
6

7 **SECTION 16. SCOPE OF TERM “TENANT.”** The law of this state other than this
8 [act] governs whether a licensee or other occupier of real property has a possessory interest in the
9 real property.

10 **Preliminary Comments**

11 For ease of reference, the Act characterizes as a “tenant” anyone who is obligated to pay
12 “rents” as defined in the Act. Thus, under the Act, the term “tenant” may include licensees and
13 other occupiers of land that do not have a possessory interest and thus do not constitute tenants as
14 that term is used in the general law of landlord and tenant. Nothing in the Act is intended to
15 make such a person a “tenant” for purposes other than this Act. Thus, for example, the fact that
16 this Act characterizes a hotel guest as a “tenant” would not give the hotel guest any rights
17 generally available to tenants under other laws of this state (such as a tenant’s protection from
18 dispossession under a forcible entry and detainer statute).
19

20 **SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
21 applying and construing this Uniform Act, consideration must be given to the need to promote
22 uniformity of the law with respect to its subject matter among states that enact it.
23

24 **SECTION 18. EFFECTIVE DATE.** This [act] takes effect on _____.
25

26 **SECTION 19. REPEALS.** The following acts are repealed: [List statutes to be
27 specifically repealed.]
28

1 **SECTION 20. APPLICATION TO EXISTING RELATIONSHIPS.** This [act]

2 applies to the enforcement of an assignment of rents, even if executed and delivered before [the

3 effective date of this [act]]. This [act] does not affect an action or proceeding commenced before

4 this [act] takes effect.