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MORTGAGE LAW TODAY

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THE BACKGROUND

Few people are aware that until the 1920's the majority of mortgage lenders were individuals rather than financial institutions.[1] Often the parties proceeded quite informally and ignored established legal procedures. This resulted in a vast amount of early litigation; for example, dealing with dishonesty problems regarding payment. At times the mortgagee sold both the mortgage and note, often at a discount, to a third party without notifying the mortgagor. When payment became due, the mortgagor paid the debt to the mortgagee, who in turn accepted a payment he should have refused.[2] By the end of World War II, mortgage lending had become the business of financial institutions. Dishonesty of the sort cited disappeared, and the reported accounts of such dishonesty vanished.

Today, all but an insignificant percentage of mortgage lending is institutionalized. Every aspect of mortgage transactions is handled legally, ethically, and skillfully by professionals. A modern example is typified by the individual who mortgages his home to a thrift institution. The mortgage is recorded. The next year the thrift institution sells a 50% participation to an institution in another state, possibly one having a lower usury rate. The homeowner continues to make mortgage payments to his lender who, in turn, remits to the participant the latter's share of the debt.[3] No particular problems arise. Responsible lenders

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1. R. DENNIS, FUNDAMENTALS OF MORTGAGE LENDING 11 (1978).

2. *See, e.g.*, Allen v. Waddle, 111 Kan. 690, 208 P. 551 (1922) (mortgagor entitled to credit for payments made to mortgagee after assignment because assignment was not recorded); Foster v. Carson, 159 Pa. 477, 28 A. 356 (1894) (payment by mortgagor to assignor discharges debt unless he has actual notice of assignment); Barry v. Stover, 20 S.D. 459, 107 N.W. 672 (1906) (purchaser of mortgaged premises made good payment to assignor on basis of lack of notice).

3. Most people today mortgage their property to savings and loan institutions. The credit policies of these institutions have widespread repercussions on property values, the growth rate of communities, and the social

who perform their work honestly and efficiently bring a welcome sense of certainty to mortgage transactions.

The Changing Scene

Mortgage law today, then, is largely the law of the institutional mortgage. Problems involving dishonesty seldom occur. Earlier decisions were handed down under circumstances quite different from those presently prevailing. This makes many older decisions obsolete. Again, the law of real property is changing so rapidly that the courts, in establishing new precedents, often fail to draw attention specifically to the numerous older, inconsistent decisions. The current decisions creating an implied warranty of habitability in sales of homes by merchant builders, for example, simply observe that earlier, caveat emptor cases, too numerous to mention, are no longer the law. This makes shepardizing a trap for the unwary. Absent precedents dealing with today's novel issues, the question must be asked as to where the courts should look for guidance in deciding modern real property law problems. A number of courts have answered by resorting to the Uniform Commercial Code (U.C.C.) as a premise for their judicial reasoning.[4] The U.C.C. has been enacted in all states except Louisiana, and, as a codification of modern commercial law, expresses modern concepts of justice and fairness.

IMPACT OF THE U.C.C.

The use of statutes as a premise for reasoning by analogy is of modern origin. In an article noting the reluctance of common law courts to refer to statutes, Chief Justice Stone commented: "I can find in the history of principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning."[5] He concluded that a policy clearly expressed in a statute should guide the courts even where the issue *sub judice* does not fall within its ambit.[6] Hence, the U.C.C., in areas it expresses public policy, is

environment. For a general discussion of the history, growth, structure, and operations of savings and loan associations, see L. KENDALL, THE SAVINGS AND LOAN BUSINESS (1962).

4. *See* Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965) [hereinafter cited as COLUM. L. REV.]. This excellent student work has been cited extensively by jurists and commentators.

5. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13 (1936) [hereinafter cited as Stone].

6. *Id.*

relevant to all issues falling within the scope of such policy. An act like the U.C.C. compels respect because it has been subjected to intense scrutiny by the finest judges and lawyers.

The U.C.C. draftsmen anticipated that the statute might be applied by analogy to areas not expressly covered by its articles.[7] As early as 1951, a respected court noted that where the U.C.C. does not conflict with statute or settled case law, it is entitled to as much respect and weight as courts have been inclined to give the various Restatements. Like the Restatements, it has the stamp of approval of a large body of American scholars.[8] The U.C.C. and the Uniform Amendments of 1972 have won approval by the Uniform Commissioners, the American Law Institute, and the American Bar Association. As a corollary to the views of Chief Justice Stone, the American Law Institute has taken the position that state statutes of general similarity, where widely adopted, provide a source of real property common law.[9] In reappraising its decisions, it is entirely proper for a reviewing court to seek guidance from policies underlying cognate legislation adopted elsewhere.[10]

The Uniform Commercial Code has been applied to transactions falling outside its scope. Before the Code was enacted, one court refused to grant specific performance due to the unconscionability of a provision in the contract.[11] Later, extending the rules embodied in the adopted Code to a breach of contract ac-

7. Uniform Commercial Code § 1-102, Comment 1 [hereinafter cited as U.C.C.] states:

> This act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for the expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.

8. Fairbanks, Moore 8 Co. v. Consolidated Fisheries Co., 190 F.2d 817, 822 n.9 (3d Cir. 1951); *see* Adams v. Waddell, 543 P.2d 215 (Alas. 1975) (U.C.C. standards used to determine lessee's rights regarding option to purchase leased real property); Zamore v. Whitten, 395 A.2d 435 (Me. 1978) (referred to U.C.C.'s liberal approach to formation of contracts regarding contract to purchase stock); Seabrook v. Community Hous. Co., 72 Misc. 2d 6, 12, 338 N.Y.S.2d 67, 71 (Cir. Ct. 1972) (landlord held to U.C.C. "merchant standard" with respect to lease of an apartment).

9. [C]ourts, in assessing the continued vitality of precedents, rules and doctrines of the past, may give weight to the policies reflected in more recent, widespread legislation, though the statutes do not apply—treating the total body of the statutory law in the manner endorsed long ago by Mr. Justice Stone "as both a declaration and a source of law, and as a premise for legal reasoning."

Stone, *supra* note 5, at 13; Introduction to Restatement (Second) of Property, Landlord and Tenant (1973).

10. Pugh v. Holmes, 405 A.2d 897, 904 (Pa. 1979).

11. Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

tion, the court commented, "While this contract is not controlled by the Code, the Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions."[12]

Equipment Leasing—U.C.C. Applied by Analogy

Provisions of uniform acts have been extended to cover transactions within their spirit and intent, although perhaps not within their explicit language.[13] The rational approach of the uniform act is substituted for the technical, outmoded rules expressed in older precedents. Thus, the U.C.C. has been applied to equipment leases, based on the philosophy that they are in essence actual sales.[14] Equipment leasing is a device of recent origin which enables users of goods to have sole and exclusive use of property for specific periods of time at advantageous costs. It has become a widely-employed substitute for purchase, with the lessor, in economic reality, taking the place of a financing agency; with the lessee paying the equivalent of the full purchase price plus interest during the minimum lease period. The lessee, in effect, is the true purchaser.[15] Article 2 of the U.C.C. applies to "transactions" in goods,[16] which, in spirit, includes transactions other than sales. The Code considers the duties, rights, and remedies that arise or ought to arise from the transaction of primary importance and relegates "title" concepts

12. Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795, 799 (3d Cir. 1967) (action for damages resulting from breach of contract to supply wool for processing); *see* United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (U.C.C. was considered the best source of what may be termed "Federal Common Law" despite the absence of any federal legislation adopting the Code as a basis for transactions with the government).

13. Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934).

14. U.C.C. section 2-302 on unconscionability was applied to an equipment lease; the court held:

> In view of the great volume of commercial transactions which are entered into by the device of a lease, rather than a sale, it would be anomalous if this large body of commercial transactions were subject to different rules of law than other commercial transactions which tend to the identical economic result.

Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 229, 298 N.Y.S.2d 392, 395 (Civ. Ct. 1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (App. Term 1970); *see* Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977); Lousin, *Heller & Co. et al. v. Convalescent Home et al.: Leases, Sales and the Scope of Article Two of the U.C.C. in Illinois*, 67 ILL. B.J. 468 (1979). This article provides an enlightening discussion of the reasons for extending the U.C.C. to equipment leases.

15. Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (Civ. Ct. 1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (App. Term 1970).

16. U.C.C. § 2-102.

to a status less significant than enjoyed under earlier "rule following" common law.[17]

Implied Warranty of Habitability

By way of illustrating the impact of the U.C.C. on real property law, a majority of jurisdictions have analogized the implied warranty provisions of the U.C.C. to sales of new homes constructed by merchant builders. The implied warranty of habitability developed to protect purchasers of new homes in numerous situations involving defective construction.[18] Here, as is often the case, events shaped the law. The post-World War II homebuilders' boom brought many incompetent and dishonest homebuilders into the business. The courts, to protect unsophisticated homebuyers, discovered an implied warranty of habitability.[19] To determine the meaning of the term "habitability," the courts looked to U.C.C. section 2-314, implied warranty of merchantability,[20] and section 2-315, implied warranty of fitness for a particular purpose.[21] The advantage in analogizing lay in the fact that these terms were already well defined by statute, Official Comments, and case law.[22] Adoption of the

17. Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 231, 298 N.Y.S.2d 392, 397 (Civ. Ct. 1969), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (App. Term 1970).

18. Annot., 25 A.L.R.3d 383 (1969). McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979), offers a classic discussion of the evolution of this implied warranty, citing the many cases and articles which encouraged its development. *But cf.* Graham v. United States, 441 F. Supp. 741 (N.D. Tex. 1977) (illustrates general hesitancy of courts to apply implied warranty of habitability to used homes).

19. McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979).

20. Implied Warranty: Merchantability; Usage of Trade:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) are fit for the ordinary purposes for which such goods are used.

U.C.C. § 2-314.

21. Implied Warranty: Fitness for Particular Purpose:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that goods shall be fit for such purpose.

U.C.C. § 2-315.

22. For a U.C.C. case, *see, e.g.*, Soft Water Serv., Inc. v. M. Susan Enterprises, Inc., 39 Ill. App. 3d 1035, 351 N.E.2d 264 (1976) (implied merchantability regarding fitness of goods for ordinary purpose applies to all sales of goods). Implied warranty of habitability cases analogizing U.C.C.

Code's terms helps to solve the problem of determining whether the house is "livable."[23] This policy is clearly expressed and clearly relevant. If an implied warranty protects a housewife who buys a broom, it should also protect a purchaser of a new home. Ordinary consumers know little if anything other than the fact that builder-vendors obviously hold their newly constructed homes out to the public as reasonably fit for their intended use.[24] The level of quality anticipated by merchantability obviates the need to have guarantees expressed contractually and protects the unwary purchaser.[25] The extension of the U.C.C. by analogy to cases within the spirit of the Code was foreseen by the Bar.[26] Certainly other legal questions await perceptive reasoning by analogy.

FEDERAL REGULATIONS AS A GUIDE TO DECISION MAKING

Courts also scrutinize the vast body of federal regulations to provide solutions to problems not strictly within the letter of such regulations. The best available comparison with issues under consideration can be found in regulations adopted by the Federal Home Loan Bank Board.[27] Federal regulations are produced by well informed government agencies. Legislative committees and administrators charged with regulating an industry have better sources for gathering information and assessing its value than do courts trying isolated cases. Not surprisingly, modern courts seem increasingly prone to draw upon such expertise.

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terms include: Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974) (building contractors are compared with sellers of goods); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972) (warranty of merchantability applies); Gable v. Silver, 258 So. 2d 11 (Fla. App. 1972) (holding is not limited by U.C.C. definitions of merchantability and fitness for use); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972) (warranties of merchantable quality and fitness exist in purchase of new house); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965) (implied warranty is comparable to warranty of merchantability); Yepsen v. Burgess, 269 Or. 635, 525 P.2d 1019 (1974) (warranty of fitness applies); Rothberg v. Olenick, 128 Vt. 306, 262 A.2d 461 (1970) (manufactured product is similar to sale of a house).

23. *See* Comment, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute*, 54 WASH. L. REV. 185, 206 (1978).

24. Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972).

25. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965).

26. *See* Del Luca, *General Provisions, Sales, Bulk Transfers and Documents of Title*, 23 BUSINESS LAWYER 812 (1968); Comment, *Selected Problems in California Chattel Leasing: Equipment Leasing Under the U.C.C.*, 13 U.C.L.A. L. REV. 125 (1965).

27. Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n, 22 Cal. App. 3d 307, 99 Cal. Rptr. 417 (1972).

Thus, in an action by a real estate purchaser to recover the amount of a prepayment fee from a savings and loan association, one court looked to federal regulations governing mortgages on residences for guidance regarding the reasonableness of the prepayment penalty on a commercial mortgage.[28] Again, although it did not consider the federal regulations binding, a New York court found that a foreclosure suit, brought on a F.H.A. mortgage and a V.A. mortgage, filed in a court of equity, required the plaintiff to do equity according to the spirit of the regulations. The mortgagee was required by the court to make an effort to avoid foreclosure and to utilize acceptable methods of forebearance relief as set forth in the regulations.[29] Courts will not support oppressive acts on the part of mortgagees, even where founded on strict legal rights.[30] Where the written word conflicts with modern notions of justice and fairness, it is the written word which gives way. As these cases illustrate, even a right expressed in a document must be tested by the standards of unconscionability.

UNCONSCIONABLE BARGAINS

Traditionally, an unconscionable bargain has been defined as one which no man in his senses, not under delusion, would make on the one hand, and which no fair and honest man would accept on the other.[31] Yet, after repeating this rubric, many courts proceed to disregard it. If a contract, or provision thereof, seems quite unfair to a court, it strikes the contract down as unconscionable.

In cases involving mortgages, courts recognize the fact that circumstances, such as illness or unemployment, bear heavily on borrowers. For this reason, courts have shown a growing tendency to protect mortgagors from mortgagees.[32] Pursuant to this policy, a court of equity will grant relief to a mortgagor in

28. *Id.*

29. Federal Nat'l Mortgage Ass'n v. Ricks, 83 Misc. 2d 814, 372 N.Y.S.2d 485 (Sup. Ct. 1975).

30. *Id.*

31. Hume v. United States, 132 U.S. 406, 410 (1889).

32. The mere existence of a contractual provision authorizing acceleration of a mortgage debt upon conveyance does not entitle the mortgagee to declare the debt due and foreclose upon the property. Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972). Utilization of such a provision, according to many decisions, depends upon whether the invocation of the acceleration clause would be inequitable under the circumstances. Romig v. Gillett, 187 U.S. 111 (1902); Chicago & V. R.R. v. Fosdick, 106 U.S. 47 (1882); Mutual Fed. Sav. & Loan Ass'n v. American Medical Servs., Inc., 66 Wis. 2d 210, 223 N.W.2d 921 (1974); Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Wis. 2d 99, 205 N.W.2d 762 (1973).

instances of unconscionability.[33] In determining whether a given transaction is reasonable or unconscionable, the court may consider, among other circumstances, the age of the mortgagor and any indication of financial adversity.[34] Holdings of unconscionability are increasingly common with respect to acceleration clauses.[35]

Acceleration Clauses

The mortgage and the mortgage note usually provide that in case of any default the entire principal sum shall become immediately due and payable. This is the familiar acceleration clause. Whether it is an automatic[36] or elective[37] acceleration clause, most mortgagees accept tardy payments since inadvertent defaults are common. Once a late payment has been accepted, the mortgagee has waived his right to accelerate as to that payment. Acceleration can also be invoked for other reasons such as failures to pay taxes, to keep a building in repair,[38] or to keep insurance in force.[39]

In the past it was commonly held that notice of acceleration and an opportunity to cure default were unnecessary. Filing the foreclosure complaint was considered to provide sufficient notice.[40] Today such decisions are suspect.[41] The operation of the

33. Clark v. Lachenmeier, 237 So. 2d 583 (Fla. App. 1970); Butler v. Duncan, 47 Mich. 94, 10 N.W. 123 (1881); Gilbralter Fin. Corp. v. Rouse, 145 Or. 89, 25 P.2d 559 (1933); Mutual Fed. Sav. & Loan Ass'n v. American Medical Servs., Inc., 66 Wis. 2d 210, 223 N.W.2d 921 (1974); Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Wis. 2d 99, 205 N.W.2d 762 (1973).

34. Butler v. Duncan, 47 Mich. 94, 10 N.W. 123 (1881).

35. *See* note 42 *infra*.

36. The theory of the automatic clause is that the happening of an event *ipso facto* advances the maturity of the debt. Note, *Acceleration Clauses in Notes and Mortgages*, 88 U. PA. L. REV. 94, 95 (1939). Automatic acceleration clauses are uncommon. *See* Annot., 69 A.L.R.3d 713, 748 (1976).

37. The elective or optional clause merely gives the lender the ability to call the debt due.

38. Annot., 69 A.L.R.3d 713 (1976).

39. Annot., 69 A.L.R.3d 774 (1976).

40. Home Fed. Sav. & Loan Ass'n v. LaSalle Nat'l Bank; S.D. Walker, Inc. v. Brigantine Beach Hotel Corp., 44 N.J. Super. 193, 129 A.2d 758 (1957) (institution of mortgage proceedings is sufficient notice); Thomas v. Foulger, 71 Utah 274, 264 P. 975 (1928) (notice not required as condition precedent to election of acceleration); Jacobson v. McClanahan, 43 Wash. 2d 751, 264 P.2d 253 (1953) (fact that mortgage was not foreclosed on first default did not prevent foreclosure on second default without notice).

41. Notice of acceleration gives the mortgagor an opportunity to cure defaults. White v. Turbidy, 227 Ga. 825, 183 S.E.2d 363 (1971) (court set aside clause explicitly allowing acceleration without notice); Crow v. Heath, 516 S.W.2d 225 (Tex. 1974) (formal notice mandatory when foreclosure is by power of sale); Haase v. Blank, 187 N.W. 669 (Wis. 1922) (mortgagor must be given notice and a reasonable time to cure defaults).

acceleration clause can bring about a harsh result. In today's atmosphere of debtor protection, few of the old cases will survive. Courts have begun to set accelerations aside on the ground of unconscionability.[42] Legislatures have enacted laws granting borrowers the right to cure defaults by paying sums necessary to make whole the mortgagees.[43] An unspoken premise is that the lender is not really hurt by giving the borrower another chance to pay up his arrears. And, of course, the notion that the borrower is not hurt, and there is no forfeiture because the borrower can prevent acceleration by making timely payments, is widely at variance with the facts. An unemployed borrower simply cannot make his payments on time.

Acceleration Clauses Today

Many articles and cases cited in section 231 of the Restatement of Contracts require each party to a contract to exercise *good faith* and *fair dealing* in the performance and enforcement of a contract. The question that arises, then, is how these standards will affect mortgage accelerations and foreclosures. For example, for a period of time some mortgagees accepted FHA-insured mortgages in large numbers. Not only did the mortgagees receive FHA "points" for making these loans, but on default, they immediately instituted foreclosure, collected their government FHA insurances, and then repeated the entire process. A national controversy resulted.[44] Now, as a result, the federal manuals require a mortgagee to confer with the mortgagor *before foreclosure* to negotiate an arrangement that will permit the mortgagor to save his property.[45]

Today, there is much activity in mortgage law, especially in

42. Federal Home Loan Corp. v. Taylor, 318 So. 2d 203 (Fla. 1975) (court of equity may refuse to foreclose when acceleration would be inequitable); *see* Rosenthal, *The Role of Courts of Equity in Preventing Acceleration Predicated Upon a Mortgagor's Inadvertent Default*, 22 SYRACUSE L. REV. 897 (1971). The seminal opinion remains Justice Cardozo's dissent in Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884, 70 A.L.R.3d 984 (1930).

43. ILL. REV. STAT. ch. 95, § 57 (1974); *see* COLO. REV. STAT. § 38-39-118 (1973); Comment, *Real Property—Mortgages—Colorado's Curative Default Statute*, 52 DEN. L.J. 637 (1975).

44. Stanton, *Consumer Protection and National Housing Policy: The Problem of New-Home Defects*, 29 CASE W. RES. L. REV. 527, 542 (1979).

45. A foreclosure was filed on an FHA mortgage in a situation much like that described above. The suit was defended on the ground that the mortgagee had failed to take the workout steps required by the FHA manuals. The mortgagee, in turn, argued that the manuals were not binding on the court. The court responded by holding that precipitous foreclosures are inimical to FHA objectives. Failure to follow the manuals is unconscionable conduct. Moreover, judicial foreclosure is in a court of equity. One who seeks equity must do equity. Foreclosure may be denied where the mortgagee has not, in the exercise of good faith and fair dealing, applied the fed-

relation to the function of the acceleration clause in home mort-

eral guidelines. The foreclosure was dismissed. Federal Nat'l Mortgage Ass'n v. Ricks, 83 Misc. 2d 814, 372 N.Y.S.2d 485 (Sup. Ct. 1975).

More recently, the failure of a VA mortgagee to show compliance with VA's forbearance regulations was held to constitute unconscionable conduct that precluded foreclosure. Guardian Mortgage Corp. v. Lyons, No. ___ (N.Y. Sup. Ct. Suffolk Cty. Sept. 28, 1979). A good account of the current attitude toward HUD insured mortgages is found in Note, 52 CHI.-KENT L. REV. 703 (1976). The article discusses Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1974); 392 F. Supp. 559 (N.D. Ill. 1975) and Federal Nat'l Mortgage Ass'n v. Huffman, No. 73 Ch. 7453 (Cir. Ct. Cook Cty. Apr. 17, 1975). The cases concluded that HUD was ignoring the congressional mandate to encourage and protect home ownership. At page 708 the article states:

> Dicta in the conclusion of the second *Brown* opinion stated that even though the Handbook was not binding on the original mortgagees, mortgagors might raise the non-compliance of the guidelines in a foreclosure suit and that a court of equity could restrict a mortgagee who did not, in good faith, attempt to follow them. In addition, *Brown* suggested that an equity court hearing a foreclosure suit might even deny a foreclosure where the guidelines were flagrantly violated. *Huffman* agreed with this dicta, indicating that equity courts might exercise their powers by refusing to grant foreclosures where mortgagees have flagrantly disregarded the guidelines. The court evidently believed that equitable considerations should be applied to situations where the mortgagees and FNMA fail to comply with the guidelines.
>
> The court in *Huffman* noted that *Brown* had distinguished an action in the form of positive relief for damages and an injunction against a mortgagee under the guidelines, the situation in *Brown*, from a case where a court of equity might refuse to grant a foreclosure by a mortgagee when the guidelines are used as a defense to show non-compliance, the situation in *Huffman*. Because the same equitable considerations were involved, however, the court in *Huffman* saw no distinction between the two situations. It stated that either a positive duty to abide by the guidelines exists in *all* situations, the failure to perform that duty constituting both a cause of action for damages and a bar to foreclosure, or there is no such duty. Presumably, these equitable considerations would be the "clean hands doctrine" and the maxim that "he who seeks equity must do equity." By these doctrines, the mortgagee cannot foreclose its lien through an equity court when it has not abided by the spirit and purpose of the federally insured mortgage act: to give every American a chance to own *and keep* a decent home. Thus the guideline alternatives express this spirit and should be followed by any mortgagee, if at all possible, in order to do equity. The court noted that the guidelines are not expressed in mandatory terms, but that their existence implies use, and that unless a mortgagee is obligated to attempt to follow the alternatives when the situation so merited, the guidelines and the purpose of the housing program would become meaningless.
>
> In addition to the concept of an all-encompassing equitable duty to bind the mortgagee, the *Huffman* court also relied on the contract theory of the mortgagor as a third party beneficiary of the mortgage insurance agreement between FHA and the mortgagee, and the contract between FNMA and the mortgagee. The court pointed to HUD and FNMA regulations which provide that their positions become part of the contracts between the mortgagee and FHA-FNMA. Since the housing programs were initiated to benefit the mortgagor, he or she becomes a third party beneficiary and the guidelines, as part of the contract, bind the mortgagee. Thus the HUD guidelines would be binding on the mortgagee if HUD, rather than FNMA, had sued to foreclose, with a

gage foreclosures.[46] In short, residential mortgage law is developing an *affirmative action* program for mortgage lenders. Thus, the "teeth" of the acceleration clause have been extracted.

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similar result: the action being barred due to non-compliance. Through the application of equitable principles and the third party beneficiary concept, *Huffman* has clearly extended *Brown* by deciding that mortgagees are bound by the alternative HUD guidelines.

Another case considered in this valuable note is Federal Nat'l Mortgage Ass'n v. Ricks, 83 Misc. 2d 814, 372 N.Y.S.2d 485 (Sup. Ct. 1979). Of this case the note says (page 710):

> As in *Brown*, the court stated that the Handbook did not have the force and effect of law because of non-publication in the Federal Register and HUD's non-compliance with its own publication guidelines. However, as in *Huffman*, the dicta in *Brown* regarding the refusal of courts to grant foreclosure relief where mortgagees flagrantly violate the alternative guideline provisions were cited. *Huffman* was cited as following *Brown* for the proposition that equitable principles in the guidelines obligate mortgagees to seek alternatives to foreclosure. Applying the maxim "he who seeks equity must do equity," the court ruled that "any conduct on the part of the mortgagee that is considered *unconscionable* or oppressive will operate to deny it the aid of the court of equity." The court found that by ignoring the guideline alternatives the mortgagees are permitted to make a mockery of the National Housing Act, and that failing to follow guidelines in the event of default may constitute unconscionable conduct so as to deny foreclosure relief. *Ricks*, however, rejected the contention that the mortgagees must follow a "prudent lending" standard, specifically citing *Brown* for support.

46. This, of course, is merely the beginning. The stage has been set for highly activist intervention in home mortgage foreclosures. Surely, the acceleration clause cannot withstand an onslaught of this nature and magnitude.

Other decisions point in the same direction. *See, e.g.*, Associate E. Mortgage Co. v. Young, 163 N.J. Super. 315, 394 A.2d 899 (1978) (R mortgaged to E, and HUD insured the mortgage. E filed for foreclosure without complying with the HUD regulations or handbook requiring an attempt at a "face to face" workout. The court held foreclosure barred by principles of fair play and by the unclean hands doctrine); *accord*, Federal Nat'l Mortgage Ass'n v. Bryant, 62 Ill. App. 3d 25, 379 N.E.2d 333 (1978) (R mortgaged to E and HUD insured the mortgage; held, that the mortgagor has the right to cure defaults under HUD regulations); *cf.* United States v. American Nat'l Bank, 443 F. Supp. 167 (N.D. Ill. 1977) (it has been held that HUD must make the effort to modify, recast, extend, or refinance the mortgage before resorting to foreclosure); 10 Clearinghouse Rev. 56, 57 (mortgagor was successful on a counterclaim contending that a mortgagee must exhaust foreclosure-avoidance alternatives prior to initiation of foreclosure).

Likewise court rules incorporate the new trend. The Appellate Division of the New York Supreme Court has amended its pleading rules to require attorneys representing mortgagees in mortgage foreclosure suits to file an affidavit, signed by the attorney and an officer of the mortgagee, relating that the HUD directives have been complied with. 11 Clearinghouse Rev. #8 (Dec. 1977).

There are, indeed, cases holding that the HUD regulations do not, *per se*, bar foreclosure. Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); Encarnacion Hernandez v. Prudential Mtg. Corp., 553 F.2d 241 (1st Cir. 1977); Government Nat'l Mortgage Ass'n v. Screen, 85 Misc. 2d 86, 379 N.Y.S.2d 327 (Sup. Ct. 1976). These cases seem devoid of meaning. The mortgagees lose their status as HUD servicers. They win a battle and lose a war.

Contrary to the old law, presently wholly new concepts pervade the mortgagee-mortgagor relation in residential cases. Now, the mortgagee *must* help the mortgagor keep his home.[47] Acceleration clauses in residential mortgages have come full circle.[48]

Due-On-Sale Clauses

Debtor protection has been read into the due-on-sale clause as well. Due-on-sale is the term used for an acceleration clause which is activated in the event of a sale of the secured property without the lender's consent. The mortgage usually contains an interest rate lower than the going rate at the time of conveyance.

47. In short, residential mortgage law is developing an *affirmative action* program for mortgage lenders. In this new situation, the teeth of the acceleration clause have been pulled. Contrary to the old law, the new law adds a wholly new concept to the relation of mortgagor-mortgagee in residential cases. The mortgagee must help the mortgagor keep his home. It must always be remembered that today's decisions seek a just and fair result, and that *federal regulations that also seek the same result may be considered reliable guides to judicial action.*

The administrative remedies for a lender's misconduct are severe. If a lender is found guilty by FHLMC of unconscionable conduct toward borrowers, that lender is cut off from acting as an FHLMC servicer. He may as well go out of business.

Thus, a foundation has been laid for tempering the acceleration clause in residential lending. The federal manuals cover the great majority of the home mortgages made today. Moreover, as to mortgages not explicitly covered by the manuals, the courts will look to the manuals for guidance.

48. Once the doctrine of unconscionability was accepted, the role of the courts was changed drastically. Under the U.C.C., the RESTATEMENT (SECOND) OF CONTRACTS, and the decisional law, matters of unconscionability are for the court to decide. This thrusts an activist role upon the courts.

EXAMPLE: E, a mortgagee, files suit to foreclose a mortgage on a home. R, the mortgagor, files a special defense. In this defense, he sets forth that, owing to temporary unemployment, he offered E a workout calling for smaller monthly payments with a resumption of full payments as soon as his unemployment problem was solved. The court must consider the reasonableness of the workout. If the court finds that the workout is reasonable, it cannot permit the foreclosure to continue. In short, the acceleration must be set aside or suspended. But the court's work does not end there. E also needs protection. The case must be allowed to remain pending with a reservation of jurisdiction that allows the court to police the situation.

FNMA, FHLMC, FHA, and VA forms dominate home mortgage lending. Federal RESPA governs home mortgage closings. Now federal concepts of home mortgage default and rescue seem to be gaining the force of law. Most institutional lenders, such as thrift institutions, have always pursued such a compassionate course. It is now becoming part of our foreclosure law. Commercial mortgages do not fall within the ambit of federal regulations. It is conceivable, then, that in this age of consumerism a cleavage may result, with both courts and regulators extending a hitherto undreamed of leniency toward home mortgages.

As is pointed out, many courts have applied the U.C.C. concept of unconscionability to real estate transactions, including mortgage transactions. *E.g.*, Delgado v. Strong, 360 So. 2d 73 (Fla. 1978); Rosenthal, *The Role of Equity in Preventing Acceleration*, 22 SYRACUSE L. REV. 897 (1972).

The mortgagee's right to declare an acceleration forces a purchaser to seek alternate financing, or reach an agreement with the mortgagee on a higher interest rate, in consideration of the mortgagee's agreement not to accelerate. Some lenders use a clause which explicitly permits an increase of the rate of interest, instead of the acceleration of the maturity of the debt, upon transfer of the property. This type of clause is unobjectionable for it informs the borrower in advance as to his rights on sale of the mortgaged land.[49] The due-on-encumbrance clause allows acceleration of the debt upon further encumbering the secured property, such as with a junior mortgage. This provision is usually held to be a reasonable restraint on alienation.[50] High interest rate junior mortgage debt siphons off the borrower's income and causes default on senior debt.

Some courts automatically uphold the validity of the due-on-sale clause[51] or find it to be a reasonable restraint upon the sale in order to protect the security interest of the lender.[52] The law must protect both lender and borrower, and protecting the lender's portfolio return to prevent lender insolvency is well within the area of sound public policy.[53] On the other hand, there is authority for the proposition that the use of the clause is invalid if exercised in an unconscionable manner. Courts may find use of due-on-sale clauses to be unconscionable when used to levy unconscionably higher interest rates from purchasers or to obtain assumption fees from buyers.[54] The tendency of the law in some decisions is to require the lender to justify enforcement of the clause by showing that the buyer is not credit worthy.[55] Under this view the lender's interest in keeping its

49. Miller v. Pacific First Fed. Sav. & Loan Ass'n, 86 Wash. 2d 401, 545 P.2d 546 (1976).

50. LaSala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113 (1971).

51. Baker v. Leight, 91 Ariz. 112, 370 P.2d 268 (1962); Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964); Jones v. Sacramento Sav. & Loan Ass'n, 248 Cal. App. 2d 522, 56 Cal. Rptr. 741 (1967); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973); Jacobson v. McClanahan, 43 Wash. 2d 751, 264 P.2d 253 (1953); Kobber, *The "Due-On-Sale" Clause in California*, 44 L.A.B. BULL. 64 (1968).

52. Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1 (1975).

53. Comment, *Acceleration Clauses as a Protection for Mortgages in a Tight Money Market*, 20 S.D.L. REV. 329 (1975).

54. Note, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109 (1975).

55. Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1970); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973); Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).

portfolio returning current interest rates will not suffice.[56]

Recently, the California Supreme Court rejected the portfolio protection argument that would permit a mortgagee to raise interest rates in the event of the sale of land subject to a mortgage which contained a due-on-sale clause.[57] The court observed that thrift institutions could have recourse to variable rate mortgages (V.R.M.), stating that "the variable interest rate mortgage has become an attractive and viable alternative."[58] This type of mortgage contains a clause which varies the interest payment on a loan balance in relation to cyclical economic changes as reflected by an external index.[59] Alternative mortgage instruments are still largely experimental.[60] Criticism of the variable rate mortgage is now coming from the Federal Home Loan Bank Board.[61] New alternatives will be substituted for the V.R.M. Evidently, the court's analysis was superficial.[62]

The law of due-on-sale clauses includes not only judicial developments but also legislative enactments. Colorado prohibits acceleration on account of transfer unless lenders reasonably determine that buyers are financially unable to handle their debts.[63] Virginia prohibits prepayment penalties when the prepayment results from enforcement of a due-on-sale clause which did not appear in conspicuous type.[64] A disappointing aspect of this concern over due-on-sale clauses is the failure of the

56. *See* note 55 *supra*. *Contra* Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973).

57. Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978), *criticized in* Kratovil, *A New Dilemma For Thrift Institutions: Judicial Emasculation of the Due-On-Sale Clause*, 12 J. MAR. J. 299 (1979) [hereinafter cited as Kratovil]. The *Wellenkamp* court rested its decision, in part, on a superficial economic analysis. This is evident from a recent article, Wall St. J., Mar. 25, 1980, at 1, col. 6, wherein it was stated that "if present interest-rate levels persist, savings and loans around the country stand to lose nearly $700 million for the 1980 second quarter and $3 billion or more for the whole year. . . . Current and potential losses probably won't cause many failures."

58. 21 Cal. 3d at 952 n.10, 582 P.2d at 976 n.10, 148 Cal. Rptr. at 385 n.10.

59. Comment, *The Variable Interest Rate Clause and Its Use in California Real Estate Transactions*, 19 U.C.L.A.L. REV. 468, 470 (1978).

60. Kratovil, *supra* note 57, at 312.

61. Anita Miller, former member of the Federal Home Loan Bank Board, states, "I am less than satisfied with the existing V.R.M." 12 FED. HOME LOAN BANK BD. J. 6, 9 (1979). Jay Jones, the new chairman of the board, has stated that the V.R.M. will be replaced.

62. Perhaps this is due to the troubles the court is presently experiencing. *See* Besfell, *The Wages of Secrecy*, 65 A.B.A.J. 1796 (1979).

63. COLO. REV. STAT. § 38-30-165 (1973).

64. VA. CODE §§ 6.1-23, 6.1-24 (1975). *See also* CAL. [CIV.] CODE § 2924.6 (1974) (with four or fewer residential units, any acceleration clause must appear in both the mortgage and the note).

courts to deal with the plight of thrift institutions, which results from the loss of deposits to money market funds.

Consumer Protection

No matter what method of foreclosure is utilized, lenders must always be mindful that present day courts tend to protect consumers. In mortgage transactions, borrowers are consumers. Evidence of the protection afforded borrowers may be found in recent decisions. Lenders are required to ascertain the reasons for default and make a concerted effort to avoid foreclosure by voluntary forebearance or recasting the mortgage.[65]

In one case, a mortgagor lost his job and fell four payments behind on his mortgage, whereupon the mortgagee commenced foreclosure proceedings. When the mortgagor found employment and tendered past due payments, the mortgagee refused the tender because it did not include the attorney's fees incurred in beginning proceedings. The court would not allow foreclosure, reasoning that the mortgagee's conduct was unconscionable.[66] Such a decision reflects not only the law, but the "vigilant equity" practiced by today's judges in foreclosure courts.[67] Frequently, foreclosure will not be allowed unless the borrower is at least three or four payments behind, and good faith settlement negotiations have not produced results.

The concept of unconscionability has been applied to leases of real estate[68] and leases with options to purchase,[69] as well as

65. Federal Nat'l Mortgage Ass'n v. Ricks, 83 Misc. 2d 814, 372 N.Y.S.2d 485 (Sup. Ct. 1975).

66. Brown v. Lynn, 385 F. Supp. 986 (N.D. Ill. 1974). *See also* Comment, *Secured Transactions: Judicial Approval Under Section 9-507(2) as a Tool to Assure a Commercially Reasonable Disposition of Collateral*, 53 CHI.-KENT L. REV. 701 (1976).

67. Unconscionability has become the key word in the adjudication of the validity of foreclosures based on acceleration clauses. *See, e.g.*, United States v. White, 429 F. Supp. 1245 (N.D. Miss. 1977); Delgado v. Strong, 360 So. 2d 73 (Fla. 1978); Federal Home Loan Mfg. Corp. v. Taylor, 318 So. 2d 203 (Fla. 1975); Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 1970); Continental Ill. Nat'l Bank v. Eastern Ill. Water Co., 31 Ill. App. 3d 148, 334 N.E.2d 96 (1975); Streets v. M.G.I.C. Mortgage Corp., 378 N.E.2d 915 (Ind. App. 1978); Miller v. Pacific First Fed. Sav. & Loan Ass'n, 86 Wash. 2d 401, 545 P.2d 546 (1976). *See also* Comment, *Applying the Brakes to Acceleration Clauses: Controlling Their Misuse in Real Property Secured Transactions*, 9 CAL. W.L. REV. 514 (1973).

68. *See, e.g.*, Paradee Oil Co. v. Phillips Petroleum Co., 320 A.2d 769 (Del. Ch. 1974); Weaver v. American Oil Co., 276 N.E.2d 276 (Ind. 1971); Mury v. Tublitz, 151 N.J. Super. 39, 376 A.2d 547 (1977); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (1972); Weidman v. Tomasselli, 365 N.Y.S.2d 681 (Cty. Ct. 1975); Atlantic Discount Corp. v. Mangels of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968). *See also* Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972).

mortgages. It is evident today that the doctrine of unconscionability permeates the law in all its aspects. The home mortgage field provides an ideal "home" for the doctrine. The American dream of home ownership connotes an ability to *keep* the home one has purchased. This approach is so obvious that one wonders why it took the judicial system so long to take cognizance of it.

COMBINED INFLUENCE OF CONTRACT LAW AND U.C.C.

Mortgage law today finds itself in the middle of a movement that is substituting fluid contract principles for ancient property law. Our law of real property began with the Norman conquest of England and developed a rigid set of rules. Contract law developed much later and was always more attuned to the times. Today's courts, impatient with the unwitty diversities of real property law, are substituting contract law concepts for outmoded property law rules. Illustration is found in the implied warranty of habitability which developed from the contract-based implied warranty of workmanlike quality.[70] Another example is the growth of the doctrine of mitigation of damages in cases of abandonment by a tenant.[71] Thus, the modern principles of contract law introduced needed changes in property law generally.

Though influences from contract law and the Uniform Commercial Code can be viewed separately, it is noted that the Restatement (Second) of Contracts follows the U.C.C.[72] The reasons for the rapid spread of U.C.C. thinking in the fields of contract and property law are best recounted in a frequently cited article:

> The provisions of the Code embody articulate, reasoned and impartial policy determinations. Its development involved a thorough examination of almost every aspect of innumerable market transactions and an analysis and evaluation of existing and proposed legal rules in order to find those best suited to grant proper recognition to each element and interest involved in a commercial agreement. The cross-section of parties represented in the drafting process assured that every possible point of view was carefully taken into consideration. Thus, the Uniform Commercial Code—because of the unique sophistication and thoroughness of the drafting process, the representation of all interested parties, and the

69. Rego v. Decker, 482 P.2d 834 (Alas. 1971).

70. *See* note 18 *supra*.

71. Reget v. Dempsey-Tegler & Co., 96 Ill. App. 2d 278, 238 N.E.2d 418 (1968); Scheinfeld v. Muntz TV, Inc., 67 Ill. App. 2d 8, 214 N.E.2d 506 (1966); 48 ILL. B.J. 546 (1960).

72. *See* RESTATEMENT (SECOND) OF CONTRACTS § 231 (1972). The drafters of this provision, entitled "Duty of Good Faith and Fair Dealing," compare the terms extensively with those employed by the U.C.C. in the explanatory comment.

existence of a vast number of similar situations not expressly within its coverage—is an example par excellence of a statute that is appropriate for use as a premise for reasoning.[73]

THE UNIFORM LAND TRANSACTIONS ACT

The Uniform Land Transactions Act (U.L.T.A.)[74] is designed to accomplish for real estate transactions what the Uniform Commercial Code effected for personal property. This project was begun in 1970 and has since been completed. Approved by the Uniform Commissioners and the American Bar Association, the U.L.T.A. has been endorsed by the great body of American legal scholars. The U.L.T.A. is modeled, in part, on the corresponding articles of the U.C.C. Article 1, containing "General Provisions," follows generally the organization of Article 1 of the U.C.C., but it also incorporates provisions from Article 2. The provisions on good faith[75] and unconscionability[76] are quite similar to their U.C.C. counterparts.[77] Article 2 of the U.L.T.A., "Contracts and Conveyances," reflects the basic contract philosophy of the U.C.C. as expressed in Article 2 on sales of goods. Article 3, "Secured Transactions," attempts to reduce mortgage costs by substituting nonjudicial for judicial foreclosure.[78]

Often, transactions concerning real estate fall within some provision of the U.C.C.[79] When a mortgage secures a negotiable note, this transaction is governed basically by mortgage law. But when the lender assigns the mortgage and negotiable note and then records the assignment, new rules control. If personal notice of the assignment is not given to the individual, and thereafter he makes some payments to the assignor, these payments are effective. Section 9-318(3) of the U.C.C. provides that where a note is secured by chattels, the account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee. This philosophy distinguishes a *secured* from an *unsecured* negotiable note. The U.C.C. is applicable to negotiable notes secured by real estate

73. COLUM. L. REV., *supra* note 4, at 887.

74. UNIFORM LAND TRANSACTIONS ACT; 1975 OFFICIAL TEXT WITH COMMENTS (1976) [hereinafter cited as U.L.T.A.].

75. U.L.T.A. § 1-301.

76. *Id.* § 1-311.

77. U.C.C. § 1-203, Obligation of Good Faith; U.C.C. § 2-302, Unconscionable Contract or Clause.

78. U.L.T.A. § 3-103.

79. Shanker, *The Unsecured Party*, 1 U.C.C. L.J. 73, 78 (1968); *see* Bowmar, *Real Estate Interests as Security Under the U.C.C.: The Scope of Article 9*, 12 U.C.C. L.J. 99, 116-21 (1979).

mortgages.[80] As the U.C.C. recognizes in Article 9, secured paper is different from unsecured paper. It is the security which has the greater importance. This same philosophy controls assignments of real estate mortgages.

Non-Judicial Foreclosure

Simple mortgage documentation permits foreclosure by non-judicial power of sale procedures, commonly employing the deed of trust. Power of sale refers to the mortgagee's right to sell the secured property upon default of the loan in order to recover the value of the debt. At one time, concern was expressed over powers of sale in the aftermath of United States Supreme Court decisions which held that pre-judgment seizures of chattels violated the due process clause of the fourteenth amendment.[81] The debate centered on whether power of sale foreclosures of real property were constitutional in the absence of prior notice and a hearing for the benefit of the defaulting mortgagor.[82] Recent case law, however, has consistently upheld state statutes authorizing non-judicial power of sale foreclosures.[83] If the upward spiral of home prices is to be arrested, expensive judicial foreclosing of simple home mortgages must end.

Congress has expressed the need for a uniform mortgage foreclosure system,[84] and the possibility of federal preemption in this area should motivate state legislatures to adopt the U.L.T.A. Congress focused upon three difficulties with the present system which a uniform foreclosure system should attempt

80. U.C.C. § 3-105(e).

81. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (pre-judgment garnishment of corporate debtor's bank account without a hearing violates due process); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (sequestration process upheld since ruled upon by a judge in an adversary hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (pre-judgment seizure of household goods without any prior notice or hearing denied due process); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

82. *See, e.g.*, Note, *California's Nonjudicial Foreclosure Notice Requirements and the "Sniadach Progeny,"* 9 CAL. W.L. REV. 290 (1973); Note, *Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Rights?* 4 CUM.-SAM. L. REV. 507 (1974); Note, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEX. L. REV. 1085 (1971). This problem has not yet been completely resolved. *E.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594 (E.D. Mich. 1974).

83. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978); 92 HARV. L. REV. 57, 124 (1979); *accord*, Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974); Hoffman v. Department of Hous. & Urban Dev., 371 F. Supp. 576 (N.D. Tex. 1974); Law v. Department of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973); Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973).

84. U.L.T.A., article 3, Introductory Comment; Federal Mortgages Foreclosure Act of 1973, H.R. 10688 and S. 2507, 93d Cong., 1st Sess. § 402 (1973).

to eliminate: lack of free flow of mortgage money; delays in foreclosure that result in property depreciation; and the expense and time-consuming nature of present foreclosure procedures.[85] Article 3 of the U.L.T.A. accomplishes this goal through non-judicial powers of sale.

The power of sale is a quick and inexpensive procedure for terminating the debtor's interest in the secured property, and it is the preferred method of foreclosure under the Act. Yet, the U.L.T.A. protects the interests of all parties involved. This method of foreclosure is available only if authorized in the security agreement between the parties.[86] Additionally, no sale may take place until five weeks after notice of intent to foreclose is given.[87] Stricter notice procedures show concern with the constitutional requirements of foreclosure on chattels.[88] Every aspect of the sale, including the method, advertising, time, place, and terms, must be commercially reasonable whether conducted as a private or public sale.[89] Though judicial foreclosure is expensive, complicated, and time consuming, this method is still available to the mortgagee[90] when needed, as when issues of competing priorities arise. The court controls the sale of property in a judicial sale and, under the U.L.T.A., applies the general rules of civil procedure.[91]

Protected Parties

The U.L.T.A. includes many safeguards for the "protected

85. *Id.*; Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245, 1247 (1976).

86. A debtor may institute a judicial proceeding to stop the sale if he asserts a defense to the claimed default. U.L.T.A. § 3-513(a).

87. *Id.* § 3-508. But the right to notice of acceleration may be waived in the security agreement or otherwise by any party other than a protected party. *Id.* § 3-512(b).

88. *See* note 77 *supra*.

89. The Official Comment states:

> The requirement that the sale be conducted in a commercially reasonable manner, including advertising aspects, requires that the person conducting the sale use the ordinary methods of making buyers aware that are used when an owner is voluntarily selling his land. Thus an advertisement in the financial sections of a daily newspaper where these ads are placed or, in appropriate cases such as the sale of an industrial plant, a display advertisement in the financial sections of the daily newspaper may be the most reasonable method. In other cases employment of a professional real estate agent may be the more reasonable method. It is unlikely that an advertisement in a legal publication among other legal notices would qualify as a commercially reasonable method of sale advertising.

U.L.T.A. § 3-508.

90. *Id.* § 3-509.

91. *Id.*, Comment 1.

party," a new concept in this statutory proposal.[92] These non-waivable protections have been included in light of the modern concern with consumer protection.[93] Although the definition is somewhat broader,[94] a protected party is essentially the individual homeowner.[95] Special considerations include actual notice of intent to foreclose,[96] and acceleration of the debt only after the delinquent payment remains unpaid for five weeks.[97] Once notice is given, foreclosure by power of sale cannot take place for five weeks.[98] In addition, the protected party may cure the default at any time before the foreclosure sale. Costs incurred in the foreclosure proceeding must be paid, but there is a limit placed on these expenses.[99]

The U.L.T.A. also provides a single interest or usury rate for borrowers who are protected parties.[100] Each state legislature is to set that limit as it does now. With other parties, all real estate mortgage loans may be made at any interest rate regardless of the priority of the lien or the identity of the lender.[101] By exempting all debtors except protected parties from existing usury limits, lenders can alleviate the real estate financing problems of recent years. A question currently raised is whether the federal government means to preempt usury rates as it has done for the first three months of 1980.

The Enactment of the U.L.T.A.

Judicial rejection of the mortgagee's portfolio argument in

92. *Id.* § 1-203(a).

93. *See* notes 59-63 and accompanying text *supra*.

94. Kratovil, *The Uniform Land Transaction Act: A First Look*, 49 ST. JOHN'S L. REV. 460, 465 (1975).

95. "Protected party" means: (1) an individual who contracts to give a real estate security interest in, or to buy or to have improved, residential real estate all or a part of which he occupies or intends to occupy as a residence; (2) a person obligated primarily or secondarily on a contract to buy or have improved residential real estate or on an obligation secured by residential real estate if, at the time he becomes obligated, that person is related to an individual who occupies or intends to occupy all or part of the real estate as a residence; or (3) with respect to a security agreement, an individual who acquires residential real estate and assumes or takes subject to the obligation of a prior protected party under the real estate security agreement.
U.L.T.A. § 1-203(a).

96. *Id.* § 3-505.

97. *Id.*

98. *Id.*

99. *Id.* § 3-512(c).

100. *Id.* § 3-403(b).

101. *Id.* § 3-403(a).

the due-on-sale situation disregards current economic reality.[102] If this judicial trend continues, the consequences to lenders could be harsh. A statutory solution which considers the needs of lenders and the protection of homeowners can be found in the U.L.T.A. Hopefully, it will be enacted by the state legislatures.

The law of property has traditionally been conservative and resistive to change. In adopting the U.L.T.A., the legislature can take the giant step forward, so sorely needed in the field of real property.[103]

Adverse effects upon lenders and borrowers may not be enough to spur state legislatures to act. Perhaps the threat of federal preemption of mortgage transactions will provide the catalyst. The federal government has long held the philosophy that homes should be affordable to all. The mortgage market, as a foundation of this nation's wealth, has been viewed as a national market.[104] Lenders were pleased with the current override of state usury laws when the government stepped in to provide emergency assistance.[105] Just as many emergency assistance acts have become permanent enactments, so may this regulation develop as well. Certainly the federal government means to do something about the current crisis pricing the average consumer out of the housing market. If the states wish to hold on to their traditional control of real property, so long neglected by their legislatures, they should look to the U.L.T.A. as the initial step in the solution of current problems.

CONCLUSION

Law changes with the times.[106] Events shape the law. In our times event crowds upon event and the courts find it difficult to keep pace with the change. Recourse to the philosophy expressed in regulations helps guide the courts in dealing with the embattled institutionalized mortgage. The modernization of aspects of property law through analogy to the U.C.C. and the decisions concerning unconscionability reflect needed change, but more is needed. The U.L.T.A. results from a scholarly and prac-

102. *See* Report of the Subcommittee on "Due-on" Clauses, 13 REAL PROP., PROB. & TR. J. 891, 936 n.6 (1978); *see* Kratovil, *supra* note 57, at 316.

103. Felsenfeld & Finkelson, *Consumer Protection Influences on Article 9*, 5 U.C.C. L.J. 5, 62-63 (1972).

104. Mortgage Commentary, Vol. 17, No. 7, January 25, 1980 (Mortgage Commentary Publications, Wash., D.C.).

105. Depository Institutions Deregulation Act of 1979 (H.R. 4986).

106. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); 39 U. CINC. L. REV. 600 (1970); 1970 DUKE L.J. 1040 (1970); 39 GEO. WASH. L.J. 152 (1970); 84 HARV. L. REV. 729 (1970); 16 VILL. L. REV. 383 (1970); *see* 66 NW. U.L. REV. 227 (1970).

tical study of real estate transactions and presents a more balanced approach to lenders and consumers alike. Justice Cardozo noted that the rules of common law have evolved in the courts through dealing with the litigated problems of the times. Therefore, as times change the rules must change, and this is no more than observance of an ancient common law tradition.[107] The efforts of state legislatures are needed to deal with the economic crises that are being placed before us.

107. Creating the implied warranty of habitability for leaseholds, the Illinois Supreme Court quoted Justice Cardozo in Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 266 N.E.2d 338 (1972).