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FOR DISCUSSION ONLY

UNIFORM ASSIGNMENT OF RENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ASSIGNMENT OF RENTS ACT

Prefatory Note

Traditionally, under the title theory of mortgages, a mortgage effected a transfer of legal title to real property as security for the mortgage debt. As an incident of this legal title, the mortgagee obtained the right to collect rents arising from the real property and apply them to the mortgage debt unless the mortgage stated otherwise. By contrast, 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 property.

As a result, it has become customary that when a lender makes a mortgage loan on income-producing real property, 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 before 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 or paying operating expenses of the real property (a process often referred to as "milking" the rents). By taking the assignment, the lender makes clear its intent to hold 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, among others, 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 payments 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 governing the creation and enforcement of security interests in proceeds of personal property). 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 interests 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 property 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.

To address some of these concerns, the Act seeks to bring consistency to commercial real property transactions by establishing a comprehensive statutory model for the creation, perfection, and enforcement of a security interest in rents. The Act addresses (among others) 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 before 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 real property 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 real property 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 lien on the real property that generates those rents. For further background, *see* Act § 4(b), Preliminary Comment 2.

"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 reject existing case law that suggests that a security interest in rents is "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 nevertheless constitute equitable mortgages if the surrounding circumstances demonstrate that the parties are using title 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(b), Preliminary Comment 3.

Appointment of a Receiver. In some states, comprehensive statutory provisions 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 real property be 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 property, 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 property 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 real property (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 property 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 in the public real property 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 interests 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 further background, *see* Act § 2, Preliminary Comment 12.

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. For further background, *see* Act § 8, Preliminary Comment 1.

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 § 9, Comments 1 through 6.

Mortgage Creates a Security Interest in Rents by Default. Under Uniform Commercial Code Article 9, a security interest in personal property automatically extends to proceeds of that property unless the security agreement provides otherwise. Because Article 9 defines “proceeds” to include whatever is received upon disposition (including a lease) of the collateral, a security interest in personal property collateral automatically extends to rentals arising from that collateral. Article 9’s treatment of personal property rents as “proceeds” reflects the presumed intention of lender and borrower that the lender’s security interest should extend to sums (e.g., rents) that reflect a return upon the economic value of the collateral.

By contrast, real property law has been less clear regarding the mortgagee’s interest in rents. Under the title theory of mortgages, the mortgagee’s title to the real property automatically included the right to collect and apply rents arising from the real property to the mortgage debt (unless the mortgage itself provided otherwise). By contrast, under the lien theory of mortgages, the mortgagee did not automatically acquire the right to collect and apply rents as an incident of the mortgage. For this reason, most commercial real property mortgage lenders require the mortgagor to make an assignment of rents in order to give the mortgagee an unquestioned interest in rents that accrue prior to the completion of a foreclosure.

Particularly with respect to commercial real property, rents reflect the economic return received by the owner in exchange for a temporal disposition of the right to possess and occupy the real property. In this regard, rents from real property should be viewed as proceeds of the property — and should receive treatment comparable to the treatment Article 9 accords to proceeds of personal property collateral. In order to promote desirable consistency between Article 9 and real property law, the Act establishes that a mortgage creates a security interest in rents by default (*e.g.*, unless the mortgage provides otherwise), even if the mortgage does not by its express terms create an assignment of rents. For further background, *see* Act § 4(a), Preliminary Comment 1.

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 real property (by becoming a mortgagee in possession or purchasing the premises at foreclosure). A prudent lender may 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/landlord 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.

Coordination with Uniform Commercial Code Article 9. The Act provides that a perfected security interest in rents extends automatically into the identifiable proceeds received upon collection of rent. In the typical case, however, “proceeds” of rents will constitute personal property. This means that conflicting interests may arise in the same proceeds — the assignee’s interest by virtue of this Act, and another person’s by virtue of other law such as Article 9 of the Uniform Commercial Code. The Act provides a set of rules to establish priority between such conflicting interests. To ensure the coordination of this Act with Article 9, this Act generally treats the assignee’s “proceeds” interest as if it had arisen under Article 9 and applies Article 9’s priority rules. For example, the Act protects a third person to whom an assignor transfers money that constitute proceeds of rents, so long as the transferee is not acting in collusion with the assignor to violate the rights of the assignee. *Cf.* U.C.C. § 9-332(a). For further background, *see* Act § 15, Preliminary Comments 1-4.

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 and from which the
9 rents arise.

10 (3) “Assignor” means a person that makes an assignment of rents or the successor
11 owner of the real property from which the rents arise.

12 (4) “Cash proceeds” means proceeds that are money, checks, deposit accounts, or
13 the like.

14 (5) “Day” means calendar day.

15 (6) “Deposit account” means a demand, time, savings, passbook, or similar
16 account maintained with a bank, savings bank, savings and loan association, credit union, or trust
17 company.

18 (7) “Document” means information that is inscribed on a tangible medium or that
19 is stored on an electronic or other medium and is retrievable in perceivable form.

20 (8) “Notification” means a document containing information that this [act]
21 requires a person to provide to another and signed by the person required to provide the
22 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) "Proceeds" means personal property that is received or collected on account
5 of a tenant's obligation to pay rents.

6 (11) "Purchase" means taking by sale, lease, discount, negotiation, mortgage,
7 pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an
8 interest in property.

9 (12) "Rents" means:

10 (A) sums payable for the right to possess or occupy, or for the actual
11 possession or occupation of, real property of another person;

12 (B) sums payable to an assignor under a policy of rental interruption
13 insurance covering real property;

14 (C) claims arising out of a default in the payment of sums payable for the
15 right to possess or occupy real property;

16 (D) sums payable to terminate an agreement to possess or occupy real
17 property;

18 (E) sums payable to an assignor for payment or reimbursement of
19 expenses incurred in owning, operating and maintaining, or in constructing or installing
20 improvements on, real property; or

21 (F) any other sums payable under an agreement relating to the real
22 property of another person that constitute rents under the law of this state other than this [act].

1 (13) “Secured obligation” means an obligation the performance of which is
2 secured by an assignment of rents.

3 (14) “Security instrument” means a document, however denominated, that creates
4 or provides for a security interest in real property, whether or not it also creates or provides for a
5 lien on personal property.

6 (15) “Security interest” means an interest in property that arises by agreement and
7 secures performance of an obligation.

8 (16) “Sign” means, with present intent to authenticate or adopt a document:

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

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

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

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

18 (19) “Tenant” means a person that holds a right to possess or occupy, or who
19 actually possesses or occupies, the real property of another person and has a corresponding
20 obligation to pay rents.

21 **Preliminary Comments**

22 1. “Assignee.” The term “assignee” means the person entitled to enforce an assignment

1 of rents.

2
3 2. “Assignment of rents.” The Act uses the term “assignment of rents” to mean the
4 transfer of an interest in rents, rather than the document by which the transfer is made. Any
5 document sufficient to effect a transfer of a security interest in rents constitutes an assignment of
6 rents under the Act. As a result, a mortgagee need not use a separate document to create an
7 assignment of rents, but can merely incorporate into the mortgage document language that
8 creates an assignment of rents. *See* Act § 4, Comment 4.
9

10 For sake of simplicity, the Act uses the term “assignment of rents” even though the
11 document creating such an assignment is usually termed “assignment of leases and rents” and
12 effectively transfers to the assignee an interest in the leases covering the real property (as well as
13 an interest in the rents payable under those leases). The focus of the Act is to govern the
14 creation, perfection, and enforcement of security interests in rents. By using the term
15 “assignment of rents,” the Act is not intended to bifurcate a tenant’s obligation to pay rents from
16 the lease under which the tenant’s obligation to pay rents arises.
17

18 3. “Assignor.” The term “assignor” means a person that makes an assignment of rents or
19 the successor owner of the real property subject to the assignment.
20

21 4. “Cash proceeds.” The term “proceeds” means personal property that is collected on
22 account of a tenant’s obligation to pay rents covered by this Act. *See* Comment 10. The term
23 “cash proceeds” means proceeds that are in the form of cash, checks, funds in a deposit account,
24 and the like.
25

26 5. “Day.” The Act defines “day” as a calendar day.
27

28 6. “Deposit account.” This definition is similar to that contained in U.C.C. Section 9-
29 102(a)(29). The term uses the term “bank” in a fashion comparable to the definition contained in
30 U.C.C. Section 1-201(b)(4).
31

32 7. “Document.” The definition of “document” is media-neutral and comparable to the
33 definition used in Section 102(3) of the Uniform Residential Mortgage Satisfaction Act. Because
34 this Act uses the term “record” in its customary fashion under real property law — *i.e.*, as a verb
35 to describe the act of filing an instrument of conveyance with the recorder’s office — the Act
36 does not use the term “record” as a noun, and instead uses the term “document.”
37

38 8. “Notification.” The Act permits an assignee to enforce an assignment of rents by
39 giving a notification to the assignor (Section 8) or by giving a notification to tenants of the
40 assignor (Section 9). In any circumstance in which the Act requires notification to be given to a
41 person, any such notification shall be in the form of a document, as defined in Section 2(7), and
42 shall contain the information required by the specific section authorizing that notification.
43

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

3
4 10. “Proceeds.” In this Act, the term “proceeds” means whatever is collected from a
5 tenant on account of the tenant’s obligation to pay rent. In most instances, these proceeds will be
6 in the form of cash or checks. The Act provides that a security interest in rents extends
7 automatically to any proceeds of those rents so long as those proceeds are identifiable. Section
8 14(b), (c).

9
10 It is possible that an assignee may claim a security interest in proceeds of rents and that
11 another creditor or person may also claim a conflicting interest in those proceeds by virtue of
12 other law, particularly Article 9 of the Uniform Commercial Code. The Act provides priority
13 rules in Section 15 to address such potential priority conflicts.

14
15 11. “Purchase” is defined in the same manner as in Uniform Commercial Code Section
16 1-201(b)(29), and includes any voluntary transaction creating an interest in property.

17
18 12. “Rents.” In many commercial real property developments (*e.g.*, office buildings,
19 industrial parks, retail shopping centers, and apartment complexes), the owner stands in a
20 landlord-tenant relationship with the occupiers of the development, based upon the execution of
21 leases covering portions of the development. Because the common law has treated unaccrued
22 rents as an interest in real property (an incorporeal hereditament), the right to collect sums paid
23 by tenant occupiers undoubtedly constitutes “rent” in the nature of real property. Thus, a
24 mortgage lender taking a security interest in “rents” must comply with the provisions of real
25 property law in order to obtain and enforce that security interest. In other words, the mortgage
26 lender must have the mortgagor execute and deliver an instrument sufficient to convey an interest
27 in “rents” and must record that instrument in the appropriate real property records.

28
29 In many other developments, however, the owner does not stand in a landlord-tenant
30 relationship with the user/occupier of real property because that user/occupier is only a licensee.
31 Examples of this type of project include nursing homes, parking garages, golf courses, landfills,
32 marinas, stadiums/arenas, student dormitories, and hotels/motels. If the development’s occupier
33 is a licensee and not a tenant, a significant classification problem arises. Is the right to collect
34 sums from project occupiers “rent” governed by real property law (such that the lender would
35 obtain and record an assignment of rents in the real property records), or an “account” governed
36 by Article 9 of the Uniform Commercial Code (such that the lender would create a security
37 interest in present and after-acquired accounts and perfect that interest by filing a financing
38 statement covering accounts in the Article 9 filing system)?

39
40 In theory, a lender could moot the resolution of this characterization question simply by
41 (a) making sure that its loan documents create a security interest in both “rents” and “accounts,”
42 and (b) recording/filing evidence of those interests in the respective filing systems. This “belt
43 and suspenders” approach would appear to give the lender a perfected security interest in the

1 right to collect unaccrued occupancy charges, regardless of how a court resolved the
2 characterization question.

3
4 Unfortunately, Bankruptcy Code § 552(a) complicates this analysis. Section 552(a)
5 generally provides that any pre-petition security agreement covering after-acquired property does
6 not affect property that the bankruptcy estate acquires post-petition. By itself, section 552(a)
7 would suggest that a lender's security interest in pre-petition revenues would not attach to post-
8 petition revenues (which would, in turn, mean that those revenues would not constitute the
9 lender's cash collateral). Congress drew a careful distinction, however, between *property*
10 *received by the debtor post-petition* and *post-petition proceeds of pre-petition collateral*. This
11 distinction is reflected in section 552(b), which provides that a valid and properly perfected pre-
12 petition security interest in collateral will attach to any rents, profits, and proceeds of that
13 collateral that are received by the debtor post-petition. The protection accorded to secured
14 creditors by section 552(b) makes the resolution of the "what revenues are 'rents'?" question
15 critical for the commercial real property mortgage lender. If post-petition project revenues are
16 "rents," "profits," or "proceeds" of the real property, the lender's security interest attaches to
17 those revenues. If not, then section 552(a) extinguishes the lender's interest in post-petition
18 project revenues.

19
20 Most of the bankruptcy cases addressing this characterization question involved hotels
21 and security interests in hotel room revenues. Before 1994, a few decisions sensibly treated hotel
22 room revenues as the functional equivalent of tenant rents and concluded that § 552(b)'s
23 protection for "rents" preserved a lender's properly perfected interest in post-petition hotel room
24 revenues. *See, e.g., In re S.F. Drake Hotel Assocs.*, 131 B.R. 156, 158-61 (Bankr. N.D. Cal.
25 1991), *aff'd*, 147 B.R. 538 (N.D. Cal. 1992); *In re Mid-City Hotel Assocs.*, 114 B.R. 634, 638-
26 642 (Bankr. D. Minn. 1990). Most courts, however, concluded that post-petition hotel room
27 revenues were accounts (personal property) and were neither "rents," "profits," nor "proceeds" of
28 the real property. *See, e.g., In re Northview Corp.*, 130 Bankr. 543, 548 (9th Cir. BAP 1991); *In*
29 *re Investment Hotel Properties, Ltd.*, 109 Bankr. 990, 994-97 (Bankr. D. Colo. 1990). These
30 courts typically applied the formalistic reasoning that room revenues could not be "rents"
31 because hotel guests were not "tenants." As a result, many bankruptcy courts routinely
32 invalidated lenders' claimed interests in post-petition hotel revenues. The formalistic
33 invalidation of a hotel lender's interest in post-petition room revenues was particularly
34 inappropriate, as hotel room revenues are economically identical to the "rents" paid by tenants
35 under apartment, office, or industrial leases. *See, e.g., R. Wilson Freyermuth, Of Hotel*
36 *Revenues, Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming*
37 *Commercial Real Estate Finance*, 40 UCLA L. Rev. 1461 (1993). Recognizing the absurdity of
38 these decisions, Congress amended section 552(b) in 1994 to preserve the lender's interest in
39 post-petition "fees, charges, accounts, or other payments for the use or occupancy of rooms and
40 other public facilities in hotels, motels, or other lodging properties."

41
42 This amendment provided a practical solution to the classification problem with respect
43 to hotels and other "lodging properties," but it did not address a wide variety of other income-

1 generating developments. Courts have generally concluded that golf course greens fees do not
2 constitute “rents,” “profits,” or “proceeds” of the real property. *See, e.g., In re McKim*, 217 B.R.
3 97 (Bankr. D.R.I. 1998); *In re GGVXX, Ltd.*, 130 B.R. 322 (Bankr. D. Colo. 1991). Likewise,
4 courts have refused to characterize stadium/arena revenues as rents. *See, e.g., Klingner v.*
5 *Pocono International Raceway, Inc.*, 433 A.2d 1357 (Pa. Super. 1981); *In re Zeeway Corp.*, 71
6 B.R. 210 (9th Cir. Bankr. 1987). By contrast, courts have treated revenues from parking garages
7 as rents, *see, e.g., In re Ashford Apartments Ltd. Partnership*, 132 B.R. 217 (Bankr. D. Mass.
8 1991), and have treated landfill dumping fees as rents. *See, e.g., In re West Chestnut Realty of*
9 *Haverford, Inc.*, 166 B.R. 53 (Bankr. E.D. Pa. 1993), *aff’d*, 173 B.R. 322 (E.D. Pa. 1994). Courts
10 have split on the characterization of marina slip fees, with some characterizing these as “rents”
11 depending upon the duration of use and others characterizing such fees as accounts subject to
12 Article 9. *Compare In re Northport Marina Assocs.*, 136 B.R. 911 (Bankr. E.D.N.Y. 1992) (fees
13 paid by marina users for assigned slip for six months or more were in nature of “rents,” while
14 fees paid by transitory users were “accounts”) *with In re Harbour Pointe Ltd. Partnership*, 132
15 B.R. 501 (Bankr. D.D.C. 1991) (fees generated by marina treated as “rents”) and *In re Hamlin’s*
16 *Landing Joint Venture*, 77 B.R. 916 (Bankr. M.D. Fla. 1987) (same).

17
18 In Section 2(12)(A), the Act takes the view that “rents” should include all sums payable
19 for the right to possess or occupy the real property of another. A person “possesses” the real
20 property of another if that person has a possessory interest in that real property (*e.g.*, the interest
21 of a tenant under a lease). A person “occupies” the real property of another if that person has a
22 contractual right that permits them to occupy the real property of another to the exclusion of
23 persons other than the owner. Thus, the Act defines the term “rents” to include all sums paid by
24 a person in order to acquire the right to possess or occupy the real property of another.

25
26 The Act also provides that the term “rents” includes any right to payment on account of
27 the actual possession or occupation of the real property of another. Thus, the right to collect
28 from a tenant at sufferance for the period in which that tenant holds over following the
29 termination of its lease constitutes “rents,” even if the landlord chooses to treat the holdover
30 tenant as a trespasser and institute eviction proceedings.

31
32 The application of subsection (12)(A) is demonstrated by the following illustrations:

33
34 *Illustration 1.* ABC Life Insurance Company holds an assignment of rents on the
35 Friendly Shopping Center. Grocer signs a 20-year lease for an anchor tenancy within the
36 Friendly Shopping Center. The lease provides that Grocer will pay base rent and
37 (depending upon sales) percentage rent. Sums payable from Grocer under the terms of
38 the lease (whether for base rent or percentage rent) constitute “rents” within the meaning
39 of the Act.

40
41 *Illustration 2.* ABC Life Insurance Company holds an assignment of rents on the
42 Friendly Hotel. Heinsz is a guest of Friendly Hotel for three nights. Although Heinsz has
43 no possessory interest in a particular hotel room vis-a-vis the owner of Friendly Hotel,

1 Heinsz does “occupy” the room in a fashion that essentially excludes third persons. Sums
2 payable for the room occupancy charges that Heinsz incurs for his stay are “rents.” Sums
3 payable for charges that Heinsz incurs for additional hotel-related services (such as room
4 service meals, dry cleaning or laundry services, or the like) would not constitute “rents,”
5 as they are not incurred in exchange for the right to occupy the room.
6

7 *Illustration 3.* ABC Life Insurance Company holds an assignment of rents on the
8 Friendly Nursing Home, where Davis is a resident. Although Davis may not have a
9 possessory interest in the room vis-a-vis the owner of Friendly Nursing Home, Davis does
10 “occupy” the room in a fashion that essentially excludes third persons. Sums payable for
11 the room occupancy charges that Davis incurs for his stay are “rents.” Sums payable for
12 medical treatment, medication, physical therapy, or the like would not constitute “rents,”
13 as they are not incurred in exchange for the right to occupy the room.
14

15 *Illustration 4.* First Bank holds an assignment of rents on the Friendly Marina. Smith has
16 a contract with Friendly Marina pursuant to which he pays a monthly fee for a slip at
17 which he may dock his yacht. The monthly fees payable by Smith under this agreement
18 are “rents.”
19

20 *Illustration 5.* First Bank holds an assignment of rents on Friendly Parking Garage.
21 Smith has a contract with Friendly Parking Garage pursuant to which he pays \$150 per
22 month for a reserved parking space. Sums payable by Smith for this parking space
23 constitute “rents.”
24

25 *Illustration 6.* First Bank holds an assignment of rents on Friendly Golf Course. Smith
26 pays greens fees to play at Friendly Golf Course. Sums payable on account of Smith’s
27 greens fees are not right “rents,” as Smith does not “occupy” the real property but is
28 merely using it in a temporary and essentially nonexclusive fashion.
29

30 In jurisdictions adopting this Act, there will remain certain developments for which the
31 definition of “rents” does not unambiguously resolve the classification dilemma. For example,
32 consider a stadium that stages athletic or entertainment events. On the one hand, one might
33 characterize as “rents” the right to collect admission fees from patrons, on the ground that while
34 patrons do not have a possessory interest, they may “occupy” a stadium seat in a more or less
35 exclusive fashion (as two persons cannot literally occupy the same seat simultaneously). On the
36 other hand, one might characterize the right to collect admission fees as “accounts” governed by
37 Uniform Commercial Code Article 9, on the ground that patrons have merely a temporary
38 interest that is more appropriately characterized as “use” rather than “occupancy.” In such cases,
39 a prudent lender may choose to follow the “belt and suspenders” approach — taking both an
40 assignment of rents (and recording it in the real property records) and an Article 9 security
41 interest in present and after-acquired accounts (and perfecting it by filing an Article 9 financing
42 statement) — in order to assure that it has a perfected security interest in the revenues generated
43 by the project.

1 Subsections (12)(B) through (E) define rents to include sums payable that leases or
2 occupancy agreements often characterize as “rents,” as well as the right to collect sums that
3 constitute an economic substitute for rents that might otherwise have accrued or been collected.
4 These include the sums payable under a policy of rental interruption insurance; claims arising out
5 of a default in the payment of rents (*e.g.*, liquidated damages); sums payable in order to terminate
6 a lease or occupancy agreement; and sums payable for the purpose of paying or reimbursing the
7 assignor’s payment of expenses incurred in owning, operating and maintaining the real property
8 (such as taxes or insurance) or in constructing or installing improvements.
9

10 In any particular state, a court or legislature might choose to define particular sums
11 payable as “rents” even though such sums would not be covered by subsection (12)(A) through
12 (E). Under subsection 12(F), such sums would constitute “rents” under this Act.
13

14 13. “Secured obligation.” The term “secured obligation” covers any obligation the
15 performance of which is secured by an assignment of rents.
16

17 14. “Security instrument.” This definition is similar to that used in Section 102(19) of
18 the Uniform Nonjudicial Foreclosure Act, and recognizes that the title given to a document by its
19 parties is not dispositive of whether the document is a security instrument. Instead, the key issue
20 is whether the document creates a security interest in real property. The definition thus covers a
21 mortgage, deed of trust, deed to secure debt, or any other document used by the parties to create a
22 security interest in real property.
23

24 15. “Security interest.” Under the Act, a security interest arises in any transaction,
25 regardless of its form, in which a person receives or retains an interest in property for the purpose
26 of securing an obligation owed to that person. Thus, the term “security interest” as used in this
27 Act would cover both a security interest in “rents” taken by an assignee as well as a security
28 interest in the proceeds of rents taken by a secured party under Article 9 of the Uniform
29 Commercial Code.
30

31 16. “Sign.” This definition is media-neutral and comparable to that contained in
32 Uniform Commercial Code § 2-103(1)(p).
33

34 17. “Submit for recording.” This definition is comparable to that contained in Section
35 102(21) of the Uniform Residential Mortgage Satisfaction Act. To “submit for recording” means
36 that the person has submitted a document that has complied with the appropriate legal
37 requirements for the document submitted, along with required fees and taxes, to the appropriate
38 recording official. Whether an assignment of rents that is submitted for recording is actually
39 recorded or otherwise binds third parties is determined by the state’s recording act.
40

41 18. “State.” This definition is the boilerplate definition of the term as used in uniform
42 acts.
43

1 19. “Tenant.” For purposes of this Act, a “tenant” is any person that holds a right to
2 possess or occupy the real property of another, or who actually possesses or occupies that real
3 property, and is thereby obligated to pay rents. The Act defines “rents” to include sums payable
4 by certain occupants of real property that do not have a possessory interest in the real property
5 and thus do not stand in a landlord-tenant relationship with the assignor. Although the Act treats
6 such a licensee as a “tenant” for the purposes of this Act, it does not render such a licensee a
7 tenant within the meaning of the state’s landlord-tenant law. Thus, for example, nothing in this
8 Act would grant a licensee the benefit of the state’s forcible entry and detainer statutes, the
9 benefit of an implied warranty of habitability, or any other right recognized under the state’s
10 general law of landlord and tenant.
11

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

13 (a) Except as otherwise provided in subsections (c) and (d), a person gives a
14 notification or a copy of a notification under this [act] by depositing it with the United States
15 Postal Service or with a commercially reasonable delivery service, properly addressed to the
16 intended recipient’s address as specified in subsection (b), with first-class postage or cost of
17 delivery provided for.

18 (b) The following rules determine the proper address for giving a notification
19 under subsection (a):

20 (1) A person giving a notification to an assignee shall use the address for
21 notices to the assignee provided in the document creating the assignment of rents, but if the
22 assignee has provided the person giving the notification with a more recent address for notices,
23 the person giving the notification shall use that address.

24 (2) A person giving a notification to an assignor shall use the address for
25 notices to the assignor provided in the document creating the assignment of rents, but if the
26 assignor has provided the person giving the notification with a more recent address for notices,
27 the person giving the notification shall use that address.

1 (3) If a tenant’s agreement with an assignor provides an address for
2 notices to the tenant and the person giving notification has received a copy of the agreement or
3 knows the address for notices specified in the agreement, the person giving the notification shall
4 use that address in giving a notification to the tenant. Otherwise, the person shall use the address
5 of the premises covered by the agreement.

6 (c) If a person giving a notification pursuant to this [act] and the recipient have
7 agreed to the method for giving a notification, any notification must be given by that method.

8 (d) If a notification is received by the recipient, it is effective even though it was
9 not given in accordance with subsection (a) or (c).

10 Preliminary Comments

11
12 1. *Methods of giving notification.* This section specifies the methods for giving any
13 notification required by this Act. Under subsection (a), notices required by the Act may be
14 transmitted by first-class United States mail or via a commercial reasonable delivery service.
15 Proper dispatch, not receipt, satisfies the obligation to give notification. The person asserting
16 that notification was given has the burden of proof that notification was given in accordance with
17 the provisions of this section.

18
19 Subsection (c) provides that if an agreement between the person giving a notification and
20 the recipient dictates a method of notification other than the methods permitted under subsection
21 (a), any notification must be given by the agreed-upon method. Subsection (c) would thus permit
22 the giving of a notification by electronic mail or other form of electronic communication, but
23 only where there recipient had agreed to receive notifications by that manner of delivery. Such
24 an agreement may arise either by express written provisions or by virtue of an established course
25 of conduct between the giver and recipient of the notification (such as the consistent delivery and
26 receipt of previous formal notices).

27
28 Under subsection (d), a notification actually given in a manner not authorized by
29 subsection (a) or (c), but received by the recipient, is nevertheless effective under this Act.

30
31 2. *Identifying the address for notification.* Typically, an assignment of rents contains a
32 provision specifying addresses for notices to the assignor and the assignee. Subsection (b)
33 provides that the respective addresses for notice contained in an assignment of rents will be the
34 default addresses for any notification to the assignor or assignee under this Act. If the intended

1 recipient has provided the person giving a notification with a more recent address, then the Act
2 requires the person giving the notification to use that address. For example, if an assignee gives
3 a notification to the assignor enforcing its interest in rents under Section 8 (which governs
4 enforcement by notification to the assignor), and that notification specifies a new address for
5 future notices to the assignee, the assignor would thereafter be obligated to use that new address
6 in giving any notification required by the Act.

7
8 Subsection (b)(3) provides that a tenant's address for notification will be the address of
9 the leased premises, unless the lease provides an alternative address for notification to the tenant
10 and the notifier either has a copy of the lease or knows of the alternative address.

11
12 3. *Obligations under the Act triggered by receipt.* While a person obligated to give a
13 notification under the Act satisfies the obligation to give that notification by dispatch in
14 accordance with subsection (a), several substantive provisions of the Act effectively require that
15 the intended recipient actually receive notification. For example, although an assignee may give
16 notification to a tenant by mail directing that tenant to pay rents to the assignee, the Act does not
17 legally obligate the tenant to pay rents to the assignee until the tenant receives the notification.
18 *See Section 9(b).*
19

20 **SECTION 4. SECURITY INSTRUMENT CREATES ASSIGNMENT OF RENTS;**
21 **ASSIGNMENT OF RENTS CREATES SECURITY INTEREST.**

22 (a) An enforceable security instrument creates an assignment of rents arising from
23 the real property described in the security instrument, unless the security instrument provides
24 otherwise.

25 (b) An assignment of rents creates a presently effective security interest in all
26 accrued and unaccrued rents arising from the real property described in the document creating the
27 assignment, whether the document is denominated an absolute assignment, an absolute
28 assignment conditioned upon default, an assignment as additional security, or otherwise. The
29 security interest in rents is separate and distinct from any security interest held by the assignee in
30 the real property.

31 **Preliminary Comments**

1 1. *Security instrument creates an assignment of rents.* Under subsection (a), a security
2 instrument that creates a security interest in real property automatically creates a security interest
3 in the rents arising from that real property, unless the security instrument expressly provides
4 otherwise. In this regard, the Act adopts a default rule comparable to the rule existing under
5 Uniform Commercial Code Article 9, under which a security agreement covering collateral
6 automatically covers the proceeds of that collateral (including rents from the collateral) unless
7 the agreement provides otherwise. U.C.C. §§ 9-203(f), 9-315(a)(2).
8

9 In nearly all commercial mortgage transactions covering income-producing real property,
10 the loan documentation will create an express assignment of rents. Thus, subsection (a) should
11 not impact in any meaningful way upon the negotiation and documentation of commercial
12 mortgage transactions. However, in residential mortgage transactions in “lien theory” states,
13 current mortgage documents often do not contain an assignment of rents. Current mortgages that
14 do not contain an assignment of rents are not covered by subsection (a). *See* Section 20(c).
15 Under subsection (a), a mortgage that is signed and delivered after this Act takes effect would, by
16 default, create an assignment of any rents arising from the mortgaged real property, unless the
17 mortgage document provided otherwise. This should not significantly affect the negotiation and
18 documentation of residential mortgage transactions, however, as rents will rarely arise in the
19 circumstances where the borrower occupies the mortgaged real property as its primary residence.
20 Further, the Act’s remedial mechanism for enforcing the assignee’s interest in rents by
21 notification (either to the assignor or to tenants) is not available to an assignee that holds a
22 security interest in rents solely by virtue of subsection (a). *See* Sections 8(d) and 9(g).
23

24 2. *Rents as a distinct source of collateral.* An assignment of rents permits the assignee to
25 collect rents that accrue between the date of the assignor’s default and the date that the assignee
26 can complete a mortgage foreclosure on the underlying real property. In many states, this
27 foreclosure process can be quite lengthy. In these states, a mortgagee faces a heightened risk that
28 the mortgagor may collect rents and expend the proceeds other than to reduce the mortgage debt
29 or to pay the expenses of operating and maintaining the real property (a process often referred to
30 as “milking” the rents) while a foreclosure proceeding is pending. By taking an assignment of
31 rents, the assignee demonstrates its intention to have a lien upon all future rents arising from the
32 real property, including those accruing prior to the completion of a foreclosure sale — a period
33 that may be extended if the assignor files a bankruptcy petition that stays the foreclosure.
34

35 Traditionally, state law has governed the creation and enforcement of security interests in
36 rents. Most frequently, however, disagreements regarding security interests in rents arise in the
37 federal bankruptcy courts. On its face, the Bankruptcy Code appears to recognize that state law
38 has traditionally treated “rents” that accrue between default and foreclosure as a source of
39 collateral that is separate and distinct from the real property that generated those rents. The
40 Bankruptcy Code characterizes rents from mortgaged real property as “cash collateral,” 11
41 U.S.C. § 363(a), and preserves a secured creditor’s pre-bankruptcy lien on rents that the debtor
42 receives after it files a bankruptcy petition, *id.* § 552(b). These provisions appear to acknowledge
43 that a pre-bankruptcy assignment of rents creates a separate security interest in the rents (*i.e.*,

1 separate from the underlying mortgage lien against the real property itself).
2

3 Most bankruptcy court decisions have treated post-petition rents as a separate and distinct
4 source of collateral, but a few bankruptcy court decisions have instead concluded that post-
5 petition rents do not constitute separate collateral because the post-petition rent stream is in fact
6 “subsumed” within the valuation of the real property itself. *See, e.g., In re Wrecclesham Grange,*
7 *Inc.*, 221 B.R. 978 (Bankr. M.D. Fla. 1997); *In re Embassy Properties N. Ltd. Partnership*, 196
8 B.R. 172 (Bankr. D. Kan. 1996); *In re Citicorp Park Assocs.*, 180 B.R. 15 (Bankr. D. Me. 1995);
9 *In re Barkley 3A Investors, Ltd.*, 175 B.R. 755 (Bankr. D. Kan. 1994); *In re Mullen*, 172 B.R.
10 473 (Bankr. D. Mass. 1994). These courts have thus concluded that a debtor can use post-
11 petition rents without regard to a pre-bankruptcy assignment of rents as long as the mortgage
12 lender’s interest in the mortgaged real property is adequately protected (*i.e.*, as long as the real
13 property itself is not declining in value), even if the real property was worth less than the
14 mortgage debt.
15

16 The Act rejects the view of state law expressed in these cases that rents accruing prior to
17 foreclosure are subsumed within the land. The Act instead confirms that all rents accruing prior
18 to the completion of a foreclosure constitute a source of collateral that is separate and distinct
19 from the real property from which those rents accrued.
20

21 3. *The “Absolute Assignment of Rents.”* As many American states adopted the lien
22 theory of mortgages, some mortgagees began requiring the mortgagor to make an “absolute”
23 assignment of rents. Under a so-called “absolute” assignment of rents, the assignor purported to
24 transfer “title” to unaccrued rents to the assignee, ostensibly placing the assignee in the same
25 legal position as it would have occupied under the title theory of mortgages. Frequently, a so-
26 called “absolute” assignment will specify that it is “not merely for purposes of security” and that
27 the assignor has no title to or interest in unaccrued rents, other than a revocable license (*i.e.*, not a
28 “property” right) to collect such rents prior to default.
29

30 Mortgagees have argued that the so-called “absolute” assignment of rents strengthens
31 their position regarding rents in the bankruptcy context. When a debtor files for bankruptcy, all
32 of the debtor’s property becomes property of the bankruptcy estate. 11 U.S.C. § 541(a). The
33 debtor generally may use property of the estate in the course of its bankruptcy proceeding, subject
34 to the obligation to provide adequate protection to a secured creditor holding a lien upon that
35 property. 11 U.S.C. § 363(b). Moreover, a secured party holding a security interest in property
36 of the estate is subject to the automatic stay and cannot enforce its lien or otherwise collect the
37 debt outside of the bankruptcy proceeding. *Id.* § 362(a). As a result, a debtor that owns income-
38 producing real property gains significant leverage if the post-petition rents constitute property of
39 the estate. By contrast, the mortgagee/assignee would prefer that the law characterize the post-
40 petition rents as property that is *not* part of the estate, as then the automatic stay would place no
41 limit upon the mortgagee’s ability to collect those rents and apply them to the debt.
42

43 If a mortgagee had already completed a foreclosure sale before bankruptcy, the real

1 property belongs to the foreclosure purchaser and thus unaccrued rents would not constitute
2 property of the bankruptcy estate. But if no foreclosure has yet occurred — and thus equitable
3 ownership of the real property remains in the debtor — unaccrued post-petition rents would
4 seem to fit squarely within the broad concept “property of the estate” defined in § 541(a).
5 Nevertheless, in an attempt to boost their leverage in bankruptcy, mortgage lenders have argued
6 that under a so-called “absolute” assignment of rents, “title” to the post-petition rents is in the
7 lender and such rents therefore do not constitute property of the estate. A number of courts have
8 accepted this argument. *See, e.g.*, *First Fidelity Bank v. Jason Realty, L.P.* (*In re Jason Realty,*
9 *L.P.*), 59 F.3d 423 (3d Cir.1995); *In re Kingsport Ventures, L.P.*, 251 B.R. 841 (Bankr. E.D.
10 Tenn. 2000); *In re Robin Associates*, 275 B.R. 218 (Bankr. W.D. Pa. 2001); *In re Carretta*, 220
11 B.R. 203 (D.N.J. 1998); *see also* *NCNB Texas Nat’l Bank v. Sterling Projects, Inc.*, 789 S.W.2d
12 358 (Tex. App. 1990) (“The absolute assignment does not create a security interest but instead
13 passes title to the rents. An absolute assignment of rents is not security but is a pro tanto
14 payment of the obligation.”).

15
16 The Restatement (Third) of Property — Mortgages and most commentators have rejected
17 this view. In the typical transaction, the assignor executes an assignment of rents and leases
18 contemporaneously with its execution of the mortgage. The assignee does not immediately begin
19 collecting rents from tenants as soon as it takes the assignment, and typically has no intention to
20 do so at any time before the assignor’s default — indeed, the typical assignment expressly
21 acknowledges the assignor’s right to collect and expend the rents before default. Under such an
22 “assignment,” the circumstances demonstrate that the parties intend the rents to secure the
23 repayment of the mortgage debt. In other words, the “absolute” assignment is merely a security
24 device, regardless of its “absolute” characterization. Mortgage law has long established that
25 instruments purporting absolutely to convey an interest in real property nevertheless constitute
26 equitable mortgages when the circumstances demonstrate that the parties are using title to real
27 property to secure a debt. *See, e.g.*, Restatement of Property (Third) — Mortgages § 3.2
28 (absolute deed intended to secure an obligation constitutes a mortgage); *accord* *Smith v. Player*,
29 601 So.2d 946 (Ala. 1992); *Steckelberg v. Randolph*, 404 N.W.2d 144 (Iowa 1987). Under this
30 same principle, courts should treat a typical “absolute” assignment of rents as an assignment for
31 security purposes, and the weight of modern judicial authority so provides. *See, e.g.*, *In re*
32 *Cavros*, 262 B.R. 206 (Bankr. D. Conn. 2001); *In re 5877 Poplar, L.P.*, 268 B.R. 140 (Bankr.
33 W.D. Tenn. 2001); *National Operating, L.P. v. Mutual Life Ins. Co. of New York*, 630 N.W.2d
34 116 (Wis. 2001); *In re Guardian Realty Group, L.L.C.*, 205 B.R. 1 (Bankr. D.D.C. 1997); *In re*
35 *RV Centennial Partnership*, 202 B.R. 774 (Bankr. D. Colo. 1996); *In re Lyons*, 193 B.R. 637,
36 644 (Bankr. D. Mass. 1996). Under this view, where the underlying real property is property of
37 the estate, post-petition rents would likewise constitute property of the estate. The assignee of
38 those rents, however, would continue to have a security interest in those rents by virtue of
39 Bankruptcy Code § 552(b), and the debtor/assignor would be obligated to provide adequate
40 protection of the assignee’s interest in those rents under Bankruptcy Code § 363.

41
42 The Act adopts the view that any assignment of rents creates a security interest in rents,
43 regardless of whether the document creating that assignment is in form denominated an

1 “absolute” assignment. The term “assignment of rents” includes only an assignment of rents
2 made in conjunction with a secured loan, and any such assignment creates a security interest
3 governed by the Act. By contrast, nothing in the Act precludes an owner of real property from
4 making a truly absolute transfer of rents in a transaction that is not a security transaction, such as
5 a “true sale” of rents (in which the owner of the real property transfers full legal, equitable
6 ownership and control of unaccrued rents immediately upon execution and delivery). Such a
7 transfer, however, is not an “assignment of rents” as defined in the Act (unless applicable state
8 law dictates otherwise), and thus the provisions of the Act governing the enforcement of an
9 assignment of rents would not apply to such a transfer.

10
11 4. *Conveyancing formalities.* The Act is not intended to effect any change in the
12 underlying law of states adopting the Act with respect to the formalities necessary to effect a
13 conveyance of an interest in real property. If a document entitled “Assignment of Rents” is not
14 executed in accordance with the formal requirements for an effective conveyance of an interest in
15 real property, it does not effect a “transfer” of an interest in rents and thus the document would
16 not constitute an “assignment of rents” as defined in Section 2(2). The Act does not specify
17 precisely what formalities are necessary for a document to constitute an effective assignment of
18 rents, but leaves this question to other state law. For example, if an assignor has signed and
19 delivered a document entitled “Assignment of Rents,” but the assignee has not yet extended
20 credit to the assignor and state law provides that no transfer of rents occurs until such credit is
21 actually extended, the document would not effect an “assignment of rents” until the credit is
22 actually extended.

23
24 The Act uses the term “assignment of rents” to mean the transfer of an interest in rents,
25 rather than the document by which the transfer is made. This definition serves an important
26 purpose in promoting document simplification and transactional efficiency. In many commercial
27 transactions, it has become customary for the lender to require the borrower to execute multiple
28 documents, including both a “mortgage” or “deed of trust” covering the real property and an
29 “assignment of rents and leases” which assigns to the lender all leases covering the mortgaged
30 real property and all rents accruing under those leases. By contrast, in some transactions, lenders
31 have simply incorporated into the mortgage language sufficient to assign to the lender all leases
32 covering the mortgaged real property and rents accruing under such leases, without a separate
33 assignment document. Under this Act, either approach is sufficient to create an assignment of
34 rents. As a result, there is no need to use a separate document to create an assignment of rents.
35 Mortgage lenders may achieve efficiencies in transactional drafting and negotiation merely by
36 incorporating into the mortgage document language that creates an assignment of rents.
37

38 **SECTION 5. RECORDATION; PERFECTION OF SECURITY INTEREST IN**
39 **RENTS; PRIORITY OF CONFLICTING INTERESTS IN RENTS.**

40 (a) A document creating an assignment of rents may be submitted for recording in

1 the [appropriate governmental office under the recording act of this state] in the same manner as
2 any other document evidencing a conveyance of an interest in real property.

3 (b) Upon recording, the security interest in rents created by an assignment of rents
4 is fully perfected, notwithstanding any provision of the document creating the assignment or law
5 of this state other than this [act] which would preclude or defer enforcement of the security
6 interest until the occurrence of a subsequent event, including a subsequent default of the
7 assignor, the assignee's obtaining possession of the real property, or the appointment of a
8 receiver.

9 (c) Except as otherwise provided in subsection (d), a perfected security interest in
10 rents takes priority over the rights of a person that, after the security interest is perfected:

11 (1) acquires a judgment lien against the rents or the real property from
12 which they arise; or

13 (2) purchases an interest in the rents or the real property from which they
14 arise.

15 (d) A perfected security interest in rents has priority over the rights of a person
16 listed in subsection (c) with respect to future advances to the same extent as the assignee's
17 security interest in the real property has priority over the rights of that person with respect to
18 future advances.

19 **Preliminary Comment**

20 1. *Recording.* An assignee may submit a document creating an assignment of rents for
21 recording in accordance with the requirements of the state's recording act. The document is
22 "submitted for recording" when it is presented to the appropriate recording official. Whether the
23 recording official must actually record the document depends upon the assignee's compliance
24 with the substantive and procedural requirements of the recording act. Likewise, the state's

1 recording act governs whether the document is actually “recorded” or binds third parties under
2 state law. For example, in some states a misindexed instrument is considered to be unrecorded,
3 while in other states a misindexed instrument is considered to be properly recorded.
4

5 2. *Perfection.* Under Bankruptcy Code § 544(a) and its “strong-arm” clause, a debtor-in-
6 possession can invalidate (or, in bankruptcy parlance, “avoid”) any security interest that a
7 judgment lien creditor or bona fide purchaser could have avoided under state law as of the
8 petition date. In the 1980s and early 1990s, bankruptcy courts struggled with the proper impact
9 of § 544(a) upon a mortgagee’s security interest in post-petition rents under an assignment of
10 rents. This struggle derives in part from the confusion generated by the differing terminologies
11 of mortgage law and Article 9 of the Uniform Commercial Code. Under Article 9, a secured
12 party obtains a security interest in collateral by having the debtor execute a security agreement
13 describing that collateral, and “perfects” that security interest by filing an Article 9 financing
14 statement describing the collateral. By “perfecting” its security interest, the Article 9 secured
15 party makes that interest enforceable against subsequent creditors, including judicial lien
16 creditors. U.C.C. § 9-317(a). Because Bankruptcy Code § 544(a) gives the bankruptcy
17 trustee/debtor-in-possession the status of a hypothetical judicial lien creditor under state law, the
18 trustee/debtor-in-possession takes property of the estate subject to any security interest that was
19 properly perfected under Article 9 before the filing of the bankruptcy petition. If the secured
20 party has a properly perfected security interest before the petition date, it is irrelevant whether the
21 secured party had taken any steps to enforce that security interest prior to bankruptcy — the
22 perfected security interest continues to remain effective against the collateral and the
23 trustee/debtor-in-possession cannot avoid that security interest using its § 544(a) avoidance
24 power.
25

26 By contrast, mortgage law did not customarily use the term “perfection.” Under
27 mortgage law, recording of a mortgage interest served to make that interest valid as against
28 subsequent creditors and bona fide purchasers of the real property. Analytically, of course,
29 “recording” in this sense is similar to the Article 9 concept of perfection. By analogy, one could
30 argue that if a mortgage lender had taken and properly recorded an assignment of rents before
31 bankruptcy, that mortgage lender should have a security interest in rents that was “perfected” and
32 thus enforceable against third parties. Under this analysis, the trustee/debtor-in-possession could
33 not avoid the mortgage lender’s security interest in rents under § 544(a), and thus the mortgage
34 lender would retain its security interest in post-petition rents under § 552(b). A number of courts
35 in fact adopted this analytical approach, treating post-petition rents as the lender’s cash collateral
36 so long as the mortgagee had properly recorded its assignment of rents before bankruptcy. *See,*
37 *e.g., In re Millette*, 186 F.3d 638 (5th Cir. 1999); *Steinberg v. CrossLand Mortgage Corp. (In re*
38 *Park at Dash Point L.P.)*, 985 F.2d 1008, 1011 (9th Cir. 1993); *Vienna Park Properties v. United*
39 *Postal Sav. Ass’n (In re Vienna Park Properties)*, 976 F.2d 106, 112-15 (2d Cir 1992).
40

41 Unfortunately for lenders, some bankruptcy courts held that § 544(a) permitted the
42 trustee/debtor-in-possession to invalidate a security interest in post-petition rents if the lender had
43 not taken sufficient steps to *enforce* that interest (*e.g.*, actually collect the rents) prior to

1 bankruptcy. To understand how these decisions confused “perfection” or “enforceability” with
2 “enforcement,” it is helpful to review the distinction between the lien and title theories of
3 mortgage law. Under the title theory, the mortgagee holds “title” to the real property (and thus
4 title to unaccrued rents) by virtue of the mortgage, even before default. By contrast, under the
5 lien theory, a mortgagee holds only a security interest in the real property rather than “title” —
6 and thus a mortgage by itself traditionally gives the mortgagee no interest in unaccrued rents until
7 such time as the mortgagee completes a foreclosure, becomes a mortgagee in possession, or
8 obtains the appointment of a receiver for the real property.
9

10 If a mortgagee claims a security interest in rents by virtue of a separate assignment of
11 rents, however, any legal constraints on the mortgagee’s right to collect rents *by virtue of the*
12 *mortgage itself* should be irrelevant. Nevertheless, a number of older state court decisions
13 conflated these two situations, holding that even a separate assignment of rents was not effective
14 until the mortgagee took affirmative steps after default to enforce that assignment, such as by
15 obtaining the appointment of a receiver, becoming a mortgagee in possession, or impounding the
16 rents. *See, e.g.,* Taylor v. Brennan, 621 S.W.2d 592, 593-94 (Tex. 1981); Bevens v. Peoples
17 Bank & Trust Co., 671 P.2d 875, 879 (Alaska 1983), Martinez v. Continental Enters., 730 P.2d
18 308, 316 (Colo. 1986); Sullivan v. Rosson, 119 N.E. 405 (N.Y. 1918). Based upon these
19 decisions, numerous bankruptcy courts concluded that an assignment of leases and rents created
20 only an “inchoate” lien upon rents that was ineffective against third parties if the mortgagee had
21 not taken affirmative steps before bankruptcy to activate that lien. These courts concluded that if
22 a mortgagee had not taken action to divest the mortgagor of control over the property and its
23 rents before bankruptcy — such as by obtaining the appointment of a receiver, taking possession
24 of the real property, or notifying tenants to pay rents directly to the mortgagee — the mortgagee’s
25 security interest in post-petition rents was “unperfected” and subject to avoidance under § 544(a).
26 *See, e.g.,* *In re* Century Inv. Fund VIII L.P., 937 F.2d 371, 377 (7th Cir. 1991); *In re* 1301 Conn.
27 Ave. Assocs., 126 B.R. 1, 3 (D.D.C. 1991); First Federal Sav. & Loan Ass’n v. Hunter (*In re*
28 Sam A. Tisci, Inc.), 133 B.R. 857, 859 (N.D. Ohio 1991); Condor One, Inc. v. Turtle Creek, Ltd.
29 (*In re* Turtle Creek, Ltd.), 194 B.R. 267, 278 (Bankr. N.D. Ala. 1996); *In re* Mews Assocs., L.P.,
30 144 B.R. 867, 868-69 (Bankr. W.D. Mo. 1992). Under this view, the debtor-in-possession could
31 use post-petition rents free and clear of any claim by the mortgagee while the debtor remained in
32 bankruptcy.
33

34 These diverse interpretations of state mortgage law produced substantial nonuniformity in
35 the treatment of security interests in rents, both from state to state and even from district to
36 district within a particular state. This nonuniformity produced significant criticism among
37 academics, real property practitioners, and commercial mortgage lenders. *See, e.g.,* R. Wilson
38 Freyermuth, *The Circus Continues — Security Interests in Rents, Congress, the Bankruptcy*
39 *Courts, and the “Rents Are Subsumed in the Land” Hypothesis*, 6 J. Bankr. L. & Prac. 115, 118
40 (1997); Julia Patterson Forrester, *A Uniform and More Rational Approach to Rents as Security*
41 *for the Mortgage Loan*, 46 Rutgers L. Rev. 349 (1993); Patrick A. Randolph, Jr., *Recognizing*
42 *Lenders’ Rents Interests in Bankruptcy*, 27 Real Prop., Prob. & Trust J. 281 (1992).
43

1 In response to this criticism, Congress amended Bankruptcy Code § 552(b) in 1994 in an
2 apparent attempt to provide more uniform treatment of assignments of rents. Before 1994, §
3 552(b) provided that a pre-petition security interest in real property and rents from that real
4 property extended to post-petition rents “to the extent provided by [the] security agreement and
5 by applicable nonbankruptcy law.” By focusing upon the term “applicable nonbankruptcy law,”
6 many courts (as noted above) concluded that § 552(b) did not permit the mortgagee to claim a
7 security interest in post-petition rents where the mortgagee had failed to take the necessary steps
8 to obtain actual or constructive possession of the real property and its rents before bankruptcy. In
9 1994, however, Congress amended § 552(b) to remove this reference to “applicable
10 nonbankruptcy law.” Some commentators concluded that the amended § 552(b) established a
11 federal standard for the enforcement of an assignment of rents, thus rendering state rent
12 assignment law irrelevant. *See, e.g.*, 5 Collier on Bankruptcy ¶ 552.03[1], at 552-17 (“[Section
13 552(b)(2)] does not refer to applicable nonbankruptcy law and is intended to provide a creditor
14 with a valid post-petition interest in rents notwithstanding the creditor’s failure to perfect its
15 security interest in rents under applicable state law ...”). But while legislative history suggests
16 that Congress intended to preempt contrary state laws limiting the post-petition effectiveness of
17 an assignment of rents, the text itself provides no express statement of pre-emptive intent.
18 Further, § 552(b)’s protection for a security interest in post-petition rents is expressly subject to §
19 544’s strong-arm clause — *which implicitly incorporates underlying state law regarding the*
20 *enforceability of a security interest versus third parties*. Under § 544(a), there is no question that
21 the debtor-in-possession may avoid a security interest in rents if a bona fide purchaser of the real
22 property could have avoided that interest under state law as of the petition date. Thus, if state
23 law *actually provides* that a security interest in rents is ineffective against third parties until the
24 mortgagee has taken affirmative action to enforce that security interest, § 544(a) would appear to
25 permit the debtor to avoid the security interest of such a mortgagee in rents — notwithstanding
26 the amendment to § 552(b) — if the mortgagee failed to take such action before bankruptcy.

27
28 Roughly one-third of the states have enacted statutes making clear that an assignment of
29 rents is “perfected,” without regard to whether the mortgagee has taken any steps to “activate” or
30 “enforce” that assignment. Cal. Civ. Code §§ 2938, 2938.1; Del. Code tit. 25, § 2121; Fla. Stat.
31 Ann. § 697.07; 765 Ill. St. § 5/31.5; Ind. Code Ann. § 32-21-4-2; Kan. Stat. Ann. § 58-2343; La.
32 Rev. Stat. Ann. § 9:4401; Md. Real Prop. Code Ann. § 3-204; Neb. Rev. Stat. § 52-1704; N.C.
33 Gen. Stat. § 47-20(c); Or. Rev. Stat. § 93.806; S.C. Code § 29-3-100; Tenn. Code Ann. § 66-26-
34 116; Va. Code Ann. § 55-220.1; Wash. Rev. Code Ann. § 7-28-230(3); Wis. Stat. Ann. § 708.11.
35 The Act adopts this approach, and provides that a perfected security interest in rents cannot be
36 avoided by a person that thereafter becomes a judgment lien creditor or a purchaser of the rents
37 or the real property from which they arise.

38
39 3. *Priority versus purchasers and lien creditors.* Under subsection (c), a perfected
40 security interest in rents takes priority over the rights of a judgment lien creditor that
41 contemporaneously or thereafter acquires a lien against the rents or the real property from which
42 they arise. Likewise, a perfected security interest in rents takes priority over the rights of a
43 person that contemporaneously or thereafter purchases an interest in the rents or the real property

1 from which they arise. “Purchaser” includes both buyers and other secured creditors (such as a
2 subsequent assignee of rents).

3
4 Under subsection (d), a perfected security interest in rents has priority over a purchaser or
5 lien creditor with respect to future advances to the same extent as the assignee’s security interest
6 in the real property has priority over the rights of that purchaser or lien creditor with respect to
7 future advances. In this regard, the Act is neutral with regard to existing state law regarding
8 priority with respect to future advances.
9

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

11 (a) An assignee may enforce an assignment of rents using one or more of the
12 methods specified in Sections 7, 8, and 9 or any other method sufficient to enforce the
13 assignment under law of this state other than this [act].

14 (b) From the date of enforcement, the assignee or, in the case of enforcement by
15 appointment of a receiver under Section 7, the receiver, is entitled to collect all rents that:

- 16 (1) have accrued but remain unpaid on that date; and
17 (2) accrue on or after that date, as those rents accrue.

18 **Preliminary Comments**

19 1. *Nonexclusive method of enforcement.* Section 6 provides that the assignee may enforce
20 an assignment of rents in accordance with its terms. The Act specifies several methods of
21 enforcement of an assignment of rents in Sections 7 (appointment of a receiver), 8 (notification
22 to the assignor), and 9 (notification to tenants). If the assignee enforces an assignment of rents
23 under Section 7 or 8, the enforcement is effective with respect to all accrued but unpaid rents and
24 all rents accruing thereafter. By contrast, if the assignee enforces an assignment of rents by
25 notifying tenants under Section 9, that enforcement is effective only with respect to tenants
26 actually notified.
27

28 The Act also permits enforcement of an assignment of rents by any other method
29 recognized under other law of this state. Thus, for example, this Act would not prevent an
30 assignee holding a mortgage on the real property from taking possession of the real property and
31 thus becoming a “mortgagee in possession.” Generally speaking, mortgage lenders are loathe to
32 assume the status of a mortgagee in possession for a variety of reasons, including potential tort
33 liability to third parties, the obligation to account for rentals collected, and the assumption of a

1 duty to maintain the physical condition of the premises. *See, e.g.*, 1 GRANT S. NELSON & DALE
2 A. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.24 - 4.29, at 213-230 (3d ed. 1993). Still, in rare
3 cases a mortgagee may voluntarily choose to become a mortgagee in possession, and the Act is
4 not intended (either explicitly or implicitly) to eliminate the mortgagee-in-possession doctrine.
5 Thus, to the extent that becoming a mortgagee in possession under the law of this state would be
6 sufficient to enforce a security interest in rents, this Act would permit an assignee to enforce its
7 interest in this manner.

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

15
16 *2. Rents collectable under this Act.* Upon enforcement, an assignee may collect (1)
17 accrued but unpaid rents, and (2) unaccrued rents as they accrue in the future.

18
19 Section 6 does not authorize the assignee to collect the proceeds of rents that the assignor
20 had already collected before enforcement. However, this Act does not prevent the assignee from
21 using another legal mechanism to obtain and enforce a security interest in the proceeds of rents
22 that the assignor has already collected before enforcement. For example, the express terms of an
23 assignment of rents could (1) require the assignor to deposit the cash proceeds of rents into a
24 particular deposit account, and (2) grant the assignee a security interest in that deposit account
25 under Article 9 of the Uniform Commercial Code. If the assignment of rents so provided, the
26 assignee could exercise its available remedies under Article 9 to collect any sums within that
27 deposit account, including the proceeds of rents collected by the assignor before the assignee's
28 enforcement of its assignment of rents.

29
30 *3. Date of enforcement.* The Act specifies a "date of enforcement" of a security interest
31 in rents. This date is important for two reasons. First, under Section 6, the assignee may collect
32 rents beginning on the date of enforcement. Second, under Section 14, an assignor that collects
33 rents after the date of enforcement is obligated to turn those rents over to the assignee and faces
34 liability if it fails to do so.

35
36 The date of enforcement will depend upon the method of enforcement used by the
37 assignee. If the assignee enforces the assignment by appointment of a receiver, the date of
38 enforcement will be the date that the court appoints the receiver. Section 7(c). If the assignee
39 enforces the assignment by notification to the assignor, the date of enforcement will be the date
40 that the assignor receives the notification. Section 8(b). If the assignee enforces the assignment
41 by notification to a tenant, the date of enforcement with respect to rents payable by that tenant is
42 the date that the tenant receives the notification. Section 9(b).

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

2 (a) An assignee is entitled to the appointment of a receiver for the real property
3 subject to the assignment of rents if:

4 (1) the assignor is in default as defined in the document creating the
5 assignment and:

6 (A) the assignor has agreed in a signed document to the
7 appointment of a receiver after default;

8 (B) it appears likely that the real property may not be sufficient to
9 satisfy the secured obligation;

10 (C) the assignor has failed to turn over to the assignee proceeds
11 that the assignee was entitled to collect; or

12 (D) a subordinate assignee of rents obtains the appointment of a
13 receiver for the real property; or

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

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

18 (1) to foreclose a security interest in the real property subject to the
19 assignment of rents;

20 (2) for specific performance of the assignment;

21 (3) seeking a remedy on account of waste or threatened waste of the real
22 property subject to the assignment; or

1 (4) otherwise to enforce the secured obligation or the assignee’s remedies
2 arising from the assignment.

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

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

8 (e) The following rules govern priority among receivers:

9 (1) If more than one assignee qualifies under this section for the
10 appointment of a receiver, a receivership requested by an assignee entitled to priority in rents
11 under this [act] has priority over a receivership requested by a subordinate assignee, even if a
12 court has previously appointed a receiver for the subordinate assignee.

13 (2) If a subordinate assignee obtains the appointment of a receiver, the
14 receiver may collect the rents and apply the proceeds in the manner specified in the order
15 appointing the receiver until a receiver is appointed under a senior assignment of rents.

16 Preliminary Comments

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

24
25 The Act addresses this concern by authorizing the assignee to file an action for specific
26 performance of the assignment of rents. The pendency of this action would provide a sufficient
27 jurisdictional predicate for the appointment of a receiver, even if the assignee chose to proceed

1 with its foreclosure by power of sale.
2

3 2. *Traditional standards for appointment of a receiver.* Traditionally, courts have
4 appointed a receiver for mortgaged real property if the value of the real property was insufficient
5 to satisfy the mortgage debt (*i.e.*, where the mortgagee’s security was inadequate) or whether the
6 owner of the mortgaged real property was committing waste (thereby threatening the value of the
7 mortgagee’s security). *See, e.g.*, Restatement (Third) of Property — Mortgages §§ 4.3(a)(2),
8 4.3(a)(3); 1 G. Nelson & D. Whitman, Real Estate Finance Law § 4.34 (3d ed. 1993). Consistent
9 with this traditional approach, Section 7(a)(1)(B) authorizes the appointment of a receiver if the
10 real property appears insufficient to satisfy the secured obligation. Likewise, Section 7(a)(2)
11 authorizes the appointment of a receiver where “other circumstances” justify the appointment of
12 a receiver under the law of this state other than this Act. Such “other circumstances” could
13 include waste as defined under state law other than this Act. Thus, for example, if the law of this
14 state other than this Act treats nonpayment of real property taxes as actionable waste and allows
15 appointment of a receiver in the event of waste, the assignor’s nonpayment of taxes would
16 provide a justification for the appointment of a receiver.
17

18 A few court decisions have required a mortgagee seeking appointment of a receiver to
19 show that the mortgagor was insolvent. *See, e.g.*, Mutual Benefit Life Ins. Co. v. Frantz Klodt &
20 Son, Inc., 237 N.W.2d 350 (Minn. 1975); Chase Manhattan Bank v. Turabo Shopping Center,
21 Inc., 683 F.2d 25 (1st Cir. 1982). The Restatement (Third) of Property — Mortgages and most
22 commentators have rejected this view. The Act does not require the assignee to demonstrate the
23 assignor’s insolvency as a predicate to obtaining the appointment of a receiver, but Section
24 7(a)(2) would permit an assignee to use the assignor’s insolvency as grounds for appointment of
25 a receiver where other state law has recognized the assignor’s insolvency as sufficient grounds
26 for a receivership.
27

28 3. *Receivership clauses.* The modern commercial mortgage typically contains a provision
29 in which the mortgagor consents to the appointment of a receiver for the real property following
30 default. Often, receivership clauses provide that the mortgagor consents to the appointment of a
31 receiver following default as a matter of contract, without regard to whether the mortgagor is
32 insolvent or whether the physical condition of the real property would otherwise justify the
33 appointment of a receiver.
34

35 Because the appointment of a receiver has traditionally originated from within the court’s
36 equitable discretion, some courts have refused to appoint a receiver — despite the presence of a
37 receivership clause — in cases where they would have denied appointment of a receiver
38 otherwise. *See, e.g.*, Dart v. Western Sav. & Loan Ass’n, 438 P.2d 407 (Ariz. 1968); Chromy v.
39 Midwest Fed. Sav. & Loan Ass’n, 546 So.2d 1172 (Fla. App. 1989); Sazant v. Foremost
40 Investments, N.V., 507 So.2d 653 (Fla. App. 1987) (receivership clause not binding on court
41 where mortgagor had not committed waste and default did not place mortgagee at serious risk of
42 noncollection); Gage v. First Federal Sav. & Loan Ass’n, 717 F. Supp. 745 (D. Kan. 1989);
43 Barclays Bank, P.L.C. v. Davidson Ave. Assocs., Ltd., 644 A.2d 685 (N.J. Super. 1994)

1 (receivership clause “usurps the judicial function” and thus violates public policy). In other
2 states, courts have treated receivership clauses as presumptively but not conclusively enforceable.
3 For example, in *Barclays Bank v. Superior Court*, 137 Cal. Rptr. 743 (Cal. App. 1977), the court
4 held that a receivership clause presented a prima facie (but rebuttable) evidentiary showing of the
5 mortgagee’s entitlement to the appointment of a receiver. *See also, e.g., Riverside Properties v.*
6 *Teachers Ins. & Annuity Ass’n*, 590 S.W.2d 736 (Tex. App. 1979); *Okura & Co. v. Careau*
7 *Group*, 783 F. Supp. 482 (C.D. Cal. 1991); *Wellman Sav. Bank v. Roth*, 432 N.W.2d 697 (Iowa
8 App. 1988).

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

28
29 By expressing the circumstances justifying the appointment of a receiver in the
30 disjunctive, Section 7(a)(1) adopts the view that a receivership clause is enforceable by the
31 assignee without regard to the condition of the real property, the solvency of the assignor, or the
32 adequacy of the security for the secured obligations.

33
34 4. *Priority between conflicting receivers.* Subsection (e), which is modeled upon § 4.5 of
35 the Restatement (Third) of Property — Mortgages, provides a priority rule in the event where
36 multiple rents assignees obtain the appointment of a receiver. As a threshold matter, conflicting
37 security interests in rents are resolved based upon the priorities established by the state’s
38 recording act, and thus an assignee holding a recorded assignment of rents would be entitled to
39 priority over the interest of a later assignee of the same rents. Section 5(c). Consistent with this
40 approach, if the senior assignee is entitled to the appointment of a receiver under Section 7, the
41 court’s appointment of that receiver will take priority over and displace a prior receivership
42 obtained by a subordinate assignee. Any proceeds actually collected by the receiver for the
43 subordinate assignee, however, need not be turned over to the receiver for the senior assignee;

1 instead, the receiver for the subordinate assignee must apply those sums in the manner specified
2 in its order of appointment.

3
4 5. *Ex parte appointment of a receiver.* Many assignments of rents contain a clause
5 entitling the assignee to the appointment of a receiver on an *ex parte* basis, without notice to the
6 assignor. The Act does not establish that the assignee is entitled to a receivership on an *ex parte*
7 basis, and instead leaves to other state law the question of whether (and in what circumstances)
8 prior notice to the assignor is excused.

9
10 6. *Receiver's power to terminate or disaffirm existing leases.* In many states, statutory or
11 case law regarding receiverships has generally established (or limited) the receiver's power to
12 terminate leases in default or to disaffirm leases not in default. Likewise, the court order
13 appointing a receiver will often specify the extent to which a receiver can take these steps with or
14 without the approval of the court and/or the assignee. As a result, subsection (d) addresses the
15 receiver's power to terminate and/or disaffirm leases by leaving this question to the terms of the
16 court order appointing the receiver and other state law.

17
18 **SECTION 8. ENFORCEMENT BY NOTIFICATION TO ASSIGNOR.**

19 (a) Upon the assignor's default as defined in the document creating an assignment
20 of rents, or as otherwise agreed by the assignor, the assignee may give the assignor a notification
21 demanding that the assignor pay over the proceeds of any rents that the assignee is entitled to
22 collect under Section 6. The assignee shall also give a copy of the notification to any other
23 person that, 10 days before the notification date, held a recorded assignment of rents arising from
24 the real property.

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

27 (c) An assignee's failure to give a notification under subsection (a) to any person
28 holding a recorded assignment of rents does not affect the effectiveness of the notification as to
29 the assignor, but the other person is entitled to any relief permitted under law of this state other
30 than this [act].

1 (d) An assignee that holds a security interest in rents solely by virtue of Section
2 4(a) may not enforce the security interest under subsection (a) as long as the assignor occupies
3 the real property as the assignor’s primary residence.

4 **Preliminary Comments**

5 1. *Enforcement by notification to assignor.* An assignment of rents typically requires the
6 assignor to pay rents to the assignee following default, either immediately or upon demand by the
7 assignee. The Restatement (Third) of Property — Mortgages adopted the view that notification
8 to the assignor following default is sufficient to enforce a perfected security interest in rents and
9 to give the assignee the legal right to possession of the rents. *See* Restatement (Third) of
10 Property — Mortgages § 4.2(c). This position effectively places an obligation on the assignor to
11 pay over to the assignee any rents thereafter collected by the assignor; the assignor’s collection
12 and retention of rents following such notification would constitute waste that would potentially
13 subject the assignor to liability for damages. *Id.* §§ 4.6(a)(5), 4.6(b)(3).
14

15 The Act likewise adopts this approach, authorizing the assignee to enforce an assignment
16 of rents by means of a notification to the assignor following default under the assignment. As
17 provided in Section 13(c), the assignor’s failure to pay over to the assignee any rents it collects
18 following receipt of such notification would subject to the assignor to liability to the assignee for
19 the amount of the rents not turned over.
20

21 2. *Notification to other record rents assignees.* Subsection (a) provides that an assignee
22 enforcing an assignment of rents must give notification not only to the assignor, but also to any
23 other person that, 10 days before the notification date, held a recorded assignment of rents
24 covering the real property. Notification will alert another person holding a recorded assignment
25 of rents as to the pending enforcement effort, and permit that person to take whatever steps it
26 considers justified to protecting its interest in the rents. For example, if the enforcing rents
27 assignee holds a junior assignment of rents, notification to the senior could lead the senior to
28 enforce its interest in rents immediately (assuming its assignment permitted immediate action
29 under the circumstances) — thereby avoiding the risk that the junior might by collection acquire
30 effective priority as to the following period’s rents. By contrast, if the enforcing rents assignee
31 holds a senior assignment of rents, notification to the junior would alert the junior of the need to
32 investigate the status of the senior obligations.
33

34 Subsection (c) provides that the failure of the enforcing assignee to give notification to
35 other rents assignees does not negate the effectiveness of the notification as to the assignor. If
36 the assignor received the notification and subsequently collected rents but failed to turn those
37 over to the assignee, the assignor would face liability under Section 14(d) regardless of whether
38 the enforcing assignee had given notification to other rents assignees. If a rents assignee fails to
39 give a required notification to another creditor entitled to notification, subsection (c) entitles the

1 other creditor to any relief provided by law other than this Act. This would permit the other
2 creditor to plead and prove any damages proximately caused by the failure to give notification.

3
4 3. *Nonexclusivity of means of enforcement.* The Act’s various methods of enforcement of
5 an assignment of rents are not exclusive in nature. The primary benefit of enforcement by
6 notification to the assignor under Section 8 may be that such enforcement triggers the assignor’s
7 liability under Section 14(d) for failure to turn over any rents thereafter collected. By contrast, an
8 assignee that wants more immediate control over actual collection of rents as they accrue may
9 simultaneously choose to enforce its assignment of rents by means of appointment of a receiver
10 (Section 7) or notification to tenants (Section 9). The Act does not limit the ability of an
11 assignee to enforce its interest in rents by multiple methods.

12
13 4. *Limitation on remedy where mortgage does not contain express assignment of rents.*
14 Under Section 4(a) of the Act, the signing and delivery of a mortgage creates an assignment of
15 rents automatically, even without express language creating an assignment of rents, unless the
16 mortgage provides otherwise. However, an assignee that claims a security interest in rents solely
17 by virtue of Section 4(a) — *i.e.*, by virtue of a mortgage that does not expressly create an
18 assignment of rents and without any other document that grants the assignee a security interest in
19 rents — cannot enforce its security interest by notification under subsection (a), as long as the
20 assignor occupies the real property as its primary residence.

21
22 **SECTION 9. ENFORCEMENT BY NOTIFICATION TO TENANT.**

23 (a) Upon the assignor’s default as defined in the document creating an assignment
24 of rents, or as otherwise agreed by the assignor, the assignee may give to a tenant of the real
25 property a notification demanding that the tenant pay to the assignee all unpaid accrued rents and
26 all unaccrued rents as they become due. The assignee shall give a copy of the notification to the
27 assignor and to any other person that, 10 days before the notification date, held a recorded
28 assignment of rents arising from the real property. The notification must:

29 (1) identify the tenant, assignor, assignee, premises covered by the
30 agreement between the tenant and the assignor, and assignment of rents being enforced;

31 (2) provide the recording data for the document creating the assignment or
32 other reasonable proof that the assignment has been made;

1 (3) state that the assignee has the right to collect rents in accordance with
2 the assignment;

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

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

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

10 (7) contain a statement that the tenant may consult an attorney if the tenant
11 has questions about its rights and obligations; and

12 (8) be signed by the assignee.

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

16 (c) Subject to subsection (d) and any other claim or defense that a tenant has under
17 law of this state other than this [act], following receipt of a notification substantially complying
18 with subsection (a):

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

1 (2) a tenant that pays rents to the assignor is not discharged from the
2 obligation to pay rents to the assignee, unless the tenant occupies the premises as the tenant's
3 primary residence;

4 (3) a tenant's payment to the assignee of rents then due satisfies the
5 tenant's obligation under the tenant's agreement with the assignor to the extent of the payment
6 made; and

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

10 (d) A tenant that has received a notification under subsection (a) is not in default
11 for nonpayment of rents accruing after the date the notification is received before the earlier of:

12 (1) 10 days after the date that the next regularly scheduled rental payment
13 would be due; or

14 (2) 30 days after the date the tenant receives the notification.

15 (e) Upon receiving a notification from another creditor that is entitled to priority
16 under Section 5(c) that the other creditor has enforced and is continuing to enforce its interest in
17 rents, an assignee that has given a notification to a tenant under subsection (a) shall immediately
18 give another notification to the tenant canceling the earlier notification.

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

1 (g) An assignee that holds a security interest in rents solely by virtue of Section
2 4(a) may not enforce the security interest under subsection (a) as long as the assignor occupies
3 the real property as the assignor's primary residence.

4 **Preliminary Comments**

5 1. *Enforcement by notification to tenants.* Section 9 provides that an assignee may
6 enforce its security interest in rents by notification to tenants either following default or
7 otherwise in accordance with the assignment. Because many assignments of rents do not
8 authorize the assignee to collect rents before the assignor's default, enforcement by Section 9
9 will usually arise only after the assignor's default. Nevertheless, this Act would permit the
10 assignee to collect rents directly from the tenants even before default if the assignor so agrees.
11

12 Subsection (a) specifies the required contents of the notification. Although the Act does
13 not require that the notification be in any particular form, Section 10 provides a form notification
14 sufficient to satisfy subsection (a) if properly completed.
15

16 2. *Effect of notification.* Once the tenant receives notification from the assignee
17 demanding payment of rents pursuant to the assignment, the tenant must pay accrued but unpaid
18 rents and rents accruing in the future to the assignee in order to satisfy its rental obligation. In
19 this respect, the Act's provisions generally operate comparably to Uniform Commercial Code
20 Section 9-406(a), which governs the circumstances under which an account debtor can discharge
21 its obligation following notification and demand by an assignee of that account. Following
22 receipt of a notification, a tenant cannot discharge its rental obligations by payment to the
23 assignor. Thus, a tenant that pays its landlord following receipt of a notification under this
24 section faces the risk of having to make double payment of the sums necessary to discharge its
25 rental obligation.
26

27 The Act provides an exception to this rule in the case of a tenant that occupies the
28 premises as its primary residence. The Act allows an assignee to notify residential tenants to pay
29 rents to the assignee, and also provides that any such tenant that pays the assignee following
30 receipt of such a notification is discharged to the extent of the payment. Under subsection (c)(2),
31 however, a tenant that occupies the premises as its primary residence is discharged by payment to
32 the assignor, even if the tenant has received a notification directing it to pay rents to the assignee.
33 This exception prevents a residential tenant that has paid the assignor from being evicted from its
34 primary residence. The exception is viewed as a justifiable protection for residential tenants in
35 light of the fact that the assignee of rents arising from residential property can more effectively
36 enforce its security interest in rents through alternative means (such as by obtaining the
37 appointment of a receiver).
38

39 The tenant's obligation to direct payment of rents to the assignee following receipt of a

1 notification under subsection (a) is subject to one other caveat: the tenant need not comply if it
2 has previously received a notification from another assignee of rents given by that assignee in
3 accordance with this section, and the other assignee has not cancelled that notification. Until
4 such a tenant receives instructions canceling that prior notification, the tenant may continue to
5 pay the other assignee in accordance with the prior notification.
6

7 *3. Notification to other rents assignees.* Subsection (a) requires that the enforcing
8 assignee give notification to the assignor and to any person that, 10 days prior to the notification
9 date, held a recorded assignment of rents on the real property. Under this provision, an enforcing
10 assignee must search the public records to identify any other creditors holding a recorded
11 assignment of rents (whether junior or senior to the assignee's interest) and provide notification
12 of enforcement to such creditors. Notification will alert another person holding a recorded
13 assignment of rents as to the pending enforcement effort and permit that person to protect its
14 secured position with respect to the rents. *See Act § 8, Preliminary Comment 2.*
15

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

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

29 *5. Extension of time for payment of next rental payment following notification.* If a tenant
30 receives a notification directing payment of rents to an assignee, the tenant reasonably may wish
31 to obtain counsel regarding the effect of the notification. If the notification arrives shortly before
32 the tenant's rental due date, however, the tenant may find it difficult to obtain that advice before
33 its rental obligation would become past due.
34

35 To give the tenant a reasonable opportunity to obtain counsel, subsection (d) provides that
36 neither the assignor nor the assignee may hold a tenant in default solely for nonpayment of rents
37 that accrue after the notification is given until the earlier of 10 days after the next regularly
38 scheduled rental payment would be due under the lease or 30 days after the date the tenant
39 receives the notification. Subsection (d) would not in any way protect a tenant from the
40 consequences of a breach of the lease on grounds other than nonpayment of rent, or for
41 nonpayment of rents that accrued before 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
2 of each month. On March 28, Tenant receives a notification from Assignee
3 demanding that Tenant pay future rents to Assignee. Neither Assignor nor
4 Assignee may declare Tenant in default of the April 1 rent payment until after
5 April 11.
6

7 *Illustration 2.* Tenant’s rent is due and payable to Assignor monthly, on the first
8 of each month. On April 3, Tenant receives a notification from Assignee
9 demanding that Tenant pay future rents to Assignee. Neither Assignor nor
10 Assignee may declare Tenant in default of the May 1 rent payment until after May
11 3.
12

13 *Illustration 3.* Tenant’s rent is due and payable to Assignor quarterly, on the first
14 of January, April, July, and October. On February 28, Tenant receives a
15 notification from Assignee demanding that Tenant pay future rents to Assignee.
16 Under subsection (c), Tenant receives no extension of the time for its April 1
17 quarterly rent payment.
18

19 *Illustration 4.* Tenant’s lease provides that base rental is due and payable to
20 Assignor monthly, on the first of each month. Tenant’s lease also provides a
21 percentage rental clause by which percentage rental is payable on an annual basis
22 on September 25. On September 15, Tenant receives a notification from Assignee
23 demanding that Tenant pay future rents to Assignee. Neither Assignor nor
24 Assignee may declare Tenant in default for failure to pay the October 1 base rent
25 payment until after October 11. Neither Assignor nor Assignee may declare
26 Tenant in default for failure to pay the September 15 percentage rental payment
27 until after October 15.
28

29 6. *Enforcement by multiple rent assignees.* In some circumstances, multiple creditors
30 may seek to collect rents directly from tenants pursuant to this Act. If a subordinate rents
31 assignee collect rents under this section, the subordinate rents assignee may keep the rents
32 collected in good faith and apply those rents to its secured obligations notwithstanding its
33 subordinate position, until such time as the senior rents assignee enforces its superior collection
34 rights. Once a subordinate rents assignee that has enforced its security interest in rents under this
35 section receives a notification that a senior assignee has enforced its interest in rents, subsection
36 (e) obligates the subordinate rents assignee to give an immediate notification to tenants canceling
37 its previous payment instructions. A subordinate rents assignee that fails to cancel its prior
38 notification may not thereafter collect rents in good faith within the meaning of Section 14(f).
39

40 7. *Limitation on remedy where mortgage does not contain express assignment of rents.*
41 Under Section 4(a) of the Act, the signing and delivery of a mortgage creates an assignment of
42 rents automatically, even without express language creating an assignment of rents, unless the
43 mortgage provides otherwise. However, an assignee that claims a security interest in rents solely

1 by virtue of Section 4(a) — *i.e.*, by virtue of a mortgage that does not expressly create an
2 assignment of rents and without any other document that grants the assignee a security interest in
3 rents — cannot enforce its security interest by notification under subsection (a), as long as the
4 assignor occupies the real property as its primary residence.
5

6 **SECTION 10. NOTIFICATION TO TENANT: FORM.** No particular phrasing is
7 required for the notification specified in Section 9. However, the following form of notification,
8 when properly completed, is sufficient to satisfy the requirements of Section 9:
9

10 NOTIFICATION TO PAY RENTS TO PERSON OTHER THAN LANDLORD

11 Tenant: [Name of tenant]

12 Property Occupied by Tenant (the “Premises”): [Address]

13 Landlord: [Name of landlord]

14 Assignee: [Name of assignee]

15 Address of Assignee and Telephone Number of Contact Person: [Address for
16 payment of rents to assignee and telephone number of contact person for further
17 information]:

18 1. The Assignee named above is the assignee of rents under [name
19 of document] (the “Assignment of Rents”) dated _____, and recorded at
20 [recording data] in the [appropriate governmental office under the recording act
21 of this State]. You may obtain additional information about the Assignment of
22 Rents and the Assignee’s right to enforce it at the address listed above.

23 2. The Landlord is in default under the Assignment of Rents.
24 Under the Assignment of Rents, the Assignee is entitled to collect rents from
25 the Premises.

1 3. This notification affects your rights and obligations under the
2 agreement under which you occupy the Premises (the “Agreement”). In order
3 to provide you with an opportunity to consult with an attorney, neither the
4 Assignee nor the Landlord can hold you in default under the Agreement for
5 nonpayment of your next scheduled rental payment until 10 days after the due
6 date of that payment or 30 days following the date you receive this notification,
7 whichever occurs first. You may consult an attorney concerning your rights
8 and obligations under the Agreement and the effect of this notification.

9 4. You must pay to the Assignee at the address listed above all
10 rents under your Agreement which are due and payable on the date you receive
11 this notification and all rents accruing under the Agreement after you receive
12 this notification. If you pay rents to the Assignee after receiving this
13 notification, the payment will satisfy your rental obligation to the extent of that
14 payment.

15 5. If you pay any rents to the Landlord after receiving this
16 notification, your payment to the Landlord will not discharge your rental
17 obligation, and the Assignee may hold you liable for that rental obligation
18 notwithstanding your payment to the Landlord, unless you occupy the Premises
19 as your primary residence.

20 6. If you have previously received a notification from another
21 person that also holds an assignment of the rents due under your Agreement,
22 you should continue paying your rents to the person that sent that notification

1 until that person cancels that notification. Once that notification is canceled,
2 you must begin paying rents to the Assignee in accordance with this
3 notification.

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

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

8 (b) written instructions from the Assignee canceling this
9 notification.

10 [Name of assignee]

11 By: [Officer/authorized agent of assignee]]

12
13 **SECTION 11. EFFECT OF ENFORCEMENT.** The enforcement of an assignment of
14 rents by one or more of the methods identified in Sections 7, 8, and 9, the application of proceeds
15 by the assignee under Section 12 after enforcement, the payment of expenses under Section 13,
16 or a civil action under Section 14(d) does not:

17 (1) make the assignee a mortgagee in possession of the real property;

18 (2) make the assignee an agent of the assignor;

19 (3) constitute an election of remedies that precludes a later action to enforce the
20 secured obligation;

21 (4) make the secured obligation unenforceable[; or][;]

22 (5) limit any right available to the assignee with respect to the secured

1 obligation[.][;]

2 [(6) violate [cite the “one-action” statute of this state][.][; or]]

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

6 **Legislative Note:** *A state that does not have a “one action” statute or anti-deficiency legislation*
7 *should omit subsections (6) and (7), as appropriate.*

8 9 Preliminary Comments

10 1. *Mere enforcement of security interest in rents does not trigger mortgagee-in-*
11 *possession status.* A number of common law decisions suggest that a mortgagee can become a
12 “mortgagee in possession” — with the legal responsibilities attendant to that status — without
13 physical occupation of the mortgaged premises. *See, e.g.,* 1 GRANT S. NELSON & DALE A.
14 WHITMAN, REAL ESTATE FINANCE LAW §§ 4.25, at 218 & nn. 1-9 (3d ed. 1993) (collecting
15 cases). This result is not surprising, given the factual and legal uncertainty attendant to the term
16 “possession.” This ambiguity can produce concern for the assignee that wishes to protect its
17 security interest in rents without assuming the duties and liabilities attendant to mortgagee-in-
18 possession status. Consistent with commentary to the Restatement (Third) of Property —
19 Mortgages, the Act provides that the mere collection of rents does not render the mortgagee a
20 “mortgagee in possession” with the duties and liabilities attendant to that status. *Cf.* Restatement
21 (Third) of Property — Mortgages § 4.2 cmt. c.

22
23 2. *Cumulative nature of mortgagee’s remedies.* Under the traditional rule, the mortgagee
24 holding an assignment of rents could proceed after default to enforce its right to collect rents
25 without concern about the impact that action might have on the mortgagee’s other remedies. The
26 traditional approach treated the mortgagee’s remedies as cumulative; the mortgagee’s selection
27 of one remedy did not preclude the mortgagee from subsequently seeking another remedy (*e.g.*,
28 initially suing on the mortgage note, and later foreclosing on the mortgage). *See, e.g.*,
29 Restatement (Third) of Property — Mortgages § 8.2 Reporters’ Note (collecting cases).

30
31 The Act adopts this view, and makes clear that the assignee’s enforcement of its
32 assignment of rents does not constitute an election of remedies that precludes a later action to
33 enforce the secured obligation, render the secured obligation unenforceable, or otherwise limit
34 any rights available to the assignee with respect to the secured obligation. Thus, for example, if
35 an assignee enforces its security interest by obtaining the appointment of a receiver under Section
36 7, and the appointment is ancillary to an action by the assignee for specific performance of the
37 assignment of rents, the assignee’s enforcement action does not preclude the assignee from

1 subsequently asserting any other remedies it may have to enforce the secured obligation or
2 against any other collateral it may hold securing that obligation.

3
4 3. *“One action” rules and anti-deficiency provisions.* In some states, “one action” rules
5 provide that there can be only one form of action for the recovery of any debt secured by real
6 property. *See, e.g.,* Cal. Code Civ. Pro. § 726(a); Idaho Code § 6-101(1); Mont. Code Ann. § 71-
7 1-222(1); Nev. Rev. Stat. § 40.430(1); Utah Code § 78-37-1; *see also* First State Bank of
8 Cooperstown v. Ihringer, 217 N.W.2d 857 (N.D. 1974). Under this approach, for example, a
9 mortgagee’s decision to sue on the mortgage note would constitute an “action” that subsequently
10 bars the mortgagee from foreclosing the mortgage.

11
12 Ambiguity over the scope of a “one action” rule — and whether it would treat an attempt
13 to enforce an assignment of rents as an “action” that would prevent other collection efforts —
14 could create significant confusion over the enforcement of an assignment of rents. For this
15 reason, the Restatement (Third) of Property — Mortgages, while generally rejecting the one-
16 action approach, further argued that any limitation on the mortgagee’s remedies with respect to
17 foreclosure of the mortgage should not limit the mortgagee’s enforcement of its interest in rents:

18
19 [Section 8.2] does not affect the mortgagee’s right to enforce a mortgage on rents
20 under § 4.2 or to the appointment of a receiver under § 4.3. This is because, under
21 § 4.2, the mortgagee is proceeding against separate security and, under § 4.3, a
22 receivership is an interim remedy ancillary to the remedies delineated in [Sections
23 8.2(a) and (b)]. Nor does this section limit the mortgagee’s remedies for waste
24 under § 4.6 or the recovery of sums expended by the mortgagee for the protection
25 of the security under § 2.2. [Restatement (Third) of Property — Mortgages § 8.2,
26 cmt. b]

27
28 Consistent with this approach, the rent-collection statute in California (a one-action rule state)
29 provides that enforcement of a security interest in rents and collection of rents does not constitute
30 an “action” for purposes of the one-action rule or a “deficiency” action under the state’s anti-
31 deficiency statutes. To make the Act workable in states with one-action rules and deficiency
32 legislation, the Act follows the California approach.

33
34 4. *Marshaling requirements.* Nothing in this section limits a court’s equitable discretion
35 to order lien marshaling in appropriate cases. For example, assume Debtor owes Bank \$2
36 million, secured by a mortgage and an assignment of rents on Blackacre and a separate mortgage
37 on Whiteacre. Debtor also owes Henning \$1 million secured only by a mortgage on Whiteacre.
38 Nothing in Section 10 is intended to constrain a court’s equitable discretion to order Bank to
39 proceed against Blackacre and its rents first before foreclosing against Whiteacre or its rents.

40
41 **SECTION 12. APPLICATION OF PROCEEDS.** Unless otherwise agreed, an

1 assignee that collects rents under this [act] or collects upon a judgment in a civil action under
2 Section 14(d) shall apply the sums collected in the following order to:

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

6 (2) payment of expenses incurred by the assignee to protect or maintain the real
7 property subject to the assignment;

8 (3) payment of the secured obligation;

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

12 (5) the assignor.

13 **Preliminary Comments**

14 The term “reasonable attorneys’ fees and costs” in Section 12(1) includes those fees and
15 costs the assignee incurs in enforcing its assignment of rents. This would include, for example,
16 the fees and costs incurred in obtaining the appointment of a receiver, providing a notification
17 under Section 8, or collecting rents from tenants following notification to tenants under Section
18 9. Unlike U.C.C. § 9-607(d) — under which an assignee’s right to recover these expenses from
19 collected receivables arises automatically — the assignee may recover reasonable attorneys’ fees
20 under this Act only to the extent such fees are provided for in the assignment of rents and are not
21 prohibited by applicable law other than this Act. This limitation is consistent with the
22 expectations of mortgagors and mortgagees.

23
24 The assignee may also incur other attorneys’ fees and legal expenses in proceeding
25 against the assignor, such as expenses incurred in foreclosing the mortgage or seeking a
26 deficiency judgment. Whether the assignee has a right to collect those fees and expenses
27 depends on the parties’ agreement and the provisions of law other than this Act.
28

29 **SECTION 13. APPLICATION OF PROCEEDS TO EXPENSES OF**

1 little or no disruption of the operation and preservation of the real property. For example, if an
2 assignee enforces an assignment of rents by obtaining the appointment of a receiver under
3 Section 7, the receivership order will authorize the receiver to apply collected rents to the costs of
4 operating and preserving the real property. Likewise, if an assignee becomes a mortgagee in
5 possession, the assignee has a duty to apply collected rents to the operation and preservation of
6 the real property.

7
8 The assignor's obligation to pay taxes, insurance, or maintenance expenses (whether
9 expressed or implied in tenant leases), however, does not generally bind the assignee as a
10 successor if the lender has not yet acquired possession or ownership of the real property. If a
11 lender purchases mortgaged real property at foreclosure, the lender becomes obligated to fulfill
12 the assignor's responsibilities under the tenant leases, as the landlord's covenants in those leases
13 then run with the real property to bind the lender. By contrast, if the lender collects rents prior to
14 completing foreclosure, but without taking either actual or constructive possession of the real
15 property, the lender may collect those sums and apply them to the mortgage debt with no legal
16 obligation to pay taxes, insurance, or maintenance expenses. Such a lender is not a successor that
17 is bound to perform the landlord's covenants under tenant leases; further, courts have not
18 generally treated such sums as being impressed with a "trust" that obligates the lender to apply
19 such sums to the payment of taxes, insurance, or maintenance.

20
21 As a result, if the assignee enforces its assignment of rents by means of Section 8
22 (notification to the assignor) or Section 9 (notification to tenants), the assignor effectively
23 remains in day-to-day possession and control of the real property. In such a case, the assignee's
24 collection of rents and payment of property-related expenses does not place day-to-day
25 operational and management responsibility upon the assignee. Instead, that responsibility
26 remains upon the assignor. Such an assignee may apply the collected rents to the mortgage debt
27 in accordance with Section 12, and need not apply such rents to property-related expenses (such
28 as taxes, insurance, and/or maintenance), absent a contrary agreement by the assignee. A prudent
29 assignee may choose, however, to apply collected rents to the payment of such expenses, both to
30 protect its own interest in (and the value of) the real property and to avoid any possible claim or
31 defense that a tenant might have to payment of rent based upon the assignor's nonperformance of
32 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 against 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 pay real property taxes, insurance, and maintenance expenses. If
11 the assignee begins collecting rents from tenants after the assignor's default (without obtaining
12 the appointment of a receiver or becoming a mortgagee in possession), subsection (a) does not
13 impose a general obligation on the assignee to apply such rents to the costs of operating and
14 preserving the real property. Nevertheless, the assignor may fail to pay such costs, especially if
15 enforcement of the assignment of rents has divested the assignor of control over the rents. In this
16 circumstance, the expectations of a tenant can be significantly frustrated, particularly if the
17 nonperformance of the assignor's maintenance significantly compromises the tenant's operations.
18 Subsection (c) recognizes that such a tenant could seek the appointment of a receiver, if the
19 tenant can demonstrate that the nonpayment of expenses of operating and preserving the real
20 property threatens the tenant's interest in the real property.
21

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

24 (a) In this section, "good faith" means honesty in fact and the observance of
25 reasonable commercial standards of fair dealing.

26 (b) If an assignor collects rents that the assignee is entitled to collect under this
27 [act]:

28 (1) the assignor shall turn over the proceeds to the assignee, less any
29 amount representing payment of expenses authorized by the assignee; and

30 (2) the assignee continues to have a security interest in the proceeds so
31 long as they are identifiable.

32 (c) For purposes of this [act], cash proceeds are identifiable if they are maintained

1 in a segregated account or, if commingled with other funds, to the extent the assignee can
2 identify them by a method of tracing, including application of equitable principles, that is
3 permitted under law of this state other than this [act] with respect to commingled funds.

4 (d) In addition to any other remedy available to the assignee under law of this state
5 other than this [act], if an assignor fails to turn over proceeds to the assignee as required by
6 subsection (b), the assignee may recover from the assignor:

7 (1) the proceeds, or an amount equal to the proceeds, that the assignor was
8 obligated to turn over under subsection (b); and

9 (2) reasonable attorney's fees and costs incurred by the assignee to the
10 extent provided for by agreement and not prohibited by law of this state other than this [act].

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

14 (f) Unless otherwise agreed, if an assignee entitled to priority under Section 5(c)
15 enforces its interest in rents after another creditor holding a subordinate security interest in rents
16 has enforced its interest under Section 8 or 9, the creditor holding the subordinate security
17 interest in rents is not obligated to turn over any proceeds that it collects in good faith before the
18 creditor receives notification that the senior assignee has enforced its interest in rents, but shall
19 turn over to the senior assignee any proceeds that it collects after it receives the notification.

20 Preliminary Comments

21 1. *“Milking” of rents and existing law.* The owner of distressed income-producing real
22 property may sometimes engage in “milking” of rents — *i.e.*, collecting rents and using them for
23 purposes unrelated to the mortgage debt. Milking of rents that have been assigned as security

1 poses a significant threat to an undersecured mortgagee, who cannot expect to obtain full
2 recovery of the mortgage debt via foreclosure. This threat is even more severe where the
3 mortgagee holds a nonrecourse mortgage debt and the mortgagor thus has no personal liability
4 for a deficiency judgment. Such a threat typically prompts the mortgagee to take prompt action
5 following default to divest the mortgagor of control over rents.
6

7 Between the time that the mortgagor goes into default and the time that the mortgagee
8 finally enforces its security interest in rents, the mortgagor has often collected and disposed of
9 rents. In this situation, an undersecured mortgagee may desire to recover damages that it suffered
10 because the mortgagor collected and disposed of rents that might otherwise have reduced the
11 mortgage obligations.
12

13 All authorities agree that the mortgagee has no basis for recovering cash proceeds of rents
14 paid in the ordinary course to third parties acting in good faith; such parties would take those
15 cash proceeds free of the mortgagee’s claims by virtue of the common law negotiability of
16 money. See Act § 15, Comment 4, Illustrations 6 and 7. The mortgagee might have a damage
17 claim against the mortgagor, however, on account of the mortgagor’s disposition of rents. The
18 common law of mortgages treated this conduct as a species of legal waste — consistent with its
19 treatment of “rents” as an incorporeal hereditament in the nature of real property. The common
20 law generally imposed liability upon a mortgagor who took any action that damaged or destroyed
21 the mortgaged real property, thereby reducing its value. [In title theory jurisdictions, this liability
22 extended to the full reduction in the collateral’s value; under the lien theory, this liability existed
23 only to the extent that the waste actually impaired the mortgagee’s security.]
24

25 The weight of available authority suggests that the mortgagor’s diversion of rents would
26 constitute legal waste, at least where the mortgagee had taken sufficient steps to enforce its
27 security interest in rents. *See, e.g., Taylor v. Brennan*, 621 S.W.2d 592 (Tex. 1981) (mortgagor’s
28 collection and disposition of rents following mortgagee’s enforcement of security interest in rents
29 would constitute waste, but holding that no waste occurred because mortgagee had not taken
30 sufficient steps post-default to enforce its security interest in rents); *Ginsberg v. Lennar Florida*
31 *Holdings*, 645 So.2d 490 (Fla. App. 1994). The Restatement (Third) of Property — Mortgages
32 adopts this view in § 4.6(a)(5), which provides that “[w]aste occurs when, without the
33 mortgagee’s consent, the mortgagor . . . retains possession of rents to which the mortgagee has the
34 right to possession. . . .”
35

36 The Act does not precisely duplicate the Restatement approach, as it does not specifically
37 use the term “waste” to identify the basis of the assignor’s liability for milking rents. In lien
38 theory states, courts traditionally held that the mortgagor was liable for waste only to the extent
39 that its conduct impaired the mortgagee’s security. Rather than focusing upon impairment of
40 security — which would require proof of the value of the mortgaged real property — the Act
41 instead takes a more straightforward approach. If the assignor is obligated to turn over rents to
42 the assignee under Sections 6 and 14(b), but fails to do so, the assignor is liable for damages
43 equal to the full amount of the rents not turned over. Any such recovery must be applied by the

1 assignee in the manner specified by Section 12, so the assignee’s total recovery could not exceed
2 the loss that the assignee actually suffered. Any surplus proceeds remaining after full satisfaction
3 of the secured obligation would go to the assignor or to subordinate lienholders in accordance
4 with Section 12.

5
6 2. *Assignor’s liability to turn over rents.* The Act provides that upon default as defined in
7 the document creating an assignment of rents or as otherwise agreed, an assignee may collect (1)
8 accrued but unpaid rents and (2) unaccrued rents as they accrue in the future. If the assignor
9 collects any such sums following enforcement by the assignee, the assignor must turn over such
10 sums to the assignee under subsection (b), or face personal liability for failure to do so by virtue
11 of subsection (d).

12
13 In cases involving nonrecourse obligations (either by virtue of specific contractual
14 nonrecourse provisions or the intervention of anti-deficiency legislation), mortgagors that have
15 milked rents often argue that the mortgagee’s action is in the nature of a deficiency judgment and
16 should therefore be dismissed. The weight of authority rejects this view and concludes that an
17 action for damages for waste of rents or conversion of the proceeds of rents is not in the nature of
18 a deficiency action. *See, e.g.,* Hoelting Enters. v. Nelson, 929 P.2d 183 (Kan. App. 1996);
19 International Business Machines Corp. v. Axinn, 676 A.2d 552 (N.J. Super. 1996). *See also* In re
20 Evergreen Ventures, 147 B.R. 751 (Bankr. D. Ariz. 1992) (distinguishing deficiency action and
21 waste action). The Act follows this approach.

22
23 Subsection (e) makes clear that an assignee may bring an action to recover damages on
24 account of the assignor’s failure to turn over rents, without first having to foreclose on the
25 underlying real property or pursue other legal remedies. Requiring the assignee to pursue
26 foreclosure first “would probably result in more foreclosures.” Restatement (Third) of Property
27 — Mortgages § 4.6 cmt. f. Moreover, as provided in Section 11 of the Act, the assignee’s action
28 under Section 14(d) would not constitute an election of remedies that precludes later action to
29 enforce the secured obligation, or an action to enforce the debt within the meaning of a state’s
30 one-action law.

31
32 3. *Commingling.* An assignor that collects rents following enforcement of an assignment
33 of rents may commingle those funds with other funds that are not rents or the proceeds of rents.
34 For example, an assignor hotel operator might receive a notification of enforcement from the
35 assignee under Section 8, and thereafter might generate a day’s worth of revenues consisting in
36 part of rents (room revenues) and in part of nonrents (food and beverage revenues). Subsections
37 (b) and (c) make clear that the assignor’s commingling of these funds does not automatically
38 deprive the assignee of its security interest in the rents. As long as the proceeds of the rents are
39 “identifiable,” the assignee’s interest remains enforceable against those proceeds. In this context,
40 “identifiable” has the same meaning as it does in U.C.C. § 9-315(a). As a result, if the assignor
41 has commingled the proceeds of collected rents with other operating funds of the assignor, those
42 proceeds will remain identifiable only if the assignee can identify them by a method of tracing
43 (such as the lowest intermediate balance rule) that is recognized by law other than this Act with

1 respect to commingled property.
2

3 4. *Collection of rents by subordinate assignee.* Subsection (f) provides that a person
4 holding a subordinate assignment of rents generally may enforce that assignment, collect rents,
5 and apply any proceeds collected in good faith to its debt without having any obligation to turn
6 over those proceeds to a senior assignee. This protection is subject to two limitations, however.
7 First, once the junior assignee receives a notification from the senior assignee that the senior
8 assignee has enforced its assignment of rents, the junior assignee must turn over any proceeds
9 that it collects after receiving that notification. Second, if the junior assignee has entered into an
10 intercreditor agreement that obligates it to turn over any collected proceeds to the senior assignee,
11 the senior assignee may enforce that agreement. Furthermore, the protection extends only to
12 rents collected by the subordinate assignee in good faith. If the subordinate assignee collects
13 rents under Sections 8 or 9 of this Act without having given notification of its enforcement to the
14 senior assignee as required by the Act, the subordinate assignee would not be collecting rents in
15 good faith and would not be protected by subsection (f).
16

17 **SECTION 15. PERFECTION AND PRIORITY OF ASSIGNEE’S SECURITY**
18 **INTEREST IN PROCEEDS.**

19 (a) In this section:

20 (1) “Article 9” means [Article 9 of the Uniform Commercial Code as
21 adopted in this state] or, to the extent applicable to any particular issue, Article 9 as adopted by
22 the state whose laws govern that issue under the choice-of-laws rules contained in Article 9 as
23 adopted by this state; and

24 (2) “Conflicting interest” means an interest in proceeds, held by a person
25 other than an assignee, that is:

26 (A) a security interest arising under Article 9; or

27 (B) any other interest if Article 9 resolves the priority conflict
28 between that person and a secured party with a conflicting security interest in the proceeds.

29 (b) An assignee’s security interest in identifiable cash proceeds is perfected if its

1 security interest in rents is perfected. An assignee’s security interest in identifiable noncash
2 proceeds is perfected only if the assignee perfects that interest in accordance with Article 9.

3 (c) Except as otherwise provided in subsection (d), priority between an assignee’s
4 security interest in identifiable proceeds and a conflicting interest is governed by the priority
5 rules in Article 9.

6 (d) An assignee’s perfected security interest in identifiable cash proceeds is
7 subordinate to a conflicting interest that is perfected by control under Article 9 but has priority
8 over a conflicting interest that is perfected other than by control.

9 **Preliminary Comments**

10 1. *“Conflicting interests.”* If two or more persons claim a conflicting security interest in
11 rents, the priority of those interests is generally resolved by Section 5(c). However, once rents
12 are actually collected and held as “proceeds” as defined in this Act, conflicts may arise between
13 an assignee of rents that holds a security interest in “proceeds” as recognized by this Act and
14 certain third parties other than rents assignees. For example, these third parties might include
15 persons who hold a security interest in the proceeds by virtue of Article 9 of the Uniform
16 Commercial Code, persons who take transfers of cash proceeds from the assignor in the ordinary
17 course, or a bank claiming a right of set-off against cash proceeds held in a deposit account
18 maintained at that bank. Section 15 provides priority rules sufficient to govern such disputes. As
19 discussed in the following comments, these rules generally incorporate the priority rules already
20 in Article 9.

21
22 Section 15 applies to any priority conflict as to proceeds between an assignee of rents and
23 the holder of a “conflicting interest.” A “conflicting interest” is a security interest in the
24 proceeds that arises under Article 9, or any other interest in the proceeds if Article 9’s priority
25 rules resolve a conflict between that interest and a conflicting Article 9 security interest.

26
27 2. *Perfection and priority of assignee’s security interest in cash proceeds.* In the typical
28 case, a tenant’s payment of rent will result in cash proceeds. An assignee of rents would have a
29 security interest in cash proceeds of rents as long as the assignee could satisfy the tracing burden
30 imposed by Section 14’s “identifiability” standard. *See* Sections 14(a), (b). Further, Section
31 15(b) makes clear that the assignee’s security interest in cash proceeds is perfected so long as the
32 assignee’s security interest in rents was perfected. *Cf.* U.C.C. § 9-315(c), (d) (continuous
33 perfection of Article 9 security interest in identifiable cash proceeds where security interest in
34 original collateral was perfected).

1 Generally speaking, priority between an assignee’s security interest in identifiable
2 proceeds and a conflicting interest is governed by the priority rules expressed in Article 9.
3 However, an assignee’s perfected security interest in identifiable cash proceeds has priority over
4 a conflicting interest that is perfected under Article 9 by a means other than by control.
5

6 This Act addresses only the perfection and priority of a security interest that an assignee
7 claims in “proceeds” of rents under this Act. This Act does not prevent an assignee from
8 entering into a security agreement with the assignor that would create an Article 9 security
9 interest in those proceeds. For example, an assignee and assignor could enter into a security
10 agreement granting assignee an Article 9 security interest in the deposit account into which
11 assignor’s rent collections are deposited. If the assignee obtains such an Article 9 security
12 interest, the perfection and priority of that interest are governed by Article 9.
13

14 3. *Perfection and priority of assignee’s security interest in noncash proceeds.* It is
15 possible — though not common — that a tenant’s payment of rent could produce noncash
16 proceeds. For example, a tenant might make payment of its rental obligation to assignor by
17 transfer of a piece of equipment rather than a cash payment. Alternatively, a tenant might make
18 payment in the form of cash, and the assignor might take the cash and use it to purchase a piece
19 of equipment. Under Section 14, an assignee of rents would have a security interest in noncash
20 proceeds of rents as long as the assignee could satisfy the tracing burden imposed by Section 14’s
21 “identifiability” standard. Section 15(b) makes clear, however, that the assignee’s security
22 interest in identifiable noncash proceeds will be perfected only if the assignee perfects that
23 interest in accordance with Article 9. Thus, if the assignee claims a security interest in an item of
24 equipment that the assignor received in satisfaction of a tenant’s rental obligation (or that the
25 assignor purchased using proceeds of rents), the assignee’s security interest in that equipment
26 will be unperfected unless the assignee files a financing statement covering the equipment in the
27 proper Article 9 filing office. Likewise, any conflict between an assignee claiming a security
28 interest in an item of personal property as noncash proceeds of rents and a secured party claiming
29 an Article 9 security interest in the same item will be resolved by the appropriate Article 9
30 priority rules.
31

32 4. *Illustrations.* The application of the priority rules expressed in Section 15 is
33 demonstrated in the following illustrations:
34

35 *Illustration 1.* In year 1, Debtor grants to Secured Party an effective security interest in
36 all of Debtor’s existing and after-acquired assets, and Secured Party perfects this security
37 interest by filing. In year 2, Debtor makes an assignment of rents to Assignee, and
38 Assignee promptly records. In year 3, Debtor receives a rent check from Tenant.
39 Assignee has a perfected security interest in the check as identifiable cash proceeds of
40 rents. Secured Party has a perfected security interest in the check, but Secured Party’s
41 security interest is perfected only by filing. Thus, Assignee has priority as to the check
42 under subsection (d).
43

1 *Illustration 2.* Same as Illustration 1, except Debtor deposits the check into a deposit
2 account maintained at Bank. Secured Party has not established control over the deposit
3 account in accordance with U.C.C. § 9-104. Assignee has a perfected security interest in
4 the deposited funds as identifiable cash proceeds of rents. Secured Party also has an
5 Article 9 security interest in the deposited funds as proceeds of the check, but that
6 security interest is perfected only by virtue of Article 9's continuous perfection as to
7 identifiable cash proceeds under U.C.C. § 9-315(c), (d)(2). Thus, Assignee has priority as
8 to the deposited funds under subsection (d).
9

10 *Illustration 3.* Same as Illustration 2, except that Secured Party has established control
11 over the deposit account by virtue of a control agreement as provided in U.C.C. § 9-
12 104(a)(2). Secured Party has priority as to the deposited funds under subsection (d).
13

14 *Illustration 4.* Same as Illustration 2, except that Bank attempts to exercise a right of set-
15 off against Debtor after Debtor defaults to Bank in repayment of an unsecured line of
16 credit. Bank's right of set-off has priority over Assignee's security interest in the
17 deposited funds. *Cf.* § 9-340(a), (b) (bank's right of set-off generally not affected by
18 existence of security interest in deposited funds).
19

20 *Illustration 5.* Same as Illustration 4, but assume that Assignee has entered into a control
21 agreement with Debtor and Bank as described in U.C.C. § 9-104(a)(3). Bank's exercise
22 of its set-off right would be ineffective against Assignee. *Cf.* U.C.C. § 9-340(c) (exercise
23 of bank's set-off right ineffective against a person holding a security interest in the
24 deposit account who becomes bank's customer with respect to that account).
25

26 *Illustration 6.* Assignor makes an assignment of rents to Assignee, and Assignee
27 promptly records. The following month, Assignor receives a rent check from Tenant, and
28 deposits the check into a bank account containing only proceeds of rents. Assignor then
29 write a check drawn on that bank account to Supplier in payment of an account incurred
30 by Assignor to purchase office equipment and supplies. In good faith, Supplier accepts
31 the check and presents it for payment and the check is paid. Even though Assignee had a
32 perfected security interest in the proceeds of rents deposited into the bank account,
33 Supplier takes the funds paid from the bank account free and clear of the Assignee's
34 security interest in those funds. *Cf.* U.C.C. § 9-332(b) (transferee of funds from deposit
35 account takes them free of a security interest in the deposit account unless the transferee
36 acts in collusion with debtor in violating rights of secured party).
37

38 *Illustration 7.* Assignor makes an assignment of rents to Assignee, and Assignee
39 promptly records. The following month, Assignor receives cash from Tenant in payment
40 of Tenant's rent obligation. Assignor uses the cash to purchase cleaning equipment from
41 Supplier in an ordinary course transaction. Assignor does not file an Article 9 financing
42 statement covering the cleaning equipment. Even though Assignee had a perfected
43 security interest in the cash collected from Tenant, Supplier took the cash free and clear

1 of the Assignee's security interest. *Cf.* U.C.C. § 9-332(a) (transferee of money takes it
2 free of a security interest unless the transferee acts in collusion with debtor in violating
3 rights of secured party). Furthermore, while Assignee may have a security interest in the
4 cleaning equipment as the identifiable noncash proceeds of rents, Assignee's security
5 interest in the cleaning equipment is unperfected under subsection (b), and would be
6 subordinate to any perfected Article 9 security interest in the cleaning equipment. *Cf.*
7 U.C.C. § 9-322(a)(2) (perfected security interest has priority over conflicting unperfected
8 security interest).

9
10 *Illustration 8.* Same as Illustration 7, but assume Assignee has filed an Article 9
11 financing statement sufficient to cover all of Assignor's assets. Assignee has a perfected
12 security interest in the cleaning equipment. The priority of that security interest versus
13 other conflicting interests will be governed by the priority rules expressed in Article 9.
14 *Cf.* U.C.C. § 9-322(a)(1) (conflicting perfected security interests); U.C.C. § 9-317(b)
15 (buyers other than in ordinary course).

16
17 **SECTION 16. PRIORITY SUBJECT TO SUBORDINATION.** This [act] does not
18 preclude subordination by agreement by a person entitled to priority as to rents or proceeds
19 therefrom.

20 **Preliminary Comments**

21 Section 16 makes it clear that a person entitled to priority under this Act may effectively
22 agree to subordinate its claim. Contractual subordination of a security interest in rents and/or
23 proceeds may occur in the context of an intercreditor agreement between persons holding
24 conflicting security interests in rents. The enforceability of such agreements is governed by state
25 law other than this Act.

26
27 **SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
28 applying and construing this Uniform Act, consideration must be given to the need to promote
29 uniformity of the law with respect to its subject matter among states that enact it.

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

31 **SECTION 19. REPEALS.** The following acts are repealed: [List statutes to be
32 repealed.]

1 **SECTION 20. APPLICATION TO EXISTING RELATIONSHIPS.**

2 (a) Except as otherwise provided in this section, this [act] governs the
3 enforcement of an assignment of rents and the perfection and priority of a security interest in
4 rents, even if the document creating the assignment was signed and delivered before the effective
5 date of this [act].

6 (b) This [act] does not affect an action or proceeding commenced before the
7 effective date of this [act].

8 (c) Section 4(a) of this [act] does not apply to any security instrument signed and
9 delivered before the effective date of this [act].

10 (d) This [act] does not affect:

11 (1) the enforceability of an assignee’s security interest in rents or proceeds
12 if immediately before the effective date of this [act] that security interest was enforceable;

13 (2) the perfection of an assignee’s security interest in rents or proceeds if
14 immediately before the effective date of this [act] that security interest was perfected; or

15 (3) the priority of an assignee’s security interest in rents or proceeds with
16 respect to the interest of another person if immediately before the effective date of this [act] the
17 interest of the other person was enforceable and perfected, and that priority was established.

18 **SECTION 21. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
19 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
20 Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, *et. seq.*)
21 but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or
22 authorize electronic delivery of any of the notices described in Section 103(b) of that act (15

1 U.S.C. Section 7003(b)).