

D R A F T

FOR DISCUSSION ONLY

**UNIFORM MORTGAGEE ACCESS
TO RENTS FROM INCOME-PRODUCING
PROPERTY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS

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With Preliminary Comments

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**DRAFTING COMMITTEE ON UNIFORM MORTGAGEE ACCESS TO RENTS
FROM INCOME-PRODUCING PROPERTY ACT**

MICHAEL B. GETTY, *Chair*, 1560 Sandburg Terr., Suite 1104, Chicago, IL 60610
TERRY J. CARE, 333 South Sixth St., Las Vegas, NV 89101
BRYAN T. FREDRICKSON, 831 Royal Gorge Blvd., Ste. 329, Canon City, CO 81202
THOMAS T. GRIMSHAW, 1700 Lincoln St., Suite 3800, Denver, CO 80203
BARRY C. HAWKINS, 300 Atlantic St., Stamford, CT 06901, *Enactment Plan Coordinator*
THEODORE C. KRAMER, 45 Walnut St., Brattleboro, VT 05301
ROGER P. MORGAN, 82 Kenmore Rd., Bloomfield, CT 06002-2111
ELWAINE F. POMEROY, 1415 SW Topeka Blvd., Topeka, KS 66612-1818
ANNE BOWEN POULIN, Villanova University School of Law, 299 N. Spring Mill Rd., Garey
Hall, Villanova, PA 19085
PATRICK A. RANDOLPH, JR., University of Missouri - Kansas City, School of Law, 5100
Rockhill Road, Kansas City, MO 64110
W. JACKSON WILLOUGHBY, 309 Roundhill Ct., Roseville, CA 95747
R. WILSON FREYERMUTH, University of Missouri-Columbia School of Law, 215 Hulston
Hall, Columbia, MO 65211, *Reporter*

EX OFFICIO

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Room
3056, Norman, OK 73019, *President*
LANI LIU EWART, Suite 1800, Alii Pl., 1099 Alakea St., Honolulu, HI 96813, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

IRA J. WALDMAN, 2049 Century Park East, Suite 2800, Los Angeles, CA 90067-3284

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL
35487-0382, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

**UNIFORM MORTGAGEE ACCESS TO RENTS FROM
INCOME-PRODUCING PROPERTY ACT**

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1 **UNIFORM MORTGAGEE ACCESS TO RENTS FROM INCOME-PRODUCING**
2 **PROPERTY ACT**

3
4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Mortgagee Access
5 to Rents Act.

6
7 **SECTION 2. DEFINITIONS.** In this [act]:

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

9 (2) “Assignment of rents” means a transfer of an interest in [leases or] rents made in
10 connection with an obligation secured by real property located in this state, whether the
11 assignment is made as part of a security instrument covering the real property or in a separate
12 document.

13 (3) “Assignor” means the owner of the real property described in an assignment of rents.

14 (4) “Cash proceeds” means money, checks, deposit accounts, or the like.

15 (5) “Day” means calendar day.

16 (6) “Deposit account” means a demand, time, savings, passbook, or similar account
17 maintained with a bank.

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

20 (8) “Good faith” means honesty in fact and the observance of reasonable commercial
21 standards of fair dealing.

22 (9) “Notification” means a document containing information required under this [act] and

1 signed by the person required to provide the information.

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

5 (11) “Record” means to submit a document complying with applicable legal standards,
6 with required fees and taxes, to the appropriate governmental office under [the recording act of
7 this state].

8 ***ALTERNATIVE A***

9 (12) “Rents” means sums payable by a lessee, licensee, or other person for the right to
10 possess, use, or occupy the real property of another person. The term includes cash proceeds
11 received upon collection of such sums.

12 ***ALTERNATIVE B***

13 (12) “Rents” means sums payable by a lessee for the right to possess the real property of
14 another person and includes cash proceeds received upon collection of such sums.

15 (13) “Secured obligation” means an obligation the performance of which is secured by a
16 security interest.

17 (14) “Security instrument” means an agreement that creates or provides for a security
18 interest in real property, however denominated, and whether or not it also creates or provides for
19 a lien upon personal property.

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

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

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

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

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

7 **Preliminary Comments**

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

10
11 2. “Assignment of rents.” In many commercial transactions, it is customary for the lender to
12 require the borrower to execute multiple documents, including both a “mortgage” covering the
13 land and an “assignment of rents and leases” which assigns to the lender all leases covering the
14 mortgaged premises and all rents accruing under those leases. In some transactions, the lender
15 may simply incorporate into the mortgage language sufficient to assign to the lender all leases
16 covering the mortgaged premises and rents accruing under such leases, without a separate
17 assignment document. The Act uses the term “assignment of rents” to mean the actual transfer of
18 an interest in rents, whether that transfer occurs by virtue of the mortgage, a separate document
19 entitled “assignment of leases and rents,” or otherwise.

20
21 3. “Assignor.” The Act defines an “assignor” as the owner of the real property described in
22 an assignment of rents.

23
24 4. “Cash proceeds.” This definition is similar to that contained in U.C.C. Section 9-
25 102(a)(9). The Act defines “rents” to include the cash proceeds received upon collection of
26 rents.

27
28 5. “Day.” The Act defines “day” as calendar days. The only provision in the Act specifying
29 a time period is Section 8(c), which essentially provides a tenant that has received a notification
30 directing payment of rents to the assignee with a 10-day extension of the due date for its next
31 regularly scheduled rental payment.

32
33 6. “Deposit account.” This definition is similar to that contained in U.C.C. Section 9-
34 102(a)(29).

35
36 7. “Document.” The definition of “document” is media-neutral and is consistent with the

1 definition of the term “record” as used in Section 2(7) of the Uniform Real Property Electronic
2 Recordation Act. Because this Act uses the term “record” in its customary fashion under real
3 estate law — *i.e.*, as a verb to describe the act of filing an instrument of conveyance with the
4 recorder’s office — the Act does not use the term “record” as a noun, and instead uses the term
5 “document.”
6

7 8. “Good faith.” This definition is identical to that contained in U.C.C. § 1-201(b)(20).
8

9 9. “Notification.” The Act permits an assignee to enforce an assignment of rents by
10 delivering a notification to the assignor (Section 8) or by delivering a notification to tenants of
11 the assignor (Section 7). In any circumstance in which the Act requires notification to be given
12 to a person, any such notification shall be in the form of a document, as defined in Section 2(7),
13 and shall contain the information required by the specific section authorizing that notification.
14

15 10. “Person” includes both natural persons (individuals) and all forms of legally recognized
16 public and private organizations.
17

18 11. “Record.” To “record” means that the person submitting a document has complied with
19 the state’s existing recording act. However, for purposes of this Act, a document is “recorded”
20 even if the recording office’s personnel have indexed it incorrectly or otherwise failed to comply
21 with their legal duties.
22

23 12. “Rents.” Source (Alternative A): Restatement (Third) of Property — Mortgages § 4.2.
24

25 In the typical commercial real estate mortgage loan transaction, the lender also secures the
26 borrower’s obligation by requiring the borrower to grant a security interest in the revenue stream
27 produced by the development. In many commercial real estate developments (*e.g.*, office
28 buildings, industrial parks, retail shopping centers, and apartment complexes), the owner and
29 occupiers of the development stand in a landlord-tenant relationship, based upon the execution of
30 leases covering portions of the development. Because the common law has treated unaccrued
31 rents as an interest in land (an incorporeal hereditament), there is no question that in these cases,
32 the sums paid by tenant occupiers constitute “rent.” Thus, a mortgage lender taking a security
33 interest in those “rents” must comply with the provisions of real estate law in order to obtain and
34 enforce that security interest — *i.e.*, the mortgage lender must have the mortgagor execute and
35 deliver an instrument sufficient to convey an interest in “rents” and must record that instrument
36 on the public land records in the county where the land is situated.
37

38 In many other developments, however, the developer and the user/occupier of land do not
39 stand in the relationship of landlord and tenant. In many commercial land developments, the
40 user/occupier might be only a licensee. Examples of this type of project include nursing homes,
41 parking garages, golf courses, landfills, marinas, stadiums/arenas, student dormitories, and
42 hotels/motels. Where the development’s occupier is a licensee and not a tenant, a significant
43 classification problem arises. Are the development revenues “rents” governed by real estate law

1 (such that the lender would obtain and record an assignment of rents in the land records) or
2 “accounts” governed by U.C.C. Article 9 (such that the lender would obtain a security interest
3 creating a floating lien on accounts and perfect that interest by filing a financing statement
4 covering accounts in the U.C.C. filing system)?
5

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

22 The protection accorded to secured creditors by section 552(b) makes the resolution of this
23 classification question critical for the commercial real estate mortgage lender. If post-petition
24 project revenues are “rents,” “profits,” or “proceeds” of the land, the lender’s security interest
25 attaches to those revenues. If not, then section 552(a) extinguishes the lender’s interest in post-
26 petition project revenues.
27

28 Most of the bankruptcy cases addressing this characterization question involved hotels and
29 security interests in hotel room revenues. Prior to 1994, a few decisions sensibly treated hotel
30 room revenues as the functional equivalent of tenant rents and concluded that § 552(b)’s
31 protection for “rents” preserved a lender’s properly perfected interest in post-petition hotel room
32 revenues. *See, e.g.,* In re S.F. Drake Hotel Assocs., 131 B.R. 156, 158-61 (Bankr. N.D. Cal.
33 1991), *aff’d*, 147 B.R. 538 (N.D. Cal. 1992); In re Mid-City Hotel Assocs., 114 B.R. 634, 638-
34 642 (Bankr. D. Minn. 1990); Travelers Ins. Co. v. First Nat’l Bank, 621 N.E.2d 209 (Ill. App.
35 1993); Great-West Life Assur. Co. v. Raintree Inn, 837 P.2d 267 (Colo. App. 1992); Financial
36 Security Assur., Inc. v. Tollman-Hundley Dalton, L.P., 74 F.3d 1120 (11th Cir. 1996); In re Days
37 California Riverside Ltd. Partnership, 27 F.3d 374 (9th Cir. 1994); Matter of T-H New Orleans
38 Ltd. Partnership, 10 F.3d 1099 (5th Cir. 1993); Great-West Life & Annuity Assur. Co. v. Parke
39 Imperial Canton, Ltd., 177 B.R. 843 (N.D. Ohio 1994); In re Bellevue Place Assocs., 173 B.R.
40 1009 (Bankr. N.D. Ill. 1994). Most courts, however, concluded that post-petition hotel room
41 revenues were accounts (personal property) and were neither “rents,” “profits,” or “proceeds” of
42 the land. *See, e.g.,* In re Northview Corp., 130 Bankr. 543, 548 (9th Cir. BAP 1991); In re Green
43 Corp., 154 B.R. 819 (Bankr. D. Me. 1993); In re Shore Haven Motor Inn, Inc., 124 B.R. 617

(Bankr. S.D. Fla. 1991); *In re Majestic Motel Assocs.*, 131 B.R. 523 (Bankr. D. Me. 1991); *In re Corpus Christi Hotel Partners, Ltd.*, 133 Bankr. 850, 854-55 (Bankr. S.D. Tex. 1991); *In re Airport Inn Associates, Ltd.*, 132 Bankr. 951, 960 (Bankr. D. Colo. 1991); *In re Sacramento Mansion, Ltd.*, 117 Bankr. 592, 602-07 (Bankr. D. Colo. 1990); *In re Investment Hotel Properties, Ltd.*, 109 Bankr. 990, 994-97 (Bankr. D. Colo. 1990). These courts typically applied the formalistic reasoning that room revenues could not be “rent” because hotel guests were not “tenants.” As a result, many bankruptcy courts routinely invalidated lenders’ claimed interests in post-petition hotel revenues.

The formalistic invalidation of a hotel lender’s interest in post-petition room revenues was particularly inappropriate, as hotel room revenues are economically identical to the “rents” paid by tenants under apartment, office, or industrial leases. *See, e.g.*, R. Wilson Freyermuth, *Of Hotel Revenues, Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 UCLA L. Rev. 1461 (1993); R. Wilson Freyermuth, *The Circus Continues — Security Interests in Rents, Congress, the Bankruptcy Courts, and the “Rents Are Subsumed in the Land” Hypothesis*, 6 J. Bankr. L. & Prac. 115 (1997). Recognizing this unfairness, Congress amended section 552(b) in 1994 to preserve the lender’s interest in post-petition “fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties.”

This amendment provided a practical solution to the classification problem with respect to hotels and other “lodging properties.” Unfortunately, it did not address a wide variety of other income-generating projects. Courts have generally concluded that golf course green fees do not constitute “rents,” “profits,” or “proceeds” of the land. *See, e.g.*, *In re McKim*, 217 B.R. 97 (Bankr. D.R.I. 1998); *In re Everett Home Town Ltd. Partnership*, 146 B.R. 453 (Bankr. D. Ariz. 1992); *In re McCann*, 140 B.R. 926 (Bankr. D. Mass. 1992); *In re GGVXX, Ltd.*, 130 B.R. 322 (Bankr. D. Colo. 1991). Likewise, courts have refused to characterize stadium/arena revenue as rents. *See, e.g.*, *Klingner v. Pocono International Raceway, Inc.*, 433 A.2d 1357 (Pa. Super. 1981); *In re Zeeway Corp.*, 71 B.R. 210 (9th Cir. Bankr. 1987). By contrast, courts have treated revenue from parking garages as rents, *see, e.g.*, *In re Ashford Apartments Ltd. Partnership*, 132 B.R. 217 (Bankr. D. Mass. 1991), and likewise have treated landfill dumping fees as being rents. *See, e.g.*, *In re West Chestnut Realty of Haverford, Inc.*, 166 B.R. 53 (Bankr. E.D. Pa. 1993), *aff’d*, 173 B.R. 322 (E.D. Pa. 1994). Courts have split in the characterization of marina slip fees, with some characterizing these as “rents” depending upon the duration of use and others characterizing such fees as accounts subject to Article 9. *Compare In re Northport Marina Assocs.*, 136 B.R. 911 (Bankr. E.D.N.Y. 1992) (fees paid by marina users for assigned slip for periods of six months or more were in nature of “rents,” while fees paid by transitory users were “accounts”) *with In re Harbour Pointe Ltd. Partnership*, 132 B.R. 501 (Bankr. D.D.C. 1991) (fees generated by marina treated as “rents”) and *Matter of Hamlin’s Landing Joint Venture*, 77 B.R. 916 (Bankr. M.D. Fla. 1987) (same).

The Restatement (Third) of Property — Mortgages attempted to provide some useful guidance by defining “rents” functionally as “the proceeds payable by a lessee, licensee, or other

1 person for the right to possess, use, or occupy the real property of another.” Restatement (Third)
2 of Property — Mortgages § 4.2(a) (1996). This definition leaves some residual uncertainty, as it
3 implicitly bases the proper characterization of project revenues upon the characteristics of the
4 project itself. For example, the comments to the Restatement suggest that revenues from parking
5 garage would constitute “rents,” *see* Restatement (Third) of Property — Mortgages § 4.2
6 comment f, illustration 10 (“Because receipts from parking patrons primarily represent fees paid
7 for the right to park motor vehicles on Mortgagor’s real estate, they constitute rents and
8 Mortgagee has the right to collect them until the mortgage obligation is satisfied.”), but that gate
9 receipts from a racetrack would not constitute “rents.” *See id.* illustration 9 (“Because the gate
10 receipts are derived primarily from the entertainment provided to race track customers, they do
11 not constitute rents and Mortgagee has no right to collect them.”). The Restatement thus places
12 the burden on courts to make case-by-case judgments about the extent to which project revenues
13 are traceable to the “land” as opposed to “services” provided by the operator.
14

15 Courts would face significant practical obstacles in making such allocations. First, one might
16 argue that requiring a land/services allocation would require parties to compile and analyze
17 historical information concerning the developer’s capital and operational costs in order to
18 allocate revenue into its rent/nonrent components. R. Wilson Freyermuth, *Of Hotel Revenues,*
19 *Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real*
20 *Estate Finance*, 40 UCLA L. Rev. 1461, 1520 (1993). Second, the extent to which different
21 occupiers are concerned about occupying space as opposed to services is a function of each
22 occupier’s respective preferences, which may differ from user to user. *Id.* Third, requiring an
23 allocation would be artificial given the contractual behavior of owners and occupiers of
24 commercial real estate ... [who] typically do not separate the occupier’s payment obligation into
25 a “use” component and a “services” component. *Id.* at 1521.
26

27 Furthermore, these judgments have significant implications for the scope of U.C.C. Article 9.
28 Several commentators have proposed that bringing rents within the scope of Article 9 would
29 provide greater coherence in the law of security in rents by effectively unifying the treatment of
30 an assignment of rents with the current treatment of security in accounts receivable. *See, e.g.,* R.
31 Wilson Freyermuth, *Of Hotel Revenues, Rents, and Formalism in the Bankruptcy Courts:*
32 *Implications for Reforming Commercial Real Estate Finance*, 40 UCLA L. Rev. 1461, 1520
33 (1993); Julia Patterson Forrester, *A Uniform and More Rational Approach to Rents as Security*
34 *for the Mortgage Loan*, 46 Rutgers L. Rev. 349 (1993). Indeed, under revised Article 9, “rents”
35 would constitute “accounts” under U.C.C. § 9-102(a)(2) (“a right to payment of a monetary
36 obligation ... for property that has been or is to be sold, leased, licensed, assigned, or otherwise
37 disposed of”), but for the exclusion of an assignment of rents from Article 9’s scope. *See* U.C.C.
38 § 9-109(c)(11) (“[Article 9] does not apply to ... the creation or transfer of an interest in or lien
39 on real property, including a lease or rents thereunder”).
40

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

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

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

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

14 17. “State.” This definition is the boilerplate definition of the term as used in uniform
15 acts.
16
17

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

19 (a) A person gives a notification under this [act] by:

20 (1) depositing it in the mail or with any commercially reasonable delivery service,
21 properly addressed to the intended recipient’s address as specified in subsection (b), with postage
22 or cost of delivery provided for; or

23 (2) causing it to be received within the time that it would have been received if
24 properly given under paragraph (1).

25 (b) The following rules govern the proper address for a notification given under
26 subsection (a)(1):

27 (1) A person giving a notification to an assignee shall use the address for notices to
28 the assignee provided in the assignment of rents, but if the assignee has provided the person
29 giving a notification with a more recent address for notices, the person giving the notification
30 shall use that address.

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

(3) A person giving a notification to a tenant shall use the address for notices to the tenant as provided in the tenant's lease, but if the tenant has provided the person giving a notification with a more recent address for notices, the person giving the notification shall use that address. If the lease does not specify an address for notices to the tenant and the tenant has not provided an address, the person giving the notification shall use the address of the leased premises.

Preliminary Comment

1. *Methods of giving notification.* This section specifies the methods for giving any notification required by this Act. Under subsection (a)(1), notices required by the Act may be transmitted by registered or certified mail, regular mail, or commercial delivery services. Proper dispatch, not receipt, satisfies the obligation to give notification. Subsection (a)(2) permits a person to give notification in any manner that would result in the notification being received within the time that the recipient would have received it if the notification had been given by mail or commercial delivery service. This subsection would permit a person to give a notification by means of physical delivery to its intended recipient. The person asserting that notification was given has the burden of proof that notification was given in accordance with the provisions of this section.

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

1 Subsection (b)(3) provides that a tenant’s address for notification will be the address so
2 specified in the tenant’s lease, or any more recent address provided by the tenant to the person
3 giving notification. If the lease does not specify a particular address for legal notices and the
4 tenant has not provided a more recent address, then the person giving a notification to a tenant
5 under this Act may direct it to the tenant at the address of the leased premises.
6

7 3. *Obligations under the Act triggered by receipt.* While a person obliged to give a
8 notification under the Act satisfies its obligation to give that notification by dispatch in
9 accordance with subsection (a)(1), several substantive provisions of the Act effectively require
10 that the intended recipient actually receive notification. For example, although an assignee may
11 give notification to a tenant by mail directing that tenant to pay rents to the assignee, the Act does
12 not legally obligate the tenant to pay rents to the assignee until the tenant receives the
13 notification. *See* Section 8(b).
14

15 **SECTION 4. ASSIGNMENT OF RENTS CREATES SECURITY INTEREST.** Except
16 as otherwise provided by its express terms, an assignment of rents creates a presently effective
17 security interest in all accrued and unaccrued rents arising from the real property described in the
18 assignment, whether the assignment is denominated an absolute assignment, an absolute
19 assignment conditioned upon default, an assignment as additional security, or otherwise. The
20 security interest created by an assignment of rents is separate and distinct from any security
21 interest held by the assignee on the real property described in the assignment.

22 **Preliminary Comments**

23 Source: Cal. Civ. Code § 2938(a); Restatement (Third) of Property — Mortgages § 4.2(b).
24

25 1. *Rents as a distinct source of collateral.* An assignment of rents principally serves to
26 provide the assignee with the ability to collect rents that accrue between the date of the assignor’s
27 default and the date that the assignee can complete a foreclosure of its mortgage on the
28 underlying land. In many states, this foreclosure process can be quite lengthy. In these states, a
29 mortgagee faces a heightened risk that while a foreclosure proceeding is pending, the mortgagor
30 may continue to collect project revenues and expend them other than in reduction of the
31 mortgage debt (a process often referred to as “milking” the rents). By taking an assignment of
32 rents, the assignee demonstrates its intention to have a lien upon all future rents produced by the
33 project, including those that accrue during the period between the assignor’s default and the
34 mortgagee’s completion of a foreclosure proceeding — a period that may be extended if the

1 assignor files a bankruptcy petition that stays the completion of the foreclosure.

2
3 Traditionally, state law has governed the creation and enforcement of security interests in
4 rents. Most frequently, however, disagreements regarding security interests in rents arise in the
5 federal bankruptcy courts. On its face, the Bankruptcy Code appears to recognize that state law
6 has traditionally treated “rents” that accrue between default and foreclosure as a source of
7 collateral that is separate and distinct from the land that generated those rents. The Bankruptcy
8 Code characterizes rents from mortgaged property as “cash collateral,” 11 U.S.C. § 363(a), and
9 preserves a secured creditor’s pre-bankruptcy lien on rents that the debtor receives after it files a
10 bankruptcy petition, *id.* § 552(b). These provisions appear to acknowledge that a pre-bankruptcy
11 assignment of rents creates a separate security interest in the rents (*i.e.*, separate from the
12 underlying mortgage lien against the land itself).

13
14 While most bankruptcy court decisions have treated post-petition rents as a separate and
15 distinct source of collateral, a few bankruptcy court decisions have instead concluded that post-
16 petition rents do not constitute separate collateral because the post-petition rent stream is in fact
17 “subsumed” within the valuation of the land itself. *See, e.g.*, *In re Wrecclesham Grange, Inc.*,
18 221 B.R. 978 (Bankr. M.D. Fla. 1997); *In re Embassy Properties N. Ltd. Partnership*, 196 B.R.
19 172 (Bankr. D. Kan. 1996); *In re Citicorp Park Assocs.*, 180 B.R. 15 (Bankr. D. Me. 1995); *In re*
20 *Barkley 3A Investors, Ltd.*, 175 B.R. 755 (Bankr. D. Kan. 1994); *In re Mullen*, 172 B.R. 473
21 (Bankr. D. Mass. 1994). These courts have thus concluded that because “rents are subsumed
22 within the land,” a debtor can use post-petition rents without regard to a pre-bankruptcy
23 assignment of rents as long as the mortgage lender’s interest in the mortgaged land itself is
24 adequately protected (*i.e.*, as long as the land itself is not declining in value), even if the land was
25 worth less than the mortgage debt.

26
27 The Act rejects the view of state law expressed in these cases that rents that accrue prior to
28 foreclosure are subsumed within the land. The Act instead confirms that all rents accruing prior
29 to the completion of a foreclosure constitute a source of collateral that is separate and distinct
30 from the land from which those rents accrued.

31
32 2. *The “Absolute Assignment of Rents.”* As many American states adopted the lien theory
33 of mortgages, some mortgagees began requiring the mortgagor to make an “absolute” assignment
34 of rents. By virtue of an “absolute” assignment of rents, the assignor purported to transfer “title”
35 to unaccrued rents to the assignee, ostensibly placing the assignee in the same legal position as it
36 would have occupied under the title theory of mortgages. Frequently, such an “absolute”
37 assignment will specify that it is “not merely for purposes of security” and that the assignor has
38 no interest in unaccrued rents other than a revocable license (*i.e.*, not a “property” right) to collect
39 such rents prior to default.

40
41 Mortgagees have used the “absolute” assignment of rents in order to strengthen their position
42 with respect to rents in the context of bankruptcy. When a debtor files for bankruptcy, all of the
43 property in which the debtor holds an interest becomes property of the bankruptcy estate under

1 Bankruptcy Code § 541(a). The debtor generally may use property of the estate in the course of
2 its bankruptcy proceeding, subject to the obligation to provide adequate protection to a secured
3 creditor holding a lien upon that property. 11 U.S.C. § 363(b). Moreover, a secured party
4 holding a security interest in property of the estate is subject to the automatic stay and cannot
5 seek to enforce its lien or otherwise collect the debt outside the context of the bankruptcy
6 proceeding. *Id.* § 362(a). As a result, a debtor that owns an income-producing real estate project
7 has a significant incentive to argue that the project’s post-petition rents constitute property of the
8 bankruptcy estate. By contrast, the mortgagee/assignee would prefer that the law characterize the
9 post-petition rents as property that is **not** part of the bankruptcy estate. If the project’s post-
10 petition rents are not property of the estate, the automatic stay would place no limitation upon the
11 mortgagee’s ability to collect those rents and apply them to the debt.
12

13 Obviously, if a mortgagee had already completed a foreclosure sale prior to the debtor’s
14 bankruptcy filing, then the land would belong to the foreclosure purchaser and thus unaccrued
15 rents from that land would no longer constitute property of the bankruptcy estate. But if no
16 foreclosure has yet occurred — and thus equitable ownership of the land remains in the debtor —
17 unaccrued post-petition rents would seem to fit squarely within the broad concept “property of
18 the estate” as articulated in § 541(a). Nevertheless, in an attempt to boost their leverage in
19 context of bankruptcy, mortgage lenders have argued that if a borrower executed an “absolute”
20 assignment of rents, then “title” to the post-petition rents is in the lender and such rents therefore
21 do not constitute property of the bankruptcy estate. A number of courts have accepted this
22 argument *See, e.g.*, *First Fidelity Bank v. Jason Realty, L.P.* (In re Jason Realty, L.P.), 59 F.3d
23 423 (3d Cir.1995); *In re Kingsport Ventures, L.P.*, 251 B.R. 841 (Bankr. E.D. Tenn. 2000); *In re*
24 *Robin Associates*, 275 B.R. 218 (Bankr. W.D. Pa. 2001); *In re Carretta*, 220 B.R. 203 (D.N.J.
25 1998); *see also* *NCNB Texas Nat’l Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358 (Tex. App.
26 1990) (“The absolute assignment does not create a security interest but instead passes title to the
27 rents. An absolute assignment of rents is not security but is a pro tanto payment of the
28 obligation.”).
29

30 The Restatement (Third) of Property — Mortgages and most commentators have rejected this
31 view. In the typical transaction, the assignor executes an assignment of rents and leases
32 contemporaneously with its execution of the mortgage. The assignee does not immediately begin
33 collecting rents from tenants as soon as it takes the assignment, and typically has no intention to
34 do so at any time prior to the assignor’s default — indeed, the typical assignment expressly
35 acknowledges the assignor’s right to collect and expend the rents prior to default. Under such an
36 “assignment,” the circumstances demonstrate that the parties intend for the rents to secure the
37 repayment of the mortgage debt. In other words, the “absolute” assignment is merely a security
38 device, regardless of its “absolute” characterization.
39

40 Mortgage law has long established that instruments purporting absolutely to convey an
41 interest in land nevertheless constitute equitable mortgages when the circumstances demonstrate
42 that the parties are using an interest in land to secure payment of a debt. *See, e.g.*, Restatement of
43 Property (Third) — Mortgages § 3.2 (absolute deed intended to secure an obligation constitutes a

mortgage); *Smith v. Player*, 601 So.2d 946 (Ala. 1992) (same); *Steckelberg v. Randolph*, 404 N.W.2d 144 (Iowa 1987) (same). Under this same principle, courts should treat a typical “absolute” assignment of rents as an assignment for security purposes, and the weight of modern judicial authority so provides. *See, e.g.*, *In re Cavros*, 262 B.R. 206 (Bankr. D. Conn. 2001); *In re 5877 Poplar, L.P.*, 268 B.R. 140 (Bankr. W.D. Tenn. 2001); *National Operating, L.P. v. Mutual Life Ins. Co. of New York*, 630 N.W.2d 116 (Wis. 2001); *In re Guardian Realty Group, L.L.C.*, 205 B.R. 1 (Bankr. D.D.C. 1997); *In re RV Centennial Partnership*, 202 B.R. 774 (Bankr. D. Colo. 1996); *In re Lyons*, 193 B.R. 637, 644 (Bankr. D. Mass. 1996). Under this view, where the underlying land is property of the bankruptcy estate, post-petition rents from that property would likewise constitute property of the bankruptcy estate. However, the assignee of those rents would continue to have a security interest in those rents by virtue of Bankruptcy Code § 552(b), and the debtor/assignor would be obliged to provide adequate protection of the assignee’s interest in those rents under Bankruptcy Code § 363.

The Act adopts the view that any “assignment of rents” as defined in this Act (Section 2(2)) creates a security interest in rents, regardless of whether it is in form denominated an “absolute” assignment. The Act does not preclude an owner of land from making a truly absolute transfer of rents in a transaction other than for security purposes (*i.e.*, where the parties actually intend to transfer full legal and equitable ownership and control of unaccrued rents immediately upon execution and delivery). Such a transfer, however, is not an “assignment of rents” as defined in this Act, and thus the provisions of this Act governing the enforcement of an assignment of rents would not apply to such a transfer.

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

SECTION 5. RECORDATION OF ASSIGNMENT OF RENTS; EFFECT OF

RECORDATION. An assignment of rents may be recorded in the [appropriate governmental office under the recording act of this state] in the same manner as any other conveyance of an interest in real property. Upon recording:

(1) the assignment gives constructive notice of its contents with the same effect as any

1 other recorded conveyance of an interest in real property; and

2 (2) the security interest created by the assignment is fully perfected, notwithstanding any
3 provision of the assignment or other law of this state which would preclude or defer enforcement
4 of the security interest until the occurrence of a subsequent event, including a subsequent default
5 of the assignor, the assignee's obtaining possession of the real property, and the appointment of a
6 receiver.

7 **Preliminary Comment**

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

9 Under Bankruptcy Code § 544(a) and its “strong-arm” clause, a debtor-in-possession can
10 invalidate (or, in bankruptcy parlance, “avoid”) any security interest that a judgment lien creditor
11 or bona fide purchaser could have avoided under state law as of the petition date.

12
13 In the 1980s and early 1990s, bankruptcy courts struggled with the proper impact of § 544(a)
14 upon a mortgagee's right to post-petition rents under an assignment of rents. This struggle
15 derives in part from the confusion generated by the differing terminologies of mortgage law and
16 by Article 9 of the Uniform Commercial Code. Under Article 9, a secured party obtains a
17 security interest in collateral by having the debtor execute a security agreement describing that
18 collateral, and “perfects” that security interest by filing an Article 9 financing statement
19 describing the collateral. By “perfecting” its security interest, the Article 9 secured party makes
20 that interest enforceable against subsequent creditors, including judicial lien creditors. U.C.C. §
21 9-317(a). Because Bankruptcy Code § 544(a) provides the bankruptcy trustee/debtor-in-
22 possession with the status of a hypothetical judicial lien creditor under state law, the
23 trustee/debtor-in-possession takes property of the estate subject to any security interest that was
24 properly perfected under Article 9 prior to the filing of the bankruptcy petition. If the secured
25 party has a properly perfected security interest prior to the petition date, it is irrelevant whether
26 the secured party had taken any steps to enforce that security interest prior to bankruptcy — the
27 perfected security interest continues to remain effective against the collateral and the
28 trustee/debtor-in-possession cannot avoid that security interest using its § 544(a) avoidance
29 power.
30

31 By contrast, mortgage law did not customarily use the term “perfection.” Under mortgage
32 law, recording of a mortgage interest served to make that interest valid as against subsequent
33 creditors and bona fide purchasers of the land. Analytically, of course, “recording” in this sense
34 is similar to the Article 9 concept of perfection. By analogy, one could argue that if a mortgage
35 lender had taken and properly recorded an assignment of rents prior to bankruptcy, that mortgage

1 lender should have a security interest in rents that was “perfected” and thus enforceable against
2 third parties. Under this analysis, the trustee/debtor-in-possession could not avoid the mortgage
3 lender’s security interest in rents under § 544(a), and thus the mortgage lender would retain its
4 security interest in post-petition rents under § 552(b). A number of courts in fact adopted this
5 analytical approach, treating post-petition rents as the lender’s cash collateral so long as the
6 mortgagee had properly recorded its assignment of rents prior to bankruptcy. *See, e.g.,* In re
7 Millette, 186 F.3d 638 (5th Cir. 1999); Steinberg v. CrossLand Mortgage Corp. (In re Park at
8 Dash Point L.P.), 985 F.2d 1008, 1011 (9th Cir. 1993); Vienna Park Properties v. United Postal
9 Sav. Ass’n (In re Vienna Park Properties), 976 F.2d 106, 112-15 (2d Cir 1992).

10
11 Unfortunately, some bankruptcy courts held that § 544(a) permitted the trustee/debtor-in-
12 possession to invalidate a security interest in post-petition rents where the secured party had not
13 taken sufficient steps to **enforce** that interest (e.g., actually collect the rents) prior to bankruptcy.
14 To understand how these decisions confused “perfection” or “enforceability” with
15 “enforcement,” it is helpful to review the distinction between the lien and title theories of
16 mortgage law. Under the title theory, the mortgagee held “title” to the land (and thus title to
17 unaccrued rents) by virtue of the mortgage, even prior to default. By contrast, under the lien
18 theory, a mortgage gave the mortgagee only a security interest in the land rather than “title” —
19 and thus a mortgage by itself gave the mortgagee no interest in unaccrued rents until such time as
20 the mortgagee completed a foreclosure, became a mortgagee in possession, or obtained the
21 appointment of a receiver for the land.

22
23 However, if a mortgagee claiming a security interest in rents by virtue of a separate
24 assignment of rents, then any legal constraints on the mortgagee’s right to collect rents **by virtue**
25 **of the mortgage itself** should be irrelevant. Nevertheless, a number of older state court decisions
26 conflated these two situations, holding that even a separate assignment of rents was not effective
27 until the mortgagee took affirmative steps after default to enforce that assignment, such as by
28 obtaining the appointment of a receiver, becoming a mortgagee in possession, or impounding the
29 rents. *See, e.g.,* Taylor v. Brennan, 621 S.W.2d 592, 593-94 (Tex. 1981); Bevins v. Peoples
30 Bank & Trust Co., 671 P.2d 875, 879 (Alaska 1983), Martinez v. Continental Enters., 730 P.2d
31 308, 316 (Colo. 1986); Sullivan v. Rosson, 119 N.E. 405 (N.Y. 1918). Based upon these old
32 state law decisions, numerous bankruptcy courts concluded that an assignment of leases and rents
33 created only an “inchoate” lien upon rents that was ineffective against third parties if the
34 mortgagee had not taken affirmative steps prior to bankruptcy to activate that lien. As a result,
35 these bankruptcy courts concluded that where a mortgagee had not taken action sufficient to
36 divest the mortgagor of control over the property and its rents prior to bankruptcy — such as by
37 obtaining the appointment of a receiver, taking possession of the land, or notifying tenants to
38 begin paying rents directly to the mortgagee — the mortgagee’s security interest in post-petition
39 rents was “unperfected” and was thus subject to avoidance under § 544(a). *See, e.g.,* In re
40 Century Inv. Fund VIII L.P., 937 F.2d 371, 377 (7th Cir. 1991); In re 1301 Conn. Ave. Assocs.,
41 126 B.R. 1, 3 (D.D.C. 1991); First Federal Sav. & Loan Ass’n v. Hunter (In re Sam A. Tisci,
42 Inc.), 133 B.R. 857, 859 (N.D. Ohio 1991); Condor One, Inc. v. Turtle Creek, Ltd. (In re Turtle
43 Creek, Ltd.), 194 B.R. 267, 278 (Bankr. N.D. Ala. 1996); In re Mews Assocs., L.P., 144 B.R.

1 867, 868-69 (Bankr. W.D. Mo. 1992). Under this view, the debtor-in-possession could use post-
2 petition rents free and clear of any claim by the mortgagee while the debtor remained in
3 bankruptcy.
4

5 These diverse interpretations of state mortgage law produced substantial nonuniformity in the
6 treatment of security interests in rents, both from state to state and even from district to district
7 within a particular state. This nonuniformity produced significant criticism among academics,
8 real estate practitioners, and commercial mortgage lenders. *See, e.g.*, R. Wilson Freyermuth, *The*
9 *Circus Continues — Security Interests in Rents, Congress, the Bankruptcy Courts, and the*
10 *“Rents Are Subsumed in the Land” Hypothesis*, 6 J. Bankr. L. & Prac. 115, 118 (1997); Julia
11 Patterson Forrester, *A Uniform and More Rational Approach to Rents as Security for the*
12 *Mortgage Loan*, 46 Rutgers L. Rev. 349 (1993); Patrick A. Randolph, Jr., *Recognizing Lenders’*
13 *Rents Interests in Bankruptcy*, 27 Real Prop., Prob. & Trust J. 281 (1992).
14

15 In response to this criticism, in 1994 Congress amended Bankruptcy Code § 552(b) in an
16 apparent attempt to provide more uniform treatment of assignments of rents. Prior to 1994, §
17 552(b) provided that a pre-petition security interest in land and rents from that land extended to
18 post-petition rents “to the extent provided by [the] security agreement and by applicable
19 nonbankruptcy law.” By focusing upon the term “applicable nonbankruptcy law,” many courts
20 (as noted above) concluded that § 552(b) did not permit the mortgagee to claim a security interest
21 in post-petition rents where the mortgagee had failed to take the necessary steps to obtain actual
22 or constructive possession of the land and its rents prior to bankruptcy. In 1994, however,
23 Congress amended § 552(b) to remove this reference to “applicable nonbankruptcy law.”
24

25 Many commentators concluded that the amended § 552(b) established a federal standard for
26 the enforcement of an assignment of rents, thus rendering state rent assignment law irrelevant.
27 *See, e.g.*, 5 Collier on Bankruptcy ¶ 552.03[1], at 552-17 (“[Section 552(b)(2)] does not refer to
28 applicable nonbankruptcy law and is intended to provide a creditor with a valid post-petition
29 interest in rents notwithstanding the creditor’s failure to perfect its security interest in rents under
30 applicable state law ...”). Unfortunately, while legislative history suggests that Congress
31 intended to preempt contrary state laws limiting the post-petition effectiveness of an assignment
32 of rents, the text itself provides no express statement of preemptive intent. Further, § 552(b)’s
33 protection for a security interest in post-petition rents is expressly subject to § 544’s strong-arm
34 clause — ***which implicitly incorporates underlying state law regarding the enforceability of a***
35 ***security interest versus third parties***. Under § 544(a), there is no question that the debtor-in-
36 possession may avoid a security interest in rents if a bona fide purchaser of the land could have
37 avoided that interest under state law as of the petition date. Thus, if state law ***actually provides***
38 that a security interest in rents is ineffective against third parties until the mortgagee has taken
39 affirmative action to enforce that security interest, § 544(a) would appear to permit the debtor to
40 avoid the security interest of such a mortgagee — notwithstanding the amendment to § 552(b) —
41 if the mortgagee failed to take such action prior to bankruptcy.
42

43 Roughly one-third of the states have enacted statutes making clear that an assignment of rents

1 is perfected and effective against third persons upon its recordation, without regard to whether
2 the mortgagee has taken any steps to “activate” or “enforce” that assignment. Cal. Civ. Code §§
3 2938, 2938.1; Del. Code tit. 25, § 2121; Fla. Stat. Ann. § 697.07; 765 Ill. St. § 5/31.5; Ind. Code
4 Ann. § 32-21-4-2; Kan. Stat. Ann. § 58-2343; La. Rev. Stat. Ann. § 9:4401; Md. Real Prop. Code
5 Ann. § 3-204; Neb. Rev. Stat. § 52-1704; N.C. Gen. Stat. § 47-20(c); Or. Rev. Stat. § 93.806;
6 S.C. Code § 29-3-100; Tenn. Code Ann. § 66-26-116; Va. Code Ann. § 55-220.1; Wash. Rev.
7 Code Ann. § 7-28-230(3); Wis. Stat. Ann. § 708.11. The Act adopts this approach.
8

9 **SECTION 6. ENFORCEMENT OF SECURITY INTEREST IN RENTS.** Upon the
10 assignor’s default in performance of an obligation secured by an assignment of rents, the assignee
11 may enforce the assignment in accordance with its terms, using one or more of the methods
12 specified in Section 7, 8, 9, or 10, or any other method sufficient to enforce an assignment of
13 rents under law of this state other than this [act]. From the date of enforcement, the assignee
14 may collect and receive:

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

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

17 **Preliminary Comment**

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

19
20 1. *Nonexclusive method of enforcement.* Section 6 provides that upon default by the
21 assignor, the assignee may enforce the assignment in accordance with its terms. The Act
22 specifies several methods of enforcement of an assignment of rents in Sections 7 (appointment of
23 a receiver), 8 (notification to tenants), 9 (notification to the assignor), and 10 (taking possession
24 of the land described in the assignment of rents and thus becoming a “mortgagee in possession”).
25 The Act, however, would permit enforcement of an assignment of rents by any other method
26 recognized under the law of the state other than this Act.
27

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

1 2. *Rents collectable under this Act.* The Act provides that upon default and enforcement, an
2 assignee may collect (1) accrued but unpaid rents, and (2) unaccrued rents as they accrue in the
3 future. By its terms, Section 6 does not authorize the assignee to collect the cash proceeds of
4 rents that the assignor had already collected prior to enforcement.
5

6 However, this Act does not prevent the assignee from using any other legal mechanism to
7 obtain and enforce a security interest in the cash proceeds of rents that the assignor has already
8 collected prior to enforcement. For example, the express terms of an assignment of rents could
9 (1) require the assignor to deposit the cash proceeds of rents in a particular deposit account, and
10 (2) grant the assignee a security interest in that deposit account under Article 9 of the Uniform
11 Commercial Code. If the assignment of rents so provided, the assignee could exercise its
12 available remedies under Article 9 to collect any sums within that deposit account, including the
13 cash proceeds of rents collected by the assignor prior to the assignee's enforcement of its
14 assignment of rents.
15

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

17 (a) Upon the assignor's default as defined in an assignment of rents, the assignee may file
18 a petition for the appointment of a receiver for the real property described in the assignment with
19 the court before which is pending an action to foreclose a security interest in the real property
20 described in the assignment or an action for specific performance of the assignment of rents.
21 However, an assignee is not entitled to the appointment of a receiver under this [act] if the real
22 property described in the assignment of rents contains four or fewer dwelling units and the
23 assignor occupies one or more of those units as the assignor's principal residence.

24 (b) Upon the filing of a petition under subsection (a), the petitioner is entitled to
25 appointment of a receiver if:

26 (1) the assignor agreed in the security instrument, the assignment, or another signed
27 document to the appointment of a receiver after default;

28 (2) it appears likely that the real property and its rents may not be sufficient to satisfy
29 the secured obligation;

(3) it appears that the assignor has committed waste of the real property, failed to pay real property taxes or obligations secured by senior encumbrances on the real property, or has failed to turn over to the assignee rents that the assignee is entitled to collect under Section 6; or

(4) other circumstances exist that would justify the appointment of a receiver under the laws of this state other than this [act].

(c) From the date of its appointment, a receiver appointed under this section has the responsibility to:

(1) preserve the real property described in the assignment of rents;

(2) collect rents accruing after its appointment and any rents accrued but unpaid as of the date of its appointment;

(3) pay taxes and senior liens on the real property;

(4) pay to the assignee, for credit to the secured obligation, all rents collected from the real property, less amounts paid for taxes, senior liens, and other reasonable expenses incurred by the receiver in the management, maintenance, and repair of the real property; and

(5) comply with any obligations imposed upon the receiver by the order of appointment.

(d) From the date of its appointment, and with the prior approval of the assignee, a receiver appointed under this section has the authority to:

(1) enter into leases of all or any portion of the real property;

(2) enforce and terminate leases in accordance with their terms; and

(3) carry out any other functions authorized by the court to enforce the receivership.

Preliminary Comments

Source: Ind. Code § 32-30-5-1(4); Restatement (Third) of Property — Mortgages §§ 4.3, 4.4

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

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

2. *Traditional standards for appointment of a receiver.* Traditionally, courts have appointed a receiver for mortgaged land where the value of the land was insufficient to satisfy the mortgage debt (*i.e.*, where the mortgagee’s security was inadequate) or whether the owner of the mortgaged land was committing waste (thereby threatening the value of the mortgagee’s security). *See, e.g.*, Restatement (Third) of Property — Mortgages §§ 4.3(a)(2), 4.3(a)(3); 1 G. Nelson & D. Whitman, Real Estate Finance Law § 4.34 (3d ed. 1993). Consistent with this traditional approach, Section 6(b) authorizes the appointment of a receiver in these situations.

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

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

Because the appointment of a receiver has traditionally originated from within the court’s equitable discretion, some courts have refused to appoint a receiver — despite the presence of a

1 receivership clause — in cases where they would have denied appointment of a receiver
2 otherwise. *See, e.g.*, *Dart v. Western Sav. & Loan Ass’n*, 438 P.2d 407 (Ariz. 1968); *Chromy v.*
3 *Midwest Fed. Sav. & Loan Ass’n*, 546 So.2d 1172 (Fla. App. 1989); *Sazant v. Foremost*
4 *Investments, N.V.*, 507 So.2d 653 (Fla. App. 1987) (receivership clause not binding on court
5 where mortgagor had not committed waste and default did not place mortgagee at serious risk of
6 noncollection); *Gage v. First Federal Sav. & Loan Ass’n*, 717 F. Supp. 745 (D. Kan. 1989);
7 *Barclays Bank, P.L.C. v. Davidson Ave. Assocs., Ltd.*, 644 A.2d 685 (N.J. Super. 1994)
8 (receivership clause “usurps the judicial function” and thus violates public policy). In other
9 states, courts have treated receivership clauses as presumptively but not conclusively enforceable.
10 For example, in *Barclays Bank v. Superior Court*, 137 Cal. Rptr. 743 (Cal. App. 1977), the court
11 held that a receivership clause presented a prima facie (but rebuttable) evidentiary showing of the
12 mortgagee’s entitlement to the appointment of a receiver. *See also, e.g.*, *Riverside Properties v.*
13 *Teachers Ins. & Annuity Ass’n*, 590 S.W.2d 736 (Tex. App. 1979); *Okura & Co. v. Careau*
14 *Group*, 783 F. Supp. 482 (C.D. Cal. 1991); *Wellman Sav. Bank v. Roth*, 432 N.W.2d 697 (Iowa
15 App. 1988).

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

35
36 By expressing the circumstances justifying the appointment of a receiver in the disjunctive,
37 the Act adopts the view that a receivership clause is enforceable by the assignor without regard to
38 the condition of the real property, the solvency of the assignor, or the adequacy of the security for
39 the secured obligations.

40
41 4. *Receivership limited for owner-occupied residential real property.* Subsection (a)
42 provides that an assignee is not entitled to the appointment of a receiver as a matter of right
43 where the real property consists of four or fewer dwelling units and the assignor occupies one or

1 more of those units as its principal residence. This provision reflects an awareness that courts
2 have traditionally been very reluctant to appoint a receiver for owner-occupied residential
3 property.
4

5 5. *Ex parte appointment of a receiver.* Many assignments of rents contain a clause entitling
6 the assignee to the appointment of a receiver on an *ex parte* basis, without notice to the assignor.
7 The Act does not establish that the assignee is entitled to a receivership on an *ex parte* basis, and
8 instead leaves to other state law the question of whether (and in what circumstances) prior notice
9 to the assignor is excused.
10

11 6. *Receiver's power to disaffirm existing leases.* Subsection (d)(2) clearly establishes that
12 the receiver may terminate leases in accordance with their terms without specific court approval.
13 However, the Act does not specifically address the extent to which the receiver may disaffirm an
14 existing lease that is not in default under its terms. The Restatement (Third) of Property —
15 Mortgages § 4.4 takes the view that a receiver has no inherent authority to disaffirm leases, but
16 may disaffirm a lease that (1) violates the terms of any recorded loan document evidencing the
17 secured obligations or (2) was made while the assignor was in default to the assignee and was not
18 commercially reasonable at its inception. This would permit the receiver to disaffirm
19 “sweetheart” leases or leases that otherwise violated the terms of the assignment of rents, to the
20 extent that the receiver concluded the leases were imprudent.
21

22 The Act addresses the receiver's power to disaffirm existing leases by leaving this question to
23 the terms of the court order appointing the receiver. Under subsection (d)(3), the receiver has the
24 authority to carry out those functions authorized by the court to enforce the receivership. Thus,
25 the receiver may disaffirm an existing lease if a court order generally authorizes the receiver to
26 exercise the power to disaffirm leases, or specifically authorizes the receiver to disaffirm a
27 particular lease.
28

29 **SECTION 8. ENFORCEMENT BY NOTIFICATION TO TENANT**

30 (a) Upon the assignor's default as defined in an assignment of rents or as otherwise
31 permitted in the assignment, the assignee may give to a tenant of the real property a notification
32 demanding that the tenant pay to the assignee all accrued but unpaid rents and all unaccrued rents
33 as they become due. The assignee shall deliver a copy of the notification to the assignor and to
34 any other person that holds a recorded assignment of rents relating to the real property. The
35 notification must:

1 (1) identify the tenant, assignor, assignee, premises covered by the lease, assignment
2 of rents being enforced, and recording data for the assignment;

3 (2) state that the assignor is in default under the assignment of rents and that the
4 assignee has the right to collect rents in accordance with the terms of the assignment;

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

7 (4) describe the manner in which subsections (b) and (c) affect the tenant's rental
8 obligations;

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

12 (6) contain a statement advising the tenant to consult an attorney if the tenant has
13 questions about its rights and obligations following receipt of the notification; and

14 (7) be signed by the assignee under penalty of perjury.

15 (b) Subject to subsection (c), following receipt of a notification under subsection (a):

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

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

22 (3) a tenant's payment in good faith of rents then due to the assignee satisfies the

1 tenant's obligation under the lease to the extent of the payment made; and

2 (4) a tenant's obligation to pay rent to the assignee continues until the tenant receives
3 a court order directing the tenant to pay the rent in a different manner or written instructions from
4 the assignee canceling its notification, whichever occurs first.

5 (c) If a tenant has received a notification under subsection (a), neither the assignor nor the
6 assignee may hold the tenant in default of a lease solely for nonpayment of rents until 10 days
7 after the next regularly scheduled rental payment would be due under the lease.

8 (d) Upon receiving notification that another creditor entitled to priority under Section 5
9 has enforced its interest in rents, an assignee that has previously given notification to a tenant
10 under subsection (a) shall immediately give a new notification to that tenant canceling its earlier
11 notification. If the assignee fails to do so, the assignee is liable to the other creditor for any
12 economic loss caused by the failure.

13 (e) An assignee's failure to give notification under subsection (a) to any person holding a
14 recorded assignment of rents on the real property does not defeat the effectiveness of the
15 notification as to the assignor and those tenants receiving the notification. However, the person
16 entitled to the notification may recover damages from the assignee for any economic loss caused
17 by the failure.

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

1
2 NOTIFICATION TO PAY RENT TO PARTY OTHER THAN LANDLORD

3 Tenant: [Name of Tenant]

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

5 Landlord: [Name of Landlord]

6 Assignee: [Name of Assignee]

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

9 1. The Assignee named above is the assignee of rents under [name of
10 document] (the "Assignment of Rents") dated _____, and recorded at
11 [recording data] in the [appropriate governmental office under the recording act
12 of this State]. You may request a copy of the Assignment of Rents from the
13 Assignee at the address listed above.

14 2. The Landlord is in default under the Assignment of Rents. Under the
15 Assignment of Rents, the Assignee is entitled to collect rents from the
16 Premises.

17 3. This notification affects your rights and obligations under the lease or
18 rental agreement (the "Lease") by which you occupy the Premises. In order to
19 provide you with an opportunity to consult with an attorney about how you
20 should respond to this notification, neither the Assignee nor the Landlord can
21 hold you in default under the Lease solely because of your nonpayment of rents
22 until 10 days after the due date of your next regularly scheduled rental payment
23 following your receipt of this notification. You are therefore advised to consult

1 an attorney promptly concerning your rights and obligations, especially if you
2 have any questions regarding the extent to which this notification affects those
3 rights and obligations.

4 4. You are directed to pay to the Assignee at the address listed above all
5 rents under your Lease which are due and payable on the date you receive this
6 notification, and all rents accruing under the Lease following the date you
7 receive this notification.

8 5. If you pay rents to the Assignee in good faith in accordance with
9 paragraph 4, the payment will satisfy your rental obligation under the Lease to
10 the extent of that payment.

11 6. If you pay any rents to the Landlord after receiving this notification,
12 your payment to the Landlord will not discharge your rental obligation under
13 your Lease, and the Assignee may hold you liable for that rental obligation
14 notwithstanding your payment to the Landlord. However, if you occupy the
15 Premises as your primary residence, while you may pay rent to the Assignee as
16 directed by paragraph 4, any rental payment that you make to the Landlord will
17 discharge your rental obligation to the extent of that payment.

18 7. If you have previously received a notification from another person who
19 also holds an assignment of the rents due under your Lease, you may continue
20 paying your rents to the person who sent that notification until the person
21 cancels that notification. Once that prior notification is canceled, you must
22 begin paying rents to the Assignee in accordance with this notification.

1 the notification be in any particular form, subsection (f) provides a form notification that is
2 sufficient to satisfy subsection (a) when properly completed.
3

4 2. *Effect of notification.* Once the tenant receives notification from the assignee demanding
5 payment of rents pursuant to the assignment, the tenant must pay accrued but unpaid rents and
6 rents accruing in the future to the assignee in order to satisfy its rental obligation. In this respect,
7 the Act's provisions operate similarly to the provisions of U.C.C. § 9-406(a), which govern the
8 circumstances under which an account debtor can discharge its obligation following notification
9 and demand by an assignee of that account. However, unlike U.C.C. § 9-406(a) — under which
10 the assignee may direct an account debtor to pay an assigned account to the assignee even prior
11 to the debtor's default — an assignee under this Act cannot enforce its security interest in rents
12 under Section 8 prior to the debtor's default unless the assignment of rents so provides. Because
13 the typical assignment of rents does not authorize the assignee to collect rents prior to the
14 assignor's default, enforcement by Section 8 will usually arise only after the assignor's default.
15

16 Following receipt of a notification, a tenant cannot discharge its rental obligations by
17 payment to the assignor. Thus, a tenant that pays its landlord following receipt of a notification
18 under this section faces the risk of having to make double payment of the sums necessary to
19 discharge its rental obligation. However, the Act relieves a residential tenant of this risk; under
20 subsection (b)(2), a tenant that occupies the premises as its primary residence can discharge its
21 rental obligations either by payment to the assignee or the assignor.
22

23 The tenant's obligation to direct payment of rents to the assignee following receipt of a
24 notification under subsection (a) is subject to one other caveat: the tenant need not comply if it
25 has previously received a notification from another assignee of rent given by that assignee in
26 accordance with this section, and the other assignee has not cancelled that notification. Until
27 such a tenant receives instructions canceling that prior notification, the tenant may continue to
28 pay the other assignee in accordance with the prior notification.
29

30 3. *Notification to other rents assignees.* Subsection (a) requires that the enforcing assignee
31 give notification to any other person holding a recorded assignment of rents on the same real
32 property. This provision effectively obligates an enforcing assignee to search the public records
33 to identify any other creditors holding a recorded assignment of rents and to provide notification
34 of enforcement to such creditors. Notification will alert another person holding a recorded
35 assignment of rents as to the pending enforcement effort and permit that person to take whatever
36 steps it considers justified in protecting its secured position with respect to the rents. For
37 example, if the enforcing rents assignee holds a junior assignment of rents, notification to the
38 senior would permit the senior to take steps to enforce its senior interest in rents immediately
39 (assuming its assignment permitted immediate action under the circumstances) — thereby
40 avoiding the risk that the junior might by collection acquire effective priority as to the following
41 period's rents. By contrast, if the enforcing rents assignee holds a senior assignment of rents,
42 notification to the junior would alert the junior as to the need to investigate the status of the
43 senior obligations.

1 However, if an enforcing assignee fails to give notification to another rents assignee under
2 this section, this failure shall not defeat the effectiveness of the notification as to the assignor and
3 those tenants receiving the notification. Instead, any holder of a recorded assignment of rents
4 that is entitled to notification under subsection (a), but does not receive it, may recover damages
5 for any loss caused by such failure, subject to the normal rules of pleading and proof.
6

7 4. *Tenant protected for good faith payment to assignee.* Subsection (b)(3) provides that a
8 tenant that in good faith pays rents to the assignee following receipt of a notification under this
9 section discharges its rental obligation to the extent of such payment. Even if the
10 landlord/assignor subsequently established that the assignor was not in default and the assignee's
11 notification was wrongful, the landlord/assignor would not be able to declare a tenant in breach
12 for nonpayment of rent if that tenant paid the assignee in good faith pursuant to the notification.
13

14 5. *Extension of time for payment of next rental payment following notification.* If a tenant
15 receives a notification directing payment of rents to an assignee, the tenant reasonably may wish
16 to obtain the advice of counsel regarding the effect of the notification on its rights and
17 obligations under its lease. However, if the notification arrives shortly before the tenant's rental
18 due date, the tenant may find it difficult to obtain that advice before that rental obligation might
19 become past due. In order to permit the tenant a reasonable opportunity to obtain the advice of
20 counsel, subsection (c) provides that neither the assignor nor the assignee may hold a tenant in
21 default of a lease solely for nonpayment of rents until 10 days after the next regularly scheduled
22 rental payment would be due under the lease. Where the tenant is not in default under the terms
23 of its lease, subsection (c) essentially provides a 10-day extension for the tenant to pay the next
24 regularly scheduled rental payment (thus providing at least that period for the tenant to obtain
25 legal advice). However, subsection (c) would not in any way protect a tenant from the
26 consequences of a breach of the lease on grounds other than nonpayment of rent.
27

28 6. *Enforcement by multiple rent assignees.* In some circumstances, multiple creditors may
29 seek to collect rents directly from tenants pursuant to this Act. If a subordinate rents assignee
30 collect rents under this section, the Act provides that the subordinate rents assignee may keep the
31 rents collected and apply those rents to its secured obligations notwithstanding its subordinate
32 position, until such time as the senior rents assignee enforces its superior collection rights. See
33 Section 15(b).
34

35 Once a subordinate rents assignee that has enforced its security interest in rents under this
36 section receives a notification that a senior assignee has enforced its interest in rents, subsection
37 (d) obligates the subordinate rents assignee to give an immediate notification to tenants canceling
38 its previous payment instructions. If the subordinate rents assignee fails to do so, the subordinate
39 rents assignee is liable to a senior creditor for any damages caused by such failure.
40
41
42

1 **SECTION 9. ENFORCEMENT BY NOTIFICATION TO ASSIGNOR.**

2 (a) Upon the assignor's default as defined in an assignment of rents, the assignee may
3 give to the assignor a notification demanding that the assignor pay over all rents that the assignee
4 is entitled to collect under Section 6. The assignee shall also give a copy of this notification to
5 any other person holding a recorded assignment of rents on the real property.

6 (b) An assignee's failure to give notification under subsection (a) to any person holding a
7 recorded assignment of rents on the real property shall not defeat the effectiveness of the
8 notification as to the assignor, but the other person may recover damages from the assignee for
9 any economic loss caused by the failure.

10 **Preliminary Comments**

11 Source: Cal. Civ. Code §§ 2938(c)(4); Restatement (Third) of Property — Mortgages §
12 4.2(c), (d).

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

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

31
32 The Act likewise adopts this approach, authorizing the assignee to enforce an assignment of
33 rents by means of a notification to the assignor following default under the assignment. As

discussed in Section 14(b), the assignor's failure to pay any rents it collects following receipt of such notification would subject to the assignor to liability for conversion.

2. *Notification to other record rents assignees.* Subsection (a) provides that an assignee enforcing an assignment of rents must give notification not only to the assignor, but also to any other person holding a recorded assignment of rents on the real property. Notification will alert another person holding a recorded assignment of rents as to the pending enforcement effort and permit that person to take whatever steps it considers justified in protecting its secured position with respect to the rents. For example, if the enforcing rents assignee holds a junior assignment of rents, notification to the senior would permit the senior to take steps to enforce its senior interest in rents immediately (assuming its assignment permitted immediate action under the circumstances) — thereby avoiding the risk that the junior might by collection acquire effective priority as to the following period's rents. By contrast, if the enforcing rents assignee holds a senior assignment of rents, notification to the junior would alert the junior as to the need to investigate the status of the senior obligations.

Subsection (b) provides that the failure of the enforcing assignee to give notification to other rents assignees does not negate the effectiveness of the notification as to the assignor. If the assignor received the notification and subsequently collected rents but failed to turn those over to the assignee, the assignor would face liability under Section 14(b) regardless of whether the enforcing assignee had given notification to other rents assignees. However, subsection (b) does give another rents assignee a right to recover any damages caused by the enforcing person's failure to provide the notification required by subsection (a), subject to the normal rules of pleading and proof.

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

SECTION 10. MORTGAGEE IN POSSESSION. Upon the assignor's default as defined in an assignment of rents, the assignee may enforce the assignment by taking possession of the real property described in the assignment, to the extent permitted by applicable law of this state other than this [act].

1 **Preliminary Comment**

2 At common law, a mortgagee holding an assignment of rents could enforce that assignment
3 by means of taking steps sufficient to constitute the mortgagee as a “mortgagee in possession”
4 pending completion of a foreclosure or redemption by the mortgagor. Generally speaking,
5 mortgage lenders are loathe to assume the status of a mortgagee in possession for a variety of
6 reasons, including potential tort liability to third parties, the obligation to account for rentals
7 collected, and the assumption of a duty to maintain the physical condition of the premises. *See*,
8 *e.g.*, 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.24 - 4.29, at
9 213-230 (3d ed. 1993).

10
11 Because in rare cases a mortgagee may voluntarily choose to enforce an assignment of rents
12 by becoming a mortgagee in possession, the Act is not intended (either explicitly or implicitly) to
13 eliminate or overrule the mortgagee-in-possession doctrine. Thus, the Act provides that an
14 assignee can choose to enforce an assignment of rents by becoming a mortgagee in possession, to
15 the extent such an act is permitted by applicable law other than this Act and by the terms of the
16 parties’ loan documents.
17

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

20 The enforcement of an assignment of rents under Section 7, 8, or 9, the application of rents by
21 the assignee under Section 12 after enforcement, the payment of expenses under Section 13, or a
22 civil action under Section 14(d) does not:

23 (1) make the assignee a mortgagee in possession of the real property, unless the assignee
24 obtains actual possession of the real property;

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

26 (3) constitute a civil action to enforce the secured obligation;

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

28 (5) limit any right available to the assignee with respect to the secured obligation[.][; or]

29 [(6) violate any “one action” provision existing under the laws of this state; or

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

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

Preliminary Comments

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

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

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

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

The Act adopts this view, and makes clear that the assignee’s enforcement of its assignment of rents does not constitute a civil action to enforce the secured obligations, render the secured obligations unenforceable, or otherwise limit any rights available to the assignee with respect to the secured obligations. Thus, for example, if an assignee enforces its security interest by obtaining the appointment of a receiver under Section 7, and the appointment is ancillary to an action by the assignee for specific performance of the assignment of rents, the assignee’s

1 enforcement action does not preclude the assignee from subsequently asserting any other
2 remedies it may have to enforce the secured obligations or any other collateral it may hold
3 securing those obligations.
4

5 3. *“One action” rules and anti-deficiency provisions.* In some states, “one action” rules
6 provide that there can be only one form of action for the recovery of any debt secured by real
7 property. *See, e.g.,* Cal. Code Civ. Pro. § 726(a); Idaho Code § 6-101(1); Mont. Code Ann. § 71-
8 1-222(1); Nev. Rev. Stat. § 40.430(1); Utah Code § 78-37-1; *see also* First State Bank of
9 Cooperstown v. Ihringer, 217 N.W.2d 857 (N.D. 1974). Under this approach, for example, a
10 mortgagee’s decision to sue on the mortgage note would constitute an “action” that subsequently
11 barred the mortgagee from foreclosing the mortgage.
12

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

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

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

34 4. *Marshaling requirements.* Nothing in this section limits a court’s equitable discretion to
35 order lien marshaling in appropriate cases. For example, assume that 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 11 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.
40
41

SECTION 12. APPLICATION OF RENTS COLLECTED. An assignee that collects rents under this [act] or collects upon a judgment in a civil action under Section 14(d) shall apply the sums collected in the following order to:

(1) the assignee's reasonable expenses of enforcing its assignment of rents, including, to the extent provided for in the assignment, reasonable attorney's fees and court costs incurred by the assignee;

(2) payment of expenses in accordance with Section 13;

(3) satisfaction of the secured obligation in accordance with the terms of the documents evidencing the obligation;

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

(5) the assignor, to the extent of any remaining sums.

Preliminary Comment

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

The term “reasonable attorney’s fees and costs” in subsection (1) includes those fees and costs incurred by the assignee in enforcing its assignment of rents. This would include, *inter alia*, the fees and costs incurred in obtaining the appointment of a receiver, providing a notification under Section 10, or collecting rents from tenants following notification to tenants under Section 9. Unlike U.C.C. § 9-607(d) — under which an assignee’s right to recover these expenses from collected receivables arises automatically — the assignee may recover reasonable attorney’s fees under this Act only to the extent such fees are provided for in the assignment of rents.

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

1 **SECTION 13. PAYMENT OF EXPENSES FOR PROTECTING REAL PROPERTY.**

2 (a) In this section, “earmarked rents” means any rents that, by the terms of a lease
3 covering all or any portion of the real property described in an assignment of rents, are expressly
4 allocated to payment of taxes or insurance on, or maintenance of, the real property or to
5 reimbursement of the assignor’s payment of such expenses.

6 (b) If the assignee collects any earmarked rents after enforcement of an assignment of
7 rents under Section 8 or 9, the assignor or any other person holding a recorded assignment of
8 rents on the real property may give to the assignee a notification demanding that the assignee
9 apply the earmarked rents to the payment of the obligations for which they are earmarked.

10 (c) After receipt of a notification under subsection (b), the assignee shall apply any
11 earmarked rents to the payment of the obligations for which they are earmarked. This obligation
12 continues until the assignee obtains the appointment of a receiver under Section 7 or the date on
13 which the assignee ceases to enforce the assignment, whichever occurs first.

14 (d) This section does not require an assignee:

- 15 (1) to operate or manage the real property; or
16 (2) to apply any rents other than earmarked rents to the payment of taxes or insurance
17 on, or maintenance of, the real property.

18 **Preliminary Comments**

19 1. *Operation and management of the real property.* If the assignee enforces its assignment
20 of rents by means of Section 8 (notification to tenants) or Section 9 (notification to the assignor),
21 the assignor effectively remains in day-to-day possession and control of the real property.
22 Subsection (d)(1) makes clear that the assignee’s collection of rents and payment of property-
23 related expenses does not place day-to-day operational and management responsibility upon the
24 assignee, and that such responsibility remains upon the assignor. This provision operates in
25 conjunction with Section 11, which makes clear that the assignee’s collection and enforcement

1 actions do not render the assignee as an agent of the assignor, unless the assignee has actually
2 assumed the responsibilities of a mortgagee in possession under Section 10.

3
4 2. *Payment of costs of operation and management of the real property.* If the assignee
5 begins collecting rents following the assignor's default, the assignor may lack the funds
6 necessary to pay the costs of operating the real property even though the assignor remains
7 obligated to do so under the terms of tenant leases. Further, the assignor's nonpayment of these
8 costs may adversely affect the interests of tenants — who may reasonably expect that a portion of
9 their rental payments to be directed to the payment of these project costs. Nevertheless, existing
10 common law places no affirmative obligation on the part of an assignee to use collected rents to
11 pay the costs of operating the real property covered by the assignment of rents.

12
13 Section 12 does not abandon this principle generally, but does identify a special subcategory
14 of rents known as "earmarked rents." This category includes any rents payable by a tenant and
15 specifically allocated by contract for the payment of real property taxes, insurance, or
16 maintenance (or for the reimbursement of the assignor's payment of these obligations). Often,
17 commercial leases specifically require the tenant to pay a sum denominated "additional rent."
18 This sum is typically calculated based upon the tenant's proportionate share of the landlord's
19 expected costs for real estate taxes, insurance, and maintenance. If an assignee collects any
20 earmarked rents while enforcing its security interest in rents, the assignor or another recorded
21 assignee of the rents may give notification to the collecting assignee requesting that the assignor
22 apply any earmarked rents to the payment of the expenses for which they are earmarked. Upon
23 receiving such a notification, the collecting assignee must apply any earmarked rents as requested
24 until such time as a receiver is appointed under Section 7 or the collecting assignee ceases to
25 enforce its security interest in rents. Subsection (d)(2) makes clear that, consistent with current
26 law, the assignee has no obligation to apply non-earmarked rents to pay the costs of real property
27 taxes, insurance, or maintenance of the real property covered by the assignment of rents.

28
29 The proper application of Section 12 is demonstrated by the following illustrations:

30
31 *Illustration 1.* Following Assignor's default under an assignment of rents covering an office
32 building, Assignee begins collecting rents from the building's tenants. Under the tenant leases,
33 Assignee collects both "base rents" and "additional rents," with the "additional rents" specifically
34 allocated to reimburse the Assignor for payment of real property taxes, insurance, and common
35 area maintenance. Assignor has not paid real property taxes for the current year, and this tax
36 obligation is now past due. Upon receipt of a proper notification from Assignor, Assignee must
37 apply the "additional rents" collected to the payment of real property taxes, to the extent of the
38 total additional rents collected. Assignee has no obligation, however, to apply any of the "base
39 rents" to the payment of real property taxes.

40
41 *Illustration 2.* Following Assignor's default under an assignment of rents covering an
42 apartment building, Assignee begins collecting rents from the building's tenants. Under the
43 tenant leases, the tenants are obligated to pay "rent," but none of the rental obligation is

specifically allocated for the reimbursement of particular property-related expenses. Assignor has not paid real property taxes for the current year, and this tax obligation is now past due. Even if Assignor so requests, Assignee has no obligation to apply any of the rents collected to the payment of real property taxes, as none of the rents are “earmarked rents” within the meaning of subsection (a).

3. *Receivership.* Section 13 authorizes the assignor or a subordinate rents assignee to demand that the collecting assignee use earmarked rents to pay the expenses for which such rents are earmarked. Section 13 does not authorize such a demand where the assignee enforces its assignment of rents via the appointment of a receiver under Section 7, as the provisions of Section 7 already authorize the receiver to use collected rents to pay such expenses consistent with the terms of the court order appointing the receiver.

In many cases, leases for a particular project are structured as “gross leases,” and no specified portion of the rental obligation is allocable to payment of real property taxes, insurance, or maintenance. In these situations, the assignor/landlord’s nonpayment of taxes, insurance, or maintenance costs may significantly frustrate the expectations of tenants; nevertheless, because the tenants’ rents are not specifically earmarked, the assignee would be under no obligation to apply collected rents to the payment of these expenses. However, nothing in this Act would preclude such a tenant from seeking the appointment of a receiver if the nonpayment of these expenses so harmed the tenant’s interest as to justify the appointment of a receiver under law other than this Act.

4. *Mortgagee-in-possession status.* Section 13 does not authorize a demand for application of earmarked rents where the assignee has enforced its assignment of rents by becoming a mortgagee-in-possession under Section 10. Such a demand would be unnecessary in that context, as a mortgagee in possession would already have the legal duty to pay the expenses of maintaining the real property.

SECTION 14. TURNOVER OF RENTS; COMMINGLING AND IDENTIFIABILITY OF RENTS; TRANSFER OF RENTS BY ASSIGNOR.

(a) If the assignor or its agent collects rents that the assignee is entitled to collect or receive under Section 6:

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

(2) the assignee continues to have a security interest the rents so long as they are

1 identifiable.

2 (b) For purposes of subsection (a), the rents are identifiable if they are maintained in a
3 segregated account or, if commingled with other funds, to the extent that the assignee can
4 identify them by a method of tracing, including application of equitable principles, that is
5 permitted under law of this state other than this [act] with respect to commingled funds. If the
6 assignment of rents was recorded under Section 5, the assignee's security interest in identifiable
7 rents remains perfected and enforceable against the assignor and, subject to subsection (c), any
8 other person in possession of the rents.

9 (c) A person to which the assignor transfers cash that is identifiable cash proceeds of
10 rents takes the cash free of the assignee's security interest, unless the transferee acted in collusion
11 with the assignor in violating the rights of the assignee.

12 (d) If the assignor fails to turn over rents to the assignee in violation of subsection (a), the
13 assignee may recover damages from the assignor in an amount equal to the rents that the assignor
14 is obligated to turn over under subsection (a) and reasonable attorney's fees and costs to the
15 extent provided for in the assignment of rents. The assignee may maintain an action for damages
16 without bringing an action to foreclose any security interest that it may have in the real property.
17 Any sums recovered in such an action must be applied in the manner specified in Section 12.

18 Preliminary Comments

19 Source: Cal. Civ. Code §§ 2938(f); U.C.C. §§ 9-315(a), 9-315(b), 9-332(a); Restatement
20 (Third) of Property — Mortgages §§ 4.6(a)(5), 4.6(b)(3).

21
22 1. *“Milking” of rents and existing law.* The owner of a distressed real estate project may
23 sometimes engage in “milking” of rents — *i.e.*, collecting rents from the project and using those
24 rents to pay expenses other than the mortgage debt and expenses of preserving or maintaining the
25 mortgaged premises. Milking of rents that have been assigned as security poses a significant

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

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

13 All authorities agree that the mortgagee has no basis for recovering cash proceeds of rent paid
14 in the ordinary course to third parties acting in good faith; such parties would take those cash
15 proceeds free of the mortgagee's claims by virtue of the common law negotiability of money.
16 The mortgagee might have a damage claim against the mortgagor, however, on account of the
17 mortgagor's disposition of rents. The common law of mortgages treated this conduct as a species
18 of legal waste — consistent with its treatment of “rents” as an incorporeal hereditament in the
19 nature of real property. The common law generally imposed liability upon a mortgagor who took
20 any action that damaged or destroyed the mortgaged property, thereby reducing its value. [In title
21 theory jurisdictions, this liability extended to the full reduction in the collateral's value; under the
22 lien theory, this liability existed only to the extent that the waste actually impaired the
23 mortgagee's security.] In the context of rents, the weight of available authority suggests that the
24 mortgagor's diversion of rents would constitute legal waste, at least where the mortgagee had
25 taken sufficient steps to enforce its security interest in rents. *See, e.g., Taylor v. Brennan*, 621
26 S.W.2d 592 (Tex. 1981) (mortgagor's collection and disposition of rents following mortgagee's
27 enforcement of security interest in rents would constitute waste, but holding that no waste
28 occurred because mortgagee had not taken sufficient steps post-default to enforce its security
29 interest in rents); *Ginsberg v. Lennar Florida Holdings*, 645 So.2d 490 (Fla. App. 1994). The
30 Restatement (Third) of Property — Mortgages adopts this view in § 4.6(a)(5) which provides that
31 “[w]aste occurs when, without the mortgagee's consent, the mortgagor ... retains possession of
32 rents to which the mortgagee has the right to possession....”).
33

34 The Act does not precisely duplicate the Restatement approach, as it does not use the term
35 “waste” to identify the basis of the assignor's liability for milking rents. In lien theory states,
36 courts traditionally held that the mortgagor was liable for waste only to the extent that its conduct
37 impaired the mortgagee's security. Rather than focusing upon impairment of security — which
38 would require proof regarding the value of the mortgaged premises — the Act instead takes a
39 more straightforward approach. If the assignor is obligated to turn over rents to the assignee
40 under Sections 6 and 14(a), but fails to do so, the assignor is liable for damages equal to the full
41 amount of the rents not turned over. Any such recovery must be applied by the assignee in the
42 manner specified by Section 12, so the assignee's total recovery could not exceed the loss
43 actually suffered by the assignee — any surplus proceeds remaining after full satisfaction of the

1 secured obligations would be returned to the assignor or to subordinate lienholders in accordance
2 with Section 12.

3
4 2. *Assignor's liability to turn over rents.* The Act provides that upon default and
5 enforcement, an assignee may collect (1) accrued but unpaid rents and (2) unaccrued rents as they
6 accrue in the future. If the assignor collects any such sums following enforcement by the
7 assignee, the assignor must turn over such sums to the assignee under subsection (a), or face
8 personal liability for failure to do so by virtue of subsection (d).

9
10 In cases involving nonrecourse obligations (either by virtue of specific contractual
11 nonrecourse provisions or the intervention of antideficiency legislation), mortgagors who have
12 milked rents often argue that the mortgagee's action is in the nature of a deficiency judgment and
13 should therefore be dismissed. The weight of authority rejects this view and concludes that an
14 action for damages for waste of rents or conversion of the proceeds of rents is not in the nature of
15 a deficiency action. *See, e.g.,* Hoelting Enters. v. Nelson, 929 P.2d 183 (Kan. App. 1996);
16 International Business Machines Corp. v. Axinn, 676 A.2d 552 (N.J. Super. 1996). *See also* In re
17 Evergreen Ventures, 147 B.R. 751 (Bankr. D. Ariz. 1992) (distinguishing deficiency action and
18 waste action). The Act follows this approach.

19
20 Subsection (d) makes clear that an assignee may bring an action to recover damages on
21 account of the assignor's failure to turn over rents, without first having to foreclose on the
22 underlying real property or pursue other legal remedies. Requiring the assignee to pursue
23 foreclosure first "would probably result in more foreclosures." Restatement (Third) of Property
24 — Mortgages § 4.6 cmt. f. Moreover, as provided in Section 11 of the Act, the assignee's action
25 under Section 14(d) would not constitute an "action to enforce the secured obligations" or an
26 action to enforce the debt within the meaning of any state's one-action law.

27
28 3. *Enforceability of security interest in rents vs. third parties.* Section 14(b) makes clear
29 that the assignor's failure to turn over rents collected following enforcement by the assignee does
30 not automatically deprive the assignee of its perfected security interest in the cash proceeds of
31 those rents, and thus the assignee can continue to enforce that interest as against the assignor and
32 third parties (such as the trustee in bankruptcy following the assignor's filing of a bankruptcy
33 petition).

34
35 The Act recognizes two significant limitations, however, upon the assignee's right to enforce
36 the security interest against third parties. First, any such cash proceeds of rents must be
37 "identifiable." In this context, "identifiable" has the same meaning as it does in U.C.C. § 9-
38 315(a), under which a secured party has a security interest in the identifiable proceeds of its
39 original collateral. As a result, if the assignor has commingled the proceeds of collected rents
40 with other operating funds of the assignor, those proceeds will remain identifiable only if the
41 assignee can identify them by a method of tracing (such as the lowest intermediate balance rule)
42 that is recognized by law other than this Act with respect to commingled property. Second,
43 subsection (c) of the Act recognizes the negotiability of money and provides that any third parties

1 who receive payments of the proceeds of collected rents from the assignor will be protected so
2 long as the transferee of the funds has not acted in collusion with the assignor to deprive the
3 assignee of its interest in the funds. *See, e.g.*, U.C.C. § 9-332. A protected transferee under
4 subsection (c) could include another creditor collecting rents pursuant to a subordinate
5 assignment of rents, and a bank exercising a set-off right against a deposit account that contains
6 identifiable cash proceeds of rents.
7

8 **SECTION 15. PRIORITY AMONG COMPETING SECURITY INTEREST IN**
9 **RENTS; PRIORITY AMONG RECEIVERS.**

10 (a) Except as otherwise provided in this [act], the priority of liens among creditors
11 concerning rents is governed by Section 5.

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

18 (c) Priority among receivers is governed by the following rules:

19 (1) If more than one assignee qualifies for the appointment of a receiver under
20 Section 7, a receivership request by an assignee entitled to priority under Section 5 has priority
21 over a receivership request by a subordinate assignee, even if a court has previously appointed a
22 receiver for the subordinate assignee.

23 (2) If a subordinate assignee obtains the appointment of a receiver, that receiver has
24 the right, until a receiver is appointed under a senior assignment of rents, to collect rents from the
25 real property and, after first using them to pay real property taxes and other reasonable expenses

1 associated with the maintenance and repair of the real property, to apply the balance to the
2 obligations secured by the subordinate assignment of rents. The receiver for the subordinate
3 assignee is not obligated to turn over collected rents to the receiver for the senior assignee, even
4 if those rents are otherwise identifiable as provided in Section 14(b).

5 **Preliminary Comments**

6 Source: Cal. Civ. Code § 2938(h); Restatement (Third) of Property — Mortgages § 4.5
7

8 1. *Priority between competing assignees.* Generally speaking, priority between conflicting
9 rent assignments is resolved by reference to the state's recording act. See Section 5.
10

11 2. *Priority as to rents collected by a subordinate assignee.* The Act provides that if a senior
12 assignee enforces its right to rents after a subordinate assignee has already enforced its rights,
13 then the senior assignee will have priority as to unaccrued rents and accrued but unpaid rents.
14 However, subsection (b) provides that this priority will not extend to rents already collected by
15 the subordinate assignee. The subordinate assignee may retain already collected rents and apply
16 them in accordance with Section 12, without regard to any turnover demand by the senior
17 assignee. This provision places the subordinate assignee in the same position, vis-a-vis the
18 senior assignee, as any other third party creditor that received payment of rents from the assignor
19 — such third party creditors would take the proceeds of those rents free of the senior assignee's
20 security interest so long as they were not acting in collusion with the assignor to defeat the senior
21 assignee's rights.
22

23 3. *Priority between conflicting receivers.* Subsection (c), which is modeled upon § 4.5 of
24 the Restatement (Third) of Property — Mortgages, provides the same basic priority rule with
25 respect to conflicting receivers. If the senior assignee is entitled to the appointment of a receiver
26 under Section 7, the court's appointment of that receiver will take priority over and displace a
27 prior receivership obtained by a subordinate assignee. Any rents actually collected by the
28 receiver for the subordinate assignee, however, need not be turned over to the receiver for the
29 senior assignee; instead, the receiver for the subordinate assignee shall apply those sums in the
30 manner specified in Section 7.
31

32 **SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

33 applying and construing this [act], consideration must be given to the need to promote uniformity
34 of the law with respect to its subject matter among states that enact it.

1 **SECTION 17. EFFECTIVE DATE.** This [act] takes effect on _____.

2
3 **SECTION 18. REPEALS.** The following acts are repealed: [List statutes to be specifically
4 repealed.]

5
6 **SECTION 19. APPLICATION TO EXISTING RELATIONSHIPS.** This [act] applies
7 to the enforcement of an assignment of rents, even if executed and delivered before [the effective
8 date of this [act]].