SECURITY INTERESTS IN MANUFACTURED HOUSING

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Manufactured homes (often called mobile homes or MH) have become a major source of housing in the United States. Eight percent of the population live in them, and they constitute 7% of the national housing stock. In some states, the percentage is substantially higher. For example, in Alabama and in Mississippi, 15% of the housing units are manufactured. In South Carolina, 20% are manufactured. In most years, more than a quarter of the new single-family homes that have been sold were manufactured homes.

Despite the importance of MH to the housing market, many states characterize it as personal property. In these states, a manufactured home is titled and security interests are perfected in the same manner as for a car. Lenders' remedies also are the same, including self-help repossession in some states. A uniform law that characterizes all MH as real property, except when it is inventory, will serve three important functions: (1) increasing the availability of financing for MH; (2) providing the same legal rights and remedies for MH mortgagors and mortgagees as exist for other forms of housing; and (3) creating uniformity in a chaotic area of law.

Background Information

The popular perceptions and legal treatment of MH largely date to its earliest years. Originally, manufactured homes were mobile; they were trailers hitched to the back of a car or truck. Today, only 1% of sited MH are ever moved from their original location. The average MH sold in 2005 had 1,595 square feet and sold for $62,300. Many MH sell for much more. The current listings on Realtor.com include a unit in Tampa for $740,000 and one in Malibu for $2,333,000, both of which are on leased land. Manufactured homes now include two-story units, units with more than one full bathroom, and features such as central air conditioning, hardwood floors, and fireplaces.

Manufactured homes now must satisfy HUD construction and installation standards, which have brought construction quality to a level close to that of site-built homes.

The ownership characteristics for MH also differ from the common perceptions. MH occupants are less transient than the occupants of site-built housing. Sixty percent of manufactured home occupants live in their home for more than 10 years; the average for site-built housing is six years. Almost 80% of manufactured homes are owner occupied, compared to 68.8% for all types of single-family housing. Moreover, 70% of new manufactured homes are placed on the owner's land, rather than on leased land.

The demographics for MH occupants demonstrate that they represent a broad cross section of the population. Almost half are 50 years or older; twenty-one percent are 65 years or older. Forty percent have an annual household income of less than $30,000, but nine percent have an annual income of $75,000 or more. Twenty-four percent have a net worth of less than $25,000, but four percent have a net worth of $500,000 or more. One percent have only a grade school education, but 55% have at least some college education.

As indicated by the incomes and net worth of the lower income groups described in the preceding paragraph, MH is an important form of affordable housing. In fact, it is the largest source of unsubsidized lower income housing in this country. According to U.S. Department of Commerce figures, the average square foot price of a manufactured home is only 32% of the price of a site-built home, even without including the value of the land on which the home is sited.

The lower cost of MH enables lower income groups to enjoy the benefits of home ownership. The median annual household income for MH occupants is $27,452, which is only $400 more than for renters. In contrast, the median annual household income for all home owners is $55,571. The median monthly housing cost for MH occupants is actually lower than for renters ($445 v. $695) and is substantially less than for all home owners ($809). For this reason, the Senate and House of Representatives both recently passed the FHA Manufactured Housing Loan Modernization Act of 2008 to increase the availability of FHA-insured MH loans for low- and moderate-income home buyers.

Current Legal Classifications of Manufactured Homes

State laws differ dramatically in the ways in which they classify manufactured homes. Depending on the state, manufactured homes are (1) personal property even after they are attached to the land, (2) real property for all purposes, (3) real property for some purposes and personal property for others, or (4) personal property until becoming a fixture or until the completion of statutorily specified procedures for "converting" the title from personal to real. The great majority of states are in the fourth category. Unfortunately, both routes for changing a manufactured home's character in these states—characterization as a fixture or title conversion—create substantial uncertainty.

The uncertainty with respect to characterization as a fixture results from the fact-specific inquiry necessary to determine whether an item of personal property has become a fixture. Section 9-102(a)(41) of the Uniform Commercial Code defines fixtures as "goods that have become so related to particular real property that an interest in them arises under real property law." In applying this definition to MH, courts consider a variety of facts, such as the method by which the home is annexed to the land, the home's adaptation to its location, the parties' intention, and the physical damage that removal would cause. These inquiries provide little advance guidance to the owner and the lender in attempting to assess whether a court will characterize the manufactured home as personal property or as a fixture.

State conversion statutes also present difficulties. The statutory language often is unclear or incomplete in one or more of three ways. First, most statutes do not specify the purposes for which the home is to be considered real property. Therefore, it is uncertain whether the manufactured home is real property for purposes of defining secured creditors' rights or only for a different purpose, such as the tax or homestead laws. Second, in deciding whether the statutory conversion requirements have been satisfied, courts often rely on the fixture cases, which introduces the element of uncertainty described in the preceding paragraph. Finally, title conversion does not occur unless all the statutory procedures have been satisfied, which can be unclear because many of the statutes inadequately describe the process.

Significance of the Legal Classification for MH Loans

The characterization of MH as real or personal property significantly affects the terms and conditions of financing, the remedies upon default, and the nature and extent of the secondary market. A uniform law that treats all MH as real estate would provide substantial benefits in each area.

1. Loan Terms. The interest rates on loans secured by personal property normally are 2-5% higher than for loans secured by real estate. The other terms for chattel MH loans also tend to be less favorable for borrowers because far fewer lenders make this type of loan than make real estate loans, which limits competition's beneficial effects. Additionally, the uncertainty that exists in the great majority of states concerning the home's classification generates a significant amount of litigation, and it causes lenders to comply with the procedures for perfecting a security interest for both real and personal property, which increases costs. Finally, the Real Estate Settlement Procedures Act, which prohibits kickbacks and increases transparency concerning loan costs, applies only to real property loans. Extending its coverage to all MH loans should decrease their cost.

2. Remedies for Loan Defaults. In jurisdictions that classify MH as personal property, a secured lender can repossess the home in the same manner as a car. In some states, the lender can even use self-help repossession. Pursuant to § 9-604(b) of the Uniform Commercial Code, these remedies also are available in states in which a manufactured home can become a fixture. Although § 9-604(b) authorizes the secured lender to use the state's real estate foreclosure laws, that remedy generally is unavailable if the lender has a security interest in the home but not in the land on which it is located.

In contrast, a secured lender in a state that classifies MH as real property must comply with all the usual mortgage foreclosure requirements, such as giving notice to interested parties and conducting a foreclosure sale. Additionally, the MH owner is entitled to all the usual mortgagor rights, such as the equity of redemption. Depending on state law, the owner also may enjoy the benefits of arrearages legislation, statutory redemption, antideficiency legislation, and homestead protections. These rights are particularly important in this context because, as noted earlier, MH owners' housing expenses will significantly increase if they lose their home and become renters.

3. Secondary Mortgage Market. Although Freddie Mac and Ginnie Mae formerly purchased MH loans, they have stopped doing so. Fannie Mae is purchasing them, but its purchase program is limited to loans secured by MH that is titled as real estate. Currently, only about 30% of MH loans qualify. By characterizing all MH as real property, Fannie Mae's purchase program could substantially expand, thereby increasing the available capital and decreasing interest rates. Moreover, Fannie Mae recently has stated that it will standardize underwriting, valuation, and documentation for MH loans, which will further enhance the secondary market in states that treat MH as real estate.

4. HDC Status. The secondary mortgage market for MH also would benefit from the greater availability of HDC status that would result by recharacterizing manufactured housing as real estate. The Federal Trade Commission trade regulation rule, "Preservation of Consumers' Claims and Defenses," voids HDC protection against personal defenses for certain consumer credit transactions. This rule does not apply to loans for the purchase of real estate. Therefore, if MH is treated as real estate, mortgagors will be unable to assert personal defenses against a HDC, including secondary mortgage market participants. This protection will make MH loans more attractive to investors.

5. Bankruptcy Cram Downs. Mortgagees' rights also would be enhanced in the event of the MH owner's bankruptcy. Section 1322(b)(2) of the Bankruptcy Code permits modifications to the rights of secured lenders "other than a claim secured by a security interest in real property that is the debtor's principal residence." By reclassifying MH from personal to real property, MH lenders no longer will be subject to the possibility of a cram down pursuant to this provision.

Additional Issues

The property characterization of MH raises a variety of issues other than those directly involving financing, including marital property rights, homestead protections, judgment liens, and property taxes.

1. Marital Property Rights. Some states provide a surviving spouse with greater rights in the decedent's real property than in his or her personal property. Additionally, some states that recognize tenancy by the entirety limit it to real property. Finally, some states require that a transfer of the homestead be signed by both spouses; in states that treat MH as personal property, this homestead protection may not extend to MH.

2. Additional Homestead Protections. Many states protect a debtor's homestead from certain types of creditors' claims. In some of these states, the protection does not apply to MH that is categorized as personal property.

3. Judgment Liens. Judgment liens attach to real property, but not to personal property.

4. Property Taxes. The relative advantage of taxing MH as real or personal property varies tremendously from state to state. MH owners in some states will pay lower taxes if their home is classified as real estate, but owners in other states will pay more. The reclassification of MH as real estate also may affect which government entity receives the taxes; real property taxes often are paid to a local government entity, whereas personal property taxes often are paid to the state. These issues should be addressed in an implementation guide to the Uniform Law.

However, one clear tax benefit will result from classifying MH as real estate as of the purchase date. In many states in which MH can be converted from personal to real property, the MH purchaser has to pay sales tax on the purchase of personal property and then real estate taxes when the MH is recharacterized. The sales tax rate usually substantially exceeds the tax rate for real estate transfers, and the annual property tax rate for real estate is substantially higher than for personal property. By treating MH as personal property when it is purchased and then recharacterizing it as real estate, the owner gets the higher tax rate for both types of property. Treating MH as real estate from the beginning will eliminate this disparity.

Topics for the Uniform Law

To accomplish the goals of this proposed law, it need not apply to manufactured housing that constitutes inventory. In that situation, MH should retain its character as personal property, including for purposes of creating and perfecting security interests. The law should apply beginning with the transfer from the dealer to the user.

1. Definitions

2. Administration

a. Specify the official who is responsible for administering the law, including creating the necessary procedures and promulgating rules and forms

3. Dealer's Transfer of Title to Purchaser

a. Document to be used

b. Legal description

i. Purchaser owns land on which MH will be sited

ii. Purchaser does not own the site

c. Other information to be included in the conveyance document

d. Recording in real property records

i. Purchaser owns land on which MH will be sited

ii. Purchaser does not own the site

4. Security Interests in MH

a. Creation and perfection

b. Transfer of security interest

c. Lenders' rights upon default

i. MH owner owns the land

ii. MH owner does not own the land

d. Termination of security interest

5. Effect of Liens Against MH on the Land Where the MH is Sited (i.e. do liens against the MH also encumber the land where it is sited?)

a. MH owner owns the land

b. MH owner does not own the land

c. Priority among liens

6. Effect of Pre-existing Liens Against the Land Where the MH is Sited (i.e. if the land is encumbered by a lien before the MH is sited there, does the lien also encumber the MH?)

a. MH owner owns the land

b. MH owner does not own the land

c. Priority among liens

7. Effect of Subsequent Liens Against the Land Where the MH is Sited

(i.e. if a lien encumbers the land after the MH is sited, does it also encumber the MH?)

a. MH owner owns the land

b. MH owner does not own the land

c. Priority among liens

8. If MH is on Leased Land, Effect of Lease Expiration on MH Lender

a. MH can be moved

b. MH cannot be moved because of its condition or lack of a new site

9. Effect of MH Being Moved from Original Site

a. MH owner retains ownership

b. MH transferred to a dealer for resale

c. MH transferred to a nondealer

10. MH Transferred to or from Another State

a. Other state has enacted the Uniform Law

b. Other state has not enacted the Uniform Law

11. Uniform Law Applies Prospectively Only?

a. If not, method for converting existing MH to real property

b. If not, method for perfecting existing security interests and other liens

12. Uniform Law Preempts all State Law, Including Fixture Law

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Potential Supporters of the Proposed Uniform Law

1. Consumers. A wide variety of consumer groups are actively working to protect MH owners' rights, including by advocating for laws that treat all MH as real estate. The National Consumer Law Center (NCLC) works on this issue nationally and is very enthusiastic about the proposed Uniform Law. Although recharacterization as real estate will cause MH owners to lose some legal rights, such as the opportunity for a bankruptcy cram down, NCLC has determined that recharacterization is in the best interest of consumers. NCLC also has worked closely with AARP in promoting reform of the MH laws. The Ford Foundation, Annie E. Casey Foundation, the Corporation for Enterprise Development, and several other philanthropic organizations also support reform in this area and provide funding for it.

2. MH Industry. The MH industry has four incentives to support the proposed Uniform Law. First, MH manufacturers, dealers, and lenders currently must comply with a tremendous diversity of state laws. Second, in states that allow MH title conversions or that recognize MH as fixtures, uncertainty concerning the characterization of any particular manufactured home generates litigation and other costs. Third, the MH industry has been in a serious slump since it experienced a meltdown a few years ago as a result of poor lending practices. The increase in available credit that would occur if all MH loans qualified for Fannie Mae purchase could provide a significant boost to the market. Finally, the industry would directly benefit from the proposed law in certain ways, such as protection from bankruptcy cram downs and the availability of HDC status.

3. Fannie Mae. Fannie Mae recently stated that it "is committed to provide low cost capital to lenders active in the manufactured housing sector" in order to increase the availability of affordable housing. That goal would be substantially enhanced if the percentage of MH titled as real property increased from the current 30% to 100%. Furthermore, Fannie Mae was actively involved in UCIOA, which demonstrates its willingness to support Uniform Laws that further its interests.