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## ULTA and Non-Judicial Mortgage Foreclosure in Texas.

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# COMMENTS

## ULTA AND NON-JUDICIAL MORTGAGE FORECLOSURE IN TEXAS

PATRICIA E. RANT

I. Introduction .....	1104
II. Evolution of Mortgages .....	1107
III. The State of Mortgage Foreclosures in Texas .....	1108
IV. Overview of Uniform Land Transactions Act .....	1111
V. ULTA and the Secured Creditor in Texas .....	1114
A. Right to Possession .....	1114
B. Manner of Sale .....	1115
VI. ULTA and the Debtor in Texas .....	1118
A. Time for Cure .....	1118
B. Sale Expectations .....	1119
C. Protected Parties .....	1122
VII. ULTA and the Junior Lienholder in Texas. ....	1124
VIII. On ULTA's Future in Texas .....	1126
IX. Conclusion .....	1128

### I. INTRODUCTION

Much of the current law governing secured land transactions emanates from, and in many respects remains closely akin to, common law practices of feudal England.<sup>1</sup> Consequently, certain aspects of the law in this area are provincial, anachronistic, and ill-suited to the needs of the modern borrower and lender.<sup>2</sup> Moreover, variances in local property law sometimes impede the interstate flow of mortgage funds,<sup>3</sup> effectively denying

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1. See Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 Nw. U. L. REV. 359, 359 (1978).

2. See *id.* at 359.

3. See UNIFORM LAND TRANSACTIONS ACT (ULTA), Commissioners' Prefatory Note. See generally R. KRATOVIL, *MODERN MORTGAGE LAW AND PRACTICE* §§ 147, 148, 150 (1972); Pedowitz, *Current Developments in Summary Foreclosure*, 9 REAL PROP., PROB. & TR. J. 421, 422 (1974).

the borrower access to capital at reasonable interest rates.<sup>4</sup> The desirability of modernization and uniformity is apparent. The Uniform Land Transactions Act (ULTA), approved in 1977 by the National Conference of Commissioners on Uniform State Laws,<sup>5</sup> professes to accomplish the purposes of simplifying, modernizing, and providing uniformity to state laws relating to real estate transactions.<sup>6</sup> A further goal ULTA anticipates achieving is an increase in the availability of mortgage funds by encouraging expansion of the national secondary mortgage market<sup>7</sup> and by facili-

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4. Congressional Findings, proposed Federal Mortgage Foreclosure Act of 1973, H.R. 10688 & S. 2507, 93d Cong., 1st Sess. (1973), *quoted in* ULTA art. 3, Introductory Comment. The committee suggested the enactment of a "uniform, less expensive, and more expeditious foreclosure procedure," such as that proposed in the bill, would ameliorate the situation. *See id.* The bill, which was never enacted, proposed a comprehensive federal scheme for the foreclosure of all mortgages owned, guaranteed, or insured by the federal government. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 11.6, at 693 (1979). The federal foreclosure act would have had the effect of pre-empting many aspects of existing state mortgage foreclosure proceedings. *See id.* at 693; Pedowitz, *Current Developments in Summary Foreclosure*, 9 *REAL PROP., PROB. & TR. J.* 421, 422-25 (1974).

5. *See* Levin, *Real Estate Financing—Some Areas of Current Interest*, 13 *REAL PROP., PROB. & TR. J.* 765, 766 (1978). The ULTA was approved by the American Bar Association in 1978. Trevaskis, *Summary of the Uniform Land Transactions Act*, 13 *REAL PROP., PROB. & TR. J.* 673, 673 (1978).

6. *See* ULTA § 1-102. The aim of article 3, as stated in the official comments thereto, is "to provide a simple and unified structure within which the immense variety of financing secured by real estate can go forward with greater certainty and less transaction cost." *Id.* art. 3, Introductory Comment.

7. *See* ULTA, Commissioners' Prefatory Note. The Commissioners point out that the pressing need for adequate housing requires the stimulation of the secondary mortgage market to provide the resources for such a goal. *See id.* The secondary mortgage market has ancient roots. Mortgages were freely bought and sold in thirteenth-century England at a time when there was no other traffic in secured obligations. *See* F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 124 (2d ed. 1898). Today a number of institutions, including savings and loan associations, commercial banks, and life insurance companies, purchase home mortgages from the original lending institutions. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 11.1, at 639 (1979). The federal government also is active in the field of secondary mortgages through such agencies as the Federal National Mortgage Association (FNMA or "Fannie Mae"), the Federal Home Loan Mortgage Corporation (FHLMC or "Freddie Mac"), and the Government National Mortgage Association (GNMA or "Ginnie Mae"). *See id.* § 11.3, at 657-58. The purchase of mortgages by these entities replenishes the original lender's supply of mortgage money, thus making money available to other prospective borrowers. *See* Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 *Wis. L. Rev.* 899, 905 n.38 (1976). This practice is especially significant during a recession. *See* Bartke, *Fannie Mae And The Secondary Mortgage Market*, 66 *Nw. U. L. Rev.* 1, 65 (1971). The original lending institutions are often savings and loan associations (accounting for 36.5% of all home mortgages in 1976) whose mortgage loan fund is dependent on savings deposits and, occasionally, loans from federal agencies such as the Federal Home Loan Bank System. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 11.1, at 638 (1979); *id.* § 11.3, at 667. When

tating interstate lending by financial entities which currently restrict their lending to local markets due to existing disparity in state laws.<sup>8</sup> One of the chief methods by which ULTA expects to accomplish these various purposes is through uniformity in foreclosure proceedings.<sup>9</sup> As a lender's ability to realize the security on default is critical to his initial willingness to extend credit,<sup>10</sup> the lender's traditional remedy, foreclosure, presents a valid focus for an examination of whether the changes proposed by ULTA realistically could effect these purported goals. This comment will discuss whether the foreclosure procedures provided for in ULTA would so effectively modify existing foreclosure proceedings in Texas as to warrant its adoption by the Texas Legislature.

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money is tight, not only do fewer deposits contribute to the funds available for loans, see *id.* § 11.3, at 667, but interest rates charged by the federal loan agencies increase. See Bartke, *Fannie Mae And The Secondary Mortgage Market*, 66 Nw. U. L. Rev. 1, 74 (1971). An active secondary mortgage market, however, provides mortgage funds which might otherwise be unavailable, or available only at an excessive rate. Encouragement of the national secondary mortgage market, therefore, benefits both the lender, by enabling it to enter into more mortgage contracts and reap the subsequent profits, and the debtor by providing him with more accessible mortgage money at lower rates. Until recently the secondary mortgage market was essentially a local one, due to the diversity of local property laws. The market has now become more national in nature and presumably would become even more so were property laws more uniform. See Jensen, *Mortgage Standardization: History Of Interaction Of Economics, Consumerism And Governmental Pressure*, 7 REAL PROP., PROB. & TR. J. 397, 397-98 (1972).

8. See ULTA, Commissioners' Prefatory Note. Financial entities presently interested in investing in mortgage-backed securities are often hindered in such endeavors by the cumbersome procedures available for redeeming their security upon default. Lenders who do invest in the secondary mortgage market tend to restrict their activities to one or two states. Because of the wide variance in state property laws, problems and increased expenses arise making nationwide lending financially unattractive. The Commissioners suggest uniformity among state secured land transaction laws would achieve directly the needed economy and efficiency in the procedures making such investments more lucrative and appealing. Increased interstate lending would lead to more competitive, and hence more reasonable, rates for the borrower. See *id.*

9. See *id.*, art. 3, Introductory Comment. The Commissioners note that existing foreclosure practices in the states inhibit the "free flow of mortgage money to homeowners at reasonable rates" due to the burden placed on the lender by the procedures. Disparity among state laws make non-local lending expensive and often difficult. Delays inherent in existing foreclosure proceedings may cause depreciation of the security over which the lender has no control. Periods after foreclosure in which a debtor can redeem the security make title in purchasers uncertain and, hence, undesirable. Uniformity among the states by adoption of the foreclosure proceedings suggested by ULTA would, its drafters urge, increase the lender's willingness to lend at more advantageous interest rates, thus inuring to the benefit of both borrower and lender. See *id.*

10. See 9 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4650, at 2 (1958).

## II. EVOLUTION OF MORTGAGES

Existing foreclosure law represents the compromises reached in the continuing conflict between the interests of a lender and a borrower involved in a transaction in which land has been pledged by the debtor as security for the repayment of the debt.<sup>11</sup> Initially, the lender enjoyed the more favorable position at foreclosure.<sup>12</sup> In fifteenth century England, the debtor gave the lender an absolute deed to his property with reconveyance conditioned on full payment of the indebtedness.<sup>13</sup> Forfeiture under this scheme was automatic and irreversible.<sup>14</sup> The borrower, however, was soon to gain the upper hand. The Chancery courts found this summary and absolute forfeiture excessively harsh and routinely began to grant the debtor an opportunity to redeem his property on full payment of the debt after foreclosure.<sup>15</sup> Since this equitable redemption was available to the debtor at any time after default, the lender was disadvantaged, having no certainty in his continued possession of the property.<sup>16</sup> The positions changed once again when the Chancery courts began, at the entreaty of the lenders, to issue decrees granting the debtor only a limited time within which to repay the debt and redeem the land.<sup>17</sup> If the debtor failed to pay within the allotted time, he was prevented, or foreclosed, from asserting any claim to the land thereafter.<sup>18</sup> While the last described procedure remains law in some states today,<sup>19</sup> the far more common practice is

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11. See generally 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 438, at 546-48 (1979); 9 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 4650, at 2-6 (1958); Comment, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 1-14 (1890). Land has always provided an excellent source of security for debts because it is incapable of destruction or concealment by a recalcitrant debtor. In recent times, the recording statutes have enhanced the value of land as security by providing ready access to information on conflicting claims on the security. See 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 434, at 538 (1979).

12. See 9 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 4650, at 4 (1958).

13. See *id.* § 4650, at 4-5.

14. See *id.* § 4650, at 5.

15. See 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 438, at 546-48 (1979).

16. See *id.* § 438, at 546-48.

17. See *id.* § 438, at 546-48.

18. See *id.* § 438, at 546-48. At this point in the struggle between the interests of borrower and lender, the equities appear to have balanced out. The debtor, however, was still liable on the underlying debt even after sacrificing his property at foreclosure. See 9 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 4650, at 6 (1958). This situation no longer holds true as today a debtor is liable only for any deficiency between the value of the property at foreclosure and the unpaid balance of the debt. See *Farmers' & Merchants' State Bank v. Cameron*, 231 S.W. 738, 741 (Tex. Comm'n App. 1921, judgment adopted).

19. See Comment, *Strict Foreclosure: A Neglected Remedy*, 25 VA. L. REV. 947, 947-52

to sell the property and satisfy the debt from the sale proceeds.<sup>20</sup>

### III. THE STATE OF MORTGAGE FORECLOSURES IN TEXAS

Contrary to early common law when title to the pledged land actually passed to the lender for the duration of the debt,<sup>21</sup> in Texas the mortgage conveyance merely creates a lien on the debtor's property.<sup>22</sup> Thus, the intent of the parties to treat the land as security for the indebtedness, rather than to pass actual title, is observed.<sup>23</sup> The creditor's remedy upon

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(1939). This method of foreclosing a debtor's interest in the security is known as strict foreclosure, and is available, in varying forms, in only 19 states. *Id.* at 949. In a strict foreclosure proceeding, a court makes a determination of the respective interests of debtor and lender in the security and sets a date by which payment must be made by the debtor. If the debtor fails to pay, title vests in the lender without the necessity of a sale, thus voiding any redemption rights in the debtor. *See* 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 469, at 696.76 (31)-.76(34) (1979); 10 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 5139, at 47-49 (1957).

20. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 7.9, at 442 (1979); 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 469, at 696.76(31)-.76(34) (1979). Sale is accomplished in one of two ways; either by judicial sale in the case of a mortgage or by private trustee's sale when the form of conveyance is a deed of trust. *See* Taylor v. San Antonio Joint Stock Land Bank, 101 S.W.2d 868, 872 (Tex. Civ. App.—San Antonio 1936), *rev'd on other grounds*, 129 Tex. 335, 343, 105 S.W.2d 650, 655 (1937). The lender may obtain a personal judgment against the debtor for any deficiency between the balance due on the debt and the price realized at the sale. *See* Langever v. Miller, 124 Tex. 80, 86, 76 S.W.2d 1025, 1028 (1934).

21. *See* G. OSBORNE, *HANDBOOK OF THE LAW OF MORTGAGES* § 5, at 9 (2d ed. 1970); Madway, *A Mortgage Foreclosure Primer*, 8 CLEARINGHOUSE REV. 146, 148 (1974).

22. *See* Humble Oil & Ref. Co. v. Atwood, 150 Tex. 617, 624, 244 S.W.2d 637, 640 (1951); Duty v. Graham, 12 Tex. 427, 435 (1854); Graham v. Vining, 2 Tex. 433, 442 (1847). Similarly, a deed of trust, which is a mortgage with a power of sale, is only an incident of the underlying debt and does not vest legal title in the mortgagee. *See* Blackwell v. Barnett, 52 Tex. 326, 333 (1879); Texas Loan Agency v. Gray, 34 S.W. 650, 651 (Tex. Civ. App. 1896, writ ref'd). Since title does not pass to the lender regardless of the appearance of the conveyance, Texas is classified as a "lien theory" state. *See* 9 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 4652, at 17 (1958). States which follow the common law approach and hold title in the lender until the debt is paid are called "title theory" states. *Compare* Wright v. Henderson, 12 Tex. 43, 44 (1854) (mortgage is but security for debt, title remaining in mortgator subject to divestment by foreclosure) *with* Derby v. Derby, 147 N.E. 842, 843 (Mass. 1925) (as between parties, mortgage conveys fee title subject to redemption). *See generally* Madway, *A Mortgage Foreclosure Primer*, 8 CLEARINGHOUSE REV. 146, 149 (1974). As strict foreclosure presumes legal title in the lender, the procedure is unavailable in lien theory states such as Texas. *See* Duty v. Graham, 12 Tex. 427, 435 (1854); G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* § 312, at 650-54 (2d ed. 1970); Duffy, *The Character of Mortgages of Real Estate in Texas*, 12 S. TEX. L.J. 129, 130 (1970).

23. *See* Hudson v. Eisenmayer Milling & Elevator Co., 79 Tex. 401, 407, 15 S.W. 385, 387 (1891); Willis v. Moore, 59 Tex. 628, 637 (1883); Duty v. Graham, 12 Tex. 427, 434 (1854). An exception to the parole evidence rule allows a document which appears, on its

default, therefore, is foreclosure of the lien and sale of the property.<sup>24</sup> As title remains in the debtor, he has an inviolate right to possession until his interest is extinguished at the foreclosure sale<sup>25</sup> and may cure any

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face, to be a deed absolute to be shown to be merely a mortgage if the parties thereto intended the deed to be security for a debt. *See Humble Oil & Ref. Co. v. Atwood*, 150 Tex. 617, 626, 244 S.W.2d 637, 641 (1951); *Mann v. Falcon*, 25 Tex. 271, 275 (1860); *Norris v. Patterson*, 261 S.W.2d 758, 762 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.).

24. As noted, this is accomplished by judicial sale in the case of a mortgage or private sale by the trustee when a power of sale is contractually provided for in the deed of trust. Both methods of sale are statutorily regulated. *Compare* TEX. R. CIV. P. ANN. 309 (Vernon 1977) (procedure for judicial foreclosure proceedings) *with* TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981) (procedure for private foreclosure proceedings under deed of trust).

An exception to the remedy of sale by foreclosure exists when a vendor expressly reserves, in the contract for sale, a lien on the property conveyed in the amount of the purchase money still owing at the time of conveyance. *See Norvell, The Vendor's Lien And Reservation Of Paramount Legal Title - The Rights Of Vendors, Vendees, And Subvendees*, 44 TEXAS L. REV. 22, 25-26 (1965). As between vendor and vendee, the vendor is considered to have superior title until the money under the contract is paid. *See State v. Forest Lawn Lot Owners' Ass'n*, 152 Tex. 41, 48, 254 S.W.2d 87, 91 (1953). If the vendee defaults under such a contract, the vendor may disaffirm the contract and sue for recovery of the property or may choose to affirm the contract and proceed with the usual methods of foreclosure. *See Johnson v. Smith*, 115 Tex. 193, 199-200, 280 S.W. 158, 160-61 (1926); *Ransom v. Brown*, 63 Tex. 188, 189-90 (1885); *Peters v. Clements*, 46 Tex. 114, 122-23 (1876). Should a vendor who has taken no security other than the personal obligation of the vendee fail expressly to reserve a lien in the sale contract, a lien will be implied in equity for the amount of the purchase money still owing. *See Yarborough v. Wood*, 42 Tex. 91, 94 (1875); *Sanger Bros. v. Russell*, 289 S.W. 133, 133 (Tex. Civ. App.—Eastland 1926, no writ). The distinction between an implied vendor's lien and an express vendor's lien is that the former is considered an executed contract wherein title has passed absolutely to the vendee. In the latter case, the express vendor's lien, the contract is merely executory, with title remaining in the vendor until the debt is satisfied. *See Ransom v. Brown*, 63 Tex. 188, 189-90 (1885). As the vendor with an implied vendor's lien has already parted with title, he has no right to reclaim title by rescinding the contract should the vendee default; his remedy is to enforce the debt by foreclosing on the property. *See id.* at 189. *See generally* Howard, *Remedies On Default In Real Estate Financial Transactions With Emphasis On Non-Judicial Foreclosure* in STATE BAR OF TEXAS, REAL ESTATE FOR THE GENERAL PRACTITIONER Ch. G, at 68-79 (1980); 10A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 5242, at 492-93 (1957).

25. *See Duty v. Graham*, 12 Tex. 427, 435 (1854); *Travis v. Schonwald*, 131 S.W.2d 827, 830 (Tex. Civ. App.—Galveston 1939, writ ref'd); *Taylor v. San Antonio Joint Stock Land Bank*, 101 S.W.2d 868, 872 (Tex. Civ. App.—San Antonio 1936), *rev'd on other grounds*, 105 S.W.2d 650, 655 (1937). As an incident to the right to possession under Texas law, the borrower is also entitled to all rents and profits from the land while in possession. *See Sanger Bros. v. Hunsucker*, 212 S.W. 514, 516 (Tex. Civ. App.—Fort Worth 1919, no writ); *Johnson v. Lasker Real Estate Ass'n*, 21 S.W. 961, 963 (Tex. Civ. App. 1893, no writ). Even when the parties agree the rents and profits of the property are pledged as security on the debt, the mortgagee, as a general rule, is not entitled to such rents and profits as long as the mortgagor remains in possession. *See Teal v. Walker*, 111 U.S. 242, 248 (1884); *McGeorge v.*

default until that time.<sup>26</sup>

Even a cursory examination of Texas mortgage foreclosure law will demonstrate certain shortcomings of the existing system as it affects the three major parties involved in secured land transactions—lender, debtor, and junior lienholder. The lender is disadvantaged under the present foreclosure system in Texas. Right to possession of the mortgaged property until conveyed at foreclosure sale remains in the debtor.<sup>27</sup> A lender, therefore, has little control over dissipation of the security until he can effect the foreclosure sale.<sup>28</sup> The debtor suffers as well under the current system. Even the most protected class of debtor, the homeowner,<sup>29</sup> may be dispossessed and subjected to a personal judgment for the deficiency between the sale price at foreclosure and the amount remaining due on the debt.<sup>30</sup> This burdens the homeowner/debtor as foreclosure sales, both

Henrie, 94 S.W.2d 761, 762-63 (Tex. Civ. App.—Texarkana 1936, no writ) (quoting Freedman's Sav. & Trust Co. v. Sheperd, 127 U.S. 494, 502 (1888)).

26. See Willis v. Smith, 66 Tex. 31, 43, 17 S.W. 247, 248 (1886); G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 7.1, at 425 (1979). The debtor may not, however, redeem after a valid foreclosure sale is complete. See Slay v. Gose, 233 S.W. 348, 350 (Tex. Civ. App.—Fort Worth 1921, no writ). An exception to this ban on post-sale redemption is the tax sale. When the state sells a debtor's property to satisfy a tax lien, the debtor may redeem the property from the purchaser within two years after the sale by paying purchase price, interest, penalties, and a percentage of the aggregate amounts thereof (25% the first year and 50% the second year). See TEX. CONST. art. VIII, § 13; TEX. REV. CIV. STAT. ANN. art. 7345b, § 12 (Vernon 1960).

27. See Warnecke v. Broad, 138 Tex. 631, 634, 161 S.W.2d 453, 454 (1942); McCamant v. Roberts, 87 Tex. 241, 244, 27 S.W. 86, 87 (1894).

28. Compare Wright v. Henderson, 12 Tex. 43, 44 (1854) (mortgage passes no title to mortgagee and, hence, no right of possession) with Derby v. Derby, 147 N.E. 842, 843 (Mass. 1925) (legal title and, therefore, right of possession passes to mortgagee on execution of mortgage).

29. The homeowner is protected in Texas to the extent his "homestead" is exempt from attachment to satisfy a judgment lien. See TEX. CONST. art. XVI, §§ 50-52 (constitutional basis of homestead exemption); TEX. REV. CIV. STAT. ANN. art. 3383 (Vernon Supp. 1980-1981) (definition of "homestead"); *id.* art. 3835 (homestead exempt from attachment). This exemption does not extend, however, to liens resulting from purchase money contracts, home improvement loans, or tax liens. See *id.* art. 3839(1) (Vernon 1966) (exemption does not apply to purchase money contracts); *id.* art. 3839(3) (Vernon 1966) (exemption not applicable to home improvement loans); *id.* art. 3839(2) (Vernon 1966) (exemption does not extend to tax liens).

30. Cf. Langever v. Miller, 124 Tex. 80, 85-86, 76 S.W.2d 1025, 1028 (1934) (anti-deficiency judgment statute declared unconstitutional); Farmers' & Merchants' State Bank v. Cameron, 231 S.W. 738, 741 (Tex. Comm'n App. 1921, judgment adopted) (although secured creditor must first exhaust collateral, debtor is liable to extent land failed to satisfy debt). Even in times of inflated real estate prices, proceeds from a foreclosure sale are unlikely to cover the debt. High interest rates expand the debt far beyond the market value of the property and Texas provides no safeguards to insure a commercially reasonable sale. See, e.g., American Sav. & Loan Ass'n v. Musick, 531 S.W.2d 581, 587 (Tex. 1975) (7.4% of



judicial and non-judicial, frequently fail to wholly extinguish the underlying debt.<sup>31</sup> The junior lienholder is also inadequately protected under current Texas law. He is not entitled to notice of a non-judicial foreclosure sale even though a valid sale extinguishes his interest in the property.<sup>32</sup> The foregoing inequities warrant an examination of the proposed ULTA to see what remedies it affords these groups.<sup>33</sup>

#### IV. OVERVIEW OF UNIFORM LAND TRANSACTIONS ACT

ULTA, patterned after the Uniform Commercial Code,<sup>34</sup> proposes a

estimated property value deemed sufficient bid at sale); *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965) (\$1,200 sale price adequate when value alleged at \$4,000); *Mitchell v. Foster*, 492 S.W.2d 632, 633 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.) (sale price little more than half alleged market value adequate).

31. See *Pitman, Foreclosure Problems*, 30 TEX. B.J. 949, 980 (1967). Forced sales generally do not realize an amount even approaching the fair market value of the property sold. See *Bruce, Mortgage Law Reform Under The Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1284 (1976); *Pedowitz, Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL EST. L.J. 179, 195 (1978). Additionally, Texas foreclosure law offers little incentive for the creditor to seek a high sale price as the debtor is liable to the creditor for any deficiency not recouped at the foreclosure sale. See *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475-76 (Tex. 1965).

32. See *Hampshire v. Greeves*, 104 Tex. 620, 626, 143 S.W. 147, 150 (1912); *Richardson v. Kent*, 47 S.W.2d 420, 424-25 (Tex. Civ. App.—Dallas 1932, no writ). Posting at the county courthouse door 21 days prior to the foreclosure sale is the only notice statutorily required for junior lienholders; the secured party need only notify by mail "each debtor obligated to pay such debt according to the records of such holder." See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981).

33. See, e.g., ULTA § 3-502(a) (secured creditor may possess security on default); *id.* § 3-510(b) (debtor under purchase money contract not held liable for deficiency after foreclosure sale); *id.* §§ 3-508(a), -509(c) (junior lienholder entitled to notice prior to foreclosure sale).

34. See *id.*, Commissioners' Prefatory Note. The Act acknowledges its kinship with the U.C.C. throughout. See, e.g., *id.* § 3-203, Comment 2 (section derived from U.C.C. section 9-203); *id.* § 3-206, Comment 3 (section similar to U.C.C. section 9-318); *id.* § 3-513, Comment 3 (section similar to U.C.C. section 9-507). ULTA consists of three articles which follow U.C.C. articles 1, 2, and 9. See ULTA, Commissioners' Prefatory Note. The form of ULTA is recognizable to one familiar with the U.C.C.—statute text followed by official comments. ULTA, in article 1, proposes the substitution of the terms "security interest," "security agreement," "debtor," and "secured creditor" to replace, respectively, the terms "mortgage lien," "mortgage, or deed of trust," "mortgagor," and "mortgagee, or trustee under deed of trust." See *id.* § 3-103. ULTA terms will be used in this comment. An excellent summary of the provisions of ULTA has been written by several drafters of the Act. See *Trevaskis, Summary of the Uniform Land Transactions Act*, 13 REAL PROP., PROB. & TR. J. 672 (1978). See generally *Bruce, Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245 (1976); *Pedowitz, Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL EST. L.J. 179 (1978); *Comment, Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 WIS. L. REV. 899 (1976).

structured and modern approach to the often archaic area of consensual secured land transactions.<sup>35</sup> Like the Uniform Commercial Code, ULTA is consumer-oriented;<sup>36</sup> moreover, it also creates a special status of debtor termed "protected party."<sup>37</sup> The protected party, primarily a homeowner borrowing under a purchase money or home improvement loan,<sup>38</sup> is provided substantially more protection than other debtors under ULTA.<sup>39</sup>

Framers of ULTA, in formulating its provisions, proceeded on the basic premise that existing foreclosure proceedings are excessively expensive and time-consuming for the secured creditor.<sup>40</sup> To relieve this situation, the Act advances a number of innovations calculated to expedite foreclo-

35. One notable example is the dismissal of the lien state/title state distinction. Consent and intent of the parties are the focuses. See ULTA § 3-102(a). ULTA originally consisted of eight articles, but five, dealing generally with non-consensual liens, recording procedures, and condominiums, were severed by the Commission to expedite completion of the projects. See Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1245 (1976). For discussions of several of these articles in light of Texas law, see Comment, *An Analysis Of The Texas Condominium Act: Maintenance And Operation Of A Condominium Project*, 11 ST. MARY'S L.J. 861 (1980); Comment, *USLTA: Article 5 "Construction Liens" Analyzed In Light Of Current Texas Law On Mechanics' And Materialmen's Liens*, 12 ST. MARY'S L.J. 113 (1980); Comment, *USLTA: Marketable Record Title Act—A New Title Theory And Its Effect On Texas Law*, 12 ST. MARY'S L.J. 462 (1980).

36. Compare U.C.C. § 2-104, Comments 1-2 (consumer held to less stringent standards and afforded more protection in sales transactions than "merchant") with ULTA § 3-505(b) (protected party has five more weeks than regular debtor before foreclosure proceedings may be commenced against him).

37. See ULTA § 1-203.

38. See *id.* Although the protected party concept was initiated primarily to protect residential homeowners in security transactions, its coverage is, in effect, much broader. The definition of the term is dependent on the type and amount of property involved in the transaction rather than the nature of the debtor. The concept protects a debtor obligated under a security agreement in which the collateral is residential property "improved or to be improved, containing not more than (3) acres, not more than 4 dwelling units, and no non-residential uses for which the protected party is a lessor." *Id.* § 1-203 (b). The definition might include, therefore, vacation homes and mansions, but not small farms. See Comment, *Secured Transactions Under Article 3 Of The Uniform Land Transactions Act*, 1976 WIS. L. REV. 899, 904 (1976). The possible overinclusiveness of the status has drawn criticism from commentators. See Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1249 (1976); Pedowitz, *Report of the Committee on the Commission on Uniform Laws "(Uniform Land Transactions Act)"*, TITLE NEWS 54, 55 (Jan. 1976); Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 WIS. L. REV. 899, 904 (1976).

39. See, e.g., ULTA § 3-403 (protected party's security agreement must have ceiling on interest rate while other debtors are free to contract for rate); *id.* § 3-502 (secured creditor may not possess protected party's property on default, but may possess any other type of debtor's property on default); *id.* § 3-512 (protected party may avoid acceleration on default despite terms of security agreement).

40. See Madway & Pearlman, *A Mortgage Foreclosure Primer: Part III*, 8 CLEARINGHOUSE REV. 473, 474 (1974).

sure proceedings, including emphasis on non-judicial foreclosure,<sup>41</sup> possessory rights in the collateral for the secured creditor immediately on default,<sup>42</sup> and extinction of redemption rights in the debtor after foreclosure.<sup>43</sup> This streamlining of foreclosure procedures patently improves the lot of the secured creditor. The position of the debtor is also advanced since, as previously noted, these proposed modifications in procedure ultimately will encourage the national secondary mortgage market, thereby increasing mortgage capital available to the debtor.<sup>44</sup> Although mortgage foreclosure law in Texas is similar in many respects to ULTA proposed procedures,<sup>45</sup> the Act advances a number of concepts requiring a marked change from the system currently in operation.<sup>46</sup> In order to demonstrate how article 3 of ULTA would affect non-judicial foreclosure proceedings in Texas, three entities involved in consensual secured land transac-

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41. See ULTA art. 3, Introductory Comment; Madway & Pearlman, *A Mortgage Foreclosure Primer: Part III*, 8 CLEARINGHOUSE REV. 473, 474 (1974).

42. See ULTA § 3-502(a).

43. See *id.* § 3-512, Comment 1.

44. See Federal Mortgage Foreclosure Act of 1973, H.R. 10688 & S. 2507, 93d Cong., 1st Sess. § 402(5) (1973), quoted in ULTA, art. 3, Introductory Comment. See also note 7, *supra*. Less expensive foreclosure methods are advantageous to the debtor as "they are likely to encourage easier access to mortgage funds, lower interest rates, increased construction and ownership of property, and less litigation." Comment, *Power of Sale Foreclosure After Fuentes*, 40 U. CHI. L. REV. 206, 227 (1972).

45. Texas already recognizes a mortgage is but a security agreement and does not pass title from debtor to secured creditor. Compare *Duty v. Graham*, 12 Tex. 427, 435 (1854) (Texas is lien theory state) with ULTA § 3-102, art. 3, Introductory Comment (intent of parties to create security interest, rather than form of conveyance, is determinative of apparent absolute deed). Non-judicial foreclosure, advocated by ULTA, is already the norm in Texas. See *Cotellesse, Nonjudicial Foreclosure Under A Deed Of Trust: Some Problems of Notice*, 49 TEXAS L. REV. 1085, 1085 (1971).

46. A procedural irregularity in a foreclosure sale under deed of trust can void title in even a good faith purchaser in Texas. Under ULTA the remedy for irregularity in the sale is money damages. Compare *National Loan & Inv. Co. v. Dorenblaser*, 69 S.W. 1019, 1020-21 (Tex. Civ. App. 1902, writ ref'd) (improper posting voided trustee's sale) with ULTA §§ 3-511, -513 (title passes to good faith purchaser at sale regardless of irregularities of sale but secured creditor is liable in money damages for any loss occasioned thereby). Texas law distinguishes between an "irregular" foreclosure and a "wrongful" foreclosure. The irregular sale occurs when a sale made pursuant to a matured right to foreclose has a procedural irregularity, entitling the debtor to sue in equity to have the sale set aside. See *Biddle v. National Old Line Ins. Co.*, 513 S.W.2d 135, 138 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). The wrongful foreclosure results when the sale was unauthorized, as when the debtor was not actually in default at the time of sale. See *Calverley v. Gunstream*, 497 S.W.2d 110, 115-16 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). The debtor's remedy for wrongful foreclosure is a tort action against the secured party, on a theory of conversion, to recover the difference between the market value of the collateral at the time of sale and the amount of the debt. See *Burnett v. Manufacturer's Hanover Trust Co.*, 593 S.W.2d 755, 756-57 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

tions—secured creditor, debtor, and junior lienholder—will be analyzed in light of the uniform act and current Texas law.

## V. ULTA AND THE SECURED CREDITOR IN TEXAS

### A. Right to Possession

One of the improvements ULTA would contribute to existing Texas law, from the secured creditor's point of view, is easier and less expensive access to the collateral upon default.<sup>47</sup> As Texas is a lien theory state,<sup>48</sup> a secured creditor has no right to possession until the debtor's interest is extinguished at foreclosure sale,<sup>49</sup> and generally has no right to interfere with the debtor's use of the collateral.<sup>50</sup> Because the secured creditor has no right to take control of the property, receivers routinely are appointed by the courts to oversee the collateral until the foreclosure sale may be effected.<sup>51</sup> This procedure is time-consuming and expensive.<sup>52</sup> Additionally, control of the collateral is placed in the hands of a disinterested party.<sup>53</sup> Presumably the secured creditor, having a more direct interest in

47. Texas law does not allow a secured creditor to possess the collateral until after foreclosure sale, whereas ULTA allows possession on default. Compare *McCammant v. Roberts*, 87 Tex. 241, 244, 27 S.W. 86, 87 (1894) with ULTA § 3-502(a).

48. See *Humble Oil & Ref. Co. v. Atwood*, 150 Tex. 617, 624, 244 S.W.2d 637, 640 (1951).

49. See *Mann v. Falcon*, 25 Tex. 271, 276 (1860). This is contrary to title theory states' law. In those jurisdictions title is actually in the secured creditor. Therefore, he may step in to protect his property immediately on default. See Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1258 (1976).

50. See *Robertson v. Coates*, 65 Tex. 37, 43-44 (1885).

51. Appointment of a receiver at the request of the secured creditor is authorized statutorily whenever it appears the collateral is jeopardized. See *Greenland v. Pryor*, 360 S.W.2d 423, 425 (Tex. Civ. App.—San Antonio 1962, no writ) (appointment allowed when property in danger of becoming insufficient to satisfy indebtedness); *Myrick Inv. Co. v. Amicable Life Ins. Co.*, 183 S.W.2d 700, 703 (Tex. Civ. App.—Amarillo 1944, no writ) (although appointment of receiver is discretionary with court, it is authorized in every case which comes within purview of statute); TEX. REV. CIV. STAT. ANN. art. 2293(2) (Vernon 1971) (receiver to be appointed when mortgaged property is in danger of being lost, removed, or materially injured). Historically, the appointment of a receiver was an unusual occurrence; today, however, the practice has become a common one. See ULTA § 3-504, Comment 1; G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* §§ 148-50, at 240-54 (2d ed. 1970). ULTA proposes to reduce the frequency of this cumbersome procedure by placing the secured creditor in possession on default and allowing appointment of a receiver only in truly unusual circumstances. See ULTA § 3-503, Comment 1.

52. The cost of the receiver must be borne by the debtor. See *Houston Prod. Co. v. Taylor*, 33 S.W.2d 202, 204 (Tex. Civ. App.—Beaumont 1930, writ ref'd) (expense of receivership must be borne by party whose wrongful act required appointment of receiver).

53. See TEX. REV. CIV. STAT. ANN. art. 2294 (Vernon 1971). "No party, attorney, or any person interested in any way in any action for the appointment of a receiver shall be appointed receiver therein." *Id.*

the successful management of an income-producing property, would make more beneficial use of the collateral.<sup>54</sup>

ULTA allows the secured creditor the right to possession of the collateral on default prior to the termination of the debtor's interest.<sup>55</sup> The secured creditor in possession, pending termination of the debtor's interest, has the right to rental income<sup>56</sup> and may engage in leases which extend beyond the time of his possession.<sup>57</sup> Such leases may not be abrogated subsequently by a redeeming debtor.<sup>58</sup> This ability of a secured creditor to gain swift access to the collateral enables the creditor to make immediate advantageous use of the property so as to stabilize his investment.<sup>59</sup> The ULTA procedure also prevents a debtor in possession from draining the assets of income-producing property before the collateral can be sold at foreclosure.<sup>60</sup>

### B. *Manner of Sale*

Non-judicial, rather than judicial, foreclosure is the preferred method of sale under ULTA<sup>61</sup> and the method most frequently used in Texas.<sup>62</sup>

54. See ULTA § 3-504, Comment 1.

55. See *id.* § 3-502. The only limitations on this right are that the possession must be accomplished without breaching the peace and that it may not be invoked against a protected party. See *id.* § 3-502(a), (e). Even when a protected party is involved, however, a secured creditor with a first mortgage can possess any part of the collateral not occupied by the debtor, or one related to the debtor. See *id.* § 3-502, Comment. The entire collateral even of a protected party may be possessed on a showing of necessity to protect the secured creditor's interest therein. See *id.* § 3-502(c). The right to possession is, of course, extinguished upon cure or redemption by the debtor. See *id.* § 3-502(g).

56. See *id.* § 3-504(a). Rents automatically go to the secured creditor in possession to be applied to the debt. See *id.* § 3-504(a).

57. See *id.* § 3-504(b). A lease made by a creditor in possession would bind both a redeeming debtor and a purchaser at a trustee's sale, provided the lease terms are reasonable and customary for the kind of use involved. See *id.* § 3-504, Comment 4. Conversely, a secured creditor may be bound only for a period of two years to a lease made by a debtor in possession beyond the debtor's rightful possession. See *id.* § 3-207(b).

58. See *id.* § 3-207(b). Under Texas law, when the mortgagor leases subsequent to the initiation of a mortgage, the lessee holds subject to the rights of the mortgagee to terminate the lease and take possession. See *F. Groos & Co. v. Chittim*, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907, no writ).

59. See ULTA § 3-504.

60. See *id.* § 3-504, Comment 1; Sanders, *Impact of the Proposed ULTA on Florida's Mortgage Law*, 52 FLA. B.J. 296, 300 (1978).

61. See Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1282 (1976). Empirical data indicate a sale under a power of sale is less expensive and time-consuming than judicial foreclosures. See Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 WIS. L. REV. 899, 921 n.145 (1976).

62. See Cotellesse, *Nonjudicial Foreclosure Under A Deed of Trust: Some Problems Of*

Unlike ULTA procedures, however, Texas law demands strict compliance with the formalities of sale.<sup>63</sup> Statutory and contractual provisions must be scrupulously followed,<sup>64</sup> as failure to do so may cause the sale to be deemed illegal and title in the purchaser void.<sup>65</sup> A purchaser at a foreclosure under power of sale buys at his peril as he can acquire only such title as the trustee has to convey.<sup>66</sup> There are no conclusive presumptions of regularity as in judicial sales,<sup>67</sup> and, depending on the type of defect in the sale procedure, title in the sale purchaser may be attacked by the debtor for up to ten years.<sup>68</sup> As title in the purchaser at a trustee's sale

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*Notice*, 49 TEXAS L. REV. 1085, 1085 (1971).

63. Compare ULTA § 3-508, Comment 1 (only limitation on manner of sale is that all aspects "be conducted in a 'reasonable' manner") with *Reisenberg v. Hankins*, 258 S.W. 904, 909-10 (Tex. Civ. App.—Amarillo 1924, writ *dism'd*) (conducting sale at unusual time, 12:30 P.M., sufficient irregularity, when coupled with inadequate price, to void sale).

64. As foreclosure is considered a harsh remedy, literal compliance with even seemingly frivolous and unimportant details of the power of sale enumerated in deed of trust must be followed. See *Bowman v. Oakley*, 212 S.W. 549, 550-51 (Tex. Civ. App.—Fort Worth 1919, writ *ref'd*); *Chamberlain v. Trammell*, 131 S.W. 227, 229 (Tex. Civ. App. 1910, writ *dism'd*); *Bemis v. Williams*, 74 S.W. 332, 333 (Tex. Civ. App. 1903, no writ).

65. See, e.g., *Boone v. Miller*, 86 Tex. 74, 79, 23 S.W. 574, 575 (1893) (posting at wrong court building invalidated sale); *Chamberlain v. Trammell*, 131 S.W. 227, 229 (Tex. Civ. App. 1910, writ *dism'd*) (statutory, rather than contractual, method of notice incorrectly given, voided sale); *Davis v. Hughes*, 85 S.W. 1161, 1162 (Tex. Civ. App. 1905, no writ) (sale conducted by improper party deemed void).

66. See *First S. Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976); *Henke v. First S. Properties, Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ *ref'd n.r.e.*); *Forst v. Emerich*, 343 S.W.2d 527, 531 (Tex. Civ. App.—Houston 1961, writ *ref'd n.r.e.*).

67. See *Hart v. Eason*, 159 Tex. 375, 377, 321 S.W.2d 574, 575 (1959); *Terry v. Teachworth*, 431 S.W.2d 918, 922 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *ref'd n.r.e.*); *Sullivan v. Hardin*, 102 S.W.2d 1110, 1113 (Tex. Civ. App.—Amarillo 1937, no writ). Recitals in the deed merely give rise to rebuttable presumptions of regularity between the original parties. See *Burnett v. Manufacturer's Hanover Trust Co.*, 593 S.W.2d 755, 758 (Tex. Civ. App.—Dallas 1979, writ *ref'd n.r.e.*). Texas has not followed the lead of a number of states that have eliminated this uncertainty by enacting statutory schemes wherein recitals in the deeds, or in affidavits filed after the sale by the trustee, create prima facie evidence of compliance with requirements of sale. See COLO. REV. STAT. § 38-39-115(2) (1974) (trustee required to file affidavit after sale which creates prima facie evidence of regularity); OR. REV. STAT. § 86.780 (1979) (recitals in deed create prima facie evidence of regularity and conclusive presumptions as to bona fide purchaser); S.D. CODIFIED LAWS ANN. § 21-48-23(3) (1969) (trustee's affidavit creates prima facie presumption of regularity).

68. A sale which conveys a void title in the purchaser is governed by the ten-year statute of limitations concerning suits for the recovery of land. See *Bradford v. Thompson*, 470 S.W.2d 633, 636 (Tex. 1971) (sale accomplished prior to true default on the part of debtor void), *cert. denied*, 405 U.S. 955 (1972); TEX. REV. CIV. STAT. ANN. art. 5523a (Vernon 1958) (suits for recovery of land to be brought within 10 years after recordation of challenged instrument). A sale conveying a voidable title to the sale purchaser is governed by the four-year statute of limitations. See *Cline v. Cline*, 323 S.W.2d 276, 284 (Tex. Civ. App.—Houston 1959, writ *ref'd n.r.e.*) (claims of inadequate price and ineffective notice result in voidable

will always be somewhat uncertain, such a sale passes a title of questionable marketability with a resultant diminished value.<sup>69</sup>

In contrast to the foregoing stringent requirement of literal compliance with sale specifications in the deed of trust under threat of a void sale, ULTA demands only that all aspects of the sale be handled in a "reasonable" manner.<sup>70</sup> The Act allows the secured creditor to conduct the sale himself without the necessity of a trustee,<sup>71</sup> and permits either a public or private sale.<sup>72</sup> The secured creditor may purchase the collateral at the sale himself if he so chooses,<sup>73</sup> or may lend money to a third party to purchase it at more generous terms than his ordinary interest rates.<sup>74</sup> Further, any procedural irregularity in the sale will not affect the purchaser's title.<sup>75</sup>

ble title in purchaser); TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958) (all actions, except for those with statutorily prescribed limitation periods and for recovery of real estate, to be brought within four years from accrual of cause of action).

69. See G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 7.19, at 477 (1979); Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1284 (1976).

70. See ULTA § 3-508(a). The Act requires every aspect of the sale, including time, place, method, and terms be "reasonable." There are no specific guidelines announced as to what constitutes reasonableness in these instances. Presumably, the definitions are to be determined on a case-by-case basis. A consideration which will undoubtedly be a factor in such determinations is the obligation of good faith which was borrowed from the U.C.C. and incorporated into the Act. See *id.* § 1-301; U.C.C. § 1-203.

71. See ULTA § 3-508, Comment 1. Texas law also allows a mortgagee to conduct the sale of the collateral when the deed of trust designates the mortgagee trustee with power of sale. See *Southern Trust & Mortgage Co. v. Daniel*, 143 Tex. 321, 324-25, 184 S.W.2d 465, 467 (1944); *Howard v. Davis*, 6 Tex. 174, 183-84 (1851); *Kaiser v. Hutcheson*, 112 S.W.2d 1058, 1062 (Tex. Civ. App.—Galveston 1937, writ *dism'd*).

72. See ULTA § 3-508(a). Texas requires the sale to be at "public vendue," thus prohibiting the private foreclosure sale permitted under the Act. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981); ULTA § 3-508(a).

73. See ULTA § 3-508, Comment 1. This is contrary to the majority view which prohibits a secured creditor from purchasing at the foreclosure sale, absent an agreement to the contrary in the contract. See *Easton v. German-American Bank*, 127 U.S. 532, 536-37 (1888); G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 7.21, at 486 (1979); 10 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 5184, at 253-57. Texas is in accord with ULTA in allowing a secured creditor to purchase the collateral at a public sale. See *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 476 (Tex. 1965); *Southern Trust & Mortgage Co. v. Daniel*, 143 Tex. 321, 326, 184 S.W.2d 465, 467 (1944); *Howard v. Davis*, 6 Tex. 174, 183-84 (1851).

74. See ULTA § 3-508(c); *id.* § 3-508, Comment 3.

75. See *id.* § 3-511(a). A debtor's remedy in such a case is an action against the secured creditor for money damages. See *id.* §§ 3-511, -513. The framers noted this provision was included to eliminate the need for rigorous title examination to determine whether the foreclosure proceeding conformed to statutory requirements for sale in "meticulous detail." This expedient means of providing a sale purchaser with sure title in the collateral is designed to ensure the sale price will be as close to true market value as possible. See *id.* § 3-511, Com-

The procedures allowing the secured creditor the opportunity to gain ready access to his security at moderate cost, combined with the chance to provide a purchaser with a more certain, and hence, more marketable title, should make the ULTA foreclosure proposals appealing. Under the Act the secured creditor would enjoy the confidence of knowing he can easily disengage from ill-advised investments and reallocate his funds to more dependable debtors.

## VI. ULTA AND THE DEBTOR IN TEXAS

### A. *Time for Cure*

Under current Texas law, the secured creditor may accelerate the entire indebtedness owing under the security agreement immediately upon default of any obligation due by the debtor.<sup>76</sup> Once the debt has been accelerated, the debtor may not cure the default and avoid foreclosure in any other fashion than by payment of the entire amount remaining due under the security agreement, plus any costs incurred by the creditor.<sup>77</sup> After the sale has been accomplished, a debtor may redeem the property only on a showing, in a suit specifically instituted for the purpose, that his tender of performance was wrongfully refused by the creditor.<sup>78</sup> Bar-

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ment 1.

76. See *Covington v. Burke*, 413 S.W.2d 158, 160 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.). A secured creditor is under a duty to notify the debtor of his intent to accelerate the debt. See *id.* at 160. A failure by the debtor to fulfill specified obligations in the security agreement triggers the acceleration clause. See, e.g., *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425, 430-31 (Tex. 1964) (transfer of collateral by debtor in violation of the agreement accelerated "due on sale" clause); *French v. May*, 484 S.W.2d 420, 424 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.) (failure to make installment payment on debt activated acceleration clause); *Weierhauser v. Bennett*, 19 S.W.2d 572, 573 (Tex. Civ. App.—San Antonio 1929, no writ) (failure to obtain insurance as covenanted accelerated debt).

77. See, e.g., *Jones v. Jones*, 49 Tex. 683, 690-91 (1878) (tender to cure default properly includes balance of purchase money and amount of interest due); *French v. May*, 484 S.W.2d 420, 426-27 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e) (tender omitting amount of attorney's fee as required under deed of trust insufficient to cure); *Iden v. Lipard*, 166 S.W.2d 185, 187 (Tex. Civ. App.—Waco 1942, no writ) (debtor may not cure default by tendering amount in arrears after acceleration but before sale). See also *Hiller v. Prosper Tex. Inc.*, 437 S.W.2d 412, 415 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (with optional acceleration clause, tender of arrearages and costs incurred sufficient to cure until secured party takes definitive action to exercise option).

78. See *Minchew v. Hankins*, 278 S.W. 306, 309 (Tex. Civ. App.—Amarillo 1925), *aff'd*, 285 S.W. 264, 265 (Tex. 1926); *Burks v. Burks*, 141 S.W. 337, 340 (Tex. Civ. App.—Texarkana 1911, writ ref'd). Allowance for redemption of the collateral by the debtor after a wrongful foreclosure is a further exception to the general rule that no redemption is permitted after the foreclosure sale. See *Slay v. Gose*, 233 S.W. 348, 350 (Tex. Civ. App.—Fort Worth 1921, no writ).



ring cure or redemption after sale, however, a debtor's interest in the security interest can be extinguished completely within twenty-one days after his initial default.<sup>79</sup>

ULTA suggests several distinct advantages in this area not currently available under Texas law. Initially, the Act provides expanded time periods within which the debtor can cure.<sup>80</sup> The secured creditor may not commence foreclosure proceedings until at least five weeks after notifying the defaulting debtor of his intention to do so.<sup>81</sup> When dealing with a protected party, a secured creditor may not send notice of intent to foreclose until the debtor has been in default for five weeks.<sup>82</sup> Since the creditor must then wait an additional five weeks to institute foreclosure proceedings after the notice has been sent,<sup>83</sup> the protected party has a minimum of ten weeks within which to cure the default.<sup>84</sup> An additional advantage afforded the debtor is the fifteen-day grace period which a secured creditor is obligated to allow the debtor before he can enforce an acceleration clause.<sup>85</sup>

### B. Sale Expectations

A secured creditor, in Texas, has little incentive to obtain a price approaching fair market value at the foreclosure sale. Texas law allows the secured creditor to both conduct the sale<sup>86</sup> and purchase the collateral thereat.<sup>87</sup> The creditor may then resell the collateral and still have re-

79. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981); McNeill, *Article 3810 Revisited*, 42 TEX. B.J. 841, 842 (1979). The trustee may sell the collateral on the first Tuesday of any month after notice of the pending sale has been posted at the county courthouse for 21 days prior to the sale date. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981).

80. See ULTA §§ 3-507(c), -508(a), -512(b). A debtor may cure until the collateral is disposed of at sale by tendering performance due and reimbursing the creditor for costs incurred due to his default. See *id.* § 3-512(a). There is no redemption of the property available to the debtor for any reason after the property has been disposed of at foreclosure sale. See *id.* § 3-512(a).

81. See *id.* § 3-508(a).

82. See *id.* § 3-505(d).

83. See *id.* § 3-508(a).

84. See *id.* §§ 3-505(d), -508(a); *id.* § 3-512, Comment 1.

85. See *id.* § 3-512(b). This period is waivable by all but a protected party. See *id.* § 3-512(b).

86. See *Valley Int'l Properties, Inc. v. Ray*, 586 S.W.2d 898, 901 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Hart v. McClusky*, 118 S.W.2d 1077, 1081 (Tex. Civ. App.—Amarillo 1938, no writ); *Heiner v. Homeland Realty Co.*, 100 S.W.2d 793, 796 (Tex. Civ. App.—Waco 1936, no writ).

87. See *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 476 (Tex. 1965); *Southern Trust & Mortgage Co. v. Daniel*, 143 Tex. 321, 326, 184 S.W.2d 465, 467 (1944); *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no

course against the initial judgment debtor.<sup>88</sup> Although a debtor has the right to have an irregularly managed sale set aside,<sup>89</sup> it is well settled that inadequate price, without more, will not invalidate a sale.<sup>90</sup> The existing method of apprising potential purchasers of impending sale, posting a notice of the sale at the county courthouse door,<sup>91</sup> is not conducive to alerting all potentially interested purchasers nor to encouraging competitive bidding.<sup>92</sup> A forced sale will rarely produce a fair market value in any

writ). Although a mortgagee acting as trustee may purchase at his own sale, a trustee who is not a beneficiary under the deed of trust may not purchase at a sale he conducts. *See Southern Trust & Mortgage Co. v. Daniel*, 143 Tex. 321, 326, 184 S.W.2d 465, 467 (1944); *Howard v. Davis*, 6 Tex. 174, 183 (1851); *Kaiser v. Hutcheson*, 112 S.W.2d 1058, 1062 (Tex. Civ. App.—Galveston 1937, writ *dism'd*).

88. *See Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965); *Maupin v. Chaney*, 139 Tex. 426, 429, 163 S.W.2d 380, 382 (1942). The debtor has a right to demand the sale proceeds be applied to the debt before the deficiency amount is determined. *See Bailey v. Block*, 104 Tex. 101, 103, 134 S.W. 323, 325 (1911); *Casa Monte Co. v. Ward*, 342 S.W.2d 812, 813 (Tex. Civ. App.—Austin 1961, no writ). The creditor may renew the deficiency ad infinitum and collect thereon should the foreclosed debtor enjoy more prosperous times in the future. *See, e.g., Barron v. Thompson*, 54 Tex. 235, 238 (1880) (judgment lien attaches to after-acquired property of judgment debtor); *Hicks v. Price*, 81 S.W.2d 116, 119 (Tex. Civ. App.—Galveston 1935, no writ) (recorded judgment operates as lien on property in county of judgment debtor in favor of judgment creditor); *TEX. REV. CIV. STAT. ANN. art. 5449* (Vernon 1958) (judgment must be renewed every 10 years to remain active).

89. *See Boone v. Miller*, 86 Tex. 74, 79, 23 S.W. 574, 575 (1893); *Chamberlain v. Trammell*, 131 S.W. 227, 229 (Tex. Civ. App. 1910, no writ); *Davis v. Hughes*, 85 S.W. 1161, 1162 (Tex. Civ. App. 1905, no writ).

90. *See Diversified Developers, Inc. v. Texas First Mortgage Reit*, 592 S.W.2d 43, 45 (Tex. Civ. App.—Beaumont 1979, writ *ref'd n.r.e.*); *Lawson v. Gibbs*, 591 S.W.2d 292, 295 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ *ref'd n.r.e.*); *Hausmann v. Texas Sav. & Loan Ass'n*, 585 S.W.2d 796, 801 (Tex. Civ. App.—El Paso 1979, writ *ref'd n.r.e.*).

91. *See TEX. REV. CIV. STAT. ANN. art. 3810* (Vernon Supp. 1980-1981). The statute provides for posting 21 days prior to date of sale at the county courthouse door in the county in which the collateral is located, sale to be had on the first Tuesday of the month between 10:00 A.M. and 4:00 P.M. Provision is also made in the statute for written notice to be sent, by certified mail, to anyone obligated on the debt according to the secured creditor's records. *See id.* The statute requires only that the notice be mailed; there is no requisite that the debtor actually receive the notice. *See id.* An affidavit stating notice was mailed is sufficient to satisfy notice requirements of the statute. *See id.* This procedure is an improvement, however, over previous Texas law. Formerly, the only notice required was posting in three public places, one of which must be the county courthouse door. *See Cotellesse, Nonjudicial Foreclosure Under A Deed Of Trust: Some Problems Of Notice*, 49 *TEXAS L. REV.* 1085, 1088 (1971); *Fischman, Article 3810 (Revised): An Unanswered Question*, 43 *TEX. B.J.* 529, 530 (1980); *Wallenstein & St. Claire, Property, Annual Survey of Texas Law*, 30 *Sw. L.J.* 28, 49 (1976).

92. The usual result of this procedure is that the secured creditor is the sole bidder at the sale and is able to buy the secured collateral for a pittance. *See Flato Bros. v. Builders Loan Co.*, 457 S.W.2d 154, 156 (Tex. Civ. App.—Dallas 1970, no writ). As previously noted, unless there is some showing of fraud or duress, mere inadequacy of price will not void the

event, but failure to encourage energetic bidding unnecessarily depresses the sale price.<sup>93</sup> This is significant to the debtor as he is entitled to any surplus of sale price over the amount of the debt<sup>94</sup> and liable for any deficiency.<sup>95</sup>

ULTA mandates a sale under non-judicial foreclosure be commercially reasonable.<sup>96</sup> To satisfy this requirement, the person conducting the sale must employ methods commonly used by voluntary sellers to advertise an upcoming sale.<sup>97</sup> Such a practice would be more likely to attract competitive bids than the posting method presently employed in Texas.<sup>98</sup> The secured creditor, as in Texas, may conduct the sale and purchase the collateral himself.<sup>99</sup> There is, however, more incentive under ULTA to try to obtain the best possible price at the sale.<sup>100</sup> No deficiency judgments

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sale. See *American Sav. & Loan Ass'n v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965); *Mitchell v. Foster*, 492 S.W.2d 632, 633 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.). The debtor is, therefore, left after the sale liable to the secured creditor for the difference between the sale price and the remainder due on the debt. See *Langever v. Miller*, 124 Tex. 80, 86, 76 S.W.2d 1025, 1028 (1934). In today's market of high real estate prices and interest rates, the failure of the sale to realize the highest possible amount may impose a substantial financial burden on the debtor.

93. See *Pitman, Foreclosure Problems*, 30 TEX. B.J. 949, 980 (1967).

94. See *Jeffery v. Bond*, 509 S.W.2d 563, 565 (Tex. 1974); *Wynne v. State Nat'l Bank*, 82 Tex. 378, 382, 17 S.W. 918, 919 (1891); *Reisenberg v. Hankins*, 258 S.W. 904, 909 (Tex. Civ. App.—Amarillo 1924, writ dismissed); *Duffy, The Character of Mortgages of Real Estate in Texas*, 12 S. TEX. L.J. 129, 135 (1970).

95. *Langever v. Miller*, 124 Tex. 80, 85-86, 76 S.W.2d 1025, 1028 (1934); *Farmers' & Merchants' State Bank v. Cameron*, 203 S.W. 1167, 1168 (Tex. Civ. App.—El Paso, 1918), *aff'd*, 231 S.W. 738, 741, (Tex. Comm'n App. 1921, judgment adopted).

96. See ULTA § 3-508(a).

97. See *id.* § 3-508, Comment 1. The comments suggest such methods would include placing an advertisement in the real estate want ads of a daily newspaper when a home is being sold or the financial section when an industrial plant is the collateral for sale. In some cases only employment of a professional real estate agent would satisfy the test of reasonableness. Merely placing an advertisement in a legal publication would not be commercially reasonable nor, presumably, would posting the notice of the sale at the county courthouse door. See *id.* § 3-508, Comment 1. There is a further requirement that all persons holding recorded interests in the collateral be sent written notification of the sale in order to allow them to protect their interests at the sale. See *id.* § 3-508(a).

98. Compare TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981) (notice posted at county courthouse door sufficient notice to prospective purchasers of collateral at foreclosure sale) with ULTA § 3-508(a) (seller must use methods customarily employed by willing sellers to notify buyers of pending sale).

99. See ULTA § 3-508(a); *id.* § 3-508, Comment 1. If the sale is conducted by a third-party trustee, the secured creditor may purchase the collateral by private negotiation. See *id.* § 3-508 (a).

100. The entire ULTA foreclosure section is premised on the belief that it is in the best interest of the creditor to obtain the maximum price for the collateral on disposition at the sale. See *id.* § 3-505, Comment 1.

against protected party debtors under purchase money security agreements are permitted under the Act; the creditor must satisfy his interest solely from the sale proceeds or forfeit the balance remaining due.<sup>101</sup> Further, since all debtors are entitled to any surplus of sale proceeds above the amount of debt due and foreclosure costs, the possibility of an increased sale price is of substantial import to him.<sup>102</sup>

### C. Protected Parties

There is no specific protection available under Texas law for the commercially unsophisticated debtor.<sup>103</sup> The possible exception to this rule is the recently created protection afforded the purchaser of a residence under a purchase money installment contract.<sup>104</sup> Such a debtor is entitled to more specific notice of default than other debtors<sup>105</sup> and must be given grace periods calculated by the percentage of indebtedness already paid

101. See *id.* § 3-510(b). All other debtors are, however, liable for any deficiency between sale price and debt. See *id.* § 3-510(b).

102. See *id.* § 3-510(a)(5). The debtor is entitled to any excess after sale proceeds have been applied, respectively, to expenses of sale, costs incurred by the creditor while in possession prior to sale, satisfaction of the secured indebtedness, and payment of any recorded subordinate liens. See *id.* § 3-510(a).

103. Texas does protect purchasers of property by providing a "homestead exemption" from forced sale of the debtor's residence to satisfy a judgment lien. See TEX. CONST. art. XVI, §§ 50-52; TEX. REV. CIV. STAT. ANN. arts. 3833, 3835 (Vernon Supp. 1980-1981). This exemption effectively limits liens on homestead property to those for purchase money contracts, home improvement loans, and property tax liens. As a result, a Texas homeowner may only encumber his property with purchase money and home improvement loans. A homeowner, therefore, under a purchase money security agreement, primarily the class protected by ULTA's protected party status, is not affected by the Texas homestead exemption. A debtor under a purchase money contract stands in the same position in Texas as does any other debtor subject to losing his property by foreclosure sale. See TEX. CONST. art. XVI, §§ 50-52; TEX. REV. CIV. STAT. ANN. arts. 3833, 3835 (Vernon Supp. 1980-1981).

104. See TEX. REV. CIV. STAT. ANN. art. 1301b (Vernon 1980). Under installment sales purchase money contracts, a form of financing used extensively in low income housing, title remains in the seller until the purchase price is paid. See *Mixon, Installment Land Contracts: A Study of Low Income Transactions, With Proposals For Reform and a New Program to Provide Home Ownership in the Inner City*, 7 HOUS. L. REV. 523, 526, 528 (1970). Upon default under these contracts, the seller regains possession of the property by using summary forceable entry and detainer proceedings rather than the slower and more costly foreclosure procedures required by most deeds of trust. See TEX. REV. CIV. STAT. ANN. art. 1301 (Vernon 1980); *id.* arts. 3973-3994 (Vernon 1966); *Mixon, Installment Land Contracts: A Study of Low Income Transactions, With Proposals For Reform and a New Program to Provide Home Ownership in the Inner City*, 7 HOUS. L. REV. 523, 549-50 (1970).

105. See TEX. REV. CIV. STAT. ANN. art. 1301b (Vernon 1980) (notice must be mailed to debtor advising of rights and liabilities due to default in plain language written in ten-point type). See *id.* § 1(c).

at the time of default prior to dispossession.<sup>106</sup> This debtor is, however, liable for a deficiency judgment<sup>107</sup> and has no power to abate an acceleration clause once exercised.<sup>108</sup>

The most notable protection offered debtors under ULTA is the created status of protected party.<sup>109</sup> This protected debtor, under a residential purchase money security agreement, is immune from a deficiency judgment.<sup>110</sup> The protected party may defeat an exercised acceleration merely by making the overdue payments at any time up to disposal of the collateral at foreclosure sale.<sup>111</sup> Additionally, a secured creditor must wait ten weeks after default, exclusive of any grace period in the contract, before initiating foreclosure proceedings against a protected party.<sup>112</sup> The protected party's remedy for a procedurally irregular sale is recovery of money damages from the secured creditor.<sup>113</sup> The protected party may recover, without proof of actual damages, any loss wrongfully inflicted in an amount equal to one percent of the original indebtedness, not exceeding five hundred dollars.<sup>114</sup> This amount is not deductible by the secured creditor from any sum owing by the debtor.<sup>115</sup>

A Texas debtor would benefit under ULTA provisions allowing for an extended time to cure after default,<sup>116</sup> an increased chance to obtain an

106. *See id.* § 1(a). A debtor who has paid less than 10% of the entire indebtedness must be given 15 days grace period. *See id.* § 1(a). One having paid 10% to 20% must be granted 30 days grace period. *See id.* § 1(b). A debtor who has paid more than 20% must be given 60 days grace period. *See id.* § 1(c).

107. *See Langever v. Miller*, 124 Tex. 80, 85-86, 76 S.W.2d 1025, 1028 (1934); *Farmers' & Merchants' State Bank v. Cameron*, 231 S.W. 738, 741 (Tex. Comm'n App. 1921, judgment adopted).

108. *See T.H.G.K. & T. Corp. v. Lipe*, 399 S.W.2d 408, 411 (Tex. Civ. App.—Beaumont 1966, no writ); *Iden v. Lippard*, 166 S.W.2d 185, 186-87 (Tex. Civ. App.—Waco 1942, no writ); *Weierhauser v. Bennett*, 19 S.W.2d 572, 573 (Tex. Civ. App.—San Antonio 1929, no writ).

109. *See ULTA* § 1-203. This class, as noted previously, is basically equatable with "consumer." The drafters noted that "while freedom of contract is generally a desirable goal, there are situations in which good social policy requires that freedom of contract be limited to protect against possible overreaching and defeated expectations as to consumer transactions." *Id.*, Commissioners' Prefatory Note.

110. *See id.* § 3-510(b).

111. *See id.* § 3-512(c); *id.* § 3-512, Comment 2.

112. *See id.* §§ 3-505, -508(a).

113. *See id.* § 3-513(a), (c).

114. *See id.* § 3-513(c). The protected party may also recover reasonable court costs and attorneys' fees expended in prosecuting his claim. *See id.* § 3-513(d).

115. *See id.* § 3-513(c).

116. *Compare ULTA* § 3-505(b), (d); *id.* § 3-505, Comment 4; *id.* § 3-506, Comment 4 (secured creditor may not initiate foreclosure proceedings against protected party debtor until 10 weeks after default) *with TEX. REV. CIV. STAT. ANN.* art. 3810 (Vernon Supp. 1980-1981) (secured creditor may foreclose 21 days after notice given to debtor).

amount nearer to market value at sale,<sup>117</sup> and an expanded protection under the protected party status.<sup>118</sup> He would lose his current right, however, to void title in a purchaser at an irregularly managed sale.<sup>119</sup> A dispossessed homeowner may well prefer the Texas remedy than that allowed under ULTA for money damages.

## VII. ULTA AND THE JUNIOR LIENHOLDER IN TEXAS

The junior lienholder in Texas has the right to redeem the collateral prior to the foreclosure of a superior lien.<sup>120</sup> He has the further right to satisfy his lien from any excess produced at the foreclosure of the primary lien.<sup>121</sup> The junior lienor, however, is not entitled to notice of a pending foreclosure sale,<sup>122</sup> despite the fact a valid sale could cut off his interest in the collateral.<sup>123</sup> Even though Texas recently expanded the notice requirements of its foreclosure statute for due process purposes,<sup>124</sup> the

117. Compare ULTA § 3-508(a) (price at sale must be commercially reasonable) and *id.* § 3-508, Comment 1 (commonly used forms of realty advertising necessary to satisfy commercial reasonableness required by ULTA) with *American Sav. & Loan Ass'n v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975) (bid of less than 10% collateral's value deemed sufficient at sale) and TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981) (notification to prospective sale purchasers given by posting property description on county courthouse door).

118. Compare ULTA § 3-512(c)(3) (protected party may reverse accelerated debt by paying back payments and costs incurred by secured creditor) with *Iden v. Lippard*, 166 S.W.2d 185, 186 (Tex. Civ. App.—Waco 1942, no writ) (debtor liable for full amount of indebtedness once acceleration clause initiated by secured creditor).

119. See, e.g., *Sparkman v. McWhirter*, 263 S.W.2d 832, 837 (Tex. Civ. App.—Dallas 1953, writ ref'd) (slight irregularity of sale combined with inadequate price voids sale); *Reisenberg v. Hankins*, 258 S.W. 904, 910 (Tex. Civ. App.—Amarillo 1924, writ dism'd) (noon sale deemed sufficient irregularity, combined with inadequate sale price, to void sale); *National Loan & Inv. Co. v. Dorenblaser*, 69 S.W. 1019, 1020-21 (Tex. Civ. App. 1902, writ ref'd) (improper posting of notice of sale voids subsequent sale).

120. See *Hampshire v. Greeves*, 104 Tex. 620, 626-27, 143 S.W. 147, 150 (1912). This right to redeem is exercised by paying off the primary mortgage debt. See *id.* at 626, 143 S.W. at 150. The junior lienholder must exercise this right prior to foreclosure sale or lose it. See *Richmond v. Nowlin*, 135 S.W.2d 521, 524 (Tex. Civ. App.—Amarillo 1939, writ dism'd judgment cor.).

121. See *Huselby v. Allison*, 25 S.W.2d 1108, 1113 (Tex. Civ. App.—Amarillo 1930, writ dism'd).

122. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981) (no provision for notice of foreclosure sale to secondary lienors).

123. See *Hampshire v. Greeves*, 104 Tex. 620, 626-27, 143 S.W. 147, 150 (1912); *Richmond v. Nowlin*, 135 S.W.2d 521, 523-24 (Tex. Civ. App.—Amarillo 1940, writ dism'd judgment cor.).

124. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981). Commentators note the statute was amended to conform to the due process notice and hearing requirements enunciated in cases such as *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972). See *Fischman, Article 3810 (Revised): An Unanswered Question*, 43 TEX. B.J. 529, 529 (1980); Wal-

Texas Legislature did not require notice to be given to junior lienholders.<sup>125</sup> As is the case with secured creditors with first mortgages, junior lienholders have no right to possession of the collateral.<sup>126</sup>

As in Texas law, ULTA allows the junior lienor to redeem the collateral prior to sale<sup>127</sup> and to satisfy his lien from the excess sale proceeds.<sup>128</sup> Determination of priority among conflicting secondary security interests would be made in the same manner as that currently used under Texas law.<sup>129</sup> The junior lienholder would, however, gain a significant right under ULTA by virtue of its notice provision.<sup>130</sup> Foreclosure proceedings under ULTA require notice to be given to all recorded junior lienholders prior to sale.<sup>131</sup> While a junior lienholder has a right to take possession on default, this right may be exercised only when a senior lienholder does not elect to do so,<sup>132</sup> and never in the case of a protected party.<sup>133</sup>

The position of the junior lienholder under ULTA is basically the same

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lenstein & St. Claire, *Property, Annual Survey of Texas Law*, 30 Sw. L.J. 28, 50 (1976). If this were the case, the action subsequently proved unnecessary as the Fifth Circuit and the Texas Supreme Court both found article 3810 did not involve the significant state action necessary to warrant its compliance with the due process clause of the fourteenth amendment. See *Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166, 1172 (5th Cir. 1975); *Armenta v. Nussbaum*, 519 S.W.2d 673, 677 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

125. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981).

126. See *Humble Oil & Ref. Co. v. Atwood*, 150 Tex. 617, 624, 244 S.W.2d 637, 640 (1951) (secured creditors have no right to possession of collateral prior to foreclosure).

127. See ULTA § 3-512(f).

128. See *id.* § 3-510(a)(4).

129. ULTA, like present Texas law, follows the "first in time, first in right" rule to determine the respective priorities of unrecorded interests. Compare *Windham v. Citizens Nat'l Bank*, 105 S.W.2d 348, 350-51 (Tex. Civ. App.—Austin 1937, writ dismissed) (priority of competing unrecorded liens on same property determined according to time of creation of lien) with ULTA § 3-301(a) (first unrecorded security interest to attach has priority over other unrecorded security interests on same property). ULTA defers to existing state law for determinations of priority involving a recorded security interest. See ULTA § 3-301(c).

130. Compare TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981) (no provision for notice to junior lienor) with ULTA §§ 3-508(a), -509(c) (all recorded junior lienholders entitled to notice of foreclosure sale).

131. See ULTA §§ 3-508(a), -509(c). The foreclosing secured creditor is obligated, however, to notify only those junior creditors of record seven weeks prior to the sale. See *id.* § 3-508(a); *id.* § 3-508, Comment 1. As a junior lienor acquiring an interest in the collateral within the seven weeks preceding the sale would not be entitled to notice, all junior lienholders would appear to have an affirmative duty to check with the senior lienholder to make certain no sale was pending. See *Sanders, Impact of the Proposed ULTA on Florida's Mortgage Law*, 52 FLA. B.J. 296, 299 (1978). A junior lienholder's remedy for any loss occasioned by a foreclosing creditor's defect or omission in conduct of the sale is an action for money damages. See ULTA § 3-513(b); *id.* § 3-513, Comment 2.

132. See *id.* § 3-502(e).

133. See *id.* § 3-502(e); *id.* § 3-502, Comment 1.

as his position under current Texas law.<sup>134</sup> The right to notice<sup>135</sup> and the occasional right to possession<sup>136</sup> under ULTA, however, should make the Act appealing to the junior lienholder as it would buttress the rather tenuous position he now holds under Texas law.<sup>137</sup>

### VIII. ON ULTA'S FUTURE IN TEXAS

As demonstrated, ULTA proposes a number of foreclosure procedures which clearly could effect beneficial changes in existing Texas law.<sup>138</sup> There are several possible impediments, however, to the immediate passage of the Act.

A basic premise of the Act is that more efficient and less costly secured land transactions may be achieved through uniformity among state laws.<sup>139</sup> This purpose effectively has been frustrated to date as, thus far, no state has enacted ULTA into law.<sup>140</sup> There is little incentive for Texas to adopt an act to achieve uniformity when there is no other jurisdiction with which its laws would then be uniform.

ULTA has not achieved the enthusiastic acceptance of its model and predecessor, the Uniform Commercial Code.<sup>141</sup> A possible explanation for this discrepancy is the fact that, in many instances, the Code merely codi-

134. Compare *Firebaugh v. Ward*, 51 Tex. 409, 413 (1879) (first recorded mortgage has priority over subsequent encumbrances) and *Hampshire v. Greeves*, 104 Tex. 620, 626-27, 143 S.W. 147, 150 (1912) (junior lienholder may redeem collateral) and *Huselby v. Allison*, 25 S.W.2d 1108, 1113 (Tex. Civ. App.—Amarillo 1930, writ dismissed) (secondary mortgagee entitled to surplus at foreclosure) with ULTA § 3-301(c) (ULTA retains existing state law governing priority of recorded instruments) and *id.* § 3-512(f) (secondary lienor has right to redeem collateral) and *id.* § 3-510(a)(4) (junior lienholder due excess at senior lienor's foreclosure sale).

135. See ULTA §§ 3-508(a), -509.

136. See *id.* § 3-502(e).

137. See, e.g., *Humble Oil & Ref. Co. v. Atwood*, 150 Tex. 617, 624, 244 S.W.2d 637, 640 (1951) (secured creditors have no right to possession of collateral prior to foreclosure sale); *Hampshire v. Greeves*, 104 Tex. 620, 626, 143 S.W. 147, 150 (1912) (foreclosure sale extinguishes junior lienor's rights); TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981) (junior lienholder not entitled to notice of foreclosure sale under Texas law).

138. See, e.g., UTLA § 3-511(a) (purchasers at sale take certain title despite any irregularities therein); *id.* § 3-503 (decreased use of receiverships allow less expensive sales); *id.* §§ 3-203, -505, -508(a) (protected party allowed increased protections from secured creditor in foreclosure proceedings).

139. See *id.*, Commissioners' Prefatory Note; *id.* art. 3, Introductory Comment.

140. See UNIFORM LAWS ANN., *Table of Jurisdictions Listing Uniform Acts Adopted*, 9-74 (Master ed. 1981).

141. The U.C.C. has been enacted in all states with the sole exception of Louisiana. See J. WHITE & R. SUMMERS, *HANDBOOK ON THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 1 (1980). It is considered by commentators "the most spectacular success story in the history of American law." See *id.* at 5.



fied a number of uniform laws governing sales transactions which had predated the U.C.C.<sup>142</sup> Uniformity of property laws between jurisdictions traditionally has been unknown<sup>143</sup> and the area historically has been resistant to unification.<sup>144</sup> There is a strong sentiment to maintain the status quo in the realm of real property law.<sup>145</sup> Attorneys have demonstrated this most recently in their response—ranging from lethargy to hostility—to ULTA.<sup>146</sup>

There are, alternatively, two factors which could well rouse the bar and legislature to support ULTA actively, at least as to its foreclosure proposals. In 1973 an unsuccessful bill was introduced in Congress to enact a federal uniform system for mortgages.<sup>147</sup> It is likely the legislation, which would govern any mortgage owned, insured, or guaranteed by a federal agency,<sup>148</sup> will be reintroduced in the future.<sup>149</sup> Should Texas fail to enact ULTA, it may find the federal government has intervened and the majority of its secured real transactions governed by federal, rather than state

142. See *id.* at 3. These prior laws included, among others, the Uniform Negotiable Instruments Act, Uniform Warehouse Receipts Act, Uniform Sales Act, Uniform Bills of Lading Act, Uniform Stock Transfer Act, Uniform Conditional Sales Act, and Uniform Trust Receipts Act. See *id.* at 3.

143. See Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. U.L. REV. 359, 359 (1978).

144. See Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 WIS. L. REV. 899, 931 (1976).

145. See Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1246 (1976); Pedowitz, *Report of the Committee on the Commission on Uniform Laws ("Uniform Land Transactions Act")*, TITLE NEWS 54, 56 (Jan. 1976).

146. See Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1246 n.10 (1976). Bruce suggests lawyers often reject new legal innovations without much regard to their value. This reticence, the author proposes, may be attributable to "laziness, power politics, sound professional caution, or a vested interest in the status quo." See *id.* at 1246 n.10. *But cf.* Kuklin, *The Uniform Land Transactions Act: Article 3*, 11 REAL PROP., PROB. & TR. J. 12, 12 (1976) (lawyers have obligation to protect sound legal precedents and to consider long-term viability of proposed changes).

The Act has reached the attention of the Texas State Bar. A subsection of the Real Property, Probate and Trust Law Section of the Texas Bar Association was instrumental in suggesting revisions for the latest version of the Act, and has been studying the Act in its present form in order to make its recommendations to the Bar. Telephone interview with James H. Wallenstein, Chairman of ULTA Subsection of the Real Property, Probate and Trust Law Section of the Texas Bar Association, in Dallas, Texas (November 26, 1980). This consideration is, however, presently in abeyance; the project has been tabled for two years to enable the section members to attend to more pressing bar association needs, such as the Uniform Condominium Act which is being considered by the Texas Legislature this year. *Id.*

147. See Federal Mortgage Foreclosure Act of 1973, H.R. 10688 & S. 2507, 93d Cong., 1st Sess. (1973), quoted in ULTA, art. 3, Introductory Comment.

148. See ULTA, art. 3, Introductory Comment.

149. See Pedowitz, *Current Developments in Summary Foreclosure*, 9 REAL PROP., PROB. & TR. J. 421, 422 (1974).

law.

A second incentive to enact ULTA is the certainty which it could bring to secured transactions in real property. The Act is a comprehensive, internally consistent body of law<sup>150</sup> which would bring together in the statute books all aspects of secured land transactions.<sup>151</sup> Assuming Texas mortgage foreclosure law could be improved, an all-encompassing statutory scheme would probably be preferable to piecemeal judicial evolution.<sup>152</sup> Additionally, the statute would have the advantage of acting only prospectively, thus protecting the expectations of transacting parties which could be disturbed by a novel and unforeseen judicial determination.<sup>153</sup>

### IX. CONCLUSION

ULTA fulfills its promise to provide simpler and more efficient non-judicial foreclosure procedures,<sup>154</sup> a result inuring to the benefit of both debtor and creditor alike.<sup>155</sup> Although the Act would offer significant advantages to all parties involved in secured land transactions,<sup>156</sup> it would also result in some concurrent disadvantages.<sup>157</sup> Despite these potential losses of rights, however, the legislature should resist the temptation to

150. Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 Nw. U.L. Rev. 359, 360 (1978).

151. The rights and duties of parties involved in a non-judicial foreclosure provide a good example of this. There is but one statute regarding the foreclosure sale. See TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1980-1981). The remainder of the pertinent law is wholly decisional and is, therefore, scattered throughout the Southwestern Reporter series. See generally Howard, *Remedies On Default In Real Estate Financial Transactions, With Emphasis On Non-Judicial Foreclosure* in STATE BAR OF TEXAS, REAL ESTATE FOR THE GENERAL PRACTITIONER Ch. G (1980).

152. See Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 Wis. L. Rev. 899, 932 n. 230 (1976).

153. See ULTA, Commissioners' Prefatory Note.

154. See Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL PROP., PROB. & TR. J. 179, 197-98 (1978).

155. See Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 Wis. L. Rev. 899, 933 (1976).

156. See, e.g., ULTA § 3-502 (secured creditor may take possession immediately upon default of debtor); *id.* § 3-510(b) (protected party debtor on purchase money security agreement immune from deficiency judgment after foreclosure sale); *id.* §§ 3-508, -509(c) (junior lienholder of record must be given notice of proposed sale prior to sale date).

157. The secured creditor would lose his entitlement to a deficiency judgment to which he is now due under Texas law. See *Farmers' & Merchants' State Bank v. Cameron*, 231 S.W. 738, 741 (Tex. Comm'n App. 1921, judgment adopted). The debtor would lose the right to possess the collateral until foreclosure sale which he currently enjoys under the Texas system. See *Humble Oil & Ref. Co. v. Atwood*, 150 Tex. 617, 623, 244 S.W.2d 637, 639 (1951).

tailor ULTA's foreclosure procedures to the idiosyncrasies of Texas law. Alteration of the Act's provisions would not only defeat ULTA's goal of ultimate inter-jurisdictional uniformity,<sup>158</sup> but would also upset the Act's inherent balancing of equities between debtor, creditor, and junior lienor.<sup>159</sup> Endorsed and enacted intact, ULTA presents an attractive and workable plan for modernizing, streamlining, and improving non-judicial mortgage foreclosures in Texas.

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158. See ULTA, Commissioners' Prefatory Note; Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 Wis. L. Rev. 899, 933 (1976).

159. See Comment, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 Wis. L. Rev. 899, 932-33 (1976).