Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative

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David S. Willenzik*

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INTRODUCTION

In Louisiana, no security device has been used as frequently, or for such varied purposes, as the mortgage. The Louisiana law of mortgage, like other laws regulating commerce and finance, has evolved to address the increasingly complex needs of borrowers and creditors in modern society. Among the products of this evolution is the future advance collateral mortgage. The future advance collateral mortgage is a hybrid security instrument comprised of both a mortgage and a pledge or security agreement, which has the major advantage of being able to secure multiple present and future loans and other obligations on a cross-collateralized basis.

This article will discuss the future advance priority rights of collateral mortgages in three different contexts. Parts I and II of this article will discuss "pre-1990 collateral mortgages" and collateral chattel mortgages that were granted prior to the effective date of the Louisiana version of U.C.C. Article 9 (hereinafter "Louisiana U.C.C."). Part I will address the general structure and limitations of pre-1990 collateral mortgages and problems inherent in their use, with Part II addressing legislative efforts under Act 137 of 1989 to correct certain of these problems. Part III of this article will discuss "post-1989 collateral mortgages," which are subject to Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute. Finally, Part IV of this article will discuss new "multiple indebtedness mortgages" as the evolutionary successor to future advance collateral mortgages.

1. This article uses the term "future advance collateral mortgage" to describe a collateral mortgage that is intended to secure multiple present and future debts and other obligations on a cross-secured or cross-collateralized basis. While a collateral mortgage may also be used to secure a single, one-time extension of credit, the primary focus of this article is on the future advance priority rights of Louisiana collateral mortgages.

2. This article uses the term "pre-1990 collateral mortgages" to describe collateral mortgages and collateral chattel mortgages granted prior to the January 1, 1990 effective date of 1989 La. Acts No. 135, § 7, enacting Louisiana U.C.C. Article 9.


5. This article uses the term "post-1989 collateral mortgages" to describe collateral mortgages granted on and after the January 1, 1990 effective date of 1989 La. Acts No. 135, § 7.


I. LOUISIANA COLLATERAL MORTGAGES GENERALLY AND IN A PRE-1990 HISTORICAL CONTEXT

A. Advantages of a Future Advance Collateral Mortgage

The major advantage of a future advance collateral mortgage is its ability to secure present and future cross-collateralized indebtedness, with retroactive priority rights as to intervening creditors back to the time the mortgage was originally filed, or the collateral mortgage note was delivered in pledge, whichever was the last to occur. In comparison, prior to the 1991 comprehensive revisions to the Louisiana Civil Code mortgage articles, an ordinary conventional mortgage granted to secure an identified (paraphed) note evidencing actual indebtedness, could secure only a one-time extension of credit. An ordinary conventional mortgage could not secure revolving lines of credit or other or future cross-collateralized debt because the lien of an ordinary mortgage, granted prior to the 1991 revision of the Louisiana Civil Code mortgage articles, is reduced automatically as payments are made on the underlying mortgage note. In further

8. The most notable example is multiple loan advances extended under a revolving line of credit. A revolving line of credit is an arrangement under which a borrower may obtain loan advances from time to time one or more times up to an established credit limit, make payments to the creditor, and then borrow again and again up to the borrower's established credit limit, all on a pre-authorized, self-replenishing line of credit basis. Revolving lines of credit are generally evidenced under what are known as "master" promissory notes.


9. Collateral mortgages can also secure non-monetary obligations, such as contract performance obligations. See La. Civ. Code art. 3294.


11. Prior to the revision of the Civil Code mortgage articles, three forms of conventional mortgages were authorized in Louisiana: (1) ordinary conventional mortgages; (2) multiple advance mortgages; and (3) collateral mortgages. The Civil Code mortgage revisions under 1991 La. Acts No. 652, § 1 (effective Jan. 1, 1992), authorized a fourth form of conventional mortgage: multiple indebtedness mortgages discussed in part IV of this article.


comparison, a multiple advance mortgage, which was a special form of conventional mortgage in use prior to 1992, could secure only staged, non-self-replenishing loan advances, such as those made in construction financing. This type of multiple advance mortgage could not secure self-replenishing or revolving lines of credit under which the borrower has the right to borrow and reborrow up to an established credit limit.

Future advance collateral mortgages are not specifically recognized under the Louisiana Civil Code. They are creatures of commercial practice that arose out of the need for a special form of mortgage to secure revolving lines of credit and multiple present and future cross-collateralized debts. The law of collateral mortgages evolved jurisprudentially over the years, with the concept of a collateral mortgage being judicially recognized as early as 1869 in the case of Succession of Dolhonde.

B. General Structure of a Future Advance Collateral Mortgage

A future advance collateral mortgage can secure revolving lines of credit as well as other or future cross-collateralized debts because a collateral mortgage incorporates both a mortgage and a pledge. In a typical collateral mortgage transaction, the borrower grants a collateral mortgage in favor of “any person, firm, or corporation,” or alternatively in favor of the initial named mortgagee/creditor

The Civil Code mortgage articles were substantially revised by 1991 La. Acts No. 652, § 1 (effective Jan. 1, 1992). Louisiana Civil Code article 3298 now provides that a conventional mortgage may directly secure multiple present and future loans, and other obligations not evidenced by mortgage notes paraphed for identification with the mortgage. To accomplish this, however, a conventional mortgage must contain specially drafted provisions. This new specially drafted form of mortgage is commonly referred to as a “multiple indebtedness mortgage,” and is discussed in detail in part IV of this article.


15. While collateral real estate mortgages are jurisprudential in nature, collateral chattel mortgages are recognized under various sections of the Louisiana Revised Statutes, including: La. R.S. 9:5351-5366.2 (1991) (collateral chattel mortgages on general inventory and items in bulk); La. R.S. 9:5367-5373 (1991) (collateral chattel mortgages on commercial and industrial equipment in bulk); and La. R.S. 32:710 (Supp. 1994) (collateral chattel mortgages on motor vehicle floor plan inventory). However, collateral chattel mortgages, as well as collateral preferred ship mortgages, are no longer used, having been totally superseded by Louisiana U.C.C. Article 9.

Since 1989, collateral mortgages have also been recognized statutorily and are governed by the Louisiana collateral mortgage statute, La. R.S. 9:5550-5554 (1991).


17. The characteristics of a collateral mortgage are discussed at length in First Guar. Bank v. Alford, 366 So. 2d 1299, 1302 (La. 1978). See also Nathan & Marshall, supra note 8, at 449-506.

18. The collateral mortgage forms in M. Truman Woodward, Woodward’s Louisiana Notarial
and any subsequent holder or holders of the collateral mortgage note. The collateral mortgage agreement stipulates that the mortgage secures a collateral mortgage note, which is generally payable to bearer on demand, and which is paraphed "Ne Varietur" by the closing notary for identification with the mortgage. The collateral mortgage note is then delivered by the borrower in pledge to the creditor, pursuant to a separate collateral pledge or security agreement, which typically is in writing. The collateral pledge or security agreement identifies the indebtedness intended to be secured by the pledge of the collateral mortgage note, and thereby indirectly secured by the accessory collateral mortgage. Generally, the secured indebtedness is defined to include the specific loan or line of credit the creditor is granting at the time the mortgage is executed. It also is common for the collateral pledge or security agreement to include language to the effect that the borrower is pledging the collateral mortgage note to additionally secure any and all present and future loans, extensions of credit, liabilities and obligations of every nature and kind that the borrower may then and in the future owe to or incur in favor of the creditor, or its successors and assigns, whether such loans, extensions of credit, liabilities and obligations are direct or indirect, absolute or contingent, voluntary or involuntary, determined or undetermined, liquidated or unliquidated, or due or to become due. This is known as a "cross-collateralization" or "dragnet" clause.

Manual §§ 5.23 and 5.25 (2d ed. 1962), and in James D. Johnson, Basic Louisiana Notarial Guide § 28.6 (1986), are examples of old-style collateral mortgages in favor of "any person, firm, or corporation."

19. See infra notes 50-55 and accompanying text for discussion of so-called "landed" collateral mortgages.

20. This complies with the requirement of La. Civ. Code art. 3384 (1870). See Gulf Nat'l Bank v. Dupuis, 402 So. 2d 789, 792 (La. App. 3d Cir.), writ denied, 406 So. 2d 626 (1981), in which the court stated, "[I]t is essential in constructing a collateral mortgage package that the collateral mortgage note be identified with the act of mortgage. Paraphing of the collateral mortgage note identifies the note with the act of mortgage."

21. This article uses the generic term "borrower" to describe the borrower, the pledgor, and the mortgagor under a collateral mortgage package. A collateral mortgage may be granted by a mortgagor to secure the debts of a third-party borrower. La. Civ. Code art. 3295.

22. This article uses the generic term "creditor" to describe the lender, the pledgee, and the mortgagee under a collateral mortgage package.

23. A U.C.C. security agreement subject to Louisiana U.C.C. Article 9 is the functional equivalent of a collateral pledge agreement subject to the pledge articles of the Civil Code, including specifically Article 3158.

24. As discussed infra notes 56-58 and 201-202 and accompanying text, the borrower's collateral pledge or U.C.C. security agreement need not be reduced to writing, although it is better practice to always require the borrower to sign a written agreement.


26. The proper place to include future advance/cross-collateralization language is in the borrower's collateral pledge or U.C.C. security agreement, rather than in the collateral mortgage. See Texas Bank v. Bozorg, 457 So. 2d 667, 675 n.10 (La. 1984).

27. Cross-collateralization of pledged debts has been permitted under La. Civ. Code art. 3158.
C. How Future Advance Collateral Mortgages Work

A future advance collateral mortgage, separate from the pledge of the collateral mortgage note, does not and cannot directly secure multiple revolving line of credit loan advances, or other or future cross-collateralized debts, because the lien of a conventional mortgage granted prior to the 1991 revisions to the Louisiana Civil Code mortgage articles is reduced automatically as payments are made on the underlying mortgage note.28 A collateral mortgage is able to secure multiple extensions of credit only on an indirect basis by securing a collateral mortgage note on which payments are never made,29 which is then pledged under a separate collateral pledge or security agreement to secure the borrower’s actual present and future indebtedness evidenced by one or more hand notes.30 Pre-1990 collateral mortgages operated in this fashion because the pledge of the collateral mortgage note, prior to the adoption of Louisiana U.C.C. Article 9, was governed by the Louisiana Civil Code articles on “pledge,” and specifically by Article 3158. Article 3158 was far more flexible than the then applicable Louisiana Civil Code articles governing mortgages, and allowed a pledge to secure multiple and future extensions of credit, thus permitting cross-collateralization of pledged debt.31 Post-1989 collateral mortgages also operate

since 1952 (as revised by 1952 La. Acts No. 290, § 1). Article 3158 was further amended by 1989 La. Acts No. 137, § 17, specifically to reference inclusion of cross-collateralization clauses in borrower collateral pledge agreements in response to critical comments contained in Max Nathan, Jr. & Anthony P. Dunbar, The Collateral Mortgage: Logic and Experience, 49 La. L. Rev. 39 (1988). See infra text accompanying note 126. 28. This was the rule under La. Civ. Code art. 3292 (1870) prior to the 1991 revisions to the Civil Code mortgage articles. As a result of the revision to La. Civ. Code art. 3298, a conventional mortgage drafted in the form of a new multiple indebtedness mortgage may now directly secure multiple present and future loans and other obligations not evidenced by a paraphed mortgage note. However, new multiple indebtedness mortgages have not totally replaced the multiple advance collateral mortgage as an open-ended security instrument. Multiple advance collateral mortgages may continue to be used in their traditional form after the 1991 Civil Code mortgage revisions. To avoid unnecessary confusion, this article does not attempt to distinguish between collateral mortgages granted before and after the 1991 revisions to the Civil Code mortgage articles. The only distinction between types of mortgages made in this article is between future advance collateral mortgages granted before the January 1, 1990 effective date of Louisiana U.C.C. Article 9 (“pre-1990 collateral mortgages”), and future advance collateral mortgages granted on and after January 1, 1990 (“post-1989 collateral mortgages”). 29. Again, this was the rule prior to the 1991 revisions to the Civil Code mortgage articles. 30. As stated by the court in Cameron Brown South, Inc. v. East Glen Oaks, Inc., 341 So. 2d 450, 456 (La. App. 1st Cir. 1976), “the collateral mortgage note [‘ne varietur note’] does not represent the indebtedness; it is the security that is pledged to secure another note, usually a hand note, which represents the indebtedness. The true indebtedness is the debt that the collateral mortgage note is pledged to secure.” See also Texas Bank v. Bozorg, 457 So. 2d 667, 671 n.4 (La. 1984); Nathan & Marshall, supra note 8, at 498. 31. La. Civ. Code art. 3158(C)(1) provides in pertinent part: Whenever a pledge of any instrument . . . is made . . . to secure advances to be made up to a certain amount, and, if so desired or provided, to secure any other obligations or
in this manner because Louisiana U.C.C. § 9-204(3)\textsuperscript{32} and § 9-312(7)\textsuperscript{33} permit U.C.C. security interests to secure other or future indebtedness on an open-ended cross-collateralized basis.\textsuperscript{34}

The future advance priority rights of a pre-1990 collateral mortgage were also based on jurisprudential expansions of Article 3158, most notably in the Louisiana Fourth Circuit Court of Appeal's decision in \textit{New Orleans Silversmiths, Inc. v. Toups}.\textsuperscript{35} The court in \textit{New Orleans Silversmiths} held subsequent related and unrelated loan advances may be secured by the prior pledge of the collateral mortgage note, and thereby indirectly secured by the lien of the mortgage, with priority rights retroactive to the time the mortgage was originally filed, or the time the collateral mortgage note was delivered in pledge. To achieve this result, the court required that collateral mortgages satisfy five conditions precedent.\textsuperscript{36} First, the pledge of the collateral mortgage note must have been properly perfected by physical delivery of the note in pledge to the secured creditor or to the creditor's designated agent.\textsuperscript{37} Second, the parties must have agreed at the time of the pledge that the pledged collateral mortgage note would also secure present and future loans, other extensions of credit, and liabilities of the borrower up to the limit of the pledge.\textsuperscript{38} In other words, the borrower's pre-1990 collateral pledge agreement must have contained broad future advance/cross-collateralization language if such debts were to be secured.

\begin{itemize}
\item liabilities of the pledgor or any other person, to the pledgee, or its successor, then existing or thereafter arising, up to the limit of the pledge, such as may be included in a cross-collateralization clause, and the pledged instrument or item remains \ldots in the hands of the pledgor or its successor, the instrument or item may \ldots be repledged to the pledgee or its successor to secure at any time \ldots any new or additional loans, even though the original loan has been reduced or paid, up to the total limit which it was agreed should be secured by the pledge, and, if so desired or provided, to secure any other obligations or liabilities of the pledgor or any other person to the pledgee or its successor, then existing or thereafter arising, up to the limit of the pledge, without any added notification or other formality, and the pledge shall be valid \ldots against third persons \ldots if made in good faith; and such \ldots additional loans and advances or other obligations or liabilities shall be secured by the collateral to the same extent as if they came into existence when the instrument or item was originally pledged and the pledge was made to secure them.
\end{itemize}

38. La. Civ. Code art. 3158(E)(1) requires that when a pledge is intended to secure future obligations, the underlying pledge agreement must state the maximum amount intended to be secured.
Third, each subsequent loan or extension of credit must be secured by the pledge of the collateral mortgage note. Fourth, the pledged note must remain continuously in the hands of the creditor or its designated agent. Finally, the parties at all times must act in good faith.

The practical advantages of a future advance collateral mortgage are obvious. By securing a loan with a collateral mortgage and by including broadly drafted future advance/cross-collateralization language in the collateral pledge or security agreement, a creditor is able to assure that additional credit extended to the borrower will be secured by the prior lien of the mortgage back to the time of original filing of the mortgage or pledge of the collateral mortgage note, irrespective of whether a potentially competing creditor may have filed a junior mortgage or lien against the property during the interim period. For this reason, collateral mortgages have become the preferred mortgage instrument in Louisiana, at least among knowledgeable creditors and their attorneys.

D. Problem Areas and Unanswered Questions Relating to Pre-1990 Collateral Mortgages

The use of pre-1990 collateral mortgages has not been without some degree of risk and uncertainty. As a product of commercial usage, future advance collateral mortgages have been subject to evolving judicial construction, the vagaries of which have resulted in numerous problem areas and questions, only some of which have been resolved. The following sections will discuss some of the more important problems and unanswered questions that continue to shadow

39. This article intentionally shifts back and forth between the past and present tense when discussing pre-1990 collateral mortgages, many of which remain outstanding to this day, and secure presently existing as well as future extensions of credit. For purposes of explanation, this article uses the past tense (e.g., "was" and "were") when discussing the rules and principles that applied to pre-1990 collateral mortgages at inception of the transaction, and which no longer apply to post-1989 collateral mortgages now subject to Louisiana U.C.C. Article 9. The present tense (e.g., "is" and "are") is used when discussing the rules and principles that continue to apply to advances and new loans and obligations that are secured by now outstanding pre-1990 collateral mortgages. The present tense is also used when the statement applies to both time periods.


41. As required under La. Civ. Code art. 3158(C)(1), and as further required under La. Civ. Code art. 1759. "Good faith" is defined in Louisiana as the absence of bad faith, with "bad faith" being defined under La. Civ. Code art. 1997 cmt. (c) as "an intentional and malicious failure to perform." See also Commercial Nat'l Bank v. Audubon Meadow Partnership, 566 So. 2d 1136 (La. App. 2d Cir. 1990).


43. Unfortunately, the Federal National Mortgage Association ("FNMA" or "Fannie Mae") does not accept the purchase of Louisiana real estate mortgages executed under a collateral mortgage format. For this reason, most residential first mortgage loans in Louisiana are secured by ordinary conventional real estate mortgages, rather than by collateral mortgages. Without question, collateral mortgages are the preferred mortgage instrument used in Louisiana in commercial real estate transactions.
pre-1990 collateral mortgages and collateral chattel mortgages granted prior to the adoption of Louisiana U.C.C. Article 9.\footnote{44}

1. Was It Necessary That a Pre-1990 Collateral Mortgage Be in Favor of a Nominal Party?

Nathan and Marshall point out in their law review article, \textit{"The Collateral Mortgage,"}\footnote{45} that the most serious functional disadvantage of a collateral mortgage is that the mortgage invariably is in favor of "any person, firm or corporation," or some nominal party, so that a third person examining the public mortgage records has no way of knowing the identity of the creditor/mortgagee.\footnote{46} This knowledge may be essential because, under \textit{Mennonite Board of Missions v. Adams}\footnote{47} and its progeny,\footnote{48} for a judicial foreclosure sale to survive due process scrutiny, the seizing sheriff or other judicial officer must notify each third party having an ownership or security interest in the mortgaged property of its pending judicial foreclosure sale.\footnote{49} A foreclosing creditor may have a great deal of difficulty ascertaining whether \textit{Mennonite} notices were properly given when the prior mortgage is in the form of a traditional collateral mortgage made in favor of "any person, firm or corporation."

Since the 1973 date of the Nathan and Marshall article, an increasing number of practitioners have begun to use what are referred to as "landed" collateral mortgages—collateral mortgages made in favor of an initial named mortgagee and any future holder or holders of the collateral mortgage note.\footnote{50} While former Louisiana Revised Statutes 9:5392\footnote{51} and the Louisiana collateral

\begin{footnotes}
\footnotetext[45]{45.} Nathan & Marshall, \textit{supra} note 8.
\footnotetext[46]{46.} Id. at 523-24.
\footnotetext[48]{48.} Sterling v. Block, 953 F.2d 198 (5th Cir. 1992); Davis Oil Co. v. Mills, 873 F.2d 774 (5th Cir. 1989); Small Engine Shop, Inc. v. Cascio, 878 F.2d 883 (5th Cir. 1989); Magee v. Amiss, 502 So. 2d 568 (La. 1987).
\footnotetext[50]{50.} A "landed" collateral mortgage may be captioned:
\begin{quote}
Act of Collateral Mortgage

By: ABC Corporation

In Favor of: First National Bank and any Future Holder or Holders of the Collateral Mortgage Note
\end{quote}
mortality statute specifically sanction the use of landed collateral mortgages, the courts have never addressed whether a collateral mortgage granted prior to the effective dates of these statutes may be made in favor of an initial named creditor and any subsequent holder or holders of the collateral mortgage note. Presumably, landed collateral mortgages have always been permitted, and unquestionably should be used in light of Mennonite. The "any person, firm or corporation" collateral mortgage forms included in several widely distributed formularies are outdated and potentially misleading to practitioners.

2. Was It Necessary That the Borrower's Pre-1990 Collateral Pledge Agreement Be in Writing?

No. Article 3158 permitted oral pledge agreements if the borrower expressed an intent to pledge the collateral mortgage note to the creditor to secure the borrower's indebtedness and the borrower actually delivered the note in pledge to the creditor or its third-party agent. Nevertheless, prudent creditors and their counsel always required borrowers to sign a separate written collateral pledge agreement as a part of the borrower's pre-1990 collateral mortgage package. This was and remains the best way for the creditor to establish the extent of the indebtedness the borrower intends to secure.


53. 1988 La. Acts No. 985, § 1, enacting La. R.S. 9:5392 (1991), was declared by the legislature to be remedial in nature and therefore intended to have retroactive applicability to then existing collateral mortgages and collateral chattel mortgages. See 1988 La. Acts No. 985, § 2.

54. There is no requirement that collateral mortgages be drafted in a landed format; although it is certainly better practice to do so.

55. Woodward, supra note 18, and Johnson, supra note 18.


\[\text{We note that while this document [the collateral pledge agreement] may be evidence of an intent to pledge[,] it is not necessary to perfect a pledge of the type involved in this case. The pledge here was of a ne varietur collateral mortgage note in bearer form. To pledge such a negotiable instrument[,] no written agreement or other formality beyond delivery to the pledgee is required.}

See also Wallace v. Fidelity Nat'l Bank, 219 So. 2d 342 (La. App. 1st Cir.), writ denied, 253 La. 1083, 221 So. 2d 517 (1969).

57. The concept of the collateral mortgage package is discussed in Cameron Brown South, Inc. v. East Glen Oaks, Inc., 341 So. 2d 450, 455 (La. App. 1st Cir. 1976). It remains good practice for creditors and their counsel always to use a separate written form of collateral pledge or U.C.C. security agreement rather than to include pledge language in the borrower's evidentiary hand note. See infra note 75.

58. See Rubin, supra note 42, at 422, pointing out the prudence of using a separate written collateral pledge agreement.
3. Was It Necessary That the Collateral Pledge Agreement Be Executed in Authentic Form?

Louisiana Code of Civil Procedure article 2635(2) provides the remedy of executory process is available only to holders of Louisiana real estate mortgages executed in authentic form in the presence of a notary public and two witnesses. The question presented prior to the adoption of Louisiana U.C.C. Article 9 was whether the borrower's pre-1990 collateral pledge agreement also had to be executed in authentic form. While the courts have never addressed this issue, it seems that a collateral pledge agreement need not have been executed in authentic form for the creditor to foreclose on the collateral mortgage utilizing executory process procedures. The legal principle first established in Miller, Lyon & Co. v. Cappel, requiring every link in the chain of ownership of a paraphed mortgage note to be in authentic form for a transferee to foreclose on the mortgage utilizing executory process procedures, is limited to transfers of "order" mortgage notes. This requirement is not applicable to pledges or transfers of collateral mortgage notes made payable to "bearer." Furthermore, Louisiana Revised Statutes 9:4422(2) provides that "[t]he . . . pledge . . . of any obligation secured by a mortgage . . . may be proven by any form of private writing, and such writing shall be deemed authentic for purposes of executory process." This statute was added under Act 292 of 1989, and clearly applies to pre-1990 pledges of collateral mortgage notes.

4. What Was the Effect of a Delay in Making the Initial Loan or Advance Secured by a Pre-1990 Collateral Mortgage?

Under New Orleans Silversmiths, the lien of a pre-1990 collateral mortgage became effective (i.e., took ranking priority) against competing creditors from the time the mortgage was filed for registry, or the time the collateral mortgage note was delivered in pledge, whichever was the last to occur. Assuming the five New Orleans Silversmiths conditions are satisfied, future loan advances and other cross-collateralized debts are secured retroactively by the lien of the mortgage, irrespective of when the advances or extensions of credit are actually made.
The question presented is what was the effect, if any, of a delay in making the initial loan or advance secured by a pre-1990 collateral mortgage? What if the borrower granted a junior mortgage to a competing creditor affecting the same property and the competing creditor perfected its mortgage before the initial loan advance was made?

The Louisiana Third Circuit Court of Appeal considered this question in People’s Bank & Trust Co. v. Campbell, 66 in which the court stated:

Pledge is a contract, and it must be considered as such. ... Mere delivery of the collateral mortgage and mortgage note to the Bank in itself may not be sufficient to constitute a contract. What is needed is a “meeting of the minds” that the delivery of the mortgage and note is intended as a pledge to secure a loan, present or future. In order for such a delivery to constitute a pledge, it must be accompanied by an agreement to stand as security for repayment of a debt, either presently existing or contemplated to be made in the future. 67

Thus, as long as the borrower and the secured creditor agreed that the borrower’s pre-1990 collateral mortgage note would secure a loan or loans to be extended at some undetermined future time, and the parties otherwise acted in good faith, 68 then the fact that there may have been some delay in the initial extension of credit should not have had the effect of reordering the priority rights of a first filed and properly perfected pre-1990 collateral mortgage against the rights of a competing creditor that filed a junior mortgage or lien against the same property during the interim period.

5. Was It Necessary That There Be a Binding Commitment to Lend at the Time a Pre-1990 Collateral Mortgage Was Granted?

As discussed in Part III of this article, the giving of value by the creditor, such as the issuance of a binding loan commitment, is essential under Louisiana U.C.C. Article 9 for a completed or perfected pledge of a collateral mortgage note. 69 This, however, is the Louisiana U.C.C. rule that applies only to post-1989 collateral mortgages—those granted on and after January 1, 1990. The courts have never considered whether, under the pledge articles of the Civil Code as applicable to pre-1990 collateral mortgages and collateral chattel mortgages, a pledge was deemed to be complete without an actual extension of credit, or at

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67. Id. at 744 (footnotes omitted) (emphasis added).
68. In conformity with the fifth condition precedent of New Orleans Silversmiths.
69. See infra text accompanying note 175.
a minimum, some form of binding loan commitment on the part of the secured creditor. While there is room for debate on the issue, a careful reading of Article 3158 and *New Orleans Silversmiths* suggests the existence of a binding loan commitment was never required to perfect the pledge of the collateral mortgage note and to establish the priority of a pre-1990 collateral mortgage, so long as the parties originally contemplated that some type of secured loan would be made in the future. This again presumes the parties acted in good faith as required by *New Orleans Silversmiths* and not in an attempt to prejudice the rights of the other creditors by encumbering the property with no reasonable anticipation of there being an actual secured debt.

6. *What Was the Effect of New Credit Being Extended After the Original Loan Was Paid in Full?*

Assume the following facts: A borrower granted a pre-1990 collateral mortgage in favor of a creditor to secure a particular loan. The borrower's collateral pledge agreement referred to the contemporaneous loan and also contained future advance/cross-collateralization language. The borrower delivered the collateral mortgage note to the creditor in pledge. One year later, the borrower prepaid the original loan in full. The borrower did not request the return of the pledged collateral mortgage note, and the note remained in the creditor's possession. The borrower also did not ask that the collateral mortgage be cancelled from the public records. Six months later, the borrower obtained an additional loan from the same creditor with the understanding that the new loan was secured by the original first mortgage on the property. During the interim period, the borrower granted a junior mortgage on the same property in favor of a competing creditor. What was the effect of the lapse in credit? Was the original creditor's subsequent loan in favor of the borrower entitled to be ranked as of the time the mortgage was originally filed, or the time the collateral mortgage note was originally delivered in pledge?

The Louisiana Supreme Court addressed this issue in *Acadiana Bank v. Foreman*, holding that a lapse in credit did not cause Acadiana Bank's pre-

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71. This is consistent with People's Bank & Trust Co. v. Campbell, 374 So. 2d 741 (La. App. 3d Cir.), *writ denied*, 376 So. 2d 1268 (1979), which did not involve the issuance of a binding loan commitment.

72. 352 So. 2d 674 (La. 1977).
1990 collateral mortgage to lose its priority rights when all of the conditions precedent of New Orleans Silversmiths were otherwise satisfied.\(^7\)

7. What Constitutes Reissuance of a Pre-1990 Collateral Mortgage Note?

According to Odom v. Cherokee Homes, Inc.,\(^7\) the lien of a pre-1990 collateral mortgage is re-ranked (i.e., takes new priority) if the pledged collateral mortgage note subsequently is “reissued” in pledge to the original creditor or to another creditor. What is sufficient to constitute a “reissuance”? Is it necessary that the collateral mortgage note be returned physically to the borrower and then repledged, or can a reissuance occur as a result of the repledge of the collateral mortgage note to the original creditor to secure a new debt when the original creditor has retained possession of the note at all times?

Assume the following facts: A borrower obtained a bank loan secured by a pre-1990 collateral mortgage on the borrower’s property. The borrower executed a collateral mortgage and signed a collateral mortgage note, which the borrower delivered in pledge to the bank. The borrower also executed a promissory “hand” note evidencing his loan obligation. The borrower did not sign a separate collateral pledge agreement. Instead, the bank’s standard promissory hand note form contained pledge language under which the borrower agreed he was pledging the collateral mortgage note to secure that particular loan and note as well as any and all other present and future debts and other obligations of any nature and kind that the borrower may incur in favor of the bank.\(^7\) The borrower subsequently prepaid the original loan in full, and the bank returned the original hand note marked “Cancelled.” The bank retained possession of the collateral mortgage note and made no effort to cancel the collateral mortgage from the public records. Six months later, the borrower applied for and obtained a new loan from the bank and signed a new promissory note that contained the same pledge language as the borrower’s original hand note. Did a reissuance occur? Did the absence of a collateral pledge agreement between the parties for the six month interim period have an effect on the mortgage’s priority? Was it possible for the bank to continue to hold the

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\(^7\) See also First Guar. Bank v. Alford, 366 So. 2d 1299, 1302-03 (La. 1978); Franklin v. Bridges Loan & Inv. Co., 371 So. 2d 294, 296 (La. App. 2d Cir. 1979). La. Civ. Code art. 3158(C)(1) expressly provides that a previously pledged collateral mortgage note may secure cross-collateralized future advances “even though the original loan has been reduced or paid.”


\(^7\) At one time it was common practice for Louisiana banks to include pledge language in their preprinted promissory hand note forms rather than using separate collateral pledge agreements. This practice is outdated, particularly in light of the computerized loan documentation systems that are available and in common use today.
borrower's collateral mortgage note "in pledge" over this interim period with no
debt and no pledge agreement in effect?

No Louisiana court has addressed these issues. If a court were to do so, it
would likely follow New Orleans Silversmiths and hold the lien of the borrower's
pre-1990 collateral mortgage remained in full force and effect with respect to
subsequent extensions of credit by the secured creditor since, under this example,
the collateral mortgage note at all times remained in the hands of the secured
creditor, and the parties originally contemplated that the pledge would secure
other or future extensions of credit on an open-ended basis. Of course, under the
assumed facts, a court might be tempted to hold to the contrary, reasoning that
because the security rights of a pledgee are contractual in nature, the pledge
terminated automatically upon cancellation of the underlying contractual pledge
agreement between the parties (such as the cancellation of the hand note under
the above facts), irrespective of whether the item held in pledge (in this case, the
borrower's collateral mortgage note) was returned to the pledgor. The facts
of this example might invite the latter judicial holding because there was no
collateral pledge agreement in existence between the parties for a six month
interim period, and a contractual pledge relationship was recreated only when the
borrower obtained a new loan and signed a new hand note containing pledge
agreement language.

8. What Was the Effect of the Borrower Signing a New Pledge
Agreement Each Time He Obtained a Loan?

Some Louisiana creditors still require the borrower to sign a new collateral
pledge or U.C.C. security agreement each time he obtains an additional loan
secured by a prior outstanding collateral mortgage. These creditors believe a
new pledge or security agreement assures that the new loan will be secured by
the prior pledge of the collateral mortgage note, and thereby indirectly secured

76. The rights of a pledgee of a collateral mortgage note are contractual in nature. La. Civ.
Code art. 3133 (1870); Alaynick v. Jefferson Bank & Trust Co., 451 So. 2d 627, 630 (La. App. 5th
Cir. 1984); Durham v. First Guar. Bank, 331 So. 2d 563, 565 (La. App. 1st Cir.), writ denied, 334
So. 2d 431 (1976).

77. Professor Harrell implies this possible result. See Thomas A. Harrell, Security Devices,

If the pledge is extinguished the mere fact that the note is left in the hands of the former
pledgee does not give continued validity to the [collateral] mortgage. A new or additional
pledge in such a case is considered technically a new issuance of the note, "revitalizing"
the mortgage that becomes effective only at that time.

78. In essence, cancellation of the borrower's original hand note containing requisite pledge
language arguably results in cancellation and termination of the underlying contractual pledge
relationship between the parties. Delivery of an item in pledge is not sufficient in and of itself to
result in a completed pledge. There also must be an operative and effective agreement between the
parties that the pledged item will serve as collateral security for the borrower's debts. This latter
requirement is lacking in the hypothetical example, at least over the six-month interim period when
no contractual pledge relationship was in existence.
by the prior recorded collateral mortgage, despite the fact that the borrower's original collateral pledge or security agreement and each subsequent agreement contain the same future advance/cross-collateralization language.

This practice, as applicable to pre-1990 collateral mortgages, appears to have been unnecessary under New Orleans Silversmiths when the borrower's original pre-1990 collateral pledge agreement contained broadly drafted future advance/cross-collateralization language, and the amount of the additional loan did not exceed, in the aggregate, the maximum limit of the pledge specified in the original agreement. This practice also appears to be dangerous under Odom v. Cherokee Homes since a reissuance may be deemed to have occurred. Louisiana courts have never addressed whether the borrower's execution of a new collateral pledge agreement to secure a new loan when the borrower's pre-1990 collateral mortgage note is already pledged to the same creditor to secure an antecedent debt, constitutes a completely new pledge, or a reissuance of the note, thereby resulting in a reranking of the mortgage. If a court were to address this issue, it would likely follow New Orleans Silversmiths and hold the new loan is secured by the borrower's pre-1990 collateral mortgage with priority rights retroactive to the time of original filing or pledge since the creditor at all times retained possession of the collateral mortgage note in pledge, and the parties contemplated under the original collateral pledge agreement that the borrower's subsequent loans would be secured by the original pledge. It is possible, however, that a court could hold to the contrary and find that, by signing a new pledge agreement in connection with each new loan, the borrower intended that there be a completely new pledge, or a reissuance, of the collateral mortgage note. The court might therefore hold the lien of the borrower's pre-1990 mortgage, as affecting and securing the new loan, takes its ranking priority as against intervening creditors only from the time the new pledge agreement was signed.

79. See supra text accompanying note 74.
80. This is analogous to Citizens Nat'l Bank v. Coates, 509 So. 2d 103 (La. App. 1st Cir. 1987), in which the court upheld the borrower's ability to abrogate the contractual effects of his prior collateral pledge agreement.
81. This same argument could be asserted with respect to post-1989 collateral mortgages now subject to Louisiana U.C.C. Article 9. If a creditor were to insist that the borrower execute a new U.C.C. security agreement each time he enters into a new loan, the borrower's security agreement should contain language to the effect that:

I recognize and agree that I may have previously and may in the future execute one or more additional security agreements in favor of Lender under which I may grant a security interest in the collateral mortgage note. Should this occur, the execution of this Agreement and any additional agreements on my part will not be construed as a cancellation of any of my security agreements or a repledge of my note; it being my full intent and agreement that all of my security agreements (including this Agreement) shall be cumulative in nature and shall remain in full force and effect until such time as Lender should return my collateral mortgage note to me marked "PAID" or "CANCELLED."
9. The Bozorg Question: May an Assignee Creditor Take Advantage of the Original Creditor’s Future Advance Priority Rights?

Assume the following facts: A borrower granted a pre-1990 collateral mortgage in favor of Bank A to secure a particular loan. The borrower’s collateral pledge agreement contained a broadly drafted future advance/cross-collateralization clause. Bank A subsequently assigned the borrower’s loan to Bank B and transferred to Bank B physical possession and ownership of the entire collateral mortgage package, including the borrower’s pledged collateral mortgage note. Bank B then extended an additional loan to the borrower. Was the borrower’s subsequent loan obligation to Bank B secured by the original pledge of the borrower’s collateral mortgage note in favor of Bank A, with priority retroactive to the time the collateral mortgage was originally perfected?

This question was presented to the Louisiana Supreme Court in a slightly different factual context in Texas Bank v. Bozorg. In holding in favor of the intervening creditor, the supreme court found subsequent loans by the assignee bank were not entitled to retroactive ranking priority since the assignee bank was not able to produce a copy of the borrower’s original collateral pledge agreement containing future advance/cross-collateralization language. The court raised but did not resolve the additional question whether an assignee creditor could ever avail itself of future advance priority rights under a pre-existing collateral mortgage.

82. 444 So. 2d 698 (La. App. 5th Cir.), rev’d in part, 457 So. 2d 667 (1984).
83. Id. at 674-675. As stated by the court:
[F]or TBB [the assignee creditor] to establish entitlement to retroactive ranking, it was necessary to prove that FNB [the original creditor] and Bozorg [the borrower] mutually agreed in the 1975 contract of pledge that the pledge would also secure the pledgor’s subsequently arising obligations for which the original collateral mortgage note could be additionally pledged. The 1975 contract of pledge is not in the record, and there is no other evidence of an agreement at the time of the initial pledge that the pledge would secure obligations thereafter arising. Therefore, TBB [the assignee creditor] did not prove its compliance with the requirements of Article 3158 for retroactive ranking. (footnote omitted).

84. Bozorg, 457 So. 2d at 674:
Because there is no proof in this record regarding the initial contract of pledge, we do not reach the question whether loans made to Bozorg by TBB after January 4, 1980 might have been secured with the August 12, 1975 ranking (or even whether an assignee can ever avail himself under La. C.C. Art. 3158 of retroactive ranking for later loans). (emphasis added). This question was affirmatively answered by the legislature when it amended La. Civ. Code art. 3158 by 1989 La. Acts No. 137, § 17, as discussed infra text accompanying notes 106-108.

The supreme court’s dicta question in Bozorg is arguably inconsistent with La. Civ. Code art. 2645 (1870) (“The sale or transfer of a credit includes everything which is an accessory to the same; as suretyship, privileges and mortgage.”). See also La. Civ. Code art. 3312. The sale or transfer of the secured indebtedness from the originating creditor to the assignee creditor should necessarily carry with it all accessory rights under the borrower’s collateral pledge agreement and collateral mortgage,
10. Logical Extension of Bozorg: Must the Collateral Pledge Agreement Refer to Future Loans by the Originating Creditor's Successors or Assigns?

For subsequent loans by an assignee creditor to be secured by a pre-1990 collateral mortgage with priority rights retroactive to the time of original filing or pledge, must the borrower's original collateral pledge agreement explicitly state that the pledge of the collateral mortgage note is intended to secure future loans that may be made by the originating creditor's successors and assigns? This logical extension of Bozorg was not raised by the supreme court in its opinion. The drafters of the 1989 amendments to Article 3158, however, anticipated this extension and attempted to legislatively prevent it under Act 137 of 1989. Nevertheless, the Louisiana First Circuit Court of Appeal in Premier Bank, National Ass'n v. Prevost Motors, Inc., did not apply the 1989 amendments to Article 3158, and instead applied the logical extension of Bozorg as feared and predicted by the legislative drafters. The 1989 amendments to Article 3158 and the Prevost Motors decision are discussed in Part II of this article.

11. Must the Borrower Acknowledge or Agree on Each Occasion on Which an Additional Loan Is Made That the New Loan Is Secured by the Prior Pledge of the Borrower's Pre-1990 Collateral Mortgage Note?

The Louisiana First Circuit Court of Appeal considered this question in Citizens National Bank v. Coates. Resolution of the question requires consideration of the third condition precedent of New Orleans Silversmiths that each subsequent loan in favor of the borrower be secured by the prior pledge of the collateral mortgage note. The court in Coates adopted comments contained in Nathan and Dunbar's 1988 law review article, "The Collateral Mortgage: Logic and Experience," to the effect that some type of contemporaneous manifestation of intent is required of the borrower each time an additional loan is made for the prior pledge of the collateral mortgage note to secure that subsequent loan.

including future advance priority rights thereunder.

86. 597 So. 2d 1136 (La. App. 1st Cir.), writ denied, 605 So. 2d 1115 (1992).
87. See infra part II.B.
88. 563 So. 2d 1265 (La. App. 1st Cir. 1990).
89. Nathan & Dunbar, supra note 27.
90. Coates, 563 So. 2d app. at 1269. See also Nathan & Dunbar, supra note 27, at 64: While an open ended pledge agreement can be used to support future advances, this potentiality does not necessarily mean that it has been so used, or that the parties necessarily intended that any and all subsequent advances would be secured by the pledge. While no written "repledge" agreement is necessary, some manifestation of a specific intent to secure each subsequent advance by the mortgage is required both by New Orleans Silversmiths and by the plain language of article 3158. What is a sufficient manifestation? A ratification of the original pledge would silence all critics. A reference to the mortgage on a hand note given for the subsequent advance should clearly suffice.
result was expressly rejected by the legislative drafters of Act 137 of 1989, and was legislatively overruled by the 1989 amendments to Article 3158 discussed in Part II of this article.\footnote{91} Under Article 3158, as amended, and as applicable to then outstanding transactions,\footnote{92} as long as the borrower’s original pre-1990 collateral pledge agreement contained properly drafted cross-collateralization language, all loans by the secured creditor in favor of the borrower, up to the limits of the pledge, are secured automatically by the prior pledge of the collateral mortgage note “without any added notification or other formality.”\footnote{93}

12. Must the Borrower’s Hand Note State That It Is Secured by the Pledge of the Collateral Mortgage Note?

The Nathan and Dunbar article suggests this practice as a method of revealing the borrower’s contemporaneous intent that a subsequent loan be secured by the prior pledge of the collateral mortgage note.\footnote{94} Nonetheless, this practice would appear to be unnecessary under \textit{New Orleans Silversmiths} when the borrower’s original pre-1990 collateral pledge agreement contained properly drafted future advance/cross-collateralization language.\footnote{95} This practice can also be dangerous if the creditor references the prior collateral pledge agreement inaccurately, or incorrectly describes the prior pledged collateral mortgage note in the borrower’s new hand note. The following brief example illustrates this point. The Bank indicates on the borrower’s renewal hand note that the note is secured by the borrower’s collateral pledge agreement dated June 1, 1988, when in fact the collateral pledge agreement was executed and dated August 1 of that year. While under these facts, the Bank undoubtedly will urge excusable clerical error as a defense, the court has the discretion to hold this error to be fatal to the Bank’s security rights.

* * *

The foregoing problem areas again relate solely to pre-1990 collateral mortgages and collateral chattel mortgages. The enactment of the Louisiana U.C.C. and the Louisiana collateral mortgage statute discussed in Part III of this

\footnote{91} See infra text accompanying note 124.  
\footnote{94} Nathan & Dunbar, supra note 27, at 64. See also Slidell Bldg. Supply, Inc. v. I.D.S. Mortgage Corp., 273 So. 2d 343 (La. App. 1st Cir. 1972), writ denied, 274 So. 2d 708 (1973).  
\footnote{95} Prior to 1985, La. R.S. 6:239 (1951) required that banks cross-reference borrower collateral pledge agreements with the notes they secured. This statute applied only to Louisiana state-chartered banks and was repealed by 1984 La. Acts No. 719 (effective Jan. 1, 1985).
article, resolved some of these problems. Other problem areas and unanswered questions remain. This commentator fears some of these problems will be carried over to post-1989 collateral mortgages and, by unnecessary confusion, to new multiple indebtedness mortgages, even though neither form of mortgage is now subject to Article 3158 and the five conditions precedent of New Orleans Silversmiths.

II. LEGISLATIVE REVISIONS: THE 1989 AMENDMENTS TO LOUISIANA CIVIL CODE ARTICLE 3158

A. Act 137 of 1989

Several of the problem areas and questions discussed in Part I of this article were addressed by the legislature when it amended Louisiana Civil Code article 3158 under Act 137 of 1989. This Act, known as the "U.C.C. Implementation Bill," was introduced as companion legislation to Act 135 of 1989, which enacted a modified version of U.C.C. Article 9 into law as Chapter 9 of the Louisiana Commercial Laws. The U.C.C. Implementation Bill was designed to facilitate implementation of Louisiana U.C.C. Article 9 by amending various existing Louisiana security device laws to clarify that these laws would continue to apply to then outstanding transactions and security interests, and that U.C.C. Article 9 would apply on a prospective basis to new security interests granted or perfected on or after January 1, 1990. The U.C.C. Implementation Bill also included several amendments to Louisiana Civil Code article 3158 that were designed to correct certain perceived problems regarding future

96. See infra part III.E.8.
97. See infra parts IV.A and IV.B.
99. Responsibility for drafting the U.C.C. Implementation Bill was delegated to a drafting committee of practicing attorneys and law professors by the two legislative sponsors of the Bill, Senator Lawson Swearingen and Representative Joseph Accardo, both of whom also co-chaired the Legislative Study Committee formed pursuant to H.R. Con. Res. 238, Reg. Sess. (1988), to study and recommend changes to Louisiana law to facilitate implementation of U.C.C. Article 9. The drafting committee consisted of this commentator, as chairman; Michael H. Rubin, then of Rubin, Curry, Colvin & Joseph, Baton Rouge, now of McGlinchey Stafford Lang, Baton Rouge; James A. Stuckey, Phelps Dunbar, New Orleans; Chancellor William D. Hawkland and Professor Thomas Harrell, of the Paul M. Hebert Law Center, Baton Rouge; Jan Whitehead Swift, Louisiana Secretary of State's Office, Baton Rouge; and Mary Elizabeth Arceneaux, General Counsel, Louisiana Bankers Association, Baton Rouge. The LBA Security Device Task Force, consisting of forty-plus practicing commercial attorneys from throughout Louisiana, extensively reviewed and commented on the legislation throughout the drafting process. Several Texas attorneys also participated.
advance priority rights of pre-1990 collateral mortgages. These amendments were clarifying in nature, and thus were made specifically applicable to then outstanding transactions.

B. The "Bozorg Question" and the "Logical Extension of Bozorg"

The 1989 amendments to Article 3158 addressed the question raised by the supreme court in Bozorg (i.e., whether an assignee creditor can ever take advantage of the future advance priority rights of an outstanding collateral mortgage) and the logical extension of Bozorg (i.e., whether the borrower’s pre-1990 collateral pledge agreement must state that the collateral mortgage note is being pledged to secure future extensions of credit by the originating creditor’s successors and assigns). The legislature amended Article 3158 for the specific purpose of providing that a successor or assignee of the pledgee of a collateral mortgage note succeeds automatically to the security rights and privileges of the originating creditor. The intent was that this occur regardless of whether the borrower’s original collateral pledge agreement specified that the note was being pledged to secure future advances by the originating creditor’s “successors and assigns.” The legislature effectuated this intent by including numerous references throughout the text of Article 3158 to the “pledgee or its successor,” and by adding a new sub-section D.


106. The term “successor” is defined broadly under La. Civ. Code art. 3506(28) to include buyers, transferees and any “person who takes the place of another.” This definition includes a corporate successor as well as an assignee/transferee of the original creditor. See also La. Civ. Code. art. 2645 (1870) (“The sale or transfer of a credit includes everything which is accessory to the same; as suretyships, privileges and mortgages.”).
New sub-section D of Article 3158\textsuperscript{107} is clearly the legislature's affirmative answer to the "Bozorg question" and is intended to prevent the courts from extending Bozorg:

\begin{quote}
The assignment or transfer of the principal obligation does not: extinguish the pledge; constitute a new pledge or issuance; or affect the retroactive effect given by this Article for obligations to the original pledgee or its successor. In all cases, if the pledge at the time of its delivery, issuance, or reissuance was intended to secure obligations that may arise in the future, the pledge relates back to the time of delivery, issuance, or reissuance if and when such future obligations are incurred, as long as the pledgee, the pledgee's agents, or the pledgee's successors have maintained possession of the pledged item.\textsuperscript{108}
\end{quote}

\section*{C. Premier Bank v. Prevost Motors}

Nevertheless, in \emph{Premier Bank, National Ass'n v. Prevost Motors, Inc.},\textsuperscript{109} the Louisiana First Circuit Court of Appeal failed to consider the 1989 amendments to Article 3158 and instead applied the logical extension of Bozorg as feared and predicted by the legislative drafters. The facts of \emph{Prevost Motors} are as follows: On September 22, 1987, Prevost executed a collateral chattel mortgage package in favor of Louisiana National Bank (hereinafter "LNB"), the predecessor of Premier, covering Prevost's present and future, new and used motor vehicle inventory of all makes, models and descriptions. On January 15, 1988, at the time Prevost added Volvo automobiles to its floor line, Prevost executed a separate collateral chattel mortgage package in favor of Borg-Warner Acceptance Corporation (hereinafter "Borg-Warner"). It covered Prevost's present and future new Volvo inventory financed by Borg-Warner on a purchase money basis. The Borg-Warner mortgage was amended on December 2, 1988, at the time Prevost began selling Daihatsu vehicles. The LNB 1987 mortgage was recorded before the Borg-Warner 1988 mortgage and affected any and all of Prevost's new and used motor vehicle inventory, which would necessarily include Volvo and Daihatsu vehicles financed by Borg-Warner. Thus, LNB and, subsequently, Premier agreed under two separate subordination agreements that Borg-Warner would be entitled to first priority ranking with respect to Prevost's new Volvo and Daihatsu inventory.\textsuperscript{110} Borg-Warner and its two successors in interest, Transamerica Automotive Finance Corporation (hereinafter "Transameri-

\textsuperscript{107} The legislative drafters divided La. Civ. Code art. 3158 into various sub-paragraphs. Prior to the 1989 amendments, Article 3158 consisted of one long paragraph making the article extremely difficult to read and understand.


\textsuperscript{109} 597 So. 2d 1136 (La. App. 1st Cir.), writ denied, 605 So. 2d 1115 (1992).

\textsuperscript{110} See La. Civ. Code art. 3329 (1870); Mayer v. Gros, 116 F.2d 733, 736 (5th Cir. 1940) (holding that earlier recorded mortgages generally have superior priority rights over subsequently recorded mortgages absent subordination agreements altering priority rights).
ca") and, subsequently, General Electric Capital Commercial Automotive Finance, Inc. (hereinafter "GECAF"), then proceeded to make secured floor plan loan advances to Prevost to purchase new Volvo and Daihatsu vehicles. Unknown to Borg-Warner and Borg-Warner’s successor, GECAF, Prevost also obtained loans from Premier to finance the purchase of the same Volvo units financed by GECAF. Premier also was not aware of the duplication. Prevost subsequently defaulted on its loan obligations in favor of both Premier and GECAF, precipitating the priority dispute that was the subject matter of the litigation. On May 1, 1990, Premier filed an executory process petition seeking to foreclose under its mortgage against all of Prevost’s motor vehicle inventory, including Volvo and Daihatsu vehicles that were financed by GECAF. GECAF intervened, seeking to have its mortgage (i.e., the Borg-Warner 1988 mortgage) recognized and ranked superior to the LNB 1987 mortgage held by Premier with respect to specific Volvo and Daihatsu units that GECAF had financed.

Premier argued GECAF was not entitled to retroactive ranking priority rights under its predecessor’s (i.e., Borg-Warner’s) 1988 mortgage for loan advances made after October 17, 1988 (the date on which Transamerica succeeded to the rights of Borg-Warner). GECAF counterargued that, as a corporate successor to Borg-Warner and Transamerica by reason of a series of stock acquisitions, corporate name changes, tax-free liquidations, shareholder distributions, and corporate mergers, GECAF was entitled automatically to succeed to Borg-Warner’s first priority security rights with respect to Prevost’s Volvo and Daihatsu inventory. The court rejected GECAF’s counterarguments, holding GECAF was an assignee creditor with respect to Prevost, rather than a corporate successor to Borg-Warner,111 and Prevost’s original collateral pledge agreement, executed as part of the Borg-Warner 1987 collateral chattel mortgage package, was defective in that it failed to state with absolute clarity that Prevost was pledging its collateral mortgage note additionally to secure future loan advances by Borg-Warner’s “successors and assigns.”112 Despite GECAF’s arguments that, under Act 137 of 1989, the legislature had foreclosed the logical extension of Bozorg, the court did not consider the 1989 amendments to Article 3158 and their specific applicability to GECAF’s security rights and interests.113 GECAF subsequently applied for writs of certiorari to the Louisiana Supreme Court, which, by a four to three vote, declined to review the case.114

The Prevost Motors decision is clearly incorrect and contrary to the legislative intent of Act 137. The legislative drafters predicted that a court could misconstrue the supreme court’s prior ruling in Bozorg to hold that an assignee creditor is entitled to future advance priority rights only when the borrower’s original pre-1990 collateral pledge agreement contained contractual language in

111. Prevost Motors, 597 So. 2d at 1140.
112. Id. at 1140-41.
113. The court’s opinion did not mention the 1989 amendments to La. Civ. Code art. 3158.
which the borrower agreed at inception that the pledged collateral mortgage note additionally would secure future loan advances by the originating creditor’s “successors and assigns.” This erroneous expansion of Bozorg is precisely what the legislature intended to prevent when it amended Article 3158 under Act 137.

Although Prevost Motors is incorrect, it remains the only judicial interpretation of Article 3158 on whether a pre-1990 collateral pledge agreement must contain language to the effect that the borrower is pledging the collateral mortgage note additionally to secure other or future loans by the originating creditor’s “successors and assigns.” An assignee creditor (such as GECAF in Prevost Motors) should not extend additional credit to the borrower in reliance on the borrower’s original pre-1990 collateral mortgage in favor of the originating creditor without first reviewing the original collateral pledge agreement to determine if it contains “successors and assigns” future advance language. If the original agreement contains such language, the assignee creditor should be safe in extending additional credit secured by the lien of the collateral mortgage retroactive to the time of original filing or pledge to the originating creditor.

D. Legislative Correction of Citizens National Bank v. Coates

When considering the 1989 amendments to Article 3158, the legislative drafters also recognized the need to correct what was perceived to be a misinterpretation of New Orleans Silversmiths by the court in Citizens National Bank v. Coates. The facts of Coates were as follows: On August 8, 1988, Warren Coates and his then wife executed a collateral mortgage in favor of Citizens National Bank. The collateral mortgage secured a $40,000 demand collateral mortgage note. On February 13, 1979, Mr. Coates obtained a $32,000 loan from the Bank secured by the pledge of the collateral mortgage note. On that same day, Mr. Coates executed a collateral pledge agreement that specified that, in addition to securing the original debt, the pledged collateral mortgage note would secure any and all present and future loans or other indebtedness Mr. Coates might then and in the future obtain from the Bank. Mrs. Coates did not join in the execution of the collateral pledge agreement. Between August 13, 1978, and September 10, 1982, the original $32,000 hand note was renewed on several occasions, and some principal reduction payments were made. Mr. Coates obtained several additional unrelated loans from the Bank during the interim period. Some of these loans were secured by other collateral. Nevertheless, all of the loans made during this interim period were cross-secured by the prior pledge of Mr. Coates’ collateral mortgage note (and thus by Mr. and Mrs. Coates’ original collateral mortgage) as a result of the inclusion of broadly worded cross-collateralization language in the original collateral pledge agreement. On September 10, 1982, the Bank agreed to consolidate the

115. 563 So. 2d 1265 (La. App. 1st Cir. 1990). See also supra text accompanying note 88.
$18,680.19 balance on Mr. Coates' original loan with Mr. Coates' other unrelated loans. The total consolidated loan was $119,969.26. Mr. Coates signed a new hand note in that amount on September 10, in favor of the Bank. On July 14, 1983, the Bank renewed the $119,969.26 consolidated note and executed a new renewal note.

On March 5, 1981, Mr. and Mrs. Coates judicially separated. Mr. Coates executed a community property settlement agreement under which he transferred to his former wife his undivided 50% community interest in the mortgaged property that was recorded on May 24, 1982. The settlement agreement occurred prior to Mr. Coates' September 10, 1982 consolidation loan with the Bank, and the Bank was aware of the settlement and transfer of the property to Mrs. Coates. Some time after August 14, 1983, Mr. Coates defaulted on the $119,969.26 consolidation loan. The Bank foreclosed on its collateral mortgage. Mrs. Coates objected, claiming her former husband had made it clear to the Bank's president at the time of the consolidation loan that he no longer owned the property and that he did not wish the additional unrelated loans to be secured by the pre-existing collateral mortgage.

After two separate appeals, the first circuit affirmed the district court's decision in favor of Mrs. Coates. The court held Mr. Coates' unrelated loans, which, on September 10, 1982, were consolidated with the then outstanding $18,680.19 balance of the original loan, were not secured by the prior pledge of the collateral mortgage note, and therefore were not indirectly secured by Mr. and Mrs. Coates' original collateral mortgage. The court found Mr. Coates had made statements to the Bank's president at the time of the September 10, 1982 consolidation loan that he did not wish the collateral mortgage on the property he no longer owned to secure any more than the then outstanding $18,680.19 balance owed on his original $32,000.00 real estate loan. The court further found Mr. Coates had abrogated his agreement that all subsequent loans would be secured by the pledge of the collateral mortgage note by expressly rejecting that result at the time of consolidation. This resulted in failure of the third

116. Coates, 563 So. 2d app. at 1269. The court's holding, permitting Mr. Coates to abrogate orally his prior written agreement in favor of the bank, also was contrary to La. R.S. 6:1121-1124 (Supp. 1994), as added by 1989 La. Acts No. 531, § 1. This statute was enacted to prevent bank customers from bringing baseless lender liability claims against banks alleging breaches of undocumented side agreements between the customer and one or more bank officers. La. R.S. 6:1122 (Supp. 1994) requires that, in order for a customer to bring an action against a bank under or in connection with any type of alleged "credit agreement," the agreement must be in writing, must express consideration, must set forth relative terms and conditions, and must be signed by both the customer and the bank. The term "credit agreement" is defined broadly to include any "agreement to lend or forebear repayment of money or goods or to otherwise extend credit, or make any other financial accommodation." La. R.S. 6:1121(1) (Supp. 1994). La. R.S. 6:1123(A)(3) (Supp. 1994) further provides that:

the following actions shall not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the [above] requirements of R.S. 6:1122: . . . (3) the agreement of a creditor to take or not to take certain actions, such as entering into a new
condition precedent of *New Orleans Silversmiths*, which required that each subsequent loan in favor of the borrower be secured by the prior pledge. The court additionally found the Bank had acted in bad faith at the time of the September 10, 1982 consolidation loan because it affixed a stamp to Mr. Coates' consolidation note stating the note was secured by Mr. Coates' prior August 13, 1978 collateral pledge agreement, despite Mr. Coates' statements to the contrary. This resulted in a failure of the fifth condition precedent of *New Orleans Silversmiths* that the parties at all times act in good faith.

The *Coates* court inferred that Article 3158 and *New Orleans Silversmiths* mandate that there be some type of contemporaneous manifestation of intent by the borrower at the time of obtaining an additional cross-collateralized loan to the effect that the loan is secured by the prior pledge of the collateral mortgage note. The court did not base this added requirement on its own interpretation of *New Orleans Silversmiths*, but instead relied on certain unsupported statements contained in Nathan and Dunbar's law review article, "The Collateral Mortgage: Logic and Experience."

The legislative drafters of Act 137 disagreed with the legal conclusions of the Nathan and Dunbar article adopted by the court in *Coates*. Neither *New Orleans Silversmiths* nor Article 3158, prior to being amended, required any type of contemporaneous manifestation of intent on the part of the borrower each time he obtained an additional cross-collateralized loan. As long as the borrower's original pre-1990 collateral pledge agreement provides that the pledge of the collateral mortgage note is intended to secure future cross-collateralized indebtedness, and the creditor retains possession of the pledged note at all pertinent times, all future loans made to the borrower will be secured automatically by the prior pledge "without any added notification or other formality."

The Louisiana Second Circuit Court of Appeal in *Tallulah Production Credit Ass'n v. Turner*, which is directly contrary to *Coates*, correctly stated:

> We find no requirement of a written connection between the subsequent loan and a pledged collateral mortgage note... Paraphrased, CC Art. 3158 effectively provides that whenever a pledge of a mortgage note is

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credit agreement, forebearing from exercising remedies under a prior credit agreement, or extending installments due under a prior credit agreement.

Mr. Coates' assertion that the Bank's president somehow agreed to release the lien of the Bank's collateral mortgage for any amount in excess of the $18,680.19 balance then owed under Mr. Coates' original real estate loan, is a type of "agreement of a creditor to take or not to take certain actions" that must be in writing and signed by both the borrower and the bank within the context of La. R.S. 6:1122 and 6:1123(A)(3) (Supp. 1994).

117. *Coates*, 563 So. 2d app. at 1269.
118. *Id.*
119. *Id.*
122. The *Coates* court did not mention or attempt to distinguish the second circuit's contrary decision in *Turner*. 
made to secure indebtedness of the pledgor to the pledgee which arise after the pledge is made, and the pledged instrument remains in the hands of the pledgee, and without the necessity of any added notification or other formality, the indebtedness of the pledgor to the pledgee which arise after the pledge shall be secured by the pledged instrument to the same extent as if the indebtednesses had come into existence when the pledge was made. If the pledge was made in good faith, the pledge shall be valid against third persons as it is against the pledgor.\textsuperscript{123}

In response to the erroneous “contemporaneous manifestation of subsequent intent” theory adopted by the court in \textit{Coates}, the legislature added an additional sentence at the end of newly designated Article 3158(D)(1):

\begin{quote}
In all cases, if the pledge at the time of its delivery, issuance or reissuance was intended to secure obligations that may arise in the future, the pledge relates back to the time of delivery, issuance, or reissuance if and when such future advances are incurred, as long as the pledgee, the pledgee’s agents, or the pledgee’s successors have maintained possession of the pledged item.\textsuperscript{124}
\end{quote}

The legislative drafters also disagreed with the Nathan and Dunbar article’s general condemnation of future advance/cross-collateralization clauses as somehow being against public policy.\textsuperscript{125} After studied consideration, the legislature further amended Article 3158 to clarify what the drafters deemed to be the correct construction of the law. Article 3158 now includes a reference to “cross-collateralization” in the text of Article 3158(C)(1). A new sub-section C(2) has also been added to state affirmatively that cross-collateralization clauses “are not and have never been against the public policy of Louisiana.”\textsuperscript{126}

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\textsuperscript{123} \textit{Turner}, 391 So. 2d at 888-89 (footnote omitted) (emphasis added).

\textsuperscript{124} \textit{La. Civ. Code art. 3158(D)(1)} (emphasis added). The addition of this sentence and the inclusion of the phrase “in all cases” were intended specifically to negate any argument that some type of subsequent manifestation or expression of intent or other action will be required to assure that future cross-collateralized loans be secured by the prior pledge of the borrower’s collateral mortgage note.

\textsuperscript{125} \textit{Nathan & Dunbar, supra} note 27, at 69-70. The article uses the rather uncomplimentary term “gorilla clause” rather than the more common reference “cross-collateralization clause” or “dragnet clause.”

\textsuperscript{126} \textit{La. Civ. Code art. 3158(C)(2)} (emphasis added).

This commentator disagrees with another conclusion contained in the Nathan and Dunbar article. The authors suggest that both husband and wife, when operating under a Louisiana community property regime, and when granting a collateral mortgage on community owned real estate, must execute the collateral mortgage, the collateral mortgage note, the collateral pledge agreement, and each individual hand note evidencing the initial loan and subsequent loans secured by the mortgage. Nathan & Dunbar, \textit{supra} note 27, at 51-54. This is a very dangerous practice, which arguably violates the Federal Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1988 & Supp. V 1993), and Regulation B of the Board of Governors of the Federal Reserve System, 12 C.F.R. §§ 202.1-202.14 (1994). Specifically, this practice arguably violates the spousal signature rules of §
III. NEW RULES APPLICABLE TO POST-1989 COLLATERAL MORTGAGES: LOUISIANA U.C.C. ARTICLE 9 AND THE LOUISIANA COLLATERAL MORTGAGE STATUTE

A. Louisiana U.C.C. Article 9

Louisiana was the last state to adopt Article 9 of the Uniform Commercial Code. Louisiana U.C.C. Article 9 was originally enacted under Act 528 of 1988, with a delayed effective date of July 1, 1989. This effective date was further delayed to January 1, 1990, by Act 12 of the First Extraordinary Session of 1989. Louisiana U.C.C. Article 9 was substantially amended prior to its implementation under Act 135 of 1989. These modifications of and enhancements to the standard multi-state version of U.C.C. Article 9 were recommended to the legislature by a drafting committee of Louisiana attorneys and law professors. The legislative drafting committee also prepared the companion U.C.C. Implementation Bill, which amended the various then-existing Louisiana security device laws to facilitate the implementation of U.C.C. Article 9 in Louisiana.

Louisiana U.C.C. Article 9 applies to security interests affecting personal or movable property and certain types of intangible or incorporeal rights, that

202.7(d)(4) of Regulation B (limiting the requirement of the non-borrowing spouse’s signature solely to those documents necessary to grant a security interest on community or joint owned property). La. Civ. Code art. 2347 merely requires the “concurrence” of the non-borrowing spouse under such circumstances, and does not require the non-borrowing spouse to sign the mortgage as a co-mortgagor, or co-sign the collateral mortgage note or the collateral pledge agreement. All that is required is that the non-borrowing spouse intervene under the mortgage agreement to concur with the grant of the mortgage, and to waive any homestead exemption to which the spouse may be entitled under applicable Louisiana law. (See further discussion infra part IV.G.8) Also, when both spouses jointly apply for the initial loan secured by a collateral mortgage, and both sign the collateral mortgage, collateral mortgage note and collateral pledge agreement, it is not thereafter necessary for both spouses to co-sign or co-execute each subsequent hand note. This practice arguably violates the spousal co-signer rules of § 202.7(d)(1) of Regulation B.

128. Id. § 4.
131. The original version of Louisiana U.C.C. Article 9, enacted by 1988 La. Acts No. 528, was drafted by Chancellor Hawkland and Professor Harrell. Further enhancements and modifications to the original legislation were recommended to the legislature by the drafting committee described supra note 99. These additional modifications and enhancements were made by 1989 La. Acts No. 135, prior to the delayed effective date of the original legislation.
132. This was enacted into law by 1989 La. Acts No. 137 (effective Jan. 1, 1990).
133. The term “security interest” is defined in La. R.S. 10:1-201(37) (1993) to include “an interest in personal property or fixtures, created by contract, which secures payment or performance of an obligation.”
are granted on or after the January 1, 1990 effective date of Act 135. 135 Louisiana U.C.C. Article 9 applies only to contractual security interests. 136 Statutory liens and privileges are exempt from coverage under the Louisiana U.C.C. 137 with the exception that Louisiana U.C.C. § 9-201 138 and § 9-310 139 establish the priority rights of a perfected U.C.C. secured creditor versus those of a statutory lienholder. 140

Security interests affecting real estate or immovable property interests generally are exempt from coverage under Louisiana U.C.C. Article 9 141 and are subject to other statutory rules. 142 Nevertheless, there are two instances in which the Louisiana U.C.C. applies to real rights and related property interests. Louisiana U.C.C. § 9-105(h), § 9-109(3), § 9-312(2), and § 9-509 143 apply to security interests affecting growing crops, 144 which under certain circumstances are considered to be an immovable property interest. 145 Louisiana U.C.C. § 9-313 146 applies to security interests affecting “fixtures,” which are defined to include goods placed upon the land or incorporated into a structure so as to become a component part. 147

Louisiana U.C.C. Article 9 additionally applies to pledges of real estate mortgage notes, which are a type of “instrument” for U.C.C. purposes. 148 As

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139. La. R.S. 10:9-310 (1993) also contains non-standard language not found in the multi-state version of the U.C.C.
140. As a general rule, a perfected Louisiana U.C.C. security interest will prime or have greater priority rights over a statutory lien or privilege unless the statute giving rise to the lien or privilege requires possession of the item as a prerequisite for the lien coming into existence, and the statute creating the lien or privilege specifically provides that the lien will be superior to a perfected Louisiana U.C.C. security interest (e.g., La. R.S. 9:4521 (1991 & Supp. 1994)). La. R.S. 10:9-201 (1993).
143. Farm products, which include growing crops, are defined under La. R.S. 3:3652(10) (Supp. 1994) and under La. R.S. 10:9-109(3) (1993).
147. “Fixtures” are defined as “goods that after placement on an immovable become component parts of the land, buildings and other constructions and which are used in the conduct of a trade, business, occupation or other commercial or industrial activity.” La. R.S. 10:9-313(1)(a) (1993). See also La. Civ. Code arts. 463-466.
such, the Louisiana U.C.C. applies to the pledge aspects of post-1989 Louisiana collateral mortgages that are granted on and after January 1, 1990.149 The Louisiana U.C.C. applies only to the pledge of the borrower’s collateral mortgage note and does not apply to the collateral mortgage itself, which instead is governed by the mortgage articles of the Civil Code and by the Louisiana collateral mortgage statute150 enacted under the companion U.C.C. Implementation Bill.

Louisiana U.C.C. Article 9 replaced and superseded the various then-existing Louisiana security device laws applicable to pledges,151 collateral assignments,152 chattel mortgages,153 collateral chattel mortgages,154 and mortgages affecting undocumented vessels under construction.155 These existing statutes and Civil Code articles were not repealed by Acts 135 and 137, but were retained to govern outstanding pre-1990 security interests156 and other collateral not subject to Louisiana U.C.C. Article 9.157

B. Post-1989 Collateral Mortgages Under the Louisiana U.C.C. and the Louisiana Collateral Mortgage Statute

Post-1989 collateral mortgages are no longer subject to Civil Code article 3158 and the jurisprudential rules established in Odom v. Cherokee Homes, First Guaranty Bank v. Alford, New Orleans Silversmiths, Inc. v. Toups, Texas Bank v. Bozorg, Citizens National Bank v. Coates, Premier Bank, National Ass’n v. Prevost Motors,158 and other cases. Post-1989 collateral mortgages now are subject only to Louisiana U.C.C. Article 9,159 and to the Louisiana collateral

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149. Louisiana U.C.C. Article 9 also arguably applies to post-1989 pledges and repledges of pre-1990 collateral mortgage notes secured by outstanding pre-1990 collateral mortgages.
157. Id.
158. Each of these decisions was based on the pre-Louisiana U.C.C. provisions of La. Civ. Code art. 3158.
159. The applicability of Louisiana U.C.C. Article 9 to post-1989 collateral mortgages is briefly discussed by Professor Harrell in Harrell, supra note 70, and by Chancellor Hawkland in Hawkland’s Handbook on Chapter 9 Louisiana Commercial Law § 1:39, at 70-71 (1990). As discussed supra note 149, Louisiana U.C.C. Article 9 may also apply to post-1989 “reissuances,” or new pledges, of pre-1990 collateral mortgage notes secured by pre-1990 collateral mortgages that remain outstanding on and after January 1, 1990.
mortgage statute. The mortgage aspects of collateral mortgages, however, are additionally subject to the mortgage articles of the Civil Code, as subsequently revised by Act 652 of 1991, effective January 1, 1992, and by Act 1132 of 1992, effective January 1, 1993.

Under Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute, the lien of a post-1989 collateral mortgage is effective (i.e., takes ranking priority) against third parties from the time the mortgage is filed in the public records, or the time that creditor "perfects" its U.C.C. security interest in the collateral mortgage note, whichever is the last to occur. Perfection is the process under which a U.C.C. security interest becomes effective against third parties.

Four events must occur to complete perfection of a Louisiana U.C.C. security interest in a pledged collateral mortgage note. First, the borrower must execute a written U.C.C. security agreement in favor of the creditor, or he must orally agree that the note is being pledged to secure a specific

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160. See supra note 150.
165. La. R.S. 9:5551(A) and (B) (1991 & Supp. 1994) provide in pertinent part:
   A collateral mortgage becomes effective as to third parties, subject to the requirements of registry of the collateral mortgage, when a security interest is perfected in the obligation secured by the collateral mortgage in accordance with the provisions of Chapter 9 of the Louisiana Commercial Laws, R.S. 10:9-101, et seq., or applicable provisions of the Uniform Commercial Code in effect in any other state. . . A collateral mortgage takes its rank in priority from the time it becomes effective as to third parties. (emph added.) Essentially, this is the same rule that applied to pre-1990 collateral mortgages under La. Civ. Code art. 3158 and New Orleans Silversmiths. See also La. R.S. 9:4421 (1991), added by 1987 La. Acts No. 129, § 1.
166. La. R.S. 10:9-302, 9-303, and 9-304 (1993). U.C.C. Article 9 does not contain a definition of "perfection." Three methods of perfection are recognized under U.C.C. Article 9: (1) possession perfection (see La. R.S. 10:9-304(1) (1993)); (2) filing perfection (see La. R.S. 10:9-302 (1993)); and (3) automatic perfection (e.g., La. R.S. 10:9-302(1)(d) (1993), applicable to automatic perfection of purchase money security interests in consumer goods). For perfection to be deemed complete (i.e., for a U.C.C. security interest to become effective against third parties), the security interest must first "attach" (i.e., become effective as between the parties—the debtor and the creditor). La. R.S. 10:9-203 (1993) provides that a U.C.C. security interest is not deemed to have attached unless: "(a) the collateral is in the possession of the secured party pursuant to [an oral] agreement or the debtor has signed a security agreement which contains a description of the collateral; (b) value has been given; and (c) the debtor has rights in the collateral."
168. La. R.S. 10:9-203(1) (1993) governs the requirements of a U.C.C. security agreement, which is the functional equivalent of the borrower's collateral pledge agreement under pre-Louisiana U.C.C. law.

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debtor or other or future indebtedness that may arise or come into existence.\textsuperscript{170} There is no requirement that the borrower execute the U.C.C. security agreement in authentic form,\textsuperscript{171} or specify some maximum dollar amount of the secured indebtedness in the agreement.\textsuperscript{172} Second, the borrower must have an ownership interest in the note or instrument to be given as security.\textsuperscript{173} This requirement is satisfied when the borrower executes the collateral mortgage note made payable to bearer. Third, the borrower must deliver the collateral mortgage note in pledge to the secured creditor or its designee.\textsuperscript{174} Finally, the creditor must give “value”\textsuperscript{175} either by contemporaneously extending credit to the borrower, or by issuing a binding commitment to do so at a future time.\textsuperscript{176} The pledge of a collateral mortgage note to secure a pre-existing debt or obligation also constitutes the giving of “value.”\textsuperscript{177} These are the same basic requirements that applied to pre-1990 collateral mortgages subject to Louisiana Civil Code article 3158. The differences are only that there is no longer a requirement that the borrower’s U.C.C. security agreement specify the maximum dollar amount of the secured indebtedness,\textsuperscript{178} and that for the perfection to be deemed complete, the creditor must actually extend credit, or issue a binding loan commitment to do so.

The requirement that the creditor issue a binding loan commitment in a delayed funding situation constitutes a significant change in required procedures from those applicable under pre-Louisiana U.C.C. law. The following hypothetical facts illustrate this point. Distributor and FinanceCo come to an informal understanding under which FinanceCo agrees that it will from time to borrow when the secured collateral consists of an “instrument,” such as a pledged collateral mortgage note. Nevertheless, a prudent creditor and its counsel should always require the borrower to execute a written U.C.C. security agreement as a part of the borrower’s post-1989 collateral mortgage package.

\begin{itemize}
\item \textsuperscript{170} La. R.S. 10:9-204(3) (1993). \textit{See also} U.C.C. § 9-204(3) cmt. 5 (1972).
\item \textsuperscript{171} La. Code Civ. P. art. 2635(6) was added by 1989 La. Acts No. 137, § 18, to clarify that a U.C.C. security agreement is not required to be executed in authentic form in order for the secured creditor to be entitled to foreclose against the collateral by Louisiana executory process procedures under La. R.S. 10:9-508 (1993).
\item \textsuperscript{172} See U.C.C. § 9-204(3) cmt. 5 (1972); \textit{In re} Cooley, 624 F.2d 55 (6th Cir. 1980); Mason v. Avdoyan, 299 So. 2d 603 (Fla. Dist. Ct. App. 1974). \textit{Cf.} La. Civ. Code art. 3158, which requires that collateral pledge agreements specify the maximum dollar amount of the secured indebtedness.
\item \textsuperscript{174} La. R.S. 10:1-201(44) (1993) provides that “a person gives ‘value’ for rights if he acquires them (a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon . . . . (b) as security for or in total or partial satisfaction of a pre-existing claim. . . .”
\item \textsuperscript{175} La. R.S. 10:9-105(k) (1993) provides that: “[a]n advance is made ‘pursuant to commitment’ if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him of his obligation.”
\item \textsuperscript{177} La. R.S. 10:1-201(44)(a) (1993).
\item \textsuperscript{178} As previously required by La. Civ. Code art. 3158(C)(1). \textit{See infra} note 245 and accompanying text.
\end{itemize}
time consider requests to make credit facilities available to Distributor's customers to enable the customers to purchase goods from Distributor. FinanceCo does not issue a binding loan commitment, but informally agrees to consider making credit facilities available to Distributor's customers who meet FinanceCo's credit underwriting standards. Distributor agrees to guarantee any credit that FinanceCo extends for such purposes. In anticipation of FinanceCo actually extending credit to its customers, Distributor offers to give FinanceCo a collateral mortgage on a previously unencumbered warehouse facility. On June 1, 1994, Distributor executes a Louisiana collateral mortgage in favor of FinanceCo, which secures a demand collateral mortgage note payable to bearer. Distributor delivers the note in pledge to FinanceCo, pursuant to a written U.C.C. security agreement. The agreement provides that the pledged note secures any and all present and future loans and other extensions of credit that FinanceCo may extend either directly to Distributor or to Distributor's customers, which loans are to be guaranteed by Distributor. On the same day (June 1), Distributor files its mortgage in the appropriate parish mortgage records. Three months later, Distributor grants a junior mortgage in favor of Bank affecting the same property and securing a separate loan. Bank files its junior mortgage on September 1, 1994. During the interim, several of Distributor's customers apply to FinanceCo for lines of credit to purchase goods from Distributor. None of these customers satisfy FinanceCo's underwriting standards and FinanceCo declines to extend credit. Ultimately, on November 1, Retailer applies to FinanceCo for a credit facility to purchase goods from Distributor. FinanceCo accepts Retailer's application and makes the first credit advance to Retailer on November 15. Retailer subsequently defaults under its line of credit and FinanceCo calls upon Distributor to pay under its guaranty. Distributor refuses to do so and FinanceCo initiates executory process foreclosure proceedings under its June 1 collateral mortgage. Bank intervenes, asserting that its later September 1 mortgage is entitled to priority over FinanceCo's earlier June 1 mortgage. Who prevails?

Under these facts, Bank's subsequent September 1 mortgage should prevail over FinanceCo's earlier June 1 collateral mortgage. FinanceCo did execute and file its June 1 collateral mortgage three months before Bank's later mortgage, and Distributor executed an appropriate U.C.C. security agreement and delivered the collateral mortgage note to FinanceCo in pledge on the same earlier date. Perfection of FinanceCo's U.C.C. security interest in the pledged note, however, was not complete until November 1994, when FinanceCo agreed to and actually extended credit to Distributor's customer, Retailer. For a U.C.C. security interest to be perfected, the secured creditor must give "value." Value is not given until credit is actually extended or until the creditor issues a binding commitment to extend credit at some future time. Thus, under these facts, "value" was not given until November 1994—after Bank filed its competing September 1 mortgage.

Arguably, the result would have been different had the hypothetical transactions occurred in 1989, under pre-Louisiana U.C.C. law, rather than in
1994. Under *People's Bank & Trust Co. v. Campbell* discussed in Part II of this article, as long as the parties contemplate that the pledged collateral mortgage note will secure some type of loan or extension of credit to be made in the future and otherwise act in good faith, the pre-1990 pledge of a collateral mortgage note should be deemed complete under Article 3158 without the necessity that the creditor issue some type of binding loan commitment.

C. Future Advance Priority Rules Applicable to Post-1989 Collateral Mortgages

The future advance priority rules applicable to post-1989 collateral mortgages are essentially unchanged from the rules that applied to pre-1990 collateral mortgages. Future loans are secured by the lien of a post-1989 collateral mortgage with priority rights retroactive to the time of original filing of the mortgage or of perfection of the creditor’s U.C.C. security interest in the pledged note, provided that: (1) the borrower’s U.C.C. security agreement contains appropriate future advance/cross-collateralization language; (2) the secured creditor retains possession of the pledged note at all pertinent times; and (3) the parties act in good faith.

These future advance priority rules are derived from the inter-relationship between sections 5551(B) and 5551(C) of the Louisiana collateral mortgage statute and sections 9-204(3) and 9-312(7) of the Louisiana U.C.C. Louisiana Revised Statutes 9:5551(B) provides that a post-1989 collateral mortgage takes its rank from the time it becomes effective as to third parties; that is, from the time the mortgage is filed or the time the creditor’s U.C.C. security interest in the pledged collateral mortgage note is fully perfected, whichever is the last to occur. Assuming inscription of the collateral

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179. See supra text accompanying notes 66-67.
180. Pre-1990 rules are discussed supra part I.C.
181. See additional discussion infra text accompanying notes 204-206.
182. La. R.S. 9:5551(B) (Supp. 1994). See also La. R.S. 10:9-305(1) (1993), which provides in pertinent part: “A security interest is perfected by possession from the time possession is taken without a relation back and continues only so long as possession is retained, unless otherwise specified in this Chapter.” (emphasis added).
188. La. R.S. 9:5551(B) (Supp. 1994) provides:

A collateral mortgage takes its rank and priority from the time it becomes effective as to third parties. Once it becomes effective, as long as the effects of registry continue in accordance with Article 3369 of the Civil Code [now Articles 3328-3336], a collateral mortgage remains effective as to third parties (notwithstanding any intermediate period when the security interest in the secured obligation becomes unperfected) as long as the secured party or his agent or his successor retains possession of the collateral mortgage
mortgage is not permitted to lapse, and the collateral mortgage note is not permitted to prescribe, the borrower’s post-1989 collateral mortgage will remain effective against third parties notwithstanding any interim period when the creditor’s security interest in the pledged note is temporarily unperfected. This is so as long as the creditor or its agent or successor retains possession of the collateral mortgage note in pledge. Louisiana Revised Statutes 9:5551(C) further provides that, if the secured creditor releases the collateral mortgage note from pledge, the lien of the collateral mortgage will rerank and take new priority from the time the note is redelivered in pledge, or from the time the secured creditor extends new credit to the borrower (or issues a binding commitment to do so), whichever is the last to occur.

Louisiana Revised Statutes 9:5551(B) and (C) must be read in conjunction with Louisiana U.C.C. § 9-204(3), which provides that a U.C.C. security interest may secure future loan advances and other cross-collateralized indebtedness, whether or not given pursuant to a commitment. These sections also must be read in conjunction with Louisiana U.C.C. § 9-312(7), which provides that, as long as future advances are made while a U.C.C. security interest remains perfected by filing, or by the taking of possession, the security interest will be deemed to secure future advances to the same degree and extent as it secures the initial loan or advance.

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189. Assuming that the collateral mortgage is reinscribed at least every 10 years as required by La. Civ. Code art. 3328.

190. As a “demand” promissory note, a collateral mortgage note will prescribe and thereby become unenforceable as a result of La. Civ. Code art. 3498 if not acknowledged every five years. This requirement, however, applies only to collateral mortgage notes pledged by a mortgagor to secure the debts of a third-party borrower for which the mortgagor is not personally liable on a solidary basis. This requirement does not apply when a mortgagor/borrower grants a collateral mortgage to secure his own debt obligations, or those of a third-party borrower for which the mortgagor is solidarily liable. See La. R.S. 9:5807 (Supp. 1994).

191. See additional discussion infra text accompanying note 200.

192. La. R.S. 9-5551(C) (1991) provides:

As long as the effects of registry of the collateral mortgage continue, in accordance with Article 3369 of the Civil Code [now Articles 3328-3336], if there is a termination, remission, or release of possession of the written obligation, a collateral mortgage takes its rank and priority from the time a new security interest is perfected in the written obligation, regardless of whether the secured party is the original secured party, his successor, or a new or different secured party. Essentially, this is the same rule that applied to pre-1990 collateral mortgages as a result of Odom v. Cherokee Homes, Inc., 165 So. 2d 855 (La. App. 4th Cir. 1964). See also U.C.C. § 9-204(3) cmt. 5 (1972).

193. La. R.S. 10-9-204(3) (1993) provides, “[o]bligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment . . . .”

194. La. R.S. 10-9-312(7) (1993) provides:
D. Lapsed Credit Situations: Limitation Under U.C.C. § 9-312(7) and Solution Under Louisiana Revised Statutes 9:5551(B)

Louisiana U.C.C. § 9-312(7) is the key provision that permits post-1989 collateral mortgages to secure future loans with retroactive priority rights against the competing rights of subsequent intervening creditors. However, this section contains a limitation that, if misinterpreted or misapplied by creditors or courts, could result in priority problems in certain full paydown or “lapsed credit” situations (i.e., when the borrower’s loan balance is paid in full, and the creditor subsequently extends additional credit intended to be secured by the original collateral). U.C.C. § 9-312(7) provides that a future advance is entitled to the same priority rights as the initial advance only so long as the future advance is made while the security interest remains perfected either by filing (i.e., by having a current U.C.C.-I financing statement on file in the appropriate public records) or by the creditor retaining possession of the secured collateral in pledge. Technically, in a full paydown or lapsed credit situation, the creditor’s U.C.C. security interest ceases to be perfected at the time the borrower’s outstanding loan is paid in full and there is no further commitment to extend additional credit. While three of the four requirements for continued perfection remain satisfied (i.e., (1) the borrower’s signed security agreement remains in effect; (2) the borrower continues to have rights in the collateral; and (3) the borrower’s U.C.C.-I financing statement remains on file, or the creditor retains possession of the secured collateral in pledge), the fourth requirement for continued perfection is missing in that no “value” is currently being given. Therefore, the creditor’s security interest ceases to be perfected and, technically, the new loan, when made, will not be entitled to retroactive priority rights under U.C.C. § 9-312(7).

This limitation of U.C.C. § 9-312(7) is discussed by Chancellor Hawkland in his Uniform Commercial Code Series. Hawkland concludes that the limitation under this section is essentially theoretical in nature and should not present actual problems to traditional U.C.C. secured creditors. As pointed out by Hawkland, if the secured creditor has a current U.C.C.-I financing statement on file, as to the borrower’s subsequent additional loans, the lien of the creditor’s filing-perfected security interest will relate back to the date on which the borrower’s financing statement was originally filed. This is a result of the so-
called "first to file or perfect" rule of U.C.C. § 9-312(5)(a). The creditor's filing-perfected security interest will relate back regardless of whether the creditor's security interest is temporarily unperfected at the time the additional loan is made, and therefore the creditor is unable to take advantage of the future advance priority rule of U.C.C. § 9-312(7). Similarly, if the creditor has a possessory U.C.C. security interest in the collateral, a third-party creditor would not be able to perfect a competing security interest in the same collateral with greater priority rights than the first perfected creditor and without the original creditor's knowledge.

While these rules apply to traditional U.C.C. security interests, an entirely different result is achieved in the case of a Louisiana collateral mortgage, which is a combination of a U.C.C. security interest and a Louisiana real estate mortgage. In a collateral mortgage situation, if the secured creditor makes a subsequent loan to the borrower that is secured by the prior pledge of the borrower's collateral mortgage note after no loans have been outstanding for a period of time, there is a real possibility that an intervening creditor may have filed a junior mortgage or lien against the same property over the interim period. The competing creditor may then attempt to assert priority over the original creditor's first filed mortgage.

The following hypothetical example illustrates the potential problems. On February 1, 1994, Bank made a term loan to Borrower secured by a Louisiana collateral mortgage subject to Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute. Borrower signed a collateral mortgage, a collateral

197. La. R.S. 10:9-312(5) (1993) provides:

In all cases not governed by other rules stated in this Section, . . ., priority between conflicting security interests in the same collateral shall be determined according to the following rules: (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided there is no period thereafter when there is neither filing nor perfection.

As further explained by Hawkland:

The theory behind this rule is that, if the secured party has filed a financing statement, which indicates that he has or may have a security interest in certain collateral, other creditors will not rely on that collateral being unencumbered and advance credit on the security of the collateral. Thus, even if the debtor is no longer indebted to the secured party so that no security interest exists, so long as there is a filed financing statement, potential creditors will know that they cannot obtain a prior interest in the collateral. Similarly, if the secured party has possession of the collateral, other potential creditors cannot be misled.

Hawkland et al., supra note 196, § 9-204:05, at 787-88.


199. Double pledges of the same collateral are permitted under U.C.C. § 9-305(1) (1972). To perfect a double pledge, the subsequent creditor must notify the first creditor in possession of the collateral of the granting of the security interest. See La. R.S. 10:9-305(1) (1993). Once perfected (by notice), the subsequent creditor's U.C.C. security interest in double pledged collateral is necessarily inferior to the first perfected creditor's "possession perfected" security interest as a result of the "first to file or perfect rule" of La. R.S. 10:9-312(5)(a) (1993).
mortgage note, a U.C.C. security agreement, and a hand note. Bank filed the mortgage in the proper parish mortgage office on February 1. Borrower’s U.C.C. security agreement contained broadly drafted future advance/cross-collateralization language. Six months later (on August 1), Borrower prepaid the loan in full. Borrower did not request the return of the collateral mortgage note, which was retained by Bank, and the collateral mortgage was not cancelled from the public records. In the interim, on April 1, Borrower granted a junior mortgage on the same property in favor of Competing Creditor to secure a separate loan. The junior mortgage was filed on the same date. On October 1 (two months after the initial loan was paid in full), Borrower applied for and obtained an additional loan from Bank, secured by the original pledge of Borrower’s collateral mortgage note, and thus indirectly secured by Borrower’s outstanding collateral mortgage. Borrower subsequently defaulted on his October 1 loan. Bank instituted executory process foreclosure procedures against the mortgaged property. Competing Creditor intervened, claiming its later April 1 mortgage was entitled to greater priority rights than Bank’s earlier February 1 mortgage. Who prevails?

If the facts of this hypothetical example had involved a “filing perfected” U.C.C. security interest in Borrower’s inventory, rather than the pledge of a collateral mortgage note, then the fact that Bank’s subsequent October 1 additional loan technically was not entitled to retroactive future advance priority rights under U.C.C. § 9-312(7) would not have caused Bank to lose its priority rights. As a result of the “first to file or perfect” rule of Louisiana U.C.C. § 9-312(5)(a), Borrower’s subsequent October 1 loan would have been secured by the original lien of Bank’s filing-perfected U.C.C. security interest in Borrower’s inventory, and this security interest would have related back to the date on which Borrower’s U.C.C.-1 financing statement was originally filed in the public records (i.e., February 1, or sometime prior to that date). Similarly, if Bank had taken a “possession perfected” U.C.C. security interest in Borrower’s stock, rather than taking a U.C.C. security interest in the pledged collateral mortgage note, Competing Creditor could not have perfected its own security interest in the stock with greater priority rights than Bank and without Bank’s knowledge.

It makes a significant difference to Bank, however, that Borrower’s subsequent October 1 loan was not entitled to retroactive future advance priority rights under Louisiana U.C.C. § 9-312(7). In a collateral mortgage situation, it is possible for a subsequent intervening creditor to file a competing lien or mortgage against the same property without formal notice to the original mortgageholder and to achieve greater security rights than the first filed mortgage. Under the facts of the hypothetical, Competing Creditor filed its junior mortgage on April 1 and acquired security rights against the mortgaged property as of that date. Competing Creditor therefore has the right to claim that its otherwise inferior April 1 mortgage was entitled to greater priority rights, as to Borrower’s subsequent October 1 additional loan, than Bank’s right under the first-filed February 1 mortgage. Competing Creditor also has the right to argue that Bank is not entitled to rely upon the future advance priority rules of Louisiana U.C.C. § 9-312(7) because Bank’s U.C.C.
security interest in the form of a pledge of Borrower’s collateral mortgage note was not fully perfected at the time Borrower’s October 1 loan was made.

If this hypothetical situation were presented to a Louisiana court, the court, with some basis in law, could hold in favor of Competing Creditor, but for the parenthetical language contained in Section 5551(B) of the Louisiana collateral mortgage statute, which must be read in pari materia with the future advance priority rules of Louisiana U.C.C. § 9-312(7). Louisiana Revised Statutes 9:5551(B) provides:

Once it [a collateral mortgage] becomes effective, as long as the effects of registry continue . . . [the] collateral mortgage remains effective as to third parties (notwithstanding any intermediate period when the security interest in the secured obligation [the collateral mortgage note] becomes unperfected) as long as the secured party or his agent or his successor retains possession of the collateral mortgage note. . . .

This parenthetical language modifies the future advance priority rules of Louisiana U.C.C. § 9-312(7) in a collateral mortgage situation. The result is that the lien of a post-1989 collateral mortgage will have priority rights with respect to future loans and advances retroactive to the original filing of the mortgage, or original perfection of the creditor’s security interest in the pledged note. This holds true regardless of whether, during any interim period, the creditor’s U.C.C. security interest in the pledged note may be temporarily unperfected because of no outstanding or committed debt between the parties. Accordingly, under the facts of the hypothetical example, the court should decide in favor of Bank and hold that, as a result of the parenthetical language of Louisiana Revised Statutes 9:5551(B), Borrower’s subsequent October 1 loan was secured by the lien of Bank’s earlier filed February 1 collateral mortgage, with priority retroactive to the time when the mortgage was originally filed, even though Bank’s U.C.C. security interest in Borrower’s pledged note temporarily was unperfected at the time the subsequent October 1 loan was made.

E. Additional Questions and Potential Problems

There are several additional questions and potential problem areas with respect to the future advance priority rules governing post-1989 collateral mortgages.

1. Must There Be a Written U.C.C. Security Agreement?

It is not necessary that the borrower evidence a post-1989 pledge of the collateral mortgage note by a written U.C.C. security agreement. An oral agreement is sufficient as long as the borrower expresses an intent to grant the

creditor a security interest in the collateral mortgage note securing the borrower's indebtedness. The borrower also must actually deliver the note in pledge to the creditor or its third-party agent. Nevertheless, a prudent creditor and its counsel should always require the borrower to sign a separate U.C.C. security agreement as part of the borrower's post-1989 collateral mortgage package. A written agreement is the best evidence of the indebtedness the borrower intends to be secured.

2. *Must the U.C.C. Security Agreement Be in Authentic Form?*

Louisiana Code of Civil Procedure article 2636(5) provides that a U.C.C. security agreement is deemed to be authentic for purposes of Louisiana executory process foreclosure procedures without the necessity that the security agreement be witnessed or executed or acknowledged before a notary.

3. *Is It Necessary That the Borrower's U.C.C. Security Agreement Contain Future Advance Language?*

A number of non-Louisiana U.C.C. decisions have held that future advance language must be included in the borrower's U.C.C. security agreement in order to evidence the borrower's intent that future loans will be secured. While Hawkland argues in his *Uniform Commercial Code Series* that failure to include future advance language is not necessarily fatal, a prudent creditor and its counsel should always include broad future advance/cross-collateralization language in the security agreement if the creditor intends future loans to be secured.

4. *Must the Security Agreement Specify the Maximum Dollar Amount of the Secured Indebtedness?*

Louisiana U.C.C. § 9-204(3) does not require that the borrower's U.C.C. security agreement specify a maximum dollar amount of secured indebtedness.

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202. The third-party agent may not be the borrower/pledgor, or its employee, and must be someone beyond the borrower/pledgor's control or influence. See U.C.C. § 9-305 cmt. 2 (1972).
205. Hawkland et al., *supra* note 196, § 9-204:05, at 793.
206. Suggested language is included *infra* note 210.
207. See U.C.C. § 9-204 cmt. 5 (1972). See also *infra* note 245.
5. Are There Any Other Limitations on the Ability of a Post-1989 Collateral Mortgage to Secure Future Advances and Other Indebtedness?

Some non-Louisiana courts have frowned on the use of cross-collateralization or "dragnet" clauses and have attempted to restrict their effects to subsequent extensions of credit of the same type or classification or that are otherwise related to the original extension of credit. This approach is sometimes referred to as the "same class rule," and is designed to prevent creditor overreaching, unfairness, and surprise. A prudent creditor and its counsel may avoid the possible application of the "same class rule" by carefully drafting the definition of the secured indebtedness in the borrower's U.C.C. security agreement to include any and all present and future extensions of credit of any nature and kind whatsoever, whether or not related to the original secured loan.

Other non-Louisiana courts have permitted the borrower to negate his prior agreement that subsequent loans or advances would be secured by the creditor's U.C.C. security interest. A prudent creditor and its counsel may minimize the risk of possible assertions of this type by including self-serving language in the borrower's U.C.C. security agreement in which the borrower agrees that his additional loans will be secured automatically, without the necessity that the


209. Hawkland et al, supra note 196, § 9-204:05, at 784-86.

210. See In re Estate of Simpson, 403 N.W.2d 791 (Iowa 1987) (refusing to hold with "same type rule" when security agreement reflected intent of parties that all subsequent loans be secured). Suggested language that may be included in a U.C.C. security agreement is as follows:

The word "Indebtedness" means any and all present and future loans, extensions of credit, liabilities and obligations of every nature and kind that may now and/or in the future owe to incur in favor of Lender, its successors and assigns, including without limitation, the loan evidenced by my promissory note dated _______, 1994, in the amount of U.S. $_______, whether or not such loans, extensions of credit, liabilities and obligations are direct or indirect, absolute or contingent, voluntary or involuntary, determined or undetermined, liquidated or unliquidated, due or to become due, and whether secured or unsecured, and whether or not in any way related to the aforesaid loan, and whether any such indebtedness may be barred under any statute of limitations or prescriptive period or may be otherwise unenforceable or avoidable for any reason.

Two additional sections of the U.C.C., La. R.S. 10:9-301(4) (1993) and La. R.S. 10:9-307(3) (1993), impose further limitations on the ability of a perfected U.C.C. security interest to secure future loans or other extensions of credit in favor of the borrower. Neither of these sections applies to pledges of collateral mortgage notes under Louisiana U.C.C. Article 9.

borrower agree or consent to such a result at the time each additional loan is made, and with the borrower further agreeing that he may not later insist that his additional loans not be secured unless the creditor specifically consents in writing to that result.\footnote{212}

6. \textit{Bozorg and Prevost Revisited: Must the Borrower’s U.C.C. Security Agreement Expressly Provide That the Pledged Collateral Mortgage Note Secures Future Loans and Advances by the Originating Creditor’s Successors and Assigns?}

Non-Louisiana courts have considered this issue on a number of occasions.\footnote{213} The majority view has been that U.C.C. § 9-204(3) and § 9-312(7) entitle a successor or assignee of the originating creditor to retroactive priority rights for future advances only when the borrower’s original security agreement expressly provides that the security interest has been granted to secure not only the initial indebtedness, but also future advances by the originating creditor’s successors and assigns.\footnote{214} In other words, these non-Louisiana decisions are consistent with the logical extension of \textit{Bozorg} and the subsequent \textit{Prevost Motors} decision discussed in Parts I and II of this article.\footnote{215}

Professor Harrell states in his article, \textit{Security Devices, Developments in the Law, 1988-1989},\footnote{216} that the “\textit{Bozorg question}” and the logical extension of \textit{Bozorg} have been carried over to post-1989 collateral mortgages subject to Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute. Professor Harrell concludes that, while there is no reason why the originating creditor should not be able to transfer to an assignee creditor all of its security rights, including the originating creditor’s future advance priority rights under U.C.C. § 9-204(3) and § 9-312(7),

\begin{itemize}
\item \textbf{212.} Suggested language is as follows:
I agree that my additional Indebtedness will automatically be secured by this Agreement without the necessity that I (or any of us) agree, affirm or consent to such a result at the time such additional Indebtedness is created, or that the note or notes evidencing such additional Indebtedness reference the fact that such notes are secured by this Agreement.
I further understand that I may not subsequently have a change of mind and insist that my additional Indebtedness not be secured by this Agreement unless Lender specifically agrees to such a request in writing.
\item \textbf{214.} This is consistent with Premier Bank, Nat’l Ass’n v. Prevost Motors, Inc., 597 So. 2d 1136 (La. App. 1st Cir. 1992), discussed \textit{supra} notes 109-114 and accompanying text.
\item \textbf{215.} \textit{See} supra text accompanying notes 82-84 and 109-114.
\item \textbf{216.} Harrell, \textit{supra} note 70.
\end{itemize}
to say that such a transfer of a secured party's rights and obligations under a security agreement can be made does not mean that a particular security agreement contemplates that the obligations owed to the successor will be secured by the agreement; the matter is as much one of contract as of law.

... [I]f the debtor owes debts to, or procures credit from, the transferee without affirming the applicability of the agreement to them, he is still free to contend that the intention of the parties under the security agreement was to limit its application to debts owed to or loans made by the original bank.217

With all due respect, this commentator does not agree with Professor Harrell's conclusions. Although the language of Louisiana Revised Statutes 9:5551 was not drafted as clearly and explicitly as it might have been,218 without question it was the intent of the legislative drafters of Act 137 of 1989219 that a successor or assignee of the originating creditor/pledgee of a collateral mortgage note succeed automatically to the security rights of the originating creditor without the requirement that the borrower's original collateral pledge or U.C.C. security agreement specifically mention the fact that the note is being pledged to secure future advances by the originating creditor's "successors and assigns." It is inconceivable that the legislative drafters would have amended Article 3158 under Act 137 to prevent this logical extension of Bozorg, and at the same time allowed the extension in the case of post-1989 collateral mortgages subject to Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute. Nevertheless, until the courts have the opportunity to consider this issue, creditors and their counsel are advised to include in their security agreements language which expressly states that the borrower is granting a security interest in the pledged collateral mortgage note to secure any and all present and future extensions of credit by the originating creditor and by the originating creditor's "successors and assigns."220

217.  Id. at 367.
218.  La. R.S. 9:5551 (1991 & Supp. 1994) is replete with references to "the secured party or his successor." (emphasis added).
220.  See supra note 210 for suggested language defining the "secured indebtedness" to include other and future loans by the originating creditor's successors and assigns. Creditors and their counsel may wish to include the following additional language in their U.C.C. security agreements:

Transfer of Indebtedness. Grantor hereby recognizes and agrees that Creditor may transfer all or a portion of the Indebtedness to one or more third party creditors. Such transfers may include, but are not limited to, sales of participation interests in the Indebtedness. Grantor specifically agrees and consents to all such transfers and further waives any notice of any such transfers as may be provided for under applicable law. Grantor further agrees that, upon any transfer of all or any portion of the Indebtedness, Creditor may transfer and deliver any of the collateral securing repayment of the Indebtedness (including, but not
7. Must the Borrower, Every Time a Loan or Advance Is Made, Confirm That the Loan or Advance Is Secured by the Prior Pledge of the Collateral Mortgage Note?

Several non-Louisiana courts have held some type of contemporaneous manifestation of borrower intent is required when the subsequent loan is of a different type, or for a different purpose, and therefore is unrelated to the initial loan. Creditors may avoid this argument by stating in the borrower's U.C.C. security agreement that future loans, even those unrelated to the original loan, will be secured automatically by the pledge of the collateral mortgage note without the necessity that the borrower acknowledge, agree, or consent to this result at the time the additional loans are made.

8. What Are the Most Serious Risks Associated with Post-1989 Louisiana Collateral Mortgages?

There are three. First, there is a risk that a court will continue to apply pre-Louisiana U.C.C. jurisprudential rules to post-1989 collateral mortgages and pledges of collateral mortgage notes. The prior jurisprudential rules under Article 3158, and the explanatory cases, New Orleans Silversmiths, Cherokee Homes, Alford, Bozorg, Coates, and Prevost Motors, have no applicability whatsoever to post-1989 collateral mortgages, which are now exclusively subject to Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute. Second, there is a risk that a court will apply non-Louisiana U.C.C. jurisprudential law to Louisiana collateral mortgages, which are not pure U.C.C. security interests, but instead are combinations of the U.C.C. pledge of a collateral mortgage note and a Louisiana real estate mortgage. These non-Louisiana U.C.C. decisions may have no applicability to collateral mortgages, which are unique to Louisiana. Third, there is a risk that a court may fail to give proper deference to the parenthetical language of Louisiana Revised Statutes 9:5551(B). That language provides that the lien of a properly filed and perfected post-1989 collateral mortgage will continue to secure future loans and other obligations limited to, the aforesaid Collateral Mortgage Note) to the transferee of such Indebtedness, and such transfers shall not affect the priority and ranking of the Collateral Mortgage, and such collateral shall secure any and all present and/or future Indebtedness in favor of such a transferee in principal, interest, costs, expenses, attorneys' fees and other fees and charges. Grantor additionally agrees that, after any such transfer has taken place, Creditor shall be fully discharged from any and all liability and responsibility to Grantor with respect to any collateral so transferred, and the transferee thereafter shall be vested with all of the powers and rights with respect to such transferred collateral, with Creditor retaining all powers and rights with respect to any of the collateral that is not transferred to another party.


222. Suggested language to this effect is included supra note 212.
irrespective of whether, during any interim period, the creditor's U.C.C. security interest in the pledged note may be temporarily unperfected. The courts must interpret and apply this parenthetical language of Louisiana Revised Statutes 9:5551(B) in pari materia with the future advance priority rules of Louisiana U.C.C. § 9-204(3) and § 9-312(7).

Creditors and practitioners may avoid the risks and uncertainties associated with the continued use of future advance collateral mortgages through the use of the more modern and less problematic alternative to collateral mortgages recently authorized under revised Louisiana Civil Code article 3298; that is, the Louisiana multiple indebtedness mortgage discussed in Part IV of this article.

IV. LOUISIANA MULTIPLE INDEBTEDNESS MORTGAGES: A MODERN ALTERNATIVE TO COLLATERAL MORTGAGES

A. 1991 Revisions to the Louisiana Civil Code Mortgage Articles

The legislature substantially revised the mortgage articles of the Civil Code by enacting Act 652 of 1991. The revisions were part of the Louisiana State Law Institute's ongoing Civil Code recodification effort. Among the changes made to the mortgage articles were comprehensive revisions to Louisiana Civil Code article 3298, which now authorizes a new form of conventional mortgage instrument as a viable alternative to the future advance collateral mortgage. This new form of mortgage has come to be known as a "multiple indebtedness mortgage."

A multiple indebtedness mortgage is similar to a collateral mortgage in that a multiple indebtedness mortgage can secure multiple present and future loans and other obligations on a full cross-collateralized basis. A multiple indebtedness mortgage, however, is much simpler than a collateral mortgage because a multiple indebtedness mortgage does directly what a collateral mortgage does indirectly. A multiple indebtedness mortgage directly secures multiple...
present and future loans and other obligations without the two-step process of granting a mortgage to secure a demand collateral mortgage note, and then pledging the collateral mortgage note, under a separate collateral pledge or U.C.C. security agreement, to secure the borrower's true indebtedness evidenced under one or more hand notes.

There are no limitations or restrictions on the types of loans or obligations that can be secured by a Louisiana multiple indebtedness mortgage. A multiple indebtedness mortgage can secure revolving lines of credit, term loans, and reimbursement obligations under letters of credit, as well as non-monetary obligations not evidenced by a promissory note or credit agreement, such as a contract performance obligation.

B. Future Advance Priority Rights of Multiple Indebtedness Mortgages

A properly executed multiple indebtedness mortgage will secure future loans extended to the borrower with priority rights as to intervening creditors retroactive to the time the mortgage was filed for registry, provided that (1) the mortgage agreement contains broadly drafted future advance/cross-collateralization language; (2) the mortgage is properly filed in the appropriate parish mortgage records; and (3) the mortgage remains in full force and effect and is not otherwise terminated or permitted to lapse. Article 3298 provides in pertinent part:

because the mortgagor's true security interest is the pledge of the collateral mortgage note, which is in turn secured by the accessory mortgage. See supra text accompanying notes 29-34.

228. There are two regulatory exceptions to cross-collateralization that should be included in a consumer purpose multiple indebtedness mortgage agreement affecting the borrower's principal residence. Consumer purpose multiple indebtedness mortgages should contain language that the mortgage will not secure the borrower's other future consumer loans unless and until the creditor complies with the notice of right of rescission and other requirements of the Federal Truth in Lending Act, 15 U.S.C. § 1601 et seq. (1989), and the Federal Reserve Board Regulation Z, 12 C.F.R. § 226.1 et seq. (1994). This limited exception to cross-collateralization is intended to prevent inadvertent right of rescission violations of § 226.23 of Regulation Z. Consumer purpose multiple indebtedness mortgages also should contain contractual language providing that the mortgage will not secure consumer purpose open-end lines of credit unless and until the creditor complies with the home equity disclosure and other pertinent requirements of the Federal Truth in Lending Act and Regulation Z (see 12 C.F.R. §§ 226.5b, 226.15 (1994)). This additional limited exception to cross-collateralization is intended to prevent unintended home equity disclosure violations of Regulation Z. Only specially drafted multiple indebtedness mortgages should secure consumer purpose home equity line of credit accounts subject to Regulation Z § 226.5b. These special mortgages should not secure other consumer or commercial extensions of credit unrelated to the borrower's home equity account.

These same exceptions to cross-collateralization should be included in borrower U.C.C. security agreements executed in conjunction with consumer purpose collateral mortgages affecting the borrower's principal residence.


230. La. Civ. Code art. 3308 provides: "A mortgage is effective as to third persons only from the time that it is filed for registry in the manner provided by law."
Art. 3298. Mortgages may secure future obligations

A. A [multiple indebtedness] mortgage\(^{231}\) may secure obligations that may arise in the future.

B. As to all obligations, present and future, secured by the [multiple indebtedness] mortgage, notwithstanding the nature of such obligations or the date they arise, the [multiple indebtedness] mortgage has effect between the parties from the time the mortgage is established and as to third persons from the time the contract of mortgage is filed for registry.

The Louisiana State Law Institute Revision Comments to Article 3298 further provide:

- A [multiple indebtedness] mortgage may secure existing obligations; obligations contemporaneously incurred with the execution of the mortgage or specific identifiable or particular and limited future obligations; or general and indefinite future obligations; or any combination of them. . . .

- Paragraph B [to Article 3298] declares that a [multiple indebtedness] mortgage securing future obligations has the same effect and priority it would have if the obligations were in existence when the contract of mortgage was entered into. . . .

- The effect and rank of a [multiple indebtedness] mortgage securing future obligations thus essentially corresponds to the effect and rank which it would have if it secured a collateral note that was pledged to secure the future obligations [as would be the case with the collateral mortgage], with the exception that the Article [Article 3298] does not require that there initially be a debt or commitment in order to give vitality to the mortgage.\(^{232}\)

Finally, the \textit{Exposé des Motifs} accompanying Act 652 of 1991 provides: “If the mortgagor incurs an obligation that the [multiple indebtedness] mortgage secures before the contract of mortgage is terminated or extinguished, then that obligation will be secured to the same extent as if it had existed when the mortgage was first established.”\(^{233}\)

These expressions of Law Institute and legislative intent are clear and explicit. If a multiple indebtedness mortgage is properly executed and filed, and if the mortgage contains broadly drafted future advance/cross-collateralization

\(^{231}\) For purposes of clarification, La. Civ. Code art. 3298 applies to virtually all conventional mortgages and does not mention the term “multiple indebtedness mortgage.” A multiple indebtedness mortgage is a form of conventional mortgage authorized under Article 3298 that can secure multiple present and future loans and other obligations not evidenced by mortgage notes parphed for identification with the mortgage.

\(^{232}\) La. Civ. Code art. 3298 cmts. (b), (c), and (d).

language, then any and all present and future extensions of credit and other obligations the borrower may obtain from or incur in favor of the mortgagee, or its successors and assigns, while the mortgage remains effective, will be secured by the mortgage up to the maximum dollar limitation stipulated in the mortgage agreement, with retroactive priority rights over intervening creditors dating back to the time the mortgage originally was filed in the public records.

C. Advantages of a Multiple Indebtedness Mortgage

Multiple indebtedness mortgages are an alternative to future advance collateral mortgages and do not supersede or replace the collateral mortgage as an open-ended security instrument. Creditors may continue to use future advance collateral mortgages on and after the January 1, 1992 effective date of Act 652 of 1991.234

The major advantage of a multiple indebtedness mortgage over a future advance collateral mortgage is that a multiple indebtedness mortgage is much easier and simpler to use. To create a multiple indebtedness mortgage, the borrower must execute only one document, the multiple indebtedness mortgage agreement itself. If the obligation to be secured is a loan, the mortgagor signs only one note, which need not and should not be paraphed "Ne Varietur" for identification with the mortgage. In comparison, to create a collateral mortgage, the borrower must sign at least three separate documents: (1) a collateral mortgage; (2) a collateral mortgage note; and (3) a collateral pledge or U.C.C. security agreement. One or more promissory "hand notes" are also generally executed. As known by practitioners experienced in closing real estate loans, it is at times difficult to convince the borrower that he must sign two separate notes; the first of which, the initial hand note, is in the amount he is actually borrowing, and the second of which, the collateral mortgage note, is in some greater amount with a different interest rate, and payable on demand to bearer. It is also difficult to explain the somewhat strange two-step process of a collateral mortgage to out-of-state lenders, borrowers, and attorneys.

There are other advantages to securing a loan with a multiple indebtedness mortgage. There is no collateral mortgage note for the creditor to lose, misplace, or misfile. Thus, the creditor may avoid the sometimes frustrating and costly procedures required to cancel the mortgage when the collateral mortgage note cannot be found.235 Also, by securing a loan with a multiple indebtedness mortgage, there is no possibility that the creditor may lose its rights under the mortgage as a result of payment of the collateral mortgage note being barred by prescription.236

A possible disadvantage of using a multiple indebtedness mortgage in lieu of a collateral mortgage is that this form of mortgage is new and untested by the

234. See Rubin & Grodner, supra note 49, at 995; Rubin et al., supra note 226, at 531.
236. See discussion supra note 190.
Consequently, there is reluctance on the part of some creditors and practitioners to use this new form of mortgage instrument. This reluctance is misplaced and unjustified. Although multiple indebtedness mortgages are admittedly new and untested, they are statutory in nature since multiple indebtedness mortgages are specifically authorized by Louisiana Civil Code article 3298. In comparison, collateral mortgages are creatures of jurisprudential law, having evolved over the years in response to commercial custom and practice. As a result, collateral mortgages have been, and may in the future continue to be, subject to ever changing and uncertain judicial rules.237

It is an obvious improvement that the rules governing multiple indebtedness mortgages are clearly spelled out in Article 3298, and in the Law Institute's Revision Comments to that article. The Law Institute, when drafting revised Article 3298, and the legislature, when enacting the revised mortgage articles into law, unquestionably intended that multiple indebtedness mortgages be direct and convenient substitutes for future advance collateral mortgages, which the Law Institute found to be a complicated and cumbersome security device.238 In addition, the Law Institute and the legislature clearly intended to establish multiple indebtedness mortgages as a new form of mortgage instrument to provide direct security for future obligations not evidenced by a paraphed instrument. The intent was to achieve by means of a direct mortgage substantially the same legal effect, including priority, formerly achieved only by a collateral mortgage.239 There is no comparable expression of legislative intent supporting future advance collateral mortgages, thereby making their continued use more risky and uncertain as compared to statutorily authorized multiple indebtedness mortgages.

D. Comparison of a Multiple Indebtedness Mortgage Agreement with a Collateral Mortgage Agreement

A multiple indebtedness mortgage agreement240 differs from a collateral mortgage agreement in the following respects:

1. Mortgage in Favor of a Specific Mortgagee

A multiple indebtedness mortgage agreement must always be granted in favor of a specifically named and designated mortgagee.241 In comparison,

239. Id.
240. A suggested form of multiple indebtedness mortgage is included as an addendum to this article.
241. This requirement is derived from La. R.S. 9:5556(A) (Supp. 1994), which mandates that the certificate canceling a multiple indebtedness mortgage be signed by the "mortgagee or privilege holder of record." La. R.S. 9:5556(B) (Supp. 1994) defines the mortgagee or privilege holder as "the obligee or creditor identified in the act of mortgage or privilege or his successor, as evidenced by acts
some practitioners continue to draft collateral mortgage agreements in favor of "any person, firm, or corporation," without naming and designating the initial mortgagee. While this form of mortgage is still valid, it is now preferable to make collateral mortgages in "landed" form in favor of a specifically named and designated mortgagee.\textsuperscript{242}

2. No Reference to Pledge of Collateral Mortgage Note

A collateral mortgage agreement specifies that the mortgage is being granted to secure a demand collateral mortgage note, which in turn is pledged under a separate collateral pledge or a U.C.C. security agreement to secure the borrower's present and future indebtedness. A multiple indebtedness mortgage agreement, on the other hand, provides that the mortgage itself is being granted directly to secure the on-going present and future indebtedness of the borrower in favor of the specified mortgagee and its successors and assigns.

3. Definition of Secured Indebtedness to Include Present and Future Indebtedness

The definition of the "secured indebtedness" in a multiple indebtedness mortgage agreement is akin to what ordinarily is included in the borrower's collateral pledge or U.C.C. security agreement in a collateral mortgage package. If full, open-ended cross-collateralization is desired, the definition of the secured indebtedness should leave no doubt that the mortgagor is granting the multiple indebtedness mortgage to secure any and all present and future loans, loan advances, and other extensions of credit and obligations of every nature and kind that the borrower may owe to or incur in favor of the named and designated mortgagee and its successors and assigns, from time to time or for one or more times, whether such loans or other obligations are direct or indirect, absolute or contingent, liquidated or unliquidated, due or to become due, and whether or not in any way related to the initial extension of credit, all up to a stipulated maximum amount.\textsuperscript{243}

4. Maximum Dollar Amount of Secured Indebtedness

Louisiana Civil Code article 3288 requires that a multiple indebtedness mortgage agreement contain a maximum dollar limitation on the amount of the secured indebtedness.\textsuperscript{244} In comparison, neither Louisiana Revised Statutes
evidencing the transfer of the mortgage or privilege filed with the release."

242. See supra text accompanying notes 50-55 for discussion of so-called "landed" mortgages.

243. See the form of multiple indebtedness mortgage included as an addendum to this article for suggested language defining the secured indebtedness.

244. La. Civ. Code art. 3288 provides:
A contract of mortgage must state precisely the nature and situation of each of the immovables or other property over which it is granted; state the amount of the obligation,
9:5551 nor Louisiana U.C.C. § 9-204(3) requires that the borrower’s post-1989 U.C.C. security agreement contain a limitation on the maximum amount to be secured by the pledge of the collateral mortgage note.245

5. Reference to Louisiana Civil Code Article 3298

It is good practice to include a statement in a multiple indebtedness mortgage agreement that the mortgage is being granted pursuant to Louisiana Civil Code article 3298. This reference, though not required, will help distinguish a multiple indebtedness mortgage from a collateral mortgage or an ordinary conventional mortgage.246

6. Cancellation Procedures

A multiple indebtedness mortgage agreement should contain language spelling out the procedures under which the mortgagor may request cancellation of the mortgage at the time the secured indebtedness is paid in full, and under which the mortgagee has no further commitment to lend additional funds.247

7. No Intervention

A collateral mortgage agreement generally contains intervention language providing for an unrelated, third-party to intervene in the act of mortgage to accept the mortgage on behalf of the mortgagee. A multiple indebtedness mortgage requires no such symbolic intervention. Louisiana Civil Code article 3289 provides, “A contract of mortgage need not be signed by the mortgagee, whose consent is presumed and whose acceptance may be tacit.”248

or the maximum amount of the obligations that may be outstanding at any time and from time to time that the mortgage secures; and be signed by the mortgagor.

(emphasis added).

245. By way of explanation, La. Civ. Code art. 3158 required that pre-1990 collateral pledge agreements include a reference to the maximum amount of indebtedness secured by the pledged collateral mortgage note, and thereby indirectly secured by the borrower’s pre-1990 collateral mortgage. This rule changed with the adoption of Louisiana U.C.C. Article 9 as applicable to post-1989 collateral mortgages. La. R.S. 10:9-204(3) (1993) does not require that the maximum amount of the secured indebtedness be stipulated in the borrower’s U.C.C. security agreement. This rule changed again under La. Civ. Code art. 3288 as applicable to new multiple indebtedness mortgages as an alternative to future advance collateral mortgages.

246. This reference would appear to be necessary should the mortgage ever be challenged, to inform the court that the mortgage is granted under the express provisions of La. Civ. Code art. 3298. Suggested language is included in the form of multiple indebtedness mortgage attached as an addendum to this article.

247. See additional discussion infra part IV.F. Suggested language is included in the form of multiple indebtedness mortgage following this article.

8. No Paraph

In a collateral mortgage transaction, the collateral mortgage note must be paraphed "Ne Varietur" for identification with the mortgage to permit the creditor to obtain foreclosure by means of executory process procedures. A multiple indebtedness mortgage, however, does not require that a note be paraphed "Ne Varietur" for identification with the mortgage. Article 3298(C) provides in pertinent part, "A promissory note or other evidence of indebtedness secured by a [multiple indebtedness] mortgage . . . need not be paraphed for identification with the mortgage."

Not only is it improper to paraph a note secured by a multiple indebtedness mortgage for identification with the mortgage, it is also potentially dangerous to do so. The procedures for canceling a multiple indebtedness mortgage set out in Article 3298(C) and in Louisiana Revised Statutes 9:5555 and 9:5557 are written for non-paraphed mortgage notes. To cancel a multiple indebtedness mortgage, the mortgagor presents a written cancellation certificate signed by the mortgagee of record to the appropriate filing officer after the secured indebtedness has been paid in full and the creditor has no further commitment to extend additional secured funds. If for some reason the closing notary unknowingly or inadvertently paraphs the initial mortgage note "Ne Varietur" for identification with the multiple indebtedness mortgage, and the creditor were to return the paid mortgage note to the mortgagor marked "CANCELLED," it is conceivable that the mortgagor could present the cancelled note to the appropriate filing officer and fraudulently cancel the mortgage, notwithstanding the fact that the borrower may have other outstanding loans that are secured by the mortgage.

E. Reinscription of Multiple Indebtedness Mortgages

Once properly filed for registry, the inscription of a multiple indebtedness mortgage remains valid and effective against third persons for ten years from the date the mortgage was executed. The mortgagee may reinscribe a multiple indebtedness mortgage by filing a written reinscription notice with the appropriate filing officer. The reinscription notice must be signed by the mortgagee of record and must state the mortgagor's name as it appears in the recorded document, the recordation number of and other appropriate recordation information with respect to the mortgage, and must declare that the mortgage is

254. The appropriate filing officer is the clerk of court of the parish in which the mortgage is recorded, or if applicable, the Recorder of Mortgages for the Parish of Orleans.
being reinscribed.255 Once timely reinscribed, the inscription of a multiple indebtedness mortgage is extended for an additional ten years from the filing of the reinscription notice.256

F. Cancellation of Multiple Indebtedness Mortgages

The following procedures apply to the cancellation of multiple indebtedness mortgages, assuming that the mortgage note is not paraphed “Ne Varietur” for identification with the mortgage. At any time after the secured indebtedness has been fully paid and satisfied, and the secured creditor has no further commitment or obligation to extend additional secured credit, the mortgagor has the right to request the creditor to sign a written mortgage cancellation certificate directing the filing officer to cancel and terminate the mortgage.257 The creditor must provide this certificate within sixty days after receiving the request.258 If the secured creditor fails to provide the certificate within this period, the mortgagor may file a summary lawsuit seeking a court order directing the creditor to cancel and terminate the mortgage.259 The mortgagor may also sue to recover its costs and attorneys fees as well as for damages sustained as a result of the creditor’s failure to act timely.260 Only the mortgagee of record may sign the cancellation certificate.261 If the secured indebtedness has been transferred from the originating creditor to an assignee creditor, the original creditor/mortgagee of record must sign the cancellation certificate, unless the assignee creditor files a notice of assignment in the mortgage records of the appropriate parish.262

G. Additional Questions Relating to Multiple Indebtedness Mortgages

1. Must a Secured Creditor Make or Commit to Make an Initial Loan or Advance to the Borrower Before a Multiple Indebtedness Mortgage Will Become Effective Against Third Parties?

The Law Institute’s Revision Comments to Article 3298 negate any requirement that “there initially be a debt or commitment in order to give vitality to the [multiple indebtedness] mortgage.”263 In comparison, post-1989 Louisiana collateral mortgages are not deemed to be fully effective or perfected against

258. See the second sentence of La. R.S. 9:5557(A) (Supp. 1994).
259. See the third sentence of La. R.S. 9:5557(A) (Supp. 1994).
260. Id.
third parties until the secured creditor actually makes an initial loan advance, or commits to do so, or otherwise gives "value" to the borrower.\textsuperscript{264}

2. \textit{Must the Borrower's Evidentiary Promissory Note Reference the Fact That the Note Is Secured by the Multiple Indebtedness Mortgage?}

Article 3298(C) provides that the "promissory note or other evidence of indebtedness secured by a [multiple indebtedness] mortgage . . . need not recite that it is secured by the mortgage."\textsuperscript{265}

3. \textit{Must the Borrower's Evidentiary Promissory Note Be Paraphed "Ne Varietur" for Identification with an Act of Partial Release of a Multiple Indebtedness Mortgage?}

There is no requirement that a note be paraphed "Ne Varietur" for identification with the mortgage; therefore, a note does not need to be paraphed for identification with an act of partial release of the mortgage.\textsuperscript{266}

4. \textit{Must the Borrower Agree or Concur at the Time a Subsequent Loan Is Made That the Loan Is Secured by the Outstanding Multiple Indebtedness Mortgage?}

An acknowledgement that the loan is secured by the prior multiple indebtedness mortgage is not required so long as the mortgage agreement includes broadly drafted future advance/cross-collateralization language. If the language is sufficiently broad and clear, all loans that the secured creditor, or its successors and assigns, may make to the borrower over time up to the limits of the mortgage, should be secured automatically by the mortgage without an acknowledgement or agreement to that effect executed contemporaneously with each loan.\textsuperscript{267}

5. \textit{What Actions Should a Creditor Take When Contemplating Making a Junior Mortgage Loan to a Borrower to Protect Itself If the First Mortgageholder Has a Multiple Indebtedness Mortgage on the Same Property?}

To protect itself, the prospective junior creditor should, at a minimum, obtain some type of stand-still or intercreditor agreement from the first filing creditor

\textsuperscript{264} See supra text accompanying note 232.

\textsuperscript{265} The only required identifying tie between a note secured by a multiple indebtedness mortgage and the mortgage itself is the definition of the secured indebtedness in the mortgage agreement.

\textsuperscript{266} See also La. R.S. 9:5180 and 9:5180.1 (Supp. 1994), which do not apply to a multiple indebtedness mortgage since a multiple indebtedness mortgage is not subject to La. R.S. 9:5180.2 (Supp. 1994).

\textsuperscript{267} Suggested language to this effect is included in the form of multiple indebtedness mortgage following this article.
whereby the first filing creditor agrees to limit its security interest to the amount that the borrower then owes. Without such a stand-still agreement, the junior creditor risks that the borrower will obtain additional loans from the first filing creditor that will be secured by the first mortgage with retroactive priority rights over those of the junior creditor.

6. **If a Creditor Receives an Assignment of a Multiple Indebtedness Mortgage from the Originating Creditor, Will Additional Loans That the Assignee Creditor Subsequently Makes to the Borrower Be Secured by the Outstanding Mortgage with Priority Back to the Date on Which the Mortgage Was Originally Filed?**

The original priority of the mortgage will be preserved if the borrower's multiple indebtedness mortgage contains language that clearly states that the mortgage not only secures multiple and future loans granted by the originating creditor, but also secures multiple and future loans granted by the originating creditor's successors and assigns. An assignee creditor should not make additional secured loans to the borrower without verifying that the borrower's multiple indebtedness mortgage contains future advance language that expressly covers advances made by successors and assigns.

7. **Does the Borrower Have the Right to Cut Off the Effects of a Multiple Indebtedness Mortgage as to Future Loans?**

No. Once a borrower signs a multiple indebtedness mortgage, the borrower should not have the right, unless the secured creditor agrees, to tell the creditor that he does not want additional loans to be secured by the mortgage. Nevertheless, creditors and their counsel may wish to include language in their multiple indebtedness mortgage agreements in which the borrower acknowledges and agrees that he may not subsequently change his mind and insist that

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268. This is the problem that plagued assignee creditors in the *Bozorg* and *Prevost Motors* cases discussed supra parts II.B and II.C.  
269. An assignee creditor should closely examine each multiple indebtedness mortgage that it purchases to confirm that the mortgage agreement contains proper "successors and assigns" language. If the mortgage contains such language, the assignee creditor should be safe in extending additional credit to the borrower secured by the lien of the mortgage back to the date of original filing.  
270. This is what happened in *Citizens Nat'l Bank v. Coates*, 509 So. 2d 103 (La. App. 1st Cir. 1987), discussed supra parts I.D.I and II.D.  

Compare continuing guaranties. A continuing guarantor has the right under La. Civ. Code art. 3061 to notify the creditor in writing of the fact that the guarantor no longer wishes the guaranty to secure additional loans that the creditor may thereafter make to the borrower. However, the guarantor remains personally liable for any then outstanding loans, as well as for any additional loans that the creditor at that time may have committed to make. The same right of "cut-off" does not apply to the future effects of a multiple indebtedness mortgage.
additional loans or indebtedness not be secured by his outstanding mortgage without the creditor agreeing to such a result in writing.\textsuperscript{271}

8. When Must a Mortgage Include an Intervention by a Non-Borrowing Spouse?

A creditworthy, married Louisiana loan applicant operating under a community property regime has the right to apply for and to obtain individual credit in his or her own name without the non-borrowing spouse being required to co-sign or otherwise guarantee the loan. This right is mandated by the Federal Equal Credit Opportunity Act\textsuperscript{272} and Federal Reserve Board Regulation B,\textsuperscript{273} in interaction with the Louisiana equal management community property laws.\textsuperscript{274} A married Louisiana loan applicant also has the right to encumber community owned property without the non-borrowing spouse being required to co-sign or otherwise intervene in the mortgage or security agreement\textsuperscript{275} except in four circumstances in which the concurrence of the non-borrowing spouse is required. These four circumstances are when the loan is secured by: (1) community owned real estate, including but not limited to the family home; (2) furniture, fixtures, and other household goods located within the family home; (3) all or substantially all of the assets of a community-owned enterprise (such as a proprietorship); and (4) certain types of property (such as stock) that is registered or issued jointly in the names of both spouses.\textsuperscript{276} Consequently, whenever a married Louisiana applicant applies for an individual loan in his or her own name and the creditor agrees to make the loan secured by a mortgage on community-owned real estate, including but not limited to the family home, the non-borrowing spouse must intervene in the mortgage to concur with the granting of the mortgage as required by Louisiana Civil Code article 2347, and to waive any homestead exemption to which the non-borrowing spouse may be entitled under applicable Louisiana law.\textsuperscript{277} The non-borrowing spouse should not be required to co-sign the mortgage as a co-mortgagor,\textsuperscript{278} but should be required only to intervene in the mortgage for the limited purposes of concurring with the granting of the mortgage. The spouse should sign the mortgage only as a spousal intervenor.\textsuperscript{279}

\textsuperscript{271} Suggested language to this effect is included in the form of multiple indebtedness mortgage following this article.
\textsuperscript{275} La. Civ. Code art. 2346.
\textsuperscript{276} La. Civ. Code art. 2347.
\textsuperscript{278} To do so arguably would violate the spousal signature rules of Section 202.7(d)(4) of Regulation B (12 C.F.R. § 202.7(d)(4) (1994)).
\textsuperscript{279} Suggested spousal intervention language is as follows:
9. If More Than One Mortgagor Has Granted a Multiple Indebtedness Mortgage, Must Each Co-Mortgagor Join in Each Request for a Subsequent Loan or Advance to Be Secured by the Mortgage?

To avoid any argument that the additional loan is not authorized, creditors should consider including language in the multiple indebtedness mortgage agreement whereby each co-mortgagor agrees that any co-mortgagor, acting alone or with others, may request additional loans that will be secured by the outstanding mortgage without the necessity that each co-mortgagor join in, consent, or agree to each such subsequent loan or extension of credit.280

10. May a Secured Creditor Foreclose on a Multiple Indebtedness Mortgage Using Louisiana Executory Process Procedures?

Louisiana Revised Statutes 9:5555281 provides that a creditor has the right to foreclose on multiple indebtedness mortgages using Louisiana executory process procedures even though the borrower’s mortgage note is not paraphed “Ne Varietur” for identification with the mortgage.282

11. In an Executory Process Foreclosure Proceeding, How Does the Secured Creditor Prove That the Borrower’s Loan is Secured by a Multiple Indebtedness Mortgage When the Borrower’s Note is Not Paraphed “Ne Varietur” for Identification with the Mortgage, and How May the Secured Creditor Prove the Amount, Date, and Terms of the Borrower’s Secured Indebtedness?

The secured creditor should allege in its verified executory process petition, or in a separate affidavit filed of record with the court, that the loan is secured by the borrower’s outstanding multiple indebtedness mortgage as a result of the future advance/cross-collateralization language included in the mortgage agreement. The creditor also should assert in its verified petition, or in a separate affidavit, the amount, terms, and maturity of each secured loan, and that the loan is then in default.283 The verified petition or affidavit should be

And now into these presents intervenes ___________ (Social Security No. ___________), my spouse, appearing herein for the limited purpose of concurring with the granting of this mortgage on the community-owned property described herein consistent with Article 2347 of the Louisiana Civil Code, and without creating any liability with respect to my spouse’s separate property, as well as for the additional purpose (when applicable) of waiving any homestead and other exemptions from seizure with regard to the mortgaged property as may be granted under applicable Louisiana law.

280. Suggested language to this effect is included in the form of multiple indebtedness mortgage following this article.
282. This is a special exception to the requirement of La. Code Civ. P. art. 2636(1).
signed by an authorized employee or officer of the secured creditor, and should recite that the employee or officer is attesting to such facts based upon his or her personal knowledge and/or on information and belief derived from records kept in the ordinary course of business. The verified petition or affidavit need not identify the records on which such knowledge, information, or belief is based. 284

H. Predictions and Conclusion

With the passage of time, multiple indebtedness mortgages should replace collateral mortgages as the most prevalent form of mortgage instrument in use in Louisiana. 285 More creditors and their attorneys will come to recognize the benefits of multiple indebtedness mortgages. When given the choice between a multiple indebtedness mortgage and a future advance collateral mortgage, there really is no choice. A multiple indebtedness mortgage is a vastly superior security instrument. It is easier and simpler to use and less susceptible to risk of unanticipated judicial construction.

Those creditors and their attorneys who refuse to use multiple indebtedness mortgages because they are new and untested by the courts, will continue to face the risks and uncertainties associated with Louisiana's continuously evolving law of collateral mortgages. Although future advance collateral mortgages are now subject to Louisiana U.C.C. Article 9 and the Louisiana collateral mortgage statute, the potential of creditor and judicial confusion has actually increased rather than decreased. As previously discussed in this article, 286 there is the risk that creditors and the courts will continue to apply pre-1990 rules to collateral mortgages granted on and after January 1, 1990. Louisiana Civil Code article 3158 and the collateral mortgage cases decided under that article, however, no longer apply, and the principles and rules established by New Orleans Silversmiths and its progeny should not be carried over to post-1989 collateral mortgages. There is the additional risk that creditors and the courts may apply non-Louisiana U.C.C. decisional law to Louisiana collateral mortgages, which are unique to Louisiana. Collateral mortgages are different from traditional U.C.C. security interests, and are combinations of a U.C.C. pledge of an "instrument" (i.e., the borrower's collateral mortgage note) and a Louisiana real estate mortgage. For this reason, non-Louisiana U.C.C. decisional law may not be applicable to Louisiana collateral mortgages. Furthermore, creditors and the courts may not give proper deference to the parenthetical language of Louisiana Revised Statutes 9:5551(B) to establish the continuing future advance priority rights of a post-1989 collateral mortgage in certain full

285. Possibly even the Federal National Mortgage Association may someday accept assignments of Louisiana multiple indebtedness mortgages.
286. See supra part III.E.8.
paydown or lapsed credit situations. This parenthetical language was intentionally included in the Louisiana collateral mortgage statute and is critical to the intended continuing priority of post-1989 collateral mortgages as open-ended security instruments.

A creditor may avoid these risks by securing the borrower’s loan with a multiple indebtedness mortgage rather than with a future advance collateral mortgage. Louisiana Civil Code article 3298, the Law Institute’s Revision Comments to that article, and the Exposé des Motifs to Act 652 of 1991 make it clear that the legislature intended new multiple indebtedness mortgages to be a simpler and less problematic alternative to future advance collateral mortgages, accomplishing directly what a collateral mortgage can accomplish only indirectly. The legislature, the Louisiana State Law Institute, and particularly Professor Harrell, who drafted revised Article 3298, are commended for their insight in authorizing multiple indebtedness mortgages as a new practical form of mortgage instrument. Multiple indebtedness mortgages are a great leap forward in the modernization of Louisiana real estate mortgage law, equivalent in their epochal effect to that of the Louisiana U.C.C. on personal property security interests.
MULTIPLE INDEBTEDNESS MORTGAGE

BY: UNITED STATES OF AMERICA

STATE OF LOUISIANA

IN FAVOR OF: PARISH OF ____________

And Any Future Holder or Holders

BE IT KNOWN, that on the ___ day of ___________, 199 ;

BEFORE ME, the undersigned Notary Public, and in the presence of

the undersigned competent witnesses;

PERSONALLY CAME AND APPEARED:

________________________________ SSN:_________, a person of the full age of

majority, domiciled and residing in the Parish of __________, State

of Louisiana, whose mailing address is ________, ________, LA

________, who declared that he has been married but once and

then to ____________ with whom he is presently living and

residing;

WHO DECLARED THAT:

TERMS AND CONDITIONS:

DEFINITIONS. The following words shall have the following meanings

when used in this Mortgage:

Additional Advances. The words “Additional Advances” mean any and all

additional sums that Mortgagee may advance on my behalf as provided

under this Mortgage.

Event of Default. The words “Event of Default” mean individually, collect-

ively and interchangeably the occurrence or existence of one or more events

of default under the Indebtedness.

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**Indebtedness.** The word “Indebtedness” means any and all present and future loans, extensions of credit, liabilities and obligations of every nature and kind that I may now and/or in the future owe to or incur in favor of Mortgagee, including without limitation, the loan evidenced by my promissory note dated _______, 1999, in the amount of U.S. $________, whether such loans, extensions of credit, liabilities and obligations are direct or indirect, or by way of assignment or purchase of a participation interest, or absolute or contingent, voluntary or involuntary, determined or undetermined, liquidated or unliquidated, due or to become due, and whether related or unrelated to my loan described above, and/or whether committed or purely discretionary, and whether secured or unsecured, in principal, interest, costs, expenses, attorneys’ fees and other fees and charges. Notwithstanding any other provision of this Mortgage, if the Property is my principal residence, my additional loans, extensions of credit, and other liabilities and obligations in favor of Mortgagee, which are entered into before or after the date of this Mortgage primarily for personal, family or household (consumer) purposes, will not be secured by this Mortgage, unless and until Mortgagee complies with the disclosure, rescission and other requirements of Federal Reserve Board Regulation Z, as applicable. Further notwithstanding any other provision of this Mortgage, the maximum amount of Indebtedness secured hereby shall be limited to $__________________.

**Mortgagee.** The word “Mortgagee” means ______________________ (TIN: _________), its successors and assigns, and any future holder or holders of any of the Indebtedness.

**Mortgagor.** The words “I”, “me”, “my”, “we”, “us”, and “our” mean individually, collectively and interchangeably the above referenced mortgagor, as well as any and all persons and entities subsequently purchasing the mortgaged Property, with or without assumption of this Mortgage.

**Property.** The word “Property” means individually, collectively and interchangeably any and all of my present and future property subject to this Mortgage.

**GRANTING OF MORTGAGE.** To secure the prompt and punctual payment and satisfaction of my present and future Indebtedness, in principal, interest, costs, late charges, and attorneys’ fees, and additionally to secure repayment of all Additional Advances that Mortgagee may advance on my behalf as provided under this Mortgage, together with interest thereon, I am hereby specifically mortgaging, affecting and hypothecating unto and in favor of Mortgagee, any and all of my present and future rights, title and interests in and to the following described Property:
The immovable (real) property as more fully described in an exhibit attached hereto and expressly made a part hereof, together with any and all present and future building(s), constructions, component parts, improvements, attachments, appurtenances, fixtures, rights, ways, privileges, advantages, batture, and batture rights, servitudes and easements of every type and description, now and/or in the future relating to the mortgaged Property, and any and all items and fixtures attached to and/or forming integral or component parts of the mortgaged Property in accordance with the Louisiana Civil Code.

The Property or its address is commonly known as

MORTGAGE SECURING PRESENT AND FUTURE INDEBTEDNESS. This Mortgage is granted pursuant to Article 3298 of the Louisiana Civil Code and shall secure my present and future Indebtedness in favor of Mortgagee subject to the restrictions and maximum dollar limitations provided herein. My additional loans and other Indebtedness automatically will be secured by this Mortgage without the necessity that I agree or consent to such a result at the time additional loans are made and that the note or notes evidencing such additional loans reference the fact that such notes are secured by this Mortgage. I understand that I may not subsequently have a change of mind and insist that my additional loans not be secured by this Mortgage unless Mortgagee specifically agrees to such a request in writing.

I agree that my Property is to remain mortgaged to Mortgagee until all of my Indebtedness is paid in full and Mortgagee has no further agreement to extend funds to me or to others for which I may be obligated, and I request and Mortgagee delivers to me a written cancellation of this Mortgage. I understand that I may request Mortgagee to provide such a cancellation instrument which I will file to cancel this Mortgage, by writing to Mortgagee at its main office or at another office that Mortgagee tells me to write to. Mortgagee may delay providing me with such a mortgage cancellation instrument for a period of sixty (60) days following receipt of my written request.

ADDITIONAL COVENANTS. So long as this Mortgage remains in effect, I agree not to, without Mortgagee's prior written consent: (a) sell, assign, transfer, convey, option, mortgage, or lease the Property; (b) permit any lien or encumbrance to be placed on or to attach to the Property; (c) do anything or permit anything to be done that may in any way impair Mortgagee's security interests and rights in and to the Property; or (d) demolish, remove, construct, restore, add to, or alter any building(s) or other improvements to the Property.

So long as this Mortgage remains in effect, I agree not to abandon, or permit others to abandon, or commit waste of, or destroy the Property. I further agree
to observe and abide by and to cause others to observe and abide by all laws, rules, regulations and ordinances, as well as all policies of insurance, affecting the Property or its use.

I agree to maintain insurance on the Property at my expense for as long as this Mortgage remains in effect. This insurance is to be in the amounts and of the types required by Mortgagee and must be issued by a financially responsible insurance company or companies acceptable to Mortgagee. I agree to name Mortgagee as a lender loss payee beneficiary under such insurance policies, which must contain noncontributory lender loss payable clauses in Mortgagee’s favor and a provision prohibiting the cancellation or alteration of such insurance without at least ten (10) days’ prior written notice to Mortgagee. I further agree to provide Mortgagee with originals or certified copies of such insurance policies along with evidence that I have paid the policy premiums and all renewal premiums when due. Should the Property at any time become located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, I agree to obtain and maintain Federal Flood Insurance to the extent such insurance is required and is or becomes available, for the term of my Indebtedness and for the full unpaid principal balance of my Indebtedness, or the maximum limit of coverage that is available, whichever is less. I further agree that Mortgagee shall have the right to directly receive all proceeds payable and unearned premiums under my insurance policies. Should I receive any such insurance proceeds, I agree immediately to turn such proceeds over and pay the same to Mortgagee. Mortgagee may apply such insurance proceeds at its sole option and discretion (after payment of all reasonable costs, expenses and attorneys’ fees incurred by Mortgagee), for the purpose of (a) repairing, replacing or restoring the lost, stolen or damaged Property, or (b) reducing the outstanding balance of the Indebtedness, and repaying all Additional Advances that Mortgagee may have advanced on my behalf as provided under this Mortgage, together with interest thereon.

I agree to promptly pay when due all taxes, local and special assessments and other governmental charges of every type and description that may from time to time be imposed, assessed, or levied against the Property, and to provide Mortgagee with evidence that such taxes, assessments and other governmental charges have been paid in full and in a timely manner.

I agree that Mortgagee or Mortgagee’s agents periodically may inspect the Property at all reasonable times. I agree to keep and maintain, and to cause others to keep and maintain, the Property in good order, repair and condition at all times while this Mortgage remains in effect, and to pay when due all claims for work done on, or services rendered or material furnished in connection with the Property so that no Encumbrance may ever attach to or be filed against the Property.
Should I fail to do what is required of me under this Mortgage, Mortgagee shall have the right, at Mortgagee's sole option and without any responsibility or liability to do so, to take such actions on my behalf (including purchasing insurance protecting only Mortgagee's interests in the Property) and/or to cure such default(s) or to cause any default(s) to be cured, whether by making payments on my behalf or by taking such other actions as Mortgagee may deem to be necessary and proper within its sole discretion. All such Additional Advances that Mortgagee may advance on my behalf during the existence of this Mortgage, as well as Mortgagee's additional expenses as further provided under this Mortgage, shall be secured by this Mortgage as an additional Indebtedness. I agree to reimburse Mortgagee immediately for all additional sums that Mortgagee may advance for such purposes, together with interest thereon at the rate of _________% per annum from the date of each Additional Advance under this Mortgage until I repay Mortgagee in full.

MORTGAGEE'S RIGHTS IN EVENT OF DEFAULT. Should one or more Events of Default occur or exist under the Indebtedness, Mortgagee shall have the right to accelerate payment of any and all amounts which I may owe under the Indebtedness, in principal, interest, costs, expenses, attorneys' fees and other fees and charges, as well as all Additional Advances that Mortgagee may have advanced on my behalf as provided under this Mortgage, together with interest thereon. Mortgagee shall have the further right, again at its sole option, to commence foreclosure proceedings under ordinary or executory process, under which Mortgagee may cause the Property to be immediately seized and sold, with or without appraisal, in regular session of court or in vacation, in accordance with applicable Louisiana law. For purposes of foreclosure under Louisiana executory process procedures, I confess judgment and acknowledge to be indebted to Mortgagee up to the full amount of the Indebtedness, in principal, interest, costs, expenses, attorneys' fees and other fees and charges, and in the amount of all Additional Advances that Mortgagee may have advanced on my behalf as provided under this Mortgage, together with interest thereon. To the extent permitted under applicable Louisiana law, I am waiving: (a) the benefit of appraisal as provided in Articles 2332, 2336, 2723, and 2724 of the Louisiana Code of Civil Procedure, and all other laws with regard to appraisal upon judicial sale; (b) the demand and three (3) days' delay as provided under Articles 2639 and 2721 of the Louisiana Code of Civil Procedure; (c) the notice of seizure as provided under Articles 2293 and 2721 of the Louisiana Code of Civil Procedure; (d) the three (3) days' delay provided under Articles 2331 and 2722 of the Louisiana Code of Civil Procedure; and (e) all other benefits provided under Articles 2331, 2722 and 2723 of the Louisiana Code of Civil Procedure and all other Articles not specifically mentioned above. I further agree that any declaration of fact made by authentic act before a Notary Public and two witnesses, by a person declaring that such facts are within his or her knowledge, shall constitute authentic evidence of such facts for purposes of foreclosure under applicable Louisiana law and for purposes of La. R.S. 9:3504(D)(6), where
applicable. Should any or all of the Property be seized, I hereby agree that the court issuing any such order shall, if requested by Mortgagee, appoint Mortgag-
ee, or any agent designated by Mortgagee as keeper of the Property. I agree to pay the reasonable fees of such a keeper, which are hereby fixed at $20.00 per hour. Any fees paid to the keeper by Mortgagee shall be secured by this Mortgage as an additional expense.

GENERAL PROVISIONS. In granting this Mortgage, I am waiving any homestead and other exemptions from seizure with regard to the Property to which I may be entitled under the laws of the State of Louisiana. I am also waiving the production of mortgage, conveyance and any and all other certificates and relieve and release the Notary Public before whom this Mortgage was passed from all responsibility and liability in connection therewith. When there is more than one Mortgagor under this Mortgage, our obligations to Mortgagee shall be on a "solidary" or "joint and several" basis. We further agree that either or any of us, acting alone or with others, may obtain additional loans and other extensions of credit from Mortgagee secured by this Mortgage, without the further necessity that all of us further agree, concur, or join in each such loan or other extension of credit. All required notices under this Mortgage shall be in writing and shall be effective when actually delivered, or when deposited in the United States mail, postage prepaid, addressed to the person to whom the notice is to be given at the address shown above, or at such other addresses as any party may designate to the other(s) in writing. If there is more than one Mortgagor under this Mortgage, notice given to any Mortgagor shall constitute notice to all Mortgagors. I agree that any failure or delay on the part of Mortgagee to exercise any of the rights and remedies granted under this Mortgage shall not constitute a waiver of such rights and remedies. Any waiver or forbearance on the part of Mortgagee shall be effective against Mortgagee only if agreed to in writing. This Mortgage shall be governed by and interpreted in accordance with the laws of the State of Louisiana. My obligations under this Mortgage shall be binding upon my heirs, administrators, executors, successors and assigns, as well as upon any person, firm or corporation subsequently acquiring title to or ownership of the Property, whether in whole or in part. Should there be any change in local, Louisiana or federal law with regard to taxation of mortgages, I agree to pay any taxes, assessments or charges that may be imposed on Mortgagee as a result of this Mortgage.

If any provision of this Mortgage is deemed to be invalid or unenforceable, such invalidity or unenforceability will not affect the validity and enforceability of the remaining provisions of this Mortgage. The caption headings in this Mortgage are for convenience purposes only and are not to be construed as a summary of each provision of this Mortgage.

SPOUSAL INTERVENTION. AND NOW INTO THESE PRESENTS INTERVENES ________________ (SSN ________________), my
spouse, appearing herein for the limited purpose of concurring with the granting of this Mortgage consistent with Article 2347 of the Louisiana Civil Code, without creating any liability with regard to my spouse's separate property not subject to this Mortgage, as well as for the purpose (as applicable) of waiving any homestead and other exemptions from seizure with regard to the Property to which my spouse may be entitled under Louisiana law. My spouse further agrees and concurs that I, acting alone or with others, may obtain additional loans and other extensions of credit secured by this Mortgage without the necessity that my spouse further agree to or concur in each such additional loan or other extension of credit.

THUS DONE AND PASSED, on the day, month and year first written above, in the presence of the undersigned Notary and the undersigned competent witnesses, who hereunto sign their names with Mortgagor and the undersigned Intervenor(s) after reading of the whole.

WITNESSES: MORTGAGOR:

X__________________ X__________________

X__________________

NON-BORROWING SPOUSE INTERVENOR

X__________________

___________________________

NOTARY PUBLIC