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INTRODUCTION TO SECURITY INTERESTS IN UTAH REAL PROPERTY

1. **Usual Types**. Security interests are rights created by contract or statute to realize on specific property to satisfy a debt or other obligation. There may be more than one which applies to any parcel of property, and their priority is generally governed by the recording act UCA §§ 57-3-101 *et seq.*, 57-4a-1 *et seq.*, subject to some special priority rules for such things as mechanics liens and tax liens. See, *e.g.*, UCA §§ 38-1-1 *et seq.* (mechanic's liens); UCA §§ 38-6-1 *et seq.* and Internal Revenue Code § 6320 *et seq.* (federal tax liens); UCA § 59-1-1413 (Utah state tax liens); see also discussion at 7(d) below. They mostly fall within known types of interests, but occasionally, the courts have to construe some strange things created by parties, which may give rise to equitable mortgages. See *Nagle v. Club Fontainbleu*, 405 P.2d 346 (Ut. 1965) (an instrument deemed to be a mortgage); *Bybee v. Stuart*, 189 P.2d 118 (Ut. 1948) and *Thornley Land & Livestock Co. v. Gailey*, 143 P.2d 283 (Ut. 1943) (a deed absolute may be a mortgage if presumption that deed is what it purports to be is overcome by proof that is "clear, definite, unequivocal, and conclusive"); see also *BMBT, LLC v. Miller*, 322 P.3d 1172 (Ut. App. 2014). The types of security interests in real property commonly used in Utah are:

(a) Mortgages. A mortgage is an instrument under which the "mortgagor" grants a lien -- an equitable remedy to obtain the mortgaged realty -- to the "mortgagee" to satisfy a specific debt identified in the mortgage. Mortgages are generally covered by UCA §§ 57-1-14 and 15, 57-1-38 through 44, 78B-6-901 (formerly 78-37-1) *et seq.*, and URCP 69B and 69C. A mortgage is not a true interest in land, but is a grant of an equitable remedy, and as such, is subject to a certain amount of court discretion. *Dugan v. Jones*, 615 P.2d 239 (Ut. 1980). They usually secure promissory notes, but just about any obligation can be secured by one. They are often used in loan transactions and seller-financed sales of real estate. The mortgaged property can be sold at a judicially-ordered sheriff's sale.

(b) Trust Deeds. Trust deeds are generally covered by UCA §§ 57-1-19 through 36, 57-1-38 through 44, 78B-6-901(1)(formerly 78-37-1). A trust deed conveys legal title from the "trustor" to a "trustee" who holds that title in trust for the "beneficiary." However, the grant is equitable in nature and subject to a certain amount of court discretion. Trust deeds usually secure the trustor's obligations under a promissory note, but just about any obligation

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may be secured by one. They are often used in loan transactions and seller-financed sales of real estate, and are by far the most commonly used of the typical security devices. The trust deed gives the trustee the power to sell the trust property to satisfy the obligation. Also, the beneficiary (lender) may elect to foreclose as a mortgage.

(c) Uniform Real Estate Contracts. Uniform Real Estate Contracts (URECs) are a standard version of contracts for later delivery of the deed on payment of the purchase price. A printed form has often been used entitled a Utah Uniform Real Estate Contract, but any contract for deed usually has the same main features. These contracts purportedly are designed for ease and speed and to provide a cheap remedy for a seller, but are fraught with problems, which often lead to litigation. They are used exclusively in seller-financed sales of real property, usually residential property with low down payments where other financing is difficult or impossible to obtain. The buyer assumes possession of the property, but the seller retains legal title until the purchase price is paid in full; sometimes a deed is placed in escrow. However, by the doctrine of equitable conversion, the buyer-debtor is treated for many other purposes as the owner of the property. *Capital Assets Financial Services v. Maxwell*, 994 P.2d 201 (Ut. 2000); *Cannefax v. Clement*, 818 P.2d 546 (Ut.1991) (seller's interest is personal property for judgment lien purposes); *Butler v. Wilkinson*, 740 P.2d 1244 (Ut. 1987) (judgment lien attaches to contract buyer's interest); *Pioneer Builders Co. of Nevada, Inc. v. K D A Corp*., 292 P.3d 672 (Utah 2012) ("It is well-settled that a party who purchases property under an executory real estate contract obtains a recognizable interest in the property before the contract is paid in full."). The remedies available under these contracts are forfeiture of payments and eviction, foreclosure as a mortgage, or suit for installments. Sometimes such a contract purports to grant a trust deed-like power of sale option, as well.

2. **One-action Rule and Other Overlapping Rules**. All security interests in real property are subject to equitable and due process considerations and to rules on priority of interests, discussed further below. The one action rule also applies to all such security interests in real estate. At common law, a mortgagee had the option to waive the security and pursue the mortgagor's general assets. However, in Utah by statute, UCA § 78B-6-901(1) (formerly 78-37-1), the secured party must exhaust the security before it can move against the obligor's general assets. The policy is that there should be but one remedy and action. The rule applies both to mortgages and trust deeds (*City Consumer Servs., Inc. v. Peters*, 815 P.2d 234, 236 (Utah 1991), but with some differences. There is an exception relating to obtaining rents, including during foreclosure, as discussed in 7(d) below. The rule does not apply to the enforcement of guarantees, at least where the guarantors are not characterized as co-obligors. *In re SLC Ltd. V*, 152 B.R. 755 (Bnkr. D. Ut. 1993); *Machock v. Fink*, 137 P.3d 779 (Ut. 2006).

(a) Trust Deed. For example, a trustee's sale under a trust deed is not treated as an "action" (*Timm v. Dewsnup*, 86 P.3d 699 (Ut. 2003)), so a later suit for a deficiency is not cut off by the rule. However, an earlier suit would be cut off until the security has been exhausted. *Utah Mortg. & Loan Co. v. Black*, 618 P.2d 43 (Ut. 1980).

(b) Fixtures. Where a mortgagee holds both a mortgage and a security interest in fixtures ("Fixtures" means goods that have become so related to particular real

property that an interest in them arises under real property law; UCA § 70A-9a-102(41)) relating to the same real property, although the secured party may proceed under the UCC as to the fixtures, it may be necessary or advisable to foreclose the mortgage and the fixture security interest judicially in the same action in order to avoid the consequences of the one-action rule and thus to preserve for the mortgagee-secured party a right to a deficiency or to prevent a defense by the mortgagor precluding any access to the security; however, the law on this point is not clear. With a trust deed (not using a judicial foreclosure), such a situation appears analogous to a creditor holding two trust deeds in the property, one as to interests other than fixtures, the other as to fixtures (see section 5 below on trust deed foreclosures). If the trust deed is foreclosed judicially, the mortgage discussion above would apply.

(c) Personal Property Security Interests. Also, although security interests in personal property (*i.e.*, other than fixtures, which are real property) generally are not subject to the one-action rule, where the security interest is also held by a mortgagee, it is possible the one-action rule could apply; the law on this point is not clear, but the better view would be that when such security interests are enforced by UCC sales rather than judicially, they do not constitute an "action" which cause the consequences of the one action rule to apply (see *Timm v. Dewsnup*, 86 P.3d 699 (Ut. 2003)). If, however, judicial action is required to realize on the personal property security interests, or after realization, to seek a deficiency judgment, it should be combined in one action with the mortgage foreclosure, at least if the judicial mortgage foreclosure has not occurred. Thus, in at least some circumstances it may be necessary or advisable in such a case, to foreclose or realize on all interests held by the mortgagee-secured party or to seek a deficiency in one action, the mortgage foreclosure action. With a trust deed (not using a judicial foreclosure) it may be necessary or advisable to avoid judicial action prior to the foreclosure, and then to seek all deficiencies in one action, which for the deficiency probably would be the case in any event as a practical matter. If the trust deed is foreclosed judicially, the mortgage discussion above would apply.

(d) UCC Provision. The consequences of the one action rule do not appear to be removed under the UCC, including under UCA § 70A-9a-604 of the Utah UCC. Official Comment 2 to the UCC, applicable to UCA § 70A-9a-604 states:

> Under a "one-form-of-action" rule (or rule against splitting a cause of action), a creditor who judicially enforces a real property mortgage and does not proceed in the same action to enforce a security interest in personalty may (among other consequences) lose the right to proceed against the personalty. Although statutes of this kind create impediments to enforcement of security interests, this Article does not override these limitations under other law.

3. **Nonforeclosure Workouts**. In case of default, a foreclosure is not inevitable. Sometimes where there are no other encumbrances to cause the lender concern, the parties agree that the debtor will give the creditor a deed in lieu of foreclosure to satisfy the debt. If there are junior lienholders, the issue will arise of whether the lender's mortgage merges into title and thus becomes subject to the junior lienholder, or whether the junior lien remains junior because the mortgage remains separate and can still be foreclosed to cut off the junior interest. See *Whitely*

v. DeVries, 209 P.2d 206 (Ut. 1949). The use of a nominee to receive the deed in lieu has been used in order to maintain the mortgage and prevent merger. See *Alden Hotel Co. v. Kanin*, 88 Misc.2d 546, 387 N.Y.S.2d 948 (N.Y. 1976). The debtor may also sell the property privately prior to foreclosure sale and use the proceeds of sale to satisfy the debt. Sometimes the creditor may be willing to grant extensions of time or make other modifications to prevent the need for a foreclosure. Beyond merger, which may require a look into whether there was an intent not to have a merger of interests (see generally, *O'Reilly v. McLean*, 37 P.2d 770, 773 (Utah 1934)), if the transfer of the title to the property satisfies ("fully cancels") the note and debt secured by the senior trust deed, this also could eliminate the senior trust deed even though the trust deed itself contained further obligations (e.g., to pay property tax, protect the collateral, etc.). *Stenquist v. JMG Holdings*, 379 P.3d 941 (Ut. App. 2016) ("a trust deed, like a mortgage, cannot exist without the debt").

4. **Foreclosure of Mortgages**. A mortgage must be foreclosed judicially, that is, by a judgment of the court at the conclusion of a lawsuit. UCA §§ 78B-6-1310 (formerly 78-40-8) and 78B-6-901 through 908 (formerly 78-37-1 through 9). The court is asked to determine the rights and priorities in the property and to "foreclose" interests junior in priority to the mortgage. The foreclosure may not, however, be used oppressively and equitable defenses may be available to a mortgagor. See *U. S. v. Loosley*, 551 P.2d 506 (Ut. 1976). The court grants a judgment for the amount owed and directs the sheriff of the county where the real property subject to the mortgage is located to sell it a public sale.

(a) Parties to Lawsuit. Suit is filed against the mortgagor, its successors in interest, and against all persons claiming an interest in the property, particularly those with more junior interests who will lose them in the foreclosure. *Dumont Corp. v. Arrington*, 457 P.2d 616 (Ut. 1969) (tests for necessary parties to foreclosure); UCA § 78B-6-903 (formerly 78-37-3) (unrecorded interest not a necessary party); *Gigliotti v. Albergo*, 115 P.2d 791 (Ut. 1941) (same). Endorsers, guarantors, lessees, etc., may be joined. More senior interests generally are not joined unless a determination of their actual priority is needed. Under 28 USC § 2410, the United States may be named a party in a foreclosure where it may have a claim on the property. It is an open question in Utah whether Mortgage Electronic Registration Systems, Inc. (MERS), which takes title in mortgages to enable their easier securitization or transfer, is a necessary party to a foreclosure. See *Landmark National Bank v. Kesler*, 192 P.3d 177 (Kan. App. 2008) (MERS is only an agent or nominee, and is mortgagee in name only, and is not a necessary party; originator of mortgage was named in the foreclosure and defaulted, and the transferee of the mortgage could not set aside the foreclosure).

(b) Sale. After judgment, the sale is by public auction, conducted by the sheriff after posting the notice of sale at the place of sale, the property, the courthouse in the county or city where the property is located, and at three other public places in that county or city, for at least 21 days before the sale, and after advertising the notice of sale in a newspaper of general circulation in the county once a week for three consecutive weeks immediately prior to sale. URCP 69B(b)(3). A sale may be postponed for up to 72 hours without renoticing the sale. The sale will be held at the courthouse between 9 a.m. and 8 p.m., Monday through Saturday.

The sheriff issues a certificate of sale to the highest bidder on payment of the price. URCP 69B(i).

(c) Deficiency. If the amount of the successful bid is not equal to the judgment, a deficiency will be automatically entered, and after the sale, the judgment creditor may then levy against any nonexempt property of the judgment-debtor.

(d) Redemption. Within 180 days after the sale, the mortgagor or any foreclosed junior interest may redeem the property by paying the amount of the bid, plus six per cent (not a per-annum amount) for an initial redemption (and six percent on costs paid after sale by the sale purchaser where notice of them is filed with the court, such as taxes, assessments, insurance, maintenance, repair, and other liens, as to an initial redemption). Subsequent redemptions are at the prior redemption price plus three percent. Each redemption is described in a certificate of redemption provided by the prior purchaser. If the defendant (mortgagor) is the redemptioner, it is returned to its estate notwithstanding the sale, and there are no further redemptions. The mortgagor's and other persons' right of redemption is provided by UCA § 78B-6-906 (formerly 78-37-6), URCP 69C; see also, UCA § 57-1-28(2). The period of redemption may be equitably extended in some cases. *Bangerter v. Petty*, 650 Utah Adv. Rep. 24 (Ut. Ct. App. 2010) (Utah courts are allowed to extend a redemption period or set aside a sheriff's sale after the period for redemption if "the equities of the case are compelling and 'move the conscience of the court.'" *Huston v. Lewis*, 818 P.2d 531, 535 (Utah 1991) (quoting *Mollerup v. Storage Sys. Int'l*, 569 P.2d 1122, 1124 (Utah 1977)). Rights to redemption, including both the equitable right before the decree of foreclosure and statutory rights after the decree, cannot be waived at the time the mortgage is granted, but can be waived later by separate agreement with adequate consideration. *Corey v. Roberts*, 25 P.2d 940 (Ut. 1933); *Young v. Corless*, 191 P. 647 (Ut. 1920).

(i) Deed. The last redemptioner receives conveyance of the land by sheriff's deed. If there is no redemption, the sheriff will issue a sheriff's deed to the successful bidder. The sheriff's deed establishes a new title in the property.

(ii) Possession. The purchaser or the then redemptioner has the right to possession and rents until a subsequent redemption, but rents are a credit against the redemption price. The right of possession and to rents is subject to a superior claim. The purchaser or redemptioner may be required to account for the rents and the redemption period may be extended until the accounting is delivered. URCP 69C(i)(2).

(e) Federal Tax Redemption. The United States has a separate federal right to notice and right of redemption where it has a tax lien. IRC § 7425. If not named a party and if the notice and redemption process is not used, the filed tax lien remains effective despite foreclosure.

5. **Foreclosure of Trust Deeds**. The nonjudicial power of sale foreclosure process for trust deeds is conducted by the trustee.

(a) Trustee. A trustee under a trust deed must be a bank or savings and loan, a licensed attorney, a title company, a trust company, or certain government agencies. Only depository institutions, trust companies, or specified government agencies may act as trustee where also a beneficiary.

(i) Duty. The trustee acts as the fiduciary of both parties, though in a limited sense, and the beneficiary retains the right to replace the trustee without cause. Some actions are prohibited by trustees, and some are not delegable by trustees. UCA §§ 57-1-21.5, 57-1-31.5. See also UCA 57-1-38 through 44 on timeliness and procedure for releases of trust deeds and mortgages.

(ii) Trustee for Sale. The trustee actually conducting the sale process must be a Utah attorney with a location in Utah or a Utah title company or agency with an office in Utah. UCA § 57-1-21(3). Thus, an attorney or title company may need to be substituted as trustee in case of a default. *McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc*., 298 P.3d 666 (Ut. App. 2013) (invalidating sale without qualified trustee; trust deed sale rules apply to condo association liens). However, in matters governed by the National Bank Act 12 U.S.C. § 92a(a)–(b), Recon Trust may act as trustee under Texas law. *Bank of America, N.A. v. Sundquist*, __ P.3d __, 2018 UT 58, 2018 WL 4856543 (Ut. 2018) (overruling its prior decision in *Federal National Mortgage Ass'n v. Sundquist,* 2013 UT 45, 311 P.3d 1004 (Ut. 2013).

(b) Alternative Remedies. In general, upon default by a debtor of an obligation secured by a trust deed, a creditor has two generally-available remedies (UCA § 57-1-23): sell the property under a power of sale and if there is a deficiency, bring a timely deficiency action after the foreclosure; or bring a judicial foreclosure action as described above for mortgages.

(i) Timing of Choice. The choice may be made or remade until a remedy is actually used, or until a court requires an election. See *Midvale Motors, Inc. v. Saunders*, 432 P.2d 37 (Ut. 1967) (election of remedies). Thus, a foreclosure action could be dismissed (where allowable under URCP 41) and a power of sale used, or the power of sale process could be stopped and the foreclosure action instituted. See Thomas & Backman, Utah Real Property Law, at § 14.03(a)(4) at ftn. 519, citing *Openshaw v. Dean*, 125 S.W. 989 (Tx. Civ. App. 1910). However, under the one-action rule (discussed at 2 above), it is not likely allowable to pursue both remedies available under a trust deed at the same time under the same instrument. See Thomas & Backman, Utah Real Property Law, § 14.03(a)(4) at p. 746 (Matthew Bender 2005). A separate mortgage and a separate trust deed on different properties for the same debt nevertheless likely could be pursued separately by use of the power of sale under the trust deed while the mortgage foreclosure is also underway. *Timm v. Dewsnup*, 86 P.3d 699 (Ut. 2003).

(ii) No Abuse. So long as only one process is being used at a time, the one-action rule may not be violated. However, in addition to one-action rule concerns, the attempted use of tandem procedures concurrently or burdensome changes in the remedy being used may be examples of abusive tactics against the debtor. The courts have recognized the

equitable nature of foreclosure (*Zions First National Bank v. Rocky Mountain Irrigation, Inc*., 795 P.2d 658 (Ut. 1990) (equitable jurisdiction in foreclosure extends to the underlying debt); *Dugan v. Jones*, 615 P.2d 239 (Ut. 1980) (foreclosure is equitable, not legal, and of necessity requires determination of debt) and have stated that the foreclosure process should not be used for oppression. *U. S. v. Loosley*, 551 P.2d 506, 508 (Ut. 1976). Abusive tactics or inequitable conduct by a secured party as to the debtor or subordinate parties, of any number of types, may give the court grounds to refuse to allow a foreclosure at all in some cases. (See also 7(d)(iv) below.) However, a judicial foreclosure may be used even if it costs more and the debtor is required to pay the cost.

(iii) Why Choose One over Other. The most common remedy in Utah is the power of sale foreclosure due to its advantages of relative speed and simplicity. Almost all knowledgeable lenders use trust deeds, and all but a few foreclosures under them are by nonjudicial power of sale. The judicial foreclosure is generally used only where there are title, priority, or other problems needing to be resolved by the court in any event to protect the lender. If the limitation period for a trustee's sale is close, a suit to foreclose may be better because it may be able to be brought in the limitation period even if it is too late to have a trustee's sale accomplished in time. See UCA § 57-1-34.

(c) Power of Sale Foreclosure Process. After the trustor defaults on the secured obligation, the beneficiary requests the trustee to exercise the power of sale. The trustee files and records a Notice of Default (UCA § 57-1-24(1)) and mails a signed copy of the recorded notice to the trustor and to other parties who have filed a request for notice by the time the notice of default is filed. The trustee uses this notice to give statutory notice to the trustor and other interested parties that a breach of the secured obligation has occurred and that the beneficiary intends to have the property sold to satisfy the obligation. It must be mailed by certified or registered mail not later than 10 days after its recordation. The trustee normally obtains a title report to determine to whom notices should be sent.

(i) Requests for Notice. A request for notice of default or of sale may be contained in the trust deed itself as to parties to the trust deed. Otherwise, it is a separate document (not included in any other recorded instrument) filed of record after the trust deed and before the notice of default, in compliance with a specific statutory procedure. UCA § 57-1-26(1). Subordinate parties will want to file such notices, or the trustee is authorized to ignore them in the notice requirements leading to sale. UCA § 57-1-26(1)(f). To prevent due process challenges, or to improve bidding at sale, a trustee may want to send notice to known and locatable subordinate parties, anyway.

(ii) Choices of Subordinate Interest Holders. The trustor, other title holders and junior lienors (*i.e.*, subordinate parties) will have some choices prior to sale.

1) The holder of such a subordinate interest may cure the default and reinstate the obligation even if the note has been accelerated. This right lasts for three months after the recording of the notice of default. This is different from the usual rule that once a valid acceleration occurs, the debtor must generally pay the entire amount to avoid

foreclosure or other remedies. See *Johnston v. Austin*, 748 P.2d 1084 (Ut. 1988). However, under the trust deed statute at UCA § 57-1-31(1), a payment of the then-due amount (with attorney fees and trustee costs) within three months of the recording of the notice of default has the effect of deaccelerating the obligation and reinstating it as if no acceleration had occurred. If the default is cured, the beneficiary requests the trustee to execute and deliver to the trustor a Cancellation of Notice of Default. When the trustee does so, the trustor has the cancellation notice recorded.

2) A subordinate party may redeem the property by paying the full amount of the debt at any time before the trustee's sale. If so redeemed, the beneficiary requests the trustee to reconvey the property to the trustor. The trustee then delivers the trust deed and note (if there is one) to the trustor, together with the reconveyance, which will be without warranty and may be made generally to persons entitled.

3) A subordinate party may bring action to enjoin the sale, if the sale is asserted to be wrongful.

4) The trustor may also institute a bankruptcy proceeding, or creditors may institute an involuntary bankruptcy proceeding against the trustor. This will create an automatic stay stopping the sale.

(iii) Notice of Sale. After three months from the date of recording the notice of default, the trustee will proceed to sale by:

1) Publishing the notice of sale once a week for at least three consecutive weeks in a newspaper of general circulation in the county. The last publication must be at least 10, but not more than 30, days before the scheduled date for sale.

2) Posting the notice of sale on the property and in the county recorder's office for at least 20 days before the scheduled sale.

3) Mailing a signed copy of the notice of sale to trustor and anyone else who filed a request for notice prior to the date of recording of the notice of default. The mailing of notice of sale is done at least 20 days before the date of sale by certified or registered mail, return receipt requested.

(iv) Timing of Sale. The trustee's sale may be held at least 20 days after mailing and posting and 10-30 days after last publication. It is held between hours of 8 a.m. and 5 p.m., at the courthouse of the county in which the property is located. The trustee may postpone the sale by giving a notice of postponement at the time and place last scheduled for the sale, either in writing or orally. If the time of postponement is greater than 45 days in the aggregate, the trustee must repeat the process for giving notice of sale. UCA §§ 57-1-25(2), 57-1-27(2). Also, there is a statute of limitations which applies; UCA § 57-1-34 states that "The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the

trust deed." See also *Timm v. Dewsnup*, 86 P.3d 699 (Ut. 2003). The applicable limitation period is not the 6 years beginning with the first default under UCA § 78B-2-309 (see *Goldenwest Fed. Credit Union v. Kenworthy*, 406 P.3d 253 (Ut. App. 2017)), but is the 6 years beginning with acceleration of the note under UCA § 70A-3-118(1), a provision of Article 3 of the Uniform Commercial Code. *Deleeuw v. Nationstar Mortgage*, 2018 UT App 59, 424 P.3d 1075 (Ut. App. 2018).

(v) Disposition of Property. At the sale, the trustee sells property to the highest bidder at public auction, and the purchaser pays the bid price then or as instructed. The trustee delivers or makes available a trustee's deed to the purchaser within three business days of payment. The deed is without any right of redemption by trustor or junior lienors, and normally, without any warranties. The deed relates back to the time of sale. The deed may include a number of recitals concerning the foreclosure process which will be conclusive as to bona fide purchasers for value and without notice. UCA §§ 57-1-28(2)(c) and 57-1-28(3). The trustee then disposes of the proceeds of sale to proper parties, including by paying costs of sale and the amount owing to the beneficiary, and then paying any balance to trustor or into court for junior lienholders, etc. UCA § 57-1-29.

(vi) Deficiency Action. At any time within three months after the sale, the beneficiary may bring an action personally against the debtor for any deficiency. Recovery is the lesser of the debt plus costs, minus the sale price, or else the debt plus costs, minus fair market value. UCA § 57-1-32.

(vii) Action to Set Aside Sale. If there is a wrongful sale, a person aggrieved, such as the trustor, another title holder, or a junior lienholder, may bring an action to set aside the sale or an action for damages for wrongful sale. See *Concepts, Inc. v. First Secur. Realty Servs. Inc.*, 743 P.2d 1158 (Ut. 1987) (action to set aside sale), *Cambridge Sav. Bank v. Cronin*, 194 N.E. 289 (Mass. 1935) (action to set aside or for damages).

(viii) Federal Redemption. The same federal right of redemption where there are tax liens on a property will apply to a power of sale foreclosure, except that without a judicial proceeding, the rules where the United States is a party to a proceeding will not apply. IRC § 7425.

6. **Enforcement of URECs**. A real estate contract may be enforced by forfeiture or foreclosure.

(a) Forfeiture. Forfeiture is exercised by the seller's giving notice to the buyer of intent to declare a forfeiture and of an election of remedies, and, absent a cure, taking possession of the property. This process, however, is loaded with opportunities to end up in court or to have the forfeiture defeated. The court reports of Utah are loaded with UREC cases. These cases are often fact intensive, so that summary judgment will not usually be appropriate. Parties are best advised not to use these contracts or if used, to exercise forfeitures only with very great care. The problem areas include:

(i) Reinstatement and Election of Remedies. The buyer needs to receive notice of default and a reasonable time to cure, with a right to reinstatement. *Lamont v. Evjen*, 508 P2d 532 (Ut. 1973); *Call v. Timber Lakes Corp*., 567 P.2d 1108 (Ut. 1977). Only the court can terminate the right to reinstatement. *Fuhriman v. Bassigger*, 375 P.2d 27 (Ut. 1962). Also, the courts have required special notice of future strict performance where late payments have been regularly accepted. See, *e.g.*, *Pearce v. Shurtz*, 270 P.2d 442 (Ut. 1954). Further, the seller needs to give a very clear notice of election of remedies. See *McMullin v. Shimmin*, 349 P.2d 720 (Ut. 1960); *Andreason v. Hansen*, 335 P.2d 404 (Ut. 1959).

(ii) Eviction. Obtaining possession is not always easy. Notices may be given to put the debtor in unlawful detainer and subject to treble damages for failure to leave the property on time. If the debtor does not leave, court action is necessary. See UCA § 78-36-1 *et seq.*

(iii) Disallowance. Where there is a forfeiture of substantial equity in the property, the forfeiture may shock the conscience of the court, which will then disallow the forfeiture and require that the seller use the mortgage foreclosure process instead. Forfeitures are generally not favored under the law. The forfeiture provision is not enforceable where it "would so shock the conscience that a court of equity would refuse such a forfeiture." *Jensen v. Nielsen*, 485 P.2d 673 (Ut. 1971).

1) Factors used to determine this are the difference between (i) actual damage (based on loss of the bargain, capital and rental value, interest value, fair rental value, etc.; there is no rigid formula; *Johnson v. Carmen*, 572 P.2d 371 (Ut. 1977)), and (ii) the amounts paid by buyer, taking into account (iii) any declines in value or any improvements made, whether the seller engaged in sharp practices, and so on.

2) Even if the seller retakes possession, the buyer can always sue the seller later for restitution (unless barred by laches or limitations). See *Jensen v. Nielsen*, 485 P.2d 673 (Ut. 1971) (action brought 2 ½ years after vacating property; case settled 10 years after the default).

3) The buyer's risk is that the court's conscience may not be easily shocked.

(iv) "Daisy Chains" of UREC's. Where there is a series of contracts so that the latest buyer pays the seller, that seller (who is a buyer under a prior contract) pays its seller, who pays its seller, and so on, there is a great risk that an earlier contract won't get paid and forfeit out everyone else down the chain, without notice and opportunity to cure.

1) For example, some middle contract buyer keeps the payment made to it and does not pay its seller, or has the payment seized by some other creditor so its seller can't be paid. An earlier seller by forfeiting its buyer can also forfeit out all later buyers and sellers. If any middle contracting party fails to timely inform the later parties, or if

later parties don't have the funds to risk on paying the forfeiting seller, they may all end up disappointed.

2) Escrow arrangements are sometimes used to make sure everyone with an earlier contract receives its share of the payment from the last buyer. Escrows entail escrow fees, however, and in case of dispute add another party to the litigation, but are generally better than the alternative of not using an escrow.

(v) Due Process. The buyer's constitutional rights under the due process provisions of the U. S. 14th Amendment and the Utah Constitution may be violated on a forfeiture without adequate notice and hearing. See *U. S. v. White*, 429 F. Supp 1245 (N.D. Miss. 1977); *Risker v. U.S.*, 417 F. Supp. 133 (D. Me. 1976); *Turner v. Black*, 389 F. Supp. 1250 (W.D. N.C. 1975).

(vi) Difficulty Obtaining Deed. Absent an escrow of the deed, in order to obtain full title, the buyer may have to chase down the seller in some other state or chase down the seller's heirs, who may include minors requiring a court authorized guardian or conservator to sign, or in case of litigation, a guardian ad litem (see URCP 17(b)).

(vii) Cloud on Seller's Title. A recorded notice of contract will cloud the seller's title, and efforts or contractual provisions to prevent recording of a notice may be void as against public policy. Nelson & Whitman, "The Installment Land Contract - a National Viewpoint", 1977 BYU L. Rev. 541, 571 (1977); see also *Norton v. Fuller*, 251 P. 29 (1926). Even if the forfeiture is otherwise appropriate, the seller may have a difficult time clearing its record title and may need to resort to a quiet title action. Sometimes quitclaim deeds from the buyer are held in escrow for the purpose of clearing seller's title in the event of a default.

(viii) Risk of Claims. Unrecorded contracts put the buyer at grave risk where, under the recording act, later recorded liens or mortgages will have priority (UCA §§ 57-3-102 and 103). An argument can be made that holders of later-recorded interests should be treated as having constructive notice of the contract buyer in possession; this, however, is an argument that is made in a lawsuit. Tax liens will have priority (IRC § 6321), and constructive notice is of no help here. The seller's bankruptcy trustee may reject the contract as an executory contract under BC § 365, leaving a claim for damage but not a home.

(ix) Not Readily Financeable. The buyer will have a hard time financing its equity in the property, since any mortgagee of the interest would be in a similar tenuous position if the seller exercised the forfeiture.

(x) Interim Lack of Good Title. The seller is not required to have marketable title until the contract is paid off, and so long as there is a way to obtain and convey title later, the buyer is not relieved of its obligations by reason of interim failures of marketable title. The interim failure may well become a permanent failure of title. In an event, the buyer will need a title report at the time of sale and also at the time of the last payment.

(xi) Risk of Loss. On which party the risk of loss falls (*e.g.*, property destruction) is not clear. The contract may leave the risk on the seller until the deed passes title. This may produce a nasty surprise to seller if the property is uninsured, or to buyer if the insurance is payable to seller. The doctrine of equitable conversion may help (absent a specific contract provision), but the risk of loss issue does not appear to have been decided in Utah; thus, for example, it is not clear if seller must hold insurance proceeds as trustee for buyer.

(xii) Federal Redemption. The federal right of redemption applies to forfeitures under contracts for deed as well as normal foreclosures. IRC § 7425. This may come as a surprise to the seller claiming the allegedly "simple" process of forfeiture.

(b) Judicial Foreclosure. The seller could elect to foreclose as a mortgage. A very clear election of remedies is necessary, however. Judicial foreclosure takes time and costs attorney's fees, and some contract sellers are too greedy not to attempt to obtain a windfall through the forfeiture of a substantial equity in a property. Thus, contract sellers are tempted into unreasonable forfeitures and often end up in even more costly court proceedings.

7. **Problem Areas for Any Foreclosure**. Any type of foreclosure (or forfeiture of contract) needs to be done carefully without undue prejudice to the debtor.

(a) Equity and Good Faith. Foreclosure is an equitable remedy and a court may not allow it to occur, even where the debtor is in default, under circumstances where it would be inequitable to do so. The secured party's inequitable behavior may raise the possibility of an equitable defense for the debtor against acceleration of the debt and foreclosure of the mortgage or trust deed or contract for deed. See *Glew v. Ohio Sav. Bank*, 181 P.3d 791 (Ut. 2007) (equitable estoppel). Also if the sale price or other aspects of a sale are so unreasonable as to shock the conscience of the court the sale may be set aside or an equitable extension may be granted to the period of redemption. *Bangerter v. Petty*, 228 P.3d 1250 (Ut. App. 2010). If the agreement (the note and the trust deed or mortgage are generally read together) is very unfair it may be unenforceable altogether if it is deemed unconscionable, but this is not an easy threshold to cross. See generally, *Knight Adjustment Bureau v. Lewis*, 228 P.3d 754 (Ut. App. 2010) (unconscionable agreements discussed).

(i) Acceleration. Where a lender refused to accept an offer of full payment of the note (secured by what was deemed to be a mortgage) but without paying the attorney's fees, it was not allowed to accelerate the debt or collect attorney's fees. *Nagle v. Club Fontainbleu*, 405 P.2d 346 (Ut. 1965). See also *State Bank of Lehi v. Woolsey*, 565 P.2d 413 (Ut. 1977) (although the debtor in that case did not meet the burden of proof as to lack of good faith, the court stated that the lender may not be able to accelerate a loan where there are substantial equities which would render acceleration unconscionable), and further see these cases cited by the *State Bank of Lehi* court: *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass'n*, 387 P.2d 801 (Az. 1963) (oppressive or unconscionable conduct may preclude acceleration; what is oppressive is tested by ordinary definition and common understanding as unjustly burdensome, harsh, or merciless), and *Murphy v. Fox*, 278 P.2d 820 (Ok. 1955) (tender of installment before the action was amended to include the failure to make the payment precluded

acceleration as did an inadvertent late payment of taxes not impairing security). See also *Home Owners' Loan Corp. v. Washington*, 161 P.2d 355 (Ut. 1945) (tender made foreclosure unnecessary and insisting on attorney's fees for foreclosure was improper; judgment of foreclosure reversed). Further, estoppel, fraud, or bad faith are also often recognized as grounds to prevent acceleration. *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 436 N.E.2d 1265 (N.Y. 1982) (oral assurances from bank were waiver of right to accelerate). Restatement (Third) Real Property-Mortgage § 8.1. See also 8(f) of this outline relating to consumer credit and the obligation of certain lenders to investigate their borrowers or suspicious circumstances.

(ii) Implied Covenant. Every contract in Utah carries with it an implied covenant of good faith and fair dealing, and the breach of this covenant creates a right to breach of contract damages. *St. Benedicts Develop. Co. v. St. Benedicts Hosp*., 811 P.2d 194 (Ut. 1991); Restatement (Second) Contracts § 205 (1981). The secured party will not be pleased when by reason of its inequitable conduct it is relegated to suing on each installment as it becomes due or to having the debt offset by damages for breach of the good faith covenant.

(b) Due Process. The debtor may not be deprived of property without due process of law. Under the federal and Utah constitutions, state action requires due process. State action is implicated by bringing a judicial foreclosure action before the court. As to trust deed power of sale foreclosures, there is an argument that indirect state action is not enough, and a nonjudicial foreclosure does not involve direct state action and thus does not violate due process. A similar argument could be made as to contract forfeitures. However, once a party brings an issue before a court, state action exists; also, there should not be excessive barriers to a debtor seeking relief from a court where it believes the foreclosure is wrongful. U. S. Constitution, 14th Amendment. Utah Constitution Article I § 7 (due process) and § 11 (right to open courts). See *Turner v. Blackburn*, 389 F. Supp. 1250 (D.C. N.C. 1975) (three-judge court finds violation of due process in North Carolina foreclosure provisions and enjoins clerk of court; action was under 42 USC § 1983; the state statutory scheme created direct state action where the court clerk was required to verify the documents concerning the report of the sale and to take even more action in case of an "upset bid"). Once the court has become involved, it cannot countenance a denial of due process without the state's countenancing the denial as forbidden by the constitutions. Thus, at a minimum, the debtor should be entitled to obtain a hearing on whether the equitable remedy of foreclosure should be allowed where there are defenses to the debt or where equities exist which may make acceleration and foreclosure an inequitable remedy. See *Bank of Ephraim v. Davis*, 581 P.2d 1001, 1005 (Ut. 1978), (cites to *North Georgia Finishing, Inc. v. Di-Chem, Inc*. 419 U.S. 601 (1975) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) in finding a due process problem and a one action rule problem with a former Rule of Civil Procedure 64C attachment without a hearing in connection with a mortgage foreclosure).

(i) Injunctive Relief. The debtor may ask a court to enjoin the foreclosure through the procedure for a temporary restraining order under URCP 65A(b) in order to raise the issues and halt the nonjudicial foreclosure. Even if an early showing of a substantial likelihood of prevailing is too much to hope for, for example, in a case based on fraud (which is provable by clear and convincing evidence), where the case nevertheless presents serious issues

on the merits which should be the subject of further litigation, the injunction may still be granted. URCP 65A(e)(4).

1) However, the secured creditor might ask the court to require the debtor to post security under the restraining order rules. Obtaining a bond may be a burden for some debtors. If the bond is posted, the court could order the nonjudicial foreclosure to await the outcome of the proceeding. Nevertheless, a bond or other security is not absolutely required under the injunction rule and may be dispensed with if there is a substantial reason to do so (*Corp. of Pres. of Church of Jesus Christ of Latter-day Saints v. Wallace*, 573 P.2d 1285 (Ut. 1978)) or if no party will suffer expense or damage from a wrongful injunction. URCP 65A(c)(1).

2) Where the debtor offers to make payments into the court, there may not be any particular need for a bond to protect the secured party which would have both the trust deed on property which has appreciated in value and the collected payments available to it, should it win the case. The debtor may move the court to allow it to make deposits of the payments with the court, to be held at interest. URCP 67; UCA § 78B-5-804 (formerly 78-27-4); URJA 4-301 and 6-201. Where the payments are safely with the court and the trust deed or other security instrument is still in place, the harsh remedy of acceleration and foreclosure may become such overkill as to be oppressive and inequitable. Thus, in such a case, it may be possible for the court in its discretion to issue an injunction without bond.

3) Even without an injunction, the debtor should not be denied access to the courts to raise its defenses. If an inability to post security prevents the stopping of the threatened sale, the debtor may desire to record a lis pendens describing the lawsuit, which affects title to land. This may have the effect of making a buyer at the foreclosure sale take the property subject to the court's eventual ruling. Although recitals in the deed to the foreclosure buyer from the trustee under the trust deed may be held to be conclusive evidence of the propriety of the foreclosure process as to bona-fide purchasers for value and without notice (UCA § 57-1-28(2)(c)), the lis pendens may prevent the foreclosure buyer from taking without notice. UCA § 57-4a-2 (recording of document under the recording act imparts notice); see *Winters v. Sniderman*, 977 P.2d 1218 (Ut. App. 1999). Without a lis pendens or a stay of judgment on appeal, a third party good faith purchaser may take title from a foreclosure sale despite general awareness of the litigation or actual notice of appeal of the foreclosure order, even if that foreclosure sale is later invalidated on appeal. *2DP Blanding v. Palmer*, 423 P.3d 1247 (Ut. 2017) (general awareness); *MAA Prospector Motor Lodge, LLC v. Palmer*, 416 P.3d 352 (Ut. 2017) (actual knowledge).

(ii) Later Suit. Also, although not nearly as desirable for a debtor who wants the property itself, a later suit to set aside the foreclosure or for damages may be brought by the debtor. See *Concepts, Inc. v. First Secur. Realty Servs. Inc*., 743 P.2d 1158 (Ut. 1987) (action to set aside sale where substantially more money may be obtained on resale); *Rogers v. Barnes*, 47 N.E. 602 (Mass. 1897) (lost equity damages). See also 6a(iii)(2) above on later suits over forfeitures of real estate contracts. Inadequate price alone is not sufficient grounds for an action to set aside a foreclosure sale, but some irregularity is also needed; however, the greater

the price disparity, the smaller the irregularity which will suffice. *Meguerditchian v. Smith*, 284 P.3d 658 (Ut. App. 2012).

(c) Possession. Under common law rules, the secured party generally has no right to receive pledged rents until it is in actual possession or the court appoints a receiver, and the debtor keeps possession and any rents or crops severed throughout the foreclosure, including the redemption period, unless the mortgage provides otherwise. See 59 CJS Mortgages §§ 300 and 301; *Carlquist v. Colthorp*, 248 P. 481 (Ut. 1926). The problems associated with these common law rules preventing obtaining rents prior to foreclosure and seizure of the rents have been significantly reduced in Utah under the Utah Uniform Assignment of Rents Act (the "Act"), UCA § 57-26-101 *et seq*. discussed below. However, actual physical possession may be desired; under URCP 69C(i) after a foreclosure sale, the purchaser (or then redemptioner) will have possession. Nevertheless, it may take considerable time to get to trial, judgment, and sale where a judicial foreclosure is involved. The nonjudicial trust deed power of sale is superior in this regard, and where necessary, a receiver may be appointed during the foreclosure process. See URCP 66 concerning the appointment of receivers.

(d) Rents. The Utah Uniform Assignment of Rents Act (the "Act"), UCA § 57-26-101 *et seq*. governs the recovery of rents in a foreclosure. An enforceable security instrument (a security instrument is any instrument that creates or provides a security interest in real property, whether or not personal property is included; UCA § 57-26-102(14)) automatically creates an assignment of the rents arising from the real property, unless the security instrument provides otherwise. Installment land sales contracts for later deed delivery are security instruments subject to the presumption of an assignment of rents. However, with respect to any kind of security instrument, non-judicial enforcement by notification of the assignor (i.e., the borrower) or of the tenant under UCA §§ 57-26-108 or 109 is not allowed for implied assignments with respect to residential property while the assignor resides there as his or her primary residence; the mortgage would need to be explicit as to the assignment of rents for the lender to have the non-judicial remedies in this situation. The ability to use these nonjudicial notification rules to collect rents during the foreclosure is a powerful remedy for a creditor.

(i) Lender Protections. Enforcement does not make the assignee lender a purchaser in possession of the real property or an agent of the assignor borrower. UCA § 57-26-111(1) and (2). These provisions help protect the enforcing lender from acquiring unexpected duties to third parties. Mortgagees in possession may, for example, acquire duties under tort law to third persons and a duty to maintain the property. There is no general duty under the Act for the assignee to use the rents to maintain or protect the real property. UCA § 57-26-113(1). Also, such enforcement of the assignment of rents does not violate Utah's one action rule (the one action rule is at UCA § 78B-6-901), constitute an election of remedies, limit any rights of the assignee lender as to the secured obligation, limit the right of foreclosure or of sale under a power of sale (e.g., in a trust deed), or bar a deficiency judgment. UCA § 57-26-111(3) through (8). Thus, the lender's other rights and remedies remain intact.

(ii) Tenant Grace. The tenant may well be confused by the notice. The statute thus provides some grace to the tenant. The tenant receiving such a notice is not in

default for non-payment as to rents accruing within 30 days of receipt of the notice until the earlier of 10 days after the payment would otherwise be due or 30 days after receipt of the notice. For example, if rents are payable in advance monthly on the first day of month, say March 1, and the notice is received February 15, the rents accruing for February will have already been paid (assuming no tenant default) and the rents accruing for March will now be due March 11. As another example, if instead of accruing monthly, rents accrue quarterly in advance and the notice is received February 15, the payment for the quarter beginning in April 1 will be payable when normally due since that date is 30 days after the date the notice was received.

(iii) Recievership. Another method of enforcement allowed by the Act is to obtain appointment of a receiver. UCA § 57-26-107. This remedy applies even to owner occupied residences. A number of issues relating to the appointment of a receiver are eliminated by the Act because the Act states that an assignee lender is entitled to the appointment of a receiver when the assignor borrower is in default and any of four conditions apply: (i) the assignor has signed an agreement provider for the appointment on default (some courts have not always honored such agreements), (ii) it appears likely the real property may not be sufficient to satisfy the obligation, (iii) the assignor failed to turn over to the assignee proceeds the assignee is entitled to collect, or (iv) a subordinate assignee of rents obtains the appointment of a receiver for the property.

(iv) Priority in Rents. The Act contains generally favorable rules for the priority of cash proceeds from rents over other secured lenders. The assignee with a perfected (i.e., recorded) interest in rents also has a perfected interest in the identifiable cash proceeds of the rents. UCA § 57-26-115(2). In the case of identifiable cash proceeds, the perfected interest of the assignee in the cash proceeds has priority over every other conflicting interest, except one where the other secured party has perfected by control. UCA § 57-26-115(4). The perfected assignee of rents loses its perfection if the rent proceeds become non-cash proceeds unless the assignor perfects as to the non-cash proceeds under Article 9, and Article 9 will provide the priority rules as to the interests in the non-cash proceeds of the rents. UCA § 57-26-115(2) and (3).

(e) Priority. Priority is generally determined by time of recording. Although the parties to an instrument (*e.g.*, a mortgage) and those with actual notice of it are bound by an unrecorded instrument (UCA § 57-3-102), and although priorities are first determined by the first in time rule as to unrecorded instruments, a recorded instrument can give priority over all of these unrecorded instruments where the party to the recorded instrument does not know of the unrecorded instrument; this is sometimes referred to as a race-notice rule. *Tracy Collins Bank & Trust Co. v. Seiger*, 546 P.2d 237 (Ut. 1976); *Haik v. Sandy City*, 254 P.3d 171 (Ut. 2011). Priority under the race notice rule is not trumped by the after acquired title rule, for example where a trust deed is granted by one without title and recorded by the beneficiary lender then the grantor without title grants another trust deed to a second lender which is recorded and then this second lender has its grantor acquire title. "The after-acquired title statute operates to convey interests in property but does not supplant the recording statute for purposes of determining the priority of competing interests in real property. Any conveyance of after-acquired title pursuant to the statute is transferred in the condition it exists at the time that title is acquired by the

formerly titleless grantor." *Federal Deposit Insurance Corp. v. Taylor*, 267 P.3d 949 (Ut. App. 2011). *Pioneer Builders Co. of Nevada, Inc. v. K D A Corp*., 292 P.3d 672 (Utah 2012) (while UCA § 57–1–10(1) retroactively validates a conveyance "as if the legal estate had been in the grantor at the time of the conveyance," it does not serve to impart to competing purchasers notice as of that date: "…a party who receives after-acquired title takes that title subject to the rights of any third party who recorded its interest in the time between the defective conveyance and the conveyance that retroactively validated it. In other words, a retroactively validated interest cannot defeat the interest of a third party who recorded its interest before the retroactive validation occurred.").

Even an ineffective trust deed can give notice and may create an equitable interest. See *General Glass Corp. v. Mast Construction Co*., 766 P.2d 429 (Utah Ct. App. 1988).

Open and notorious possession may put the later recorded instrument holder on constructive notice of prior transfers, however. See *Marlis v. Madsen*, 261 P.2d 952 (Ut. 1953). On the other hand, agreements which are ambiguous as to whether they have been fully performed do not provide such notice. *Haik v. Sandy City*, 254 P.3d 171 (Ut. 2011). If a party is on notice of sufficient facts, it may be required to inquire further as to some prior interest. Inquiry notice analysis involves two steps. First, the court conducts a subjective inquiry to determine what actual knowledge the subsequent purchaser had at the time of the purchase. Second, it conducts an objective inquiry to determine whether those facts would lead a reasonable person to inquire further. *Pioneer Builders Co. of Nevada, Inc. v. K D A Corp*, 292 P.3d 672 (Utah 2012) (where there were recorded leases, the purchaser's seeing tenant activity on the property was consistent with those leases and did not put the purchaser on inquiry notice as to unrecorded leases).

A lis pendens notice of an action involving a claim affecting title or possession of real property imparts notice which can give the judgment priority over other later recorded matters or over unrecorded matters. UCA §§ 78B-6-1303 (formerly 78-40-1) *et seq*.; *Hidden Meadows Development Co v. Mill*, 590 P.2d 1244, 1248 (Utah 1979); see also *Winters v. Schulman*, 977 P.2d 1218, 1222 (Utah Ct. App. 1999) ("The recording of a lis pendens serves as a warning to all persons that any rights or interests they may acquire in the interim are subject to the judgment or decree . . . . Thus, the primary purpose of [former] section 78-40-2 is to provide prospective purchasers with notice of litigation affecting title to or possession of property located in Utah.").

There are, however, a number of exceptions to the general rules on priority, including:

(i) Purchase Money. A purchase money mortgage might have priority over any other claim or lien attaching at or arising prior to the financing of the transaction, but it must be recorded to have priority over any subsequent transfer. See generally *Kemp v. Zions First National Bank*, 470 P.2d 390 (Ut. 1970); *Nelson v. Stoker*, 669 P.2d 390 (Ut. 1983) (the rule also applies to trust deeds; seller need not examine records to discover claims against buyer, such as judgments becoming a lien on the acquisition of real property, or any other liens, legal or

equitable, attaching on acquisition; the seller's mortgage only needs to be part of a continuous transaction relating to the land sale to obtain the priority); *Gray v. Kappos*, 61 P.2d 613 (Ut. 1937) (defining purchase money). The purchase money priority is not absolute and is subject to such doctrines as laches. *Insight Assets, Inc. v. Farias*, 321 P.3d 1021 (Ut. 2013) (laches); *Kemp, supra* (equities removed priority where seller allowed third party lender to be misled).

(ii) Taxes. Tax liens generally have priority over mortgages (see *Union Cent. Life Ins. Co. v. Black*, 247 P. 486 (Ut. 1926) (lien for real property taxes and also lien for personal property taxes levied against owners of the real property)), but the various tax laws may restrict the tax lien priority as to those taxes in some cases. Real property taxes generally maintain priority. See UCA §§ 59-2-1301 and 59-2-1325 (property tax liens). See also IRC §§ 6320 *et seq.* and 7425 (concerning federal tax liens), see particularly the priority provisions of IRC § 6323; UCA § 59-1-302.1 (Utah tax liens generally); UCA § 59-7-527(2) (corporate tax warrant becomes lien); UCA § 59-10-528(4) (individual income tax warrant becomes lien); UCA § 59-12-112 (sales tax a lien when selling business); UCA § 59-12-113(2)(c)(iii) (sales tax warrant becomes a lien).

(iii) Mechanic's Liens. Mechanic's liens may have priority retroactively relating back to the first work, prior to August 1, 2011. See prior UCA § 38-1-1 *et seq.* The law changed from and after August 1, 2011 as to construction liens and a new preconstruction lien was provided effective May 10, 2011.

1) After the change in the law, a construction service lien relates back to, and takes effect as of, the time of the first preliminary notice filing (see UCA § 38-1-32 as to such filing). Subject to the exception of UCA § 38-1-5(3)(b), a construction service lien has priority over any lien, mortgage, or other encumbrance that attaches after the first preliminary notice filing and any lien, mortgage, or other encumbrance of which the lien holder had no notice and which was unrecorded at the time of the first preliminary notice filing. UCA § 38-1-5(3)(b) provides that a recorded mortgage or trust deed of a construction lender has priority over each construction service lien of a claimant who files a preliminary notice before the mortgage or trust deed is recorded if the claimant accepts payment in full for construction service that the claimant furnishes to the project before the mortgage or trust deed is recorded and withdraws the claimant's preliminary notice by filing a notice of withdrawal under UCA § 38-1-32(8). UCA § 38-1-5.

2) Further, effective May 10, 2011, a preconstruction service lien relates back to and takes effect as of the time a notice of retention under Section 38-1-30.5 is filed and has priority over any lien, mortgage, or other encumbrance that attaches after the notice of retention is filed and any lien, mortgage, or other encumbrance of which the claimant had no notice and that was unrecorded at the time the notice of retention is filed. UCA § 38-1-4.7. However, a subsequently recorded trust deed or mortgage can cut off this special priority for future services because a preconstruction service lien is subordinate to an interest securing a bona fide loan if and to the extent that the lien covers preconstruction service provided after the interest securing a bona fide loan is recorded. Also, preconstruction service is considered complete (and thus no longer subject to the special priority) for any project, project phase, or bid

package as of the date that construction service for that project, project phase, or bid package, respectively, commences with the filing of a preliminary notice of the construction services. UCA § 38-1-4.7. Preconstruction service may, however, be included in a construction claim filing, (but not vice versa) and would presumably take the priority for a construction claim if this is done.

(iv) Conduct. Inequitable conduct by a lienholder may cause a court to subordinate it to others. 11 USC § 510(c) (Bankruptcy Code provision). See *In re Hedged - Investment Associates, Inc.*, 380 F.3d 1292 (10th Cir. 2004) (analysis of types of inequitable conduct).

(v) Agreement to Subordinate. Parties can agree to subordinate their priority to someone else's interest. Such agreements have a number of issues related to them. However, in Utah the partial subordination rule has been adopted so that if fewer than all lien claimants agree, those that have agreed to reorder their priority swap places and the nonagreeing claimants stay put; the subordinating party does not drop to the bottom and allow the nonagreeing party to move up in priority as would be the case under the complete subordination rule. *VCS, Inc. v. Countrywide Home Loans, Inc.*, 349 P.3d 704 (Ut. 2015).

(vi) Nonlien Interests. A mortgage or trust deed may not have priority over prior interests in the property which are not recorded liens, such as leasehold estates of persons in open possession.

(vii) Bankruptcy. Bankruptcy can change matters dramatically. See, *e.g.*, BC § 363(f) (trustee in bankruptcy has power to sell property free and clear of liens and other interests under certain conditions).

(viii) Fixtures and Other UCC Interests. Uniform Commercial Code fixture filings can be included in a trust deed or mortgage, or may be separate filings related to security agreements for separate loans from third parties. The UCC also covers agricultural liens, as extracted collateral, and manufactured home transactions. These are all subject to some special perfection, priority, default, and remedy rules under the UCC. See UCA §§ 70A-9a-102(5), (6), (32), (34), (40), (41), (44), (53), (54), (55) (definitions of key terms, including agricultural lien, as extracted collateral, fixtures, manufactured home transaction); 70A-9a-301(3) and (4) (law governing perfection and priority of fixtures and as-extracted collateral); 70A-9a-302 (law governing perfection and priority of agricultural liens); 70A-9a-310 (filings required); 70A-9a-317, 70A-9a-322, and 70A-9a-338 (priority of agricultural liens); 70A-9a-334 (priority as to fixtures and crops); 70A-9a-501 and 70A-9a-502 (filing on fixtures in mortgages, filing on as extracted collateral and timber to be cut); 70A-9a-604 and 70A-9a-607(2) (procedure on default where real property and fixtures covered; choice of UCC or mortgage remedy; removal and reimbursement; nonjudicial mortgage foreclosure); 70A-9a-606 (agricultural lien time of default). See also UCA § 57-3-108 (recording financing statements on fixtures, as extract collateral, and timber to be cut not subject to recording act).

(ix) Equitable Reinstatement. When a mortgage is released without negligence by accident, mistake, or in ignorance of intervening lien rights, a court can equitably reinstate that mortgage to its original priority position. See *First Nat. Bank of Layton v. Palmer*, 362 P.3d 904 (Ut. App. 2013), *cert. den.* 320 P.3d 676 (Ut. 2014) (sole reliance on title report was negligent when lender knew of other financing and thus was on inquiry notice). See also 59 C.J.S. Mortgages §§ 323, 631 (2009); 55 Am. Jur.2d Mortgages §§ 417, 1129 (2009); 2 Baxter Dunaway, Law of Distressed Real Estate § 26:41 (2010); *Badger Coal & Lumber Co. v. Olsen*, 167 P. 680, 682 (Utah 1917); *Home Fed. Sav. & Loan Ass'n v. Citizens Bank of Jonesboro*, 861 S.W.2d 321, 323 (Ark.Ct.App.1993).

(x) Criminal Forfeiture. Criminal forfeiture laws may affect security interests in real property. See UCA § 24-1-1 *et seq.* (Utah Uniform Forfeitures Procedures Act). There are also federal forfeiture laws.

(f) Strict Foreclosure. It is doubtful whether a common law strict foreclosure is available in Utah as to real property. *Mickelson v. Anderson*, 19 P.2d 1033 (Ut. 1932). Under strict foreclosure, the debtor or interest holder must pay by a set date or be foreclosed of all interests so that the property then simply belongs to the lender. This would be done through a judicial proceeding, for example, in order to cut off a party left out of a normal foreclosure proceeding to protect a purchaser at the foreclosure sale without knowledge of the other's interest.

(g) Omitted Junior Lienholder. Concerning the remedies of an omitted junior lienholder after foreclosure, see *Portland Mortgage Co. v. Creditor's Protective Assoc*., 262 P.2d 918 (Ore. 1953), and Thomas and Backman, Utah Real Property Law § 14.03(c)(12). Equitable redemptions (a redemption of the senior lien by the junior, with the foreclosure purchaser then redeeming the senior interest from the junior) or a foreclosure of the junior interest subject to a revived senior interest may be allowed.

(h) Lease Issues. An owner may sell leased real property and the landlord's rights in the lease will ordinarily pass to the buyer. Restatement 2d Real Property, §§ 15.1 and 16.2 (1977). The rule is different with respect to foreclosures because foreclosures cut off all subordinate interests. Where the lease is prior to the trust deed with no agreed subordination, the lease is paramount (Am. Jur. 2d, Mortgages, § 595), but where the lease is entered into after the trust deed or is subject to a subordination agreement (in the lease or separate from the lease), the lease is subordinate to the trust deed and will be terminated by the trust deed foreclosure sale. *Consolidated Realty Group v. Sizzling Platter, Inc*., 930 P.2d 268 (Ut. App. 1996); *White Family Harmony Investment, Ltd. v. Transwestern West Valley, Inc*., 2007 WL2821798 (D. Ut. 2007). This continues to be true where the foreclosure purchaser (which may be the lender or the lender's successor in a trust deed) both receives a deed from the borrower and forecloses the real property interest; the trust deed interest does not merge into the deeded interest. *Miller v. Martineau & Company*, 983 P.2d 1107 (Ut. App. 1999). An assignment of rents makes no difference in this result after a trust deed sale. One Utah case even goes so far as to state that in at least some cases (in that case, where a lease was not yet possessory since the building was yet

to be built) a deed in lieu of foreclosure after a foreclosure has commenced will have the same result as the foreclosure in terminating a lease. *Sizzling Platter, supra*.

(i) Tenant Notice. Utah case law has left open the question of whether a tenant needs to be named in the foreclosure for the lease termination to result (*Sizzling Platter, supra,* at ftn. 6); other states are split on the issue. Friedman on Leases § 8.1, p. 478-479 (4th Ed. 1997)). Am. Jur. 2d, Mortgages, § 594. This is an important issue whether the lender desires to keep or kill the lease.

(ii) Preserving Subordinate Leases. Where a mortgage or trust deed lender desires to preserve a subordinate lease in the absence of an attornment and nondisturbance agreement with the tenant (which lenders often and tenants sometimes require, sometimes in combination with a lease subordination agreement), the substantive issue will be whether a lender may in effect subordinate to another party (*e.g*., the tenant) and force that other party to accept the subordination, either by attempting to cancel or change the notice of sale to the tenant, by stating at the sale and including in the deed that the sale is subject to particular leases, or by signing an explicit unilateral subordination to the lease. There may also be issues as to whether the procedure is appropriate (due to alleged election of remedies, estoppels, etc.). In Utah, foreclosure is an equitable remedy and thus equitable principles may apply to change results in some cases if the court believes a party is being unfairly treated in an important way.

1) However, the well regarded Restatement Second of Law, Property at § 7.7 (1977) takes the position that a unilateral subordination can be effective except where the result is prejudicial to the party advanced by the subordination; cases on the issue appeared to the Restatement reporter to be sparse. See, however, *Graydon v. Colonial Bank – Gulf Coast Region*, 597 So.2d 1345 (Alabama 1992) (allowing subordination to second mortgage in circumstances court found not inequitable). The Restatement uses as an example of the sort of case where such a subordination will not be effective, a situation where the foreclosing party desires to maintain the lease and the tenant does not. § 7.7, Comment h, Illustration 13.

2) An agreement by the tenant to allow a subordination may not be possible at all and would require consideration in any event. Any method of essentially subordinating the trust deed to the lease against the interest of the tenant without the tenant's consent will potentially face a substantial argument from the tenant. The result in Utah of such an argument is not clear. It would turn on whether the termination should be mandatory, as the tenant will argue, so that it will not be prejudiced without its consent and without compensation for the detriment. The lender's countervailing argument would be that the law should allow a lender to pick the otherwise subordinate leases it desires to maintain in order to enhance the value of the property and that a contrary result essentially delivers a windfall to the tenant who was otherwise obligated to perform under the lease.

(i) Interpretation. Normally, the same rules will apply to mortgages and other security devices as for interpreting instruments generally, but may be construed against the party drafting it where there is uncertainty. *Bank of Ephraim v. Davis*, 559 P2d. 538 (Ut. 1977). See also, *Nagle v. Club Fontainbleu*, 405 P.2d 346 (Ut. 1965). The debt and security are generally

read together even if separate instruments. In Utah, when two agreements are executed substantially contemporaneously and are clearly interrelated, they must be construed as a whole and harmonized if possible. *Tretheway v. Furstenau*, 40 P.3d 649 (Ut. App. 2001); *Shields v. Harris*, 934 P.2d 653, 657 (Utah App.1997); *Winegar v. Froerer Corp*., 813 P.2d 104, 109 (Utah 1991); *American Sav. & Loan Ass'n v. Blomquist*, 445 P2d. 1 (Ut. 1968). Also, under UCA § 57–1–35 the transfer of any debt secured by a trust deed operates as a transfer of the security for it. This statute does not separate the debt from the security and is not violated in a securitization transaction. *Commonwealth Property Advocates, v. Mortgage Electronic Registration System*, 263 P.3d 397 (Ut. App. 2011).

8. **Additional Statutes and Related Law**. Some additional statutory provisions and other legal issues affecting security interests and liens on real estate include:

(a) Lien Laws. UCA §§ 38-9-1 *et seq.* (wrongful liens and wrongful judgment liens, including notices of interest), 38-9a-101 *et seq.* (wrongful lien injunction), 38-10-101 *et seq.* (oil, gas, and mining liens), 38-11-101 *et seq.* (residence lien restriction and lien recovery fund act), 38-12-101 *et seq.* (notice of lien filing; excepts, among others, mechanic's liens; trust deeds; mortgages; UCC security agreements; oil, gas, and mining liens; federal tax liens; but does not except state tax liens); 57-8-19 (liens on condominiums).

(b) Property Owner Associations. UCA §§ 57-8-20 and 21 (condominium association liens, priority, and foreclosures); 57-8a-203 (community association liens, priority, and foreclosures).

(c) Master Documents. UCA § 57-3-201 *et seq.* (master mortgages and trust deeds).

(d) Release of Security. UCA §§ 57-1-38 through 44 (timely release and procedure for release of mortgages and trust deeds, generally requiring a release within 90 days after receipt of the final payment). Good faith failure to release a trust deed or mortgage is an affirmative defense to an award of attorney's fees under this statute. *JP Morgan Chase Bank, NA v. Wright*, 365 P.3d 708 (Ut. App. 2015), citing *Shibata v. Bear River State Bank*, 205 P.2d 251, 254 (Utah 1949) (discussing the propriety of a fee award against a party who fails to release a mortgage) and *Hector, Inc. v. United Sav. & Loan Ass'n*, 741 P.2d 542, 545 (Utah 1987); (indicating that the statute governing release of mortgages is similar in wording and purpose to the statute governing release of trust deeds).

(e) Due on Transfer. UCA § 57-15-1 *et seq.* (assumption of indebtedness on residential rental property; restricting due on transfer provisions, etc.; repealed as of May 5, 2008); 12 USC § 1701j-3 (the Garn-St. Germain Act which largely preempts the former Utah rule and generally allows such clauses with some exceptions).

(f) Consumer Credit. UCA § 70C-2-203 (no security interest in dwelling on consumer lease); UCA § 70C-1-101 *et seq.* (Utah Consumer Credit Code; not applicable to first lien interest on dwelling or building lot); 15 USC §§ 1601 through 1611 (known as the Truth in

Lending Act) and Regulation Z of the Federal Reserve Board (federal Consumer Credit Protection Act and rules). These rules provide special procedures for consumer credit secured by second mortgage, which may in some cases include rescission. Compare *Black v. First Choice Fin., LLC*, 2011 WL 5834292 (D. Ut. 2011, Judge Kimball), with *McGinnis v. GMAC Mortg. Corp*., 2010 WL 3418204 (D. Ut. 2010, Judge Campbell) (courts disagreeing on need for debtor to plead ability to tender and repay loan proceeds on rescission).

Under Reg. Z, "A creditor [in a consumer credit transaction] shall not make a loan that is a covered transaction [secured by a dwelling, with certain exceptions] unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms". 12 C.F.R. § 1026.43(c). There is a safe harbor presumption of compliance for certain qualifying transactions which are not in a particularly risky category. 12 C.F.R. § 1026.43(e). The risk features targeted by the rule include loans providing for interest only, balloon payments, increasing principal, or terms over 30 years. The presumption is conclusive for some qualifying transactions and rebuttable for others with higher than normal interest rates. Failure to comply with Reg. Z investigation provisions (or similar state law provisions in states that have them) may risk the lender not being treated as a bona fide encumbrancer for value and thus not entitled to have its security protected in some circumstances, such as transactions tainted by fraud or other misconduct by others.

Some courts have found lenders to have a duty to investigate further in suspicious transactions. See *Johnson v. Duets he Bank Nat'l Trust Co*., 2011 WL 3675691 (Cal. App. 2011) (material dispute over whether lender is bona fide encumbrancer); *In re Harydzak*, 406 BR 499 (Bnkr. S.D. Tex. 2009) (involving foreclosure rescue scam). Other courts have not found such a duty. See *Davenport v. GMAC Mortgage*, 2013 WL 5437119 (Nev. 2013) (involving alleged identity theft). Banks may need to file suspicious activity reports in some circumstances, such as foreclosure rescue scams. See generally, Bailey and Desiderio, A Lender's Duty to Investigate Its Borrower, Probate and Property, Vol. 29, No. 2, March/ April 2015, p. 37.

How about counsel for the lender? Is counsel subject to such a duty? Counsel can usually rely on the reasonable assurances of its client, the foreclosing creditor, that the prerequisites for foreclosure have been met. *Speleos v. BAC Home Loans Servicing, L.P*., 824 F.Supp.2d 226, 231 (D. Mass. 2011) (no duty to debtor to investigate the legality of foreclosure due to debtor's phone call stating that debtor was under consideration for loan modification).

However, if a tort is involved, counsel could be responsible under the rule that where counsel acts as agent for a client it could be liable as such. In *Dutcher v. Matheson*, 733 F.3d 980, 989 (10th Cir. 2013), the court found that, under Utah law, an attorney, as mere counsel and agent of a successor trustee, would not be immune from suits by non-clients for actions taken in representing the client absent fraud, collusion, or privity of contract. Rather, like all agents, an attorney would be liable for torts that the attorney committed while working for the benefit of a principal. Restatement (Third) of the Law Governing Lawyers § 56 (2000).

(g) Required Writings. UCA §§ 25-5-1 and 3 (writing required for interests in land) and 25-5-5-4 (writing for certain credit agreements required). UCA § 70D-1-1 *et seq.* (mortgage lending and servicing act).

(h) Criminal Provisions. UCA § 76-6-503.5 (criminal wrongful liens and fraudulent handling of recordable writings), UCA § 76-6-504 (criminal tampering with records), UCA § 76-6-511 (criminal defrauding of creditors; purpose to hinder enforcement of security interest), UCA § 76-8-414 (criminal recording of false or forged instruments), UCA §§ 76-8-412 and 413 (criminal stealing, destroying, or mutilating public records).

(i) Uniform Commercial Code. The Utah Uniform Commercial Code is very similar to the Uniform Commercial Code (UCC) of other states, and it has some provisions relating to notes and mortgages which persons desiring to take an interest in the note and mortgage should consider.

(i) Perfection and Priority. UCC § 9-308(e) (UCA § 70A-9a-308(5) in Utah's version of the UCC) allows perfection of the note to also perfect the mortgage that goes with it. The same rule applies to attachment. UCC § 9-203(g).

1) Perfection of a security interest in a note by filing is possible but is not a very good method in most cases, because a buyer of the note in good faith without notice of a violation of the security interest who takes possession of the note gets priority, despite the filing. UCC § 9-312(a) (filing permitted); but UCC § 9-330(d) (subject to purchaser). Filing to perfect may, however, be useful on large pools of notes left with the debtor for collection.

2) Also, a holder in due course of the note may take free and clear under UCC §§ 3-303 and 3-306, unless it knows of the conflicting security interest; see, also, UCC § 9-331 (Article 9 does not limit rights of holder in due course).

3) Also, payment by the note debtor is governed by Article 3; thus, the note debtor may be discharged on paying the note to someone else under the terms of the note without notice of assignment, etc.

(ii) Perfection by Possession. The best way to take a security interest in notes and mortgages would be to have the notes assigned and endorsed and the mortgages assigned of record, and to take physical possession of them. This is also the best way to take a participation interest (possession may be by custodian under an authenticated agreement; UCC § 9-313(c)). UCC § 9-313(a). See also 11 USC § 541(d) (property of bankruptcy estate includes equitable interest retained in a sold mortgage or interest in a mortgage).

(iii) Description. Under UCC § 9-108, the description of the real property or of the personal property collateral may be sufficient in the security agreement, whether or not it is specific, if it reasonably identifies what it describes. However, the description may raise questions as to whether the collateral is determinable. This would affect whether the interest attaches to any collateral. Clarity is best.

(j) Forfeiture. Administrative, civil, and criminal forfeiture rules may apply to the property in which a creditor has a security interest. Many federal and state laws contain forfeiture provisions. The process for dealing with forfeitures will be complex. See, *e.g.*, 18 USC § 983 (administrative forfeiture); 18 USC § 983, Fed. R. Civ. P., Supp. Rule G (civil forfeiture; 18 USC § 983(d) is the innocent owner provision); 21 USC § 853, Fed. R. Crim. P. 32.2 (criminal forfeiture; 21 USC § 853(c), (n) are the innocent owner provisions); 28 CFR Part 9 (remission or mitigation of civil and criminal forfeitures).

INTRODUCTION TO SECURITY INTERESTS IN UTAH REAL PROPERTY

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