

# Louisiana Future Advance Mortgages: A 20-Year Retrospective

David S. Willenzik

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# Louisiana Future Advance Mortgages: A 20-Year Retrospective

David S. Willenzik\*

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## INTRODUCTION

This Article is an update and expansion of two previous 1994 articles on future advance Louisiana collateral mortgages and multiple indebtedness mortgages: D. Willenzik, *Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative*,<sup>1</sup> and M. Rubin, D. Willenzik, and M. Moore, *Is the Collateral Mortgage Obsolete?*<sup>2</sup> Both of these articles were published at a time when the original 1990 version of Louisiana UCC Article 9<sup>3</sup> and the Louisiana

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1. See generally 55 LA. L. REV. 1 (1994) [hereinafter Willenzik, *Future Advance Priority Rights* or “1994 Willenzik Article”]. This article updates and expands upon, and is intended to be read in conjunction with, the 1994 Willenzik Article.

2. See generally Michael Rubin, David Willenzik, & M. Moore, *Is the Collateral Mortgage Obsolete?*, 41 LA. B.J. 529 (1994).

3. LA. REV. STAT. ANN. §§ 10:9-101 to 10:9-710 (2002). Louisiana Revised Statutes section 10:9-101 was first enacted under Act No. 135, § 3, 1989 La. Acts 417, effective January 1, 1990, and was subsequently amended and reenacted under Act No. 128, §1, 2001 La. Acts 206, effective July 1, 2001.

collateral mortgage statute<sup>4</sup> had been in effect for less than five years, and at a time when the 1991 comprehensive revisions to the mortgage articles of the Louisiana Civil Code<sup>5</sup> had been in effect for less than three years. Louisiana collateral mortgage law has undergone significant changes over the past 20 years. The most important of these changes was the enactment of the 2001 comprehensive revisions to Article 9 of the Uniform Commercial Code,<sup>6</sup> which apply to post-July 1, 2001 UCC pledges of Louisiana collateral mortgage notes and accessory collateral mortgages.

Part I of this Article discusses the sections of Revised Louisiana UCC Article 9 and the Louisiana collateral mortgage statute that apply to post-July 1, 2001 collateral mortgages.<sup>7</sup> Part II discusses significant Louisiana collateral mortgage case law developments over the past 20 years, including critical analysis of the Louisiana

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This statute is known as the “Louisiana UCC,” or “Louisiana UCC Article 9,” or sometimes “Revised Louisiana UCC Article 9.” The Louisiana UCC was previously known as the “Louisiana Commercial Laws.” See LA. REV. STAT. ANN. § 10:1-101 (1974); see also LA. REV. STAT. ANN. § 10:1-101 (*amended by* Act No. 533, § 1, 2006 La. Acts 2041) (changing the name of Title 10 of the Louisiana Revised Statutes to the Louisiana Uniform Commercial Code). This article intentionally refers to the Uniform Commercial Code using the acronym “UCC” (without periods) rather than the abbreviation “U.C.C.” (with periods). UCC is the preferred reference to the Uniform Commercial Code. This article also intentionally refers to the parts of the Louisiana UCC as “Articles”; whereas Title 10 of the Louisiana Revised Statutes refers to the parts of the Louisiana UCC as “Chapters” so as not to cause confusion with articles of the Louisiana Civil Code and with the articles of the Code of Civil Procedure. “Articles” is the preferred reference to the parts of the UCC. Unless otherwise indicated, all references to the sections of Louisiana UCC Article 9 in this article refer to Revised Louisiana UCC Article 9, effective July 1, 2001. The sections of Revised Louisiana UCC Article 9 are cited in the text of this article as “Louisiana UCC § 9-\_\_\_.” Similarly, the sections of the multi-state version of UCC Article 9 (as distinguished from the Louisiana UCC) are cited in the text of, and in the footnotes to this article as “UCC § 9-\_\_\_.”

4. See LA. REV. STAT. ANN. § 9:5550 (1990) (enacted under Act No. 137, §7, 1989 La. Acts 527, effective January 1, 1990).

5. LA. CIV. CODE arts. 3278–3298 (*amended by* and reenacted under Act No. 652, §1, 1991 La. Acts 2068).

6. Article 9 of the UCC was totally revised on a nation-wide basis effective as of July 1, 2001. The Louisiana version of Revised UCC Article 9 became effective on the national implementation date. Act No. 128, 2001 La. Acts 206.

7. See Willenzik, *Future Advance Priority Rights*, *supra* note 1 (discussing sections of the 1990 version of Louisiana UCC Article 9 applying to UCC pledges of collateral mortgage notes from January 1, 1990, through June 30, 2001). This Article updates the 1994 Willenzik Article by discussing the sections of Revised Louisiana UCC Article 9 that now (since July 1, 2001) exclusively apply to pledges of Louisiana collateral mortgage notes.

Supreme Court's decision in *Diamond Services Corporation v. Benoit*.<sup>8</sup> Part III of this Article discusses the rules that apply to future advance Louisiana multiple indebtedness mortgages as a modern alternative to old-style collateral mortgages. Part IV discusses significant multiple indebtedness mortgage cases decided over the past 20 years, including critical analysis of the United States Bankruptcy Court and Fifth Circuit decisions in *In re Hari Aum*,<sup>9</sup> and the United States District Court for the Middle District of Louisiana decision in *KeyBank National Association v. Perkins Rowe Associates, LLC*.<sup>10</sup> Part V of this Article concludes with a discussion of the prevailing trend away from continued use of old-style Louisiana collateral mortgages in favor of the more modern and less risky alternative of using Louisiana multiple indebtedness mortgages as a preferred open-end mortgage instrument.<sup>11</sup>

### I. LOUISIANA COLLATERAL MORTGAGES

This Part discusses the history, purpose, and structure of Louisiana collateral mortgages and the rules that applied to collateral mortgages granted prior to January 1, 1990, that were previously subject to the pledge articles of the Louisiana Civil Code.<sup>12</sup> This Part further discusses the rules that presently apply to post-1989 collateral mortgages granted on and after January 1, 1990, that are now exclusively subject to the possession perfection

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8. See 780 So. 2d 367 (La. 2001).

9. No. 10-12931, 2011 WL 2746149 (Bankr. E.D. La. 2011), *aff'd*, 714 F. 3d 274 (5th Cir. 2013).

10. See 823 F. Supp. 2d 399 (M.D. La. 2011), *aff'd*, 502 F. App'x 407 (5th Cir. 2012) (adopting the reasoning of the district court).

11. An open-end mortgage is capable of securing multiple present and future loans, loan advances, and other indebtedness and performance obligations under a single mortgage instrument.

12. LA. CIV. CODE arts. 3133–3175 (1870) (as subsequently amended). The Civil Code pledge articles were recently amended and reenacted on a comprehensive basis. See Act No. 281, 2014 La. Acts (effective Jan. 2015). The Civil Code pledge articles do not apply to pledges of collateral that otherwise are subject to encumbrance under Louisiana UCC Article 9, including specifically to pledges of Louisiana collateral mortgage notes, which remain exclusively subject to Louisiana UCC Article 9. See LA. CIV. CODE arts. 3142–3143 (2015); see also LA. CIV. CODE art. 3142 cmt. c (2015). The 2015 amended pledge articles have only limited applicability to security interests in rights under certain types of insurance policies and annuity products that are excluded from coverage under Louisiana UCC Article 9. See LA. CIV. CODE art. 3142 cmt. c (2015). See also LA. REV. STAT. ANN. 10:9-109(d) (2002) (listing the limited types of collateral that are excluded from coverage under Louisiana UCC Article 9).

(pledge) provisions of Louisiana UCC Article 9 and to the Louisiana collateral mortgage statute.

*A. History and Purpose*

Louisiana collateral mortgages originated in the mid-19th century out of the commercial necessity for an enforceable security device that could encumber both immovable and movable property and that could secure multiple loans, revolving lines of credit,<sup>13</sup> and performance obligations with retroactive ranking priority vis-à-vis potential competing third persons back to the time the mortgage instrument was originally recorded in the parish mortgage records.<sup>14</sup> At that time (again the mid-19th century), and continuing until January 1, 1992, when the 1991 comprehensive revisions to the mortgage articles of the Louisiana Civil Code first took effect, Louisiana ordinary conventional mortgages<sup>15</sup> were able to secure only one-time extensions of credit evidenced by a promissory note paraphed *ne varietur* for identification with the mortgage.<sup>16</sup> Ordinary conventional mortgages were not able to secure multiple loans, revolving lines of credit, and other present and future cross-collateralized indebtedness because of the then-Civil Code rule that the lien of a conventional mortgage is

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13. A revolving line of credit is an open-end credit facility under which a borrower may request and obtain multiple loan advances from time to time, one or more times, make principal reduction payments, and then reborrow again back up to the borrower's pre-established credit limit.

14. See *Levy v. Ford*, 6 So. 671 (La. 1889); *Merchants' Mut. Ins. Co. v. Jamison*, 25 La. Ann. 363 (1873); *Succession of Dolhonde*, 21 La. Ann. 3 (1869); see also *Diamond Servs. Corp. v. Benoit*, 780 So. 2d 367, 370–71 (La. 2001); Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 7.

15. For purposes of explanation, there are four forms of mortgages recognized under Louisiana law. The first is an ordinary conventional mortgage that secures a one-time extension of credit evidenced by a promissory mortgage note. The second is a staged-advance mortgage, which generally is used incident to construction financings. See *infra* note 21. The third form of mortgage is a collateral mortgage, which can secure multiple loans, revolving lines of credit, as well as other multiple present and future cross-collateralized indebtedness and performance obligations. See *infra* Part I. The fourth form of mortgage recognized under Louisiana law is a multiple indebtedness mortgage, which is the modern alternative to old style collateral mortgages. See *infra* Part III.

16. LA. CIV. CODE art. 3384 (1870) (previously requiring mortgage notes to be paraphed *ne varietur* for identification with the mortgages they secured). This paraph requirement was eliminated in 1992 at the time the Civil Code mortgage articles were revised. See LA. CIV. CODE art. 3298(C) (2015); see also LA. CIV. CODE art. 3325 (2015) (“[A] note or other written obligation which is secured by an act of mortgage . . . need not be paraphed for identification with such mortgage . . . and need not recite that it is secured by such mortgage.”).

automatically reduced on a *pro tanto*, dollar-for-dollar basis as principal payments were made under the secured mortgage note.<sup>17</sup>

Recognizing that the lack of an enforceable open-end Civil Code mortgage instrument had the effect of inhibiting economic growth, certain innovative commercial lawyers of the mid-19th century reasoned that, although the Civil Code did not permit mortgages to directly secure multiple loans, revolving lines of credit, and other present and future cross-collateralized debt,<sup>18</sup> the pledge articles of the Civil Code, namely articles 3103 and 3125 of the 1825 Code, contained no such limitation. These two 1825 articles, when read together, provided that a Civil Code pledge could secure any lawful obligation up to the maximum amount stipulated in the pledge agreement.<sup>19</sup> The innovative commercial lawyers who first came up with the concept of a collateral mortgage further reasoned that, by having a mortgage secure a promissory note payable to bearer on demand, and then pledging that note to secure the real intended indebtedness, a mortgage could indirectly secure multiple loans, revolving lines of credit,

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17. See LA. CIV. CODE art. 3252 (1825); LA. CIV. CODE art. 3285 (1870) (“[I]t is essentially necessary to the existence of a mortgage, that there shall be a principal debt to serve as a foundation for it. Hence it happens, that in all cases where the principal debt is extinguished, the mortgage disappears with it. . . .”). See also *Mente & Co. v. Levy*, 107 So. 318, 329 (La. 1926); *Leon A. Minsky, Inc. v. Providence Fashions, Inc.*, 404 So. 2d 1275 (La. Ct. App. 1981) (requiring reduction of lien of a conventional mortgage on a *pro tanto*, dollar-for-dollar basis as principal payments are made under the secured mortgage note (citing *Thrift Funds Canal, Inc. v. Foy*, 260 So. 2d 628, 632 (La. 1972))). By way of example, the lien or encumbrance of an ordinary conventional mortgage securing a \$100,000 mortgage note automatically is reduced to \$75,000 as a result of the borrower paying down principal under the note by \$25,000. Former Code articles necessarily precluded the borrower from re-borrowing the \$25,000 previously paid, and then having the original mortgage secure the re-upped \$100,000 outstanding loan balance. See also *Expose des Motifs* to Act No. 652, 1991 La. Acts 2068 (discussing further the considerations preventing an ordinary conventional mortgage from securing revolving lines of credit and other present and future cross-collateralized indebtedness).

18. See *Thrift Funds Canal*, 260 So. 2d at 630; *First Fed. Sav. & Loan Ass’n v. Moss*, 616 So. 2d 648 (La. 1993).

19. LA. CIV. CODE art. 3103 (1825); LA. CIV. CODE art. 3131 (1870) (“Every lawful obligation may be enforced by the auxiliary obligation of pledge.”). See also LA. CIV. CODE art. 3125 (1825) (“But this privilege [pledge] takes place against third persons, only in the case that the pawn is proven by an act made either in a public form or under private signature . . . provided also, that whatever may be the form of the act, it mentions the amount of the debt as well as the species and nature of the thing given in pledge.”); LA. CIV. CODE art. 3158 (1870) (pledge of promissory notes may secure multiple loans, lines of credit, and other cross-collateralized debt up to the maximum dollar amount specified in the pledge agreement).



and other present and future cross-collateralized indebtedness up to the maximum amount agreed to by the parties.<sup>20</sup>

Thus, the future advance Louisiana collateral mortgage was created as a creature of commercial necessity and of the ingenuity of lawyers of the mid-19th century.<sup>21</sup> As discussed in Part V of this Article, collateral mortgages are still being used today notwithstanding that Louisiana law now offers a more modern and less-risky alternative open-end mortgage instrument in the form of a multiple indebtedness mortgage.<sup>22</sup>

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20. The most noteworthy decision with respect to the ability of pre-1990 collateral mortgages to secure multiple loans, revolving lines of credit and other present and future cross-collateralized debt is *New Orleans Silversmiths, Inc. v. Toups*, 261 So. 2d 252 (La. Ct. App. 1972). See Thomas J. McDonald, Jr., *Security Rights—Mortgage—Retroactive Ranking of Future Advances Secured by Collateral Mortgage*, 47 TUL. L. REV. 211 (1972); Max Nathan & H. Gayle Marshall, *The Collateral Mortgage*, 33 LA. L. REV. 497, 517–24 (1973); see also Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 10; *Tex. Bank of Beaumont v. Bozorg*, 457 So. 2d 667, 674 (La. 1984); *New Orleans Fed. Sav. & Loan Ass'n v. Lee*, 449 So. 2d 167 (La. Ct. App. 1984); *Alaynick v. Jefferson Bank & Trust Co.*, 451 So. 2d 627 (La. Ct. App. 1984); *Mardis v. Hollanger*, 426 So. 2d 392 (La. Ct. App. 1983); *Bank of Jena v. Rowlen*, 370 So. 2d 146 (La. Ct. App. 1979); *Am. Bank & Trust Co. v. F & W Constr.*, 357 So. 2d 1226 (La. Ct. App. 1978).

21. This article uses the UCC term “future advance” to describe related and unrelated loans and other extensions of credit, whether made on a line of credit basis or otherwise, and whether made pursuant to a commitment. See LA. REV. STAT. ANN. § 10:9-304(c) (Supp. 2015). Louisiana collateral mortgages should not be confused with so-called “staged-advance” mortgages, which generally are used to secure real estate construction loans that are funded on a staged-advance, non-revolving line of credit basis. See *Thrift Funds Canal*, 260 So. 2d at 630; *Am. Bank v. Red Diamond Supply Co.*, 402 So. 2d 729, 731 (La. Ct. App. 1978); *Cameron Brown S., Inc. v. E. Glen Oaks, Inc.*, 341 So. 2d 450, 458 (La. Ct. App. 1976); Bernard K. Vetter, *The Validity and Ranking of Future Advance Mortgages in Louisiana*, 21 LOY. L. REV. 141 (1975); see also MICHAEL H. RUBIN, LOUISIANA LAW OF SECURITY DEVICES: A PRÉCIS 92 (LexisNexis 2011) (discussing staged-advance mortgages). Example: A \$300,000 construction loan to be funded on a non-self-replenishing (closed-end), staged-advance basis, with an initial funding or draw in the amount of \$50,000 at time of commencement of work, a second funding or draw in the amount of \$100,000 upon completion of the building structure and exterior, a third funding or draw in the amount of \$120,000 upon completion of the building interior, and the remaining \$30,000 in the form of a 10% retainer to be funded upon final acceptance of the building and improvements. Under this example, the borrower has no right to pay down the loan and then reborrow additional funds back up to the original \$300,000 amount of the borrower’s promissory note.

22. See *infra* Part III.

*B. How Future Advance Louisiana Collateral Mortgages Work*

The Louisiana Supreme Court recognized in *First Guaranty Bank v. Alford*<sup>23</sup> that “a collateral mortgage is not a ‘pure’ mortgage; rather, it is a result of judicial recognition that one can pledge a note secured by a mortgage and use this pledge to secure yet another debt.”<sup>24</sup> As the Supreme Court further stated in *Texas Bank of Beaumont v. Bozorg*,<sup>25</sup> and again in *Diamond Services Corporation v. Benoit*,<sup>26</sup> “the collateral mortgage . . . combines the security devices of both mortgage and pledge.”<sup>27</sup>

Typically, there are four documents in a collateral mortgage package:<sup>28</sup> (1) a collateral mortgage under which the mortgagor grants a mortgage on the mortgagor’s immovable property;<sup>29</sup> (2) a collateral mortgage note payable to bearer on demand; (3) a collateral pledge/UCC security agreement; and (4) one or more hand notes or other writings evidencing the debtor’s<sup>30</sup> true indebtedness.

23. 366 So. 2d 1299 (La. 1978).

24. See *id.* at 1302; see also Michael H. Rubin, *The Work of the Louisiana Appellate Courts for the 1978–1979 Term-Security Devices*, 40 LA. L. REV. 572, 578–79 (1980) [hereinafter Rubin, *1978–1979 Term*].

25. 457 So. 2d 667, 671 (La. 1984).

26. 780 So. 2d 367, 372 (La. 2001). See further discussion of *Benoit* *infra* Part II.A.

27. *Benoit*, 780 So. 2d at 381. The Supreme Court stated that Nathan and Marshall recognized the collateral mortgage device as a “hybrid” and pronounced it “the weird blend of pledge and mortgage.” *Id.* at 372 n.8. “The device has also been described as the strange alchemy of the pledge of a mortgage created by the pledgor.” *Id.* (citing Nathan & Marshall, *supra* note 20, at 498, 521). Nathan and Marshall explained, “[A]s the very name implies, the [collateral mortgage] device contemplates that the mortgage note does not represent an actual debt but will be issued as collateral to secure such debts.” Nathan & Marshall, *supra* note 20, at 498, 521.

28. *Cameron Brown S., Inc. v. E. Glen Oaks, Inc.*, 341 So. 2d 450, 458 (La. Ct. App. 1976) (discussing the concept of a collateral mortgage package).

29. Collateral chattel mortgages on corporeal movable property are no longer used after the January 1, 1990 effective date of Louisiana UCC Article 9. Security interests in corporeal movables, including inventory and equipment in bulk, are now, since January 1, 1990, exclusively subject to Louisiana UCC Article 9.

30. This article uses the UCC term “debtor” to refer to the party granting a security interest in a collateral mortgage note or other UCC collateral. See LA. REV. STAT. ANN. § 10:9-102(a)(28) (Supp. 2015). As the context may require, the term “debtor” also may refer to the mortgagor under a Louisiana collateral mortgage. This article further uses the UCC term “secured party” to refer to the party in whose favor a security interest is granted. See *id.* § 10:9-102(b)(72). As the context may require, the term “secured party” also may refer to the mortgagee under a Louisiana collateral mortgage and the pledgee of a pledged collateral mortgage note. The UCC terms debtor and secured party are appropriate for use when discussing Louisiana collateral mortgages because the

The primary security interest in a collateral mortgage arrangement is the UCC pledge<sup>31</sup> of the collateral mortgage note, which secures the mortgagor's (or third-party obligor's)<sup>32</sup> true indebtedness. The collateral mortgage is an accessory, secondary security interest<sup>33</sup> that directly secures the pledged collateral mortgage note and that indirectly secures the true indebtedness represented by one or more hand notes or other evidence of indebtedness. The way a collateral mortgage works is that the mortgagor grants the collateral mortgage in favor of the mortgagee to secure payment of the collateral mortgage note. The mortgagor then simultaneously pledges or grants a UCC possessory security interest in the collateral mortgage note and delivers the pledged note into the secured party's possession<sup>34</sup> to secure the debtor's (or third-party obligor's) true indebtedness.<sup>35</sup> Assuming that (a) all of the requirements for

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primary security interest in a collateral mortgage arrangement is the UCC pledge of the collateral mortgage note. The collateral mortgage securing the pledged collateral mortgage note is an accessory, secondary security device.

31. The UCC does not include the term "pledge," which is a Louisiana Civil Code and pre-UCC Article 9 common law term. Nevertheless, practitioners, legal scholars, and courts continue to refer to UCC possessory security interests in collateral as pledges. This article follows that practice; although it is important to keep in mind that pre-1990 Louisiana pledges of collateral (including pledges of collateral mortgage notes) were subject to the pledge articles of the Louisiana Civil Code of 1870, as subsequently amended; whereas post-1989 pledges of most types of collateral (again including pledges of collateral mortgage notes) are now, since January 1, 1990, exclusively subject to Louisiana UCC Article 9.

32. LA. CIV. CODE art. 3295 (2015) (recognizing mortgages securing the indebtedness of a third person (i.e., a third-party mortgage)). Similarly, Louisiana UCC Article 9 permits a debtor to grant a UCC security interest in collateral to secure the indebtedness of a third party obligor. *See* LA. REV. STAT. ANN. § 10:9-102(a)(28) (Supp. 2015) (definition of "debtor"); *Id.* § 10:9-102(a)(59) (definition of "obligor"). In this context, the debtor is the person granting a UCC security interest to secure a third party obligor's indebtedness, and the obligor is the person obligated to pay the secured indebtedness. This is an important distinction.

33. *See* LA. CIV. CODE art. 3282 (2015) ("[A] mortgage is accessory to the obligation that it secures."); *see also* LA. CIV. CODE arts. 3284–3285 (1870).

34. The debtor must deliver the original signed collateral mortgage note into the secured party's possession in order for the pledge of the collateral mortgage note to be complete or perfected. *See* Valerie S. Meiners, Comment, *Formal Requirements of Pledge under Civil Code Article 3158 and Related Articles*, 48 LA. L. REV. 129 (1987); *see also* LA. REV. STAT. ANN. § 10:9-312(b)(4) (Supp. 2015) (providing that the exclusive method of perfecting a UCC security interest in a Louisiana collateral mortgage note is by the secured party taking possession of the note in pledge).

35. The secured indebtedness may include any lawful obligation of the debtor, or of a third party obligor, in favor of the secured party or its successors

perfection<sup>36</sup> of a UCC possessory security interest in the pledged note are fully satisfied and remain satisfied at all pertinent times,<sup>37</sup> (b) the collateral mortgage note is not allowed to prescribe,<sup>38</sup> and (c) the ten-year inscriptive period of the mortgage is not allowed to lapse,<sup>39</sup> then the lien of the accessory collateral mortgage will be entitled to retroactive ranking priority vis-à-vis potential intervening creditors back to the time that (i) the mortgage was originally recorded, (ii) the collateral mortgage note was delivered in pledge to the secured party, or (iii) the secured party initially funded the loan or issued a binding loan commitment to advance funds to the borrower at a later date, whichever is the last to occur.<sup>40</sup>

### C. 1990 Changes in Governing Law

Prior to January 1, 1990, pledges of Louisiana collateral mortgage notes were subject to the pledge articles of the 1870 Louisiana Civil Code, most notably including former Civil Code article 3158, which permitted a pledged collateral mortgage note to secure multiple loans, lines of credit, and other present and future obligations of the mortgagor (or third-party obligor) on an open-end, cross-collateralized basis.<sup>41</sup> This assumed that the debtor's

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and assigns. There absolutely is no requirement that the secured indebtedness be evidenced by one or more hand notes or other writing.

36. Perfection is a UCC term and means that the security interest is effective and enforceable as against third persons claiming competing rights in and to the same collateral.

37. See *infra* text accompanying notes 101–105 (discussing the four requirements that must be satisfied in order for the UCC pledge of a collateral mortgage note to be fully perfected, and to remain fully perfected).

38. See *infra* text accompanying note 97 (discussing the need to acknowledge certain third party collateral mortgage notes every five years so that the debtor's payment obligations under such notes do not prescribe).

39. See *infra* note 96 (discussing the requirement that collateral mortgages be reinscribed on the public mortgage records every ten years).

40. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 11; Nathan & Marshall, *supra* note 20, at 497 n.8, 523; Michael H. Rubin, *Security Devices, Developments in the Law, 1980–1981*, 42 LA. L. REV. 413, 421 (1982).

41. LA. CIV. CODE art. 3158 (1870). Former article 3158 provided 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 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 crosscollateralization clause, and the pledged instrument or item

collateral pledge agreement contained a broad, expansive definition of the secured indebtedness to encompass not only the loan and note for which the collateral mortgage was being initially granted, but also any and all other related and unrelated loans, extensions of credit, and obligations that the debtor (or third-party obligor) may then and thereafter owe to or incur in favor of the secured party and its successors and assigns, of every nature and kind whatsoever, all up to a maximum stipulated dollar amount.<sup>42</sup> This expansive definition of the secured indebtedness is sometimes referred to as a “cross-collateralization,” “dragnet,” or “gorilla” clause and was the key contractual provision that allowed pre-1990 pledges of collateral mortgage notes and accessory collateral mortgages to secure multiple present and future debts and other obligations.<sup>43</sup>

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remains . . . in the hands of the pledgee or its successor, the instrument or item may 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 against third persons if made in good faith; and such 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.

*Id.*

42. LA. CIV. CODE art. 3158 (1870) (requiring that collateral pledge agreements in use prior to the January 1, 1990 effective date of the Louisiana UCC Article 9 specify the maximum dollar amount to be secured by the pledge of the collateral mortgage note). Louisiana UCC Article 9 contains no such maximum dollar amount limitation.

43. Future advance/cross-collateralization language is included in most well-drafted collateral pledge/UCC security agreements and is the key contractual provision that permits post-1989 Louisiana collateral mortgages to secure multiple present and future debts and other obligations. For the most part, cross-collateralization has replaced the old-style practice of the debtor executing a new collateral pledge agreement each time that a new secured loan is made, thereby repledging/reissuing the same collateral mortgage note over and over again. *See Odom v. Cherokee Homes*, 165 So. 2d 855, 865 (La. Ct. App. 1964) (discussing this old style practice of repledging or reissuing a collateral mortgage note over and over again to secure subsequent loans); *see also* Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 17–19; Nathan & Marshall, *supra* note 20, at 504, 513–14; Max Nathan, Jr. & Anthony P. Dunbar, *The Collateral Mortgage: Logic and Experience*, 49 LA. L. REV. 39, 63–71 (1988).

*1. Louisiana UCC Article 9 Applicable to Post-1989 Louisiana Collateral Mortgages*

Louisiana collateral mortgage law significantly changed on January 1, 1990, when the Louisiana version of UCC Article 9 first took effect.<sup>44</sup> As of that date, pledges of Louisiana collateral mortgage notes were no longer subject to the pledge articles of the Louisiana Civil Code and instead became exclusively subject to Louisiana UCC Article 9.<sup>45</sup> Additionally, the various collateral mortgage cases that previously applied to pre-1990 collateral mortgages (including *Odom v. Cherokee Homes*,<sup>46</sup> *New Orleans Silversmiths v. Toups*,<sup>47</sup> *First Guaranty Bank v. Alford*,<sup>48</sup> *Texas Bank of Beaumont v. Bozorg*,<sup>49</sup> and *Citizens National Bank v. Coates*<sup>50</sup>) no longer applied to post-1989 collateral mortgages and could no longer be cited as authority by practitioners and by the courts.<sup>51</sup>

This Article adopts a conservative position differentiating between pre-1990 collateral mortgages formerly subject to the Civil Code pledge articles and post-1989 collateral mortgages, which are now exclusively subject to Louisiana UCC Article 9 and the Louisiana collateral mortgage statute. This conservative position is based on (i) the fact that the original 1990 version of Louisiana UCC Article 9 was not made retroactively applicable to then-outstanding secured transactions,<sup>52</sup> and (ii) former Louisiana Civil Code article 3133.1,<sup>53</sup> which provided that the pledge articles of the Civil Code no longer apply to UCC pledges of collateral granted on and after January 1, 1990. Now to be sure, some practitioners and legal scholars may argue that, as a result of the 2001 enactment of Revised Louisiana

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44. See LA. REV. STAT. ANN. § 10:9-601 (1990).

45. See *id.* § 10:9-602(a); LA. CIV. CODE art. 3133.1 (1990) (enacted by Act No. 137, 1989 La. Acts 527).

46. 165 So. 2d 855 (La. Ct. App. 1964).

47. 261 So. 2d 252 (La. Ct. App. 1972).

48. 366 So. 2d 1299 (La. 1978).

49. 457 So. 2d 667 (La. 1984).

50. 563 So. 2d 1265 (La. Ct. App. 1990).

51. These cases were decided based upon pre-1990 collateral mortgage law, which significantly changed as of January 1, 1990, when Louisiana UCC Article 9 and the collateral mortgage statute took effect.

52. See LA. REV. STAT. ANN. § 10:9-602 (1990) (providing that pre-Article 9 secured transactions that were outstanding as of January 1, 1990, remained subject to pre-Article 9 Louisiana law). By way of comparison, the 2001 transition rules that applied at the time Revised Louisiana UCC Article 9 went into effect purported to make Revised Article 9 retroactively applicable to all secured transactions that were outstanding as of July 1, 2001.

53. LA. CIV. CODE art. 3133.1 (1990) (enacted by Act No. 137, 1989 La. Acts 527) (“This Title shall apply to pledges of movables that are delivered prior to the time Chapter 9 of the Louisiana Commercial Laws becomes effective . . .”).

UCC Article 9, all then-outstanding pledges of collateral mortgage notes, including pre-1990 pledges of collateral mortgage notes granted before January 1, 1990, became subject to Revised Louisiana UCC Article 9. This contrary position is based on the fact that the 2001 comprehensive revisions to UCC Article 9 were made retroactively applicable to all then-outstanding secured transactions falling within the scope of Revised UCC Article 9, including secured transactions which (prior to July 1, 2001) were excluded from coverage under the UCC.<sup>54</sup>

The question raised is what difference does it make whether the Civil Code articles on pledge or Revised Louisiana UCC Article 9 apply to pre-1990 pledges of Louisiana collateral mortgage notes? In truth, it makes very little difference because only a relatively small number of pre-1990 Louisiana collateral mortgages remain outstanding as of this date, some 25 years after Louisiana UCC Article 9 first took effect. The vast majority of pre-1990 collateral mortgages have been either fully paid and satisfied or refinanced and replaced with substitute mortgages.

## 2. *The Louisiana Collateral Mortgage Statute*

Another significant 1990 change in the law applicable to Louisiana collateral mortgages was the enactment of the Louisiana collateral mortgage statute. Prior to the collateral mortgage statute taking effect on January 1, 1990, Louisiana collateral mortgages were jurisprudential in nature and subject to unpredictable and sometimes inconsistent interpretation and application by practitioners and the courts.<sup>55</sup> The drafters of the 1989 UCC Implementation Bill sought to codify the law of collateral mortgages and thus make the law more certain and predictable.<sup>56</sup>

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54. See LA. REV. STAT. ANN. § 10:9-702(a) (Supp. 2015) (“Except as otherwise provided in this Part, this Chapter [referring to Revised UCC Article 9] applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.”); see also *id.* § 10:9-702(b) (providing for additional 2001 transition rules implementing Revised UCC Article 9, which became effective on July 1, 2001).

55. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 11–30 (critically discussing *Texas Bank of Beaumont v. Bozorg*, 457 So. 2d 671 (La. 1984), *Citizens National Bank v. Coates*, 563 So. 2d 1265 (La. Ct. App. 1990), and other troublesome pre-Louisiana UCC Article 9 cases that no longer apply to post-1989 collateral mortgages).

56. See *id.* at 23–30 (discussing how the 1989 UCC drafting committee sought to legislatively correct some of the problems and legal uncertainties that arose out of *Bozorg*, *Coates*, and other troublesome, pre-Louisiana UCC Article 9 collateral mortgage cases).

*D. Provisions of Revised Louisiana UCC Article 9 and the Louisiana Collateral Mortgage Statute that Apply to Post-1989 Collateral Mortgages*

*1. Definitions*

Louisiana UCC Article 9 contains certain key definitions that apply to pledges of collateral mortgage notes. The term “collateral mortgage” is defined under section 5550(1) of the Louisiana collateral mortgage statute as “a mortgage that is given to secure a written obligation, such as a collateral mortgage note.”<sup>57</sup> The term “collateral mortgage note” is defined under non-uniform Louisiana UCC section 9-102(d)(3) as “an instrument that is secured by a collateral mortgage on real property located in this state and executed for the purpose of being issued, pledged, or otherwise used as security for another obligation.”<sup>58</sup> Collateral mortgage notes are considered to be a form of instrument for Louisiana UCC Article 9 purposes. Non-uniform Louisiana UCC section 9-102(a)(47) provides that the term “instrument”—generally referring to negotiable and non-negotiable promissory notes and other written evidences of indebtedness transferable by delivery—also “includes a collateral mortgage note.”<sup>59</sup>

*2. Ability of Post-1989 Collateral Mortgages to Secure Multiple Present and Future Cross-Collateralized Debt*

As previously discussed, former Louisiana Civil Code article 3158 was the lynchpin that permitted pre-1990 pledges of collateral mortgage notes and accessory collateral mortgages to secure multiple loans, revolving lines of credit, and other present and future cross-collateralized indebtedness.<sup>60</sup> Louisiana UCC section 9-204(c) is the comparable section of Louisiana UCC Article 9 that permits post-1989 UCC pledges of collateral mortgage notes and accessory collateral mortgages to secure future advances and other open-end debt.<sup>61</sup> “A [UCC] security agreement may provide that collateral secures . . . future advances or other value, whether or not advances

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57. LA. REV. STAT. ANN. § 9:5550(1) (2007).

58. *Id.* § 10:9-102(d)(3). The Louisiana version of Revised UCC Article 9 contains a number of non-uniform provisions not found in the standard, multi-state version of the UCC. See James A. Stuckey, *Louisiana’s Non-Uniform Variations in U.C.C. Chapter 9*, 62 LA. L. REV. 793 (2002).

59. LA. REV. STAT. ANN. § 10:9-102(a)(47) (Supp. 2015). See Stuckey, *supra* note 58, at 814–15.

60. See *supra* note 41.

61. LA. REV. STAT. ANN. § 10:9-204(c) (2001). See also *id.* § 10:9-204(3).



or value are given pursuant to a commitment.”<sup>62</sup> The Louisiana State Law Institute’s 2001 Revision Comments to Louisiana UCC section 9-204(c) further clarify that cross-collateralization of secured indebtedness is permitted under the Louisiana UCC.

(b) Subsection (c) changes the language of former Chapter 9 to state more clearly that the parties may by agreement provide that collateral secures future advances as well as past and present advances. This rule is consistent with Civil Code Article 3298 (mortgage may secure future obligations). The parties are free to agree that a security interest secures any lawful obligation whatsoever, including the performance of an act, or general or indefinite future obligations. The matter is one of contract, not law. For future advances to be covered, the obligations secured by the collateral must be within the intent of the parties’ agreement. Determining the obligations secured by collateral is solely a matter of construing the parties’ contract by applying normal principals of contract interpretation.<sup>63</sup>

Louisiana UCC section 9-204(c) requires that, in order for a post-1989 pledge of a collateral mortgage note to secure future advances and other cross-collateralized indebtedness, the debtor’s UCC security agreement must contain a cross-collateralization clause in the form of a broad, expansive definition of the secured indebtedness.<sup>64</sup> This is the key contractual provision that permits post-1989 collateral mortgages to secure other and future cross-collateralized debt.

Technically, there is no requirement under Louisiana UCC Article 9 that there be a written UCC security agreement when the secured party takes a possessory UCC security interest in pledged collateral,<sup>65</sup> such as pledged stock and bond certificates

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62. See *In re Branch*, 368 B.R. 80, 82 (Bankr. Col. 2006). The Colorado bankruptcy court applied Louisiana law, namely Louisiana Revised Statutes section 10:9-204(c), to uphold the right of a Louisiana debtor to agree that UCC secured collateral, originally located in Louisiana and later moved to Colorado, could additionally secure other unrelated loans of the debtor to the secured party.

63. LA. REV. STAT. ANN. § 10:9-204 cmt. b (2001) (citations omitted). See also UCC § 9-204 cmt. 5 (2010) (citations omitted) (emphasizing that the changed wording of revised UCC § 9-204(c) was intended to reject the holdings of certain cases decided under former UCC § 9-204(3) limiting cross-collateralized future debts to those closely related to the originally secured loan); see, e.g., *Blair v. Memphis Bank & Trust Co.*, 26 B.R. 228 (Bankr. W.D. Tenn. 1982).

64. LA. CIV. CODE art. 3158 (1870) (containing a similar requirement that applied to pre-1990 pledges of collateral mortgage notes).

65. See LA. REV. STAT. ANN. § 10:9-203(b)(3)(B), (C) (2002).

(certificated securities)<sup>66</sup> and promissory notes (instruments).<sup>67</sup> The debtor's agreement to grant a security interest in possessory collateral can be implied under the circumstances even though the debtor did not sign a written security agreement.<sup>68</sup> Nevertheless, prudent lenders and their counsel continue to require debtors to execute collateral pledge/UCC security agreements as part of a post-1989 collateral mortgage package.<sup>69</sup>

Additionally, there is no requirement under Louisiana UCC Article 9 that a UCC security agreement specify the maximum principal dollar amount of the secured indebtedness.<sup>70</sup> This is in comparison to former Louisiana Civil Code article 3158, which required that the maximum secured amount be stated in pre-1990 collateral pledge agreements.<sup>71</sup> Furthermore, there is absolutely no requirement that the indebtedness secured by the pledge of the collateral mortgage note, and indirectly secured by the accessory collateral mortgage, be evidenced under one or more hand notes or some other writing, or that the secured indebtedness arise out of a loan or other debt obligation.<sup>72</sup>

### *3. Possession Perfection Required: Loss of Possession and Its Legal Consequences*<sup>73</sup>

Although UCC section 9-312(a) and section 9-313(a) generally give a secured party the option of perfecting a UCC security interest in an instrument (e.g., a promissory note) either by filing a UCC financing statement (filing perfection), or by taking possession of the instrument in pledge (possession perfection), or by both filing and taking possession (dual perfection), non-uniform Louisiana

66. See *id.* § 10:9-102(a)(49).

67. See *id.* § 10:9-102(a)(47).

68. See UCC § 9-203(b)(3) cmt. 4 (2010); see also Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 42–43; *Liberty Bank and Trust Co. v. Dapremont*, 844 So. 2d 877 (La. Ct. App. 2003).

69. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 13 n.57 (“It remains good practice for creditors and their counsel always to use a separate written form of collateral pledge or UCC security agreement rather than to include pledge language in the borrower's evidentiary hand note.”). See also Rubin, *supra* note 40, at 422.

70. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 43.

71. LA. CIV. CODE art. 3158 (1870) (requiring that the collateral pledge agreement affirmatively state the maximum dollar amount intended to be secured by the pledge of the collateral mortgage note).

72. A UCC security interest may secure any lawful obligation, including non-monetary performance obligations. See LA. REV. STAT. ANN. § 10:1-201(b)(35) (Supp. 2015) (definition of security interest).

73. The legal consequence of a secured party ceasing to possess the pledge collateral mortgage note was not discussed in the 1994 Willenzik Article.

UCC section 9-312(b)(4)<sup>74</sup> provides that the exclusive method of perfecting a Louisiana UCC security interest in a collateral mortgage note is by possession.<sup>75</sup> Possession perfection requires that the secured party or its collateral agent<sup>76</sup> take and retain actual physical possession of the original signed collateral mortgage note at all pertinent times.<sup>77</sup> It then necessarily follows that the secured party will cease to have a possession-perfected UCC security interest if the secured party or its collateral agent should, for any reason, no longer physically possess the original signed collateral mortgage note, such as by intentionally or unintentionally returning the pledged note to the debtor, or by losing, misplacing, or discarding the note, or by reducing the note to electronic form and then destroying the original.<sup>78</sup>

The full legal consequences of the secured party ceasing to retain physical possession of the debtor's original signed collateral mortgage note are subject to debate. Some practitioners and legal scholars may argue that the secured party's loss of possession not only results in the secured party ceasing to have a possession-perfected UCC security interest in the pledged note but also results in the accessory collateral mortgage ceasing to be effective as against third persons just as if the mortgage had never been recorded. This argument is based on the language of section 5551(B) of the Louisiana collateral mortgage statute, which

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74. LA. REV. STAT. ANN. § 10:9-312(b)(4) (2002) (providing that a UCC security interest in a collateral mortgage note may be perfected only by the secured party taking possession of the pledged note under Louisiana Revised Statutes section 10:9-313).

75. *See id.* § 10:9-102 cmt. (h)(2)(b) ("Most importantly, revised Chapter 9 reproduces existing Louisiana law requiring possession of a collateral mortgage note for perfection. While Revised Chapter 9 follows revised U.C.C. Article 9 in changing the law to permit perfection by filing with respect to instruments generally, revised Chapter 9 varies to exclude collateral mortgage notes in that respect. Without this variation, a financing statement covering instruments might have the unintended effect of giving the secured party a mortgage over the debtor's immovable property." (citations omitted)); *see also id.* § 10:9-330 cmt. ("Although a collateral mortgage note is an instrument, perfection of a security interest in a collateral mortgage note is achieved only by possession, not by filing.").

76. A third party collateral agent must be someone beyond the debtor's control. *See* UCC § 9-313 cmt. 3 (2010).

77. *See* LA. REV. STAT. ANN. § 10:9-313(d) (2002) ("If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.").

78. *See id.* § 13:3733.1(J) (providing for digital imaging and destruction of financial institution loan documents and other records, with the notable exception that a secured lender must retain actual physical possession of pledged original collateral mortgage notes).

provides that a collateral mortgage maintains its ranking priority vis-à-vis competing third persons only so long as the secured party retains physical possession of the pledged collateral mortgage note.<sup>79</sup> Other practitioners and legal scholars may argue to a greater extreme that failure of the secured party to retain physical possession of the pledged note has the draconian effect of rendering the mortgage ineffective as against the debtor and as a lien and encumbrance on the mortgaged property just as if the mortgage had never been granted in the first place. This more extreme position is based on the premise that the real security interest in a collateral mortgage arrangement is the pledge of the collateral mortgage note, and without the secured party continuing to hold on to the original signed note in pledge, the accessory mortgage becomes unenforceable and worthless.<sup>80</sup>

The courts have yet to fully consider the legal consequences of a secured party ceasing to possess a pledged collateral mortgage note.<sup>81</sup> Nonetheless, it is not a good idea for a secured party to give up possession or to misplace or otherwise dispose of a pledged collateral mortgage note under any circumstance. Furthermore, it is not a good idea for a secured party to lose or misplace the debtor's collateral pledge/UCC security agreement, which is what occurred in *Bozorg*,<sup>82</sup> or to lose or misplace the obligor's hand note, which

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79. *Id.* § 9:5551(B). See also *id.* § 10:9-313(d).

80. See Nathan & Marshall, *supra* note 20, at 508 (supporting this more extreme position and postulating as to the legal consequences of a pledged collateral mortgage note being allowed to prescribe in five years as provided in Louisiana Civil Code article 3498). Nathan and Marshall concluded that, should enforcement of the pledged collateral mortgage note become barred, the collateral mortgage would become “virtually worthless.” *Id.* See also Kaplan v. Univ. Lake Corp., 381 So. 2d 385, 390–91 (La. 1979); McGill v. Thigpen, 780 So. 2d 1224, 1228 (La. Ct. App. 2001).

81. See *Gutierrez v. Baldrige*, 105 So. 3d 156 (La. Ct. App. 2011). In *Gutierrez*, the Louisiana Third Circuit Court of Appeal refused to permit the secured party to foreclose under a collateral mortgage when the secured party was unable to produce the original signed collateral mortgage note, which apparently was lost or misplaced. The Louisiana Third Circuit did not, however, directly address the question raised within as to whether the fact that the secured party somehow lost or misplaced the collateral mortgage note had the effect of rendering the mortgage ineffective as against third persons, the debtor, and as a lien and encumbrance on the mortgaged property. See *supra* Parts I.D.4, II.E (discussing *Gutierrez*).

82. Tex. Bank of Beaumont v. *Bozorg*, 457 So. 2d 667, 673–75 (La. 1984). The assignee bank in *Bozorg* (Texas Bank of Beaumont or “TBB”) was unable to produce *Bozorg*'s original signed collateral pledge agreement and thereby was unable to convince the court that the parties intended that *Bozorg*'s pledged collateral mortgage note and accessory collateral mortgage would not only secure any and all present and future loans that *Bozorg* might obtain from the originating lender (First Metropolitan Bank or “FMB”), but also that *Bozorg*'s

is what occurred in *Alaska Southern Partners v. Baxley*,<sup>83</sup> discussed in Part II.C of this Article.

#### 4. Future Advance Priority Rights of Post-1989 Collateral Mortgages<sup>84</sup>

The future advance, retroactive priority rights of post-1989 Louisiana collateral mortgages are derived from the interaction of Louisiana UCC section 9-204(c),<sup>85</sup> section 9-322(a)(1),<sup>86</sup> and section 9-323(a),<sup>87</sup> with sections 5551(A)<sup>88</sup> and 5551(B)<sup>89</sup> of the Louisiana collateral mortgage statute. These statutes, when read in

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pledged note and accessory mortgage additionally would secure any and all future loans that Bozorg may subsequently obtain from FMB's successors and assigns; in this case TBB which had acquired Bozorg's loans from FMB. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 20–21, 24–25 (discussing *Bozorg*).

83. 799 So. 2d 680 (La. Ct. App. 2001).

84. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 37–38 (discussing retroactive priority rules that applied to post-1989 Louisiana collateral mortgages under the original 1990 version of Louisiana UCC Article 9).

85. LA. REV. STAT. ANN. § 10:9-204(c) (2002) (providing that a UCC security interest may secure future loan advances and other cross-collateralized indebtedness, whether or not given pursuant to a commitment).

86. *Id.* § 10:9-322(a)(1) (providing the first-to-file-or-perfect priority rule of UCC Article 9: “Conflicting perfected security interests . . . rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest . . . is first perfected, if there is no period thereafter when there is neither filing nor perfection.”).

87. *Id.* § 10:9-323(a). See also *id.* § 10:9-312(7) (providing that, if and when future advances are made while a UCC security interest remains perfected by filing or possession, the security interest is deemed to secure future advances to the same degree and extent as it secures the initial loan or advance).

88. *Id.* § 9:5551(A) (“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.” (citations omitted)).

89. *Id.* § 9:5551(B) (“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 recordation continues in accordance with Articles 3328 through 3334 of the Civil Code, 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 note or other written obligation, or the obligation secured by the mortgage otherwise remains enforceable according to its terms, by the secured party or his successor.”).

conjunction with one another, permit post-1989 UCC possessory security interests in pledged collateral mortgages, notes, and accessory collateral mortgages to secure future advances and other cross-collateralized debt on a retroactive ranking priority basis back to the time the mortgage originally was recorded in the parish mortgage records, or the time that the secured party's UCC security interest in the pledged note became fully perfected, whichever is the last to occur.<sup>90</sup> This assumes and is subject to the provisos that (1) the debtor's UCC security agreement contains expansive future advance, cross-collateralization language,<sup>91</sup> (2) the secured party initially gives value either by funding the secured loan or committing to do so at a later date,<sup>92</sup> (3) the secured party retains physical possession of the original, signed collateral mortgage note at all pertinent times,<sup>93</sup> (4) the balance of the secured indebtedness is not reduced to \$0.00 when there is no forward commitment to extend additional credit,<sup>94</sup> (5) the parties at all times act in good faith,<sup>95</sup> (6) the ten year inscription period of the mortgage has not been allowed to lapse,<sup>96</sup> and (7) the collateral mortgage note has not been allowed to prescribe in five years and thereby become unenforceable.<sup>97</sup> All seven of the foregoing conditions

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90. The source of this conclusion of law is the interaction between the Louisiana collateral mortgage statute and the pertinent provisions of Louisiana UCC Article 9. Note the change in the law that occurred in 1990. Pre-1990 collateral mortgages became effective and took their ranking priority from the date of recordation, or the date that the collateral mortgage note was delivered in pledge, whichever was the last to occur. By way of comparison, post-1989 collateral mortgages become effective and take their ranking priority from the later of the recordation date, or the day that the secured party's UCC security interest in the pledged note becomes fully perfected. UCC perfection requires more than mere delivery of the collateral mortgage note to the secured party or its collateral agent. Specifically, the secured party must give value by either funding the loan or issuing a binding commitment to lend at a future date. *See id.* § 10:9-203(b)(1); *see also id.* § 10:1-204 (definition of value).

91. The proper place to include future advance/cross-collateralization language is in the debtor's collateral pledge or UCC security agreement rather than in the collateral mortgage agreement. *See Tex. Bank of Beaumont v. Bozorg*, 457 So. 2d 667, 675 n.10 (La. 1984).

92. *See discussion supra* Part I.D.6 (regarding a delayed, anticipatory credit situation).

93. *See* LA. REV. STAT. ANN. § 9:5551(B) (2007).

94. *See discussion supra* Part I.D.5 (regarding a lapsed credit situation).

95. *See* LA. CIV. CODE arts. 1759, 1983 (2015); LA. REV. STAT. ANN. § 10:1-302(b) (Supp. 2015) (requiring that every contract be performed in good faith).

96. A collateral mortgage must be reinscribed every ten years in order to remain effective against third persons. *See* LA. CIV. CODE art. 3357 (2015).

97. As a demand promissory note, a collateral mortgage note will prescribe, and thereby become unenforceable under Louisiana Civil Code article 3498, if not reacknowledged every five years. This reacknowledgement requirement

must remain satisfied at all pertinent times in order for future advances to be entitled to retroactive ranking priority vis-à-vis competing third persons.<sup>98</sup>

### 5. *No Loss of Priority in Lapsed Credit Situations*

Section 5551(B) of the Louisiana collateral mortgage statute contains a very important provision that preserves the retroactive ranking priority of a collateral mortgage when, over an intermediate period, the balance of the secured indebtedness is reduced to \$0.00 and there then is no forward commitment on the part of the secured party to extend additional credit. This circumstance is best described as a “lapsed credit” situation.<sup>99</sup>

As a general rule, a possession-perfected UCC security interest in pledged collateral will secure future advances on a retroactive priority basis only so long as there is no intermediate period when the security interest ceases to be fully perfected.<sup>100</sup> To explain, there

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applies only to collateral mortgage notes pledged to secure the debts of a third person, assuming that the debtor has not personally guaranteed the secured indebtedness. There is no comparable requirement that a debtor acknowledge a pledged collateral mortgage note every five years when the debtor is personally obligated on the secured debt either individually or with others. The constant acknowledgement rule applies under the latter circumstance. *See* Kaplan v. Univ. Lake Corp., 381 So. 2d 385 (La. 1979); *see also* Succession of Picard, 115 So. 2d 817 (La. 1959); Scott v. Corkern, 91 So. 2d 569 (La. 1956); Michael H. Rubin & Stephen Strohchein, *Developments in the Law 1993–1994—Security Devices*, 55 LA. L. REV. 611, 636–38 (1995).

98. The source of this conclusion of law again is the interaction between the Louisiana collateral mortgage statute and the pertinent provisions of Louisiana UCC Article 9. *See* LA. REV. STAT. ANN. § 10:9-312(7) (1990) (providing that, if and when a future advance is made while the security interest is fully perfected by filing or possession, the future advance is entitled to retroactive ranking priority back to the time of original perfection). The drafters of the 2001 comprehensive revisions to UCC Article 9 chose not to continue former UCC section 9-312(7) under Revised UCC Article 9 because they felt that the same result is achieved under UCC section 9-204(c) (recognizing the ability of UCC security interest to secure future advances and cross-collateralized debt), and under the first-to-file-or-perfect rule of UCC section 9-322(a)(1).

99. *See* Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 39–42 (discussing the lapsed credit rule that previously applied under the original 1990 version of Louisiana UCC Article 9, and specifically under former Louisiana Revised Statutes section 10:9-312(7) (1990)).

100. The lapsed credit rule applies to possession-perfected UCC security interests in pledged collateral, and does not apply to UCC security interest in non-possessory goods (e.g., inventory and equipment) that are perfected by filing a UCC-1 financing statement in the public UCC records (filing perfection). This is as a result of application of the first-to-file-or-perfect rule of Louisiana Revised

are four requirements that must be satisfied in order for possession perfection to be complete under UCC Article 9: (1) the debtor must have rights in the collateral, meaning the right to encumber the collateral in favor of the secured party;<sup>101</sup> (2) the secured party must give value,<sup>102</sup> either by funding the secured indebtedness or issuing a binding loan commitment to advance funds to the debtor at a later date;<sup>103</sup> (3) the debtor must enter into a UCC security agreement granting the secured party a UCC security interest in the collateral to secure the secured indebtedness;<sup>104</sup> and (4) the secured party must retain physical possession of the collateral at all pertinent times.<sup>105</sup> If any one or more of these requirements ceases to be satisfied over an intermediate period, then future advances made by the secured party after the security interest once again becomes fully perfected are not entitled to retroactive ranking priority back to the date of original perfection, but instead re-rank only from the time the security interest re-perfects. To repeat, in a lapsed credit situation, a possessory security interest ceases to be fully perfected when the debtor pays the secured indebtedness in full and there then is no binding commitment on the part of the secured party to lend additional amounts to the debtor. The reason why is because the second requirement of perfection (that of giving value) is no longer satisfied. It then necessarily follows that additional advances that the secured party may make to the debtor after expiration of the lapsed credit period will be secured by the pledged collateral with ranking priority only back to the time the security interest once again becomes fully perfected.<sup>106</sup>

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Statutes section 10:9-322(a)(1). The first secured party to file or otherwise perfect a UCC security interest in collateral has priority over competing third persons who may later file or perfect a UCC security interest in the same collateral. The reason why the lapsed credit rule does not apply to file-perfected UCC security interests is because a file-perfected security interest maintains its first-in-time priority status notwithstanding any initial or intermediate period when there is no outstanding secured debt, and there is no commitment to lend funds to debtor at a later date. The filing part of the first-to-file-or-perfect rule does not require that the security interest be fully perfected, but only that the secured party file a UCC-1 financing statement in the UCC records.

101. See LA. REV. STAT. ANN. § 10:9-203(b)(2) (2002); UCC § 9-203 cmt. 6 (2010).

102. LA. REV. STAT. ANN. § 10:1-204 (Supp. 2015) (defining the term “value”).

103. See *id.* § 10:9-203(b)(1).

104. See *id.* § 10:9-203(b)(3).

105. See *id.* § 10:9-313.

106. *Id.* § 10:9-322(a)(1) (discussing the application of the first-to-file-or-perfect rule); UCC § 9-322 cmt. 4 (2010).



The following example illustrates this rather confusing UCC Article 9 rule:

Facts: A borrower (Debtor) obtains a \$1 million loan from SP1 (a lender specializing in lending to fine art collectors) secured by the pledge of Debtor's valuable collection of listed Picasso sketches, which Debtor holds for personal investment purposes. Debtor's UCC security agreement contains cross-collateralization language under which Debtor agrees that the pledged sketches will not only secure the \$1 million loan, but also secure any and all other present and future loans that Debtor may obtain from SP1. Debtor delivers the original Picasso sketches to SP1's collateral agent (a bonded art storage/vault facility) on January 5, thus completing perfection. Three months later (on April 5), Debtor prepays the \$1 million loan in full, but allows SP1's collateral agent to hold on to the possessory collateral. Two months after that (on June 5), Debtor obtains a \$500,000 loan from SP2 (a different lender) secured by the same Picasso sketches. SP2 has the option under UCC Article 9 of perfecting its security interest in the art collateral by filing a UCC financing statement or by taking possession.<sup>107</sup> SP2 elects to file perfect only without attempting to take possession.<sup>108</sup> SP2 files a UCC-1 financing statement on June 5. The filed financing statement lists the Picasso sketches in great detail. Debtor later (on September 5) obtains a second \$750,000 loan from SP1.

Question 1: Is SP1's subsequent September 5, \$750,000 loan to Debtor secured by a UCC pledge of Debtor's Picasso sketches remaining in SP1's constructive possession, and is SP1's security interest perfected at the time the subsequent \$750,000 loan is made and funded on September 5? Answer: Yes to both questions because Debtor's original UCC security agreement contained future advance/cross-collateralization language and SP1's collateral agent continued to retain possession of the pledged sketches at all pertinent times. SP1's security interest was originally perfected on January 5,

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107. See LA. REV. STAT. ANN. §§ 10:9-310(a), 9-313(a) (2002). A secured party may perfect a UCC security interest in investment art either by filing a UCC-1 financing statement or by taking possession. *Id.*

108. Investment art is classified for UCC purposes as consumer goods when held by an individual for personal investment purposes. By way of comparison, the same art collection is classified as inventory for UCC purposes when held by an art dealer for resale purposes. See LA. REV. STAT. ANN. § 10:9-102(a)(23), (48) (2002).

and then became unperfected on April 5 at the time the first SP1 \$1 million loan was prepaid in full because value was no longer given. SP1's security interest reperfected on September 5 at the time the subsequent \$750,000 loan was made and funded.

Question 2: Does SP1's possession-perfected UCC security interest in the possessory collateral outrank SP2's later-in-time, file-perfected security interest as a result of the first-to-file-or-perfect rule of UCC 9-322(a)(1)? Answer: No, not under these facts because, when Debtor paid off the original \$1 million loan on April 5 with no forward commitment on the part of SP1 to extend additional credit, SP1 was no longer fully perfected as a result of a failure to give present value. At that moment, SP2's later-in-time file-perfected security interest in the common collateral jumped ahead of SP1's first-in-time, possessory security interest because SP1 was no longer fully perfected despite the fact that SP1 continued to possess the original pledged art. Although SP1's security interest reperfected on September 5 when SP1 made the subsequent \$750,000 loan to Debtor, SP1 had already lost its place in line (priority) to SP2's now priming file-perfected UCC security interest in the common collateral.<sup>109</sup>

Section 5551(B) of the Louisiana collateral mortgage statute alters the above result by providing that the lien of a Louisiana collateral mortgage (actually the UCC pledge of the collateral mortgage note)<sup>110</sup> retains its original retroactive ranking priority "notwithstanding any intermediate period when the security interest in the secured obligation [the pledged collateral mortgage note] becomes unperfected."<sup>111</sup>

Facts: Assume the same basic facts with the exception that Debtor's January 5, \$1 million loan is secured by the pledge

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109. *Id.* § 10:9-322(a)(1) (applying the first-to-file-or-perfect rule). SP2 filed a UCC-1 financing statement on June 5 before SP1's possession-perfected UCC security in the pledged art reperfected on September 5.

110. The primary security interest in a collateral mortgage arrangement is the UCC pledge of the collateral mortgage note. The collateral mortgage follows the pledged note as a secondary, accessory security interest. *See id.* §§ 10:9-109(b), 10:9-308(d). Consequently, when Louisiana Revised Statutes section 9:5551(B) refers to the lien of a Louisiana collateral mortgage, the statute really is referring to the UCC future advance/retroactive priority rights of that flow out of the UCC pledge of the collateral mortgage note. *See id.* § 9:5551(B).

111. *Id.* § 9:5551(B).

of a Louisiana collateral note and accessory collateral mortgage. SP1 records the mortgage and takes delivery of the collateral mortgage note in pledge on January 5. On April 5, Debtor prepays the SP1 \$1 million loan in full with no forward commitment to lend additional funds. Debtor does not require SP1 to cancel the mortgage and SP1 holds on to the pledged collateral mortgage note. On June 5, Debtor obtains a \$500,000 loan from SP2, which is secured by a second collateral mortgage on the same property. SP2 records its mortgage and takes possession of the pledged note on June 5. On September 5, SP1 makes a new \$750,000 loan to Debtor.

Question 1: Is SP1's subsequent September 5, \$750,000 loan secured by the Debtor's still outstanding collateral mortgage? Answer: Yes, so long as (i) the mortgage was not cancelled or released, (ii) Debtor's original UCC security agreement contained expansive cross-collateralization language, and (iii) the pledged collateral mortgage note remained in SP1's possession at all pertinent times.

Question 2: Does the fact that SP1 did not maintain full perfection over the intermediate, lapsed credit period (i.e., from April 5 until September 5) somehow result in a reordering of priority of SP1's first-in-time collateral mortgage vis-à-vis SP2's later-in-time collateral mortgage as a result of the first-to-file-or-perfect/lapsed credit rule discussed in the first example above? Answer: No, because section 5551(B) of the Louisiana collateral mortgage statute modifies the otherwise applicable UCC first-to-file-or-perfect priority rule by providing that the lien of a Louisiana collateral mortgage (actually the pledge of the collateral mortgage note) does not lose its retroactive ranking priority notwithstanding any intermediate period when the security interest in the pledged note ceases to be fully perfected.

*6. Effectiveness of a Collateral Mortgage in a Delayed, Anticipatory Credit Situation When There is No Contemporaneous Loan or Forward Commitment to Lend at a Later Date*

A related issue is whether a post-1989 collateral mortgage is effective and takes its initial ranking priority vis-à-vis third parties when the mortgage is granted in anticipation that the debtor might someday obtain a loan from the secured party without there being a

present, binding forward commitment to lend at a future date. This circumstance is best described as a delayed, anticipatory credit situation.<sup>112</sup>

Sections 5551(A) and 5551(B) of the Louisiana collateral mortgage statute provide that a collateral mortgage becomes effective and takes its ranking priority vis-à-vis third persons from the time the mortgage is recorded in the public mortgage records, or the time that the secured party's UCC security interest in the pledged note becomes fully perfected, whichever is the last to occur. One of the four requirements of perfection of the pledged collateral mortgage note is that the secured party must give value, meaning that the secured party must either initially fund the loan or issue a binding forward commitment to advance funds to the debtor at a later date. In a delayed, anticipatory credit situation, there is no initial loan or loan advance, and there is no binding forward commitment to lend at a future time. There is only an anticipation that one day the debtor might obtain a loan from the secured party or its successor or assignee secured by the pledge of the collateral mortgage note. This means that there is no present giving of value, and no present perfection of a UCC security interest in the pledged note, in the absence of which the debtor's collateral mortgage cannot become effective and take its ranking priority vis-à-vis third persons. This is the result despite the fact that the debtor's collateral mortgage may have been properly recorded in the public mortgage records.<sup>113</sup>

The following example illustrates this easily confused rule:

Facts: ABC wishes to construct a commercial office building on land that ABC already owns. ABC applies to Bank for a \$5,000,000 construction loan, which is still in the application stage and which is yet to be approved. For good reason, ABC feels it is necessary to immediately start construction before Bank passes on (approves or denies) ABC's loan application. Acting on advice of counsel and at Bank's request, ABC grants Bank a collateral mortgage on the land and the improvements to be constructed. The

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112. The 1994 Willenzik Article did not discuss the delayed, anticipatory credit perfection issues discussed in this Part.

113. Ordinary conventional mortgages and multiple indebtedness mortgages become effective and take their ranking priority vis-à-vis competing third persons from the time the mortgage is recorded in the parish mortgage records. *See* LA. CIV. CODE art. 3338 (2015). By way of comparison, collateral mortgages become effective and take their ranking priority from the time the mortgage is recorded, or the time the secured party's UCC security interest in the pledged collateral mortgage note is fully perfected, whichever is the last to occur.

stated reason why this was done is to result in Bank's mortgage having priority over potentially competing contractor and supplier liens under the Louisiana Private Works Act<sup>114</sup> should Bank subsequently approve and fund ABC's loan. ABC's mortgage, collateral mortgage note, and UCC security agreement are each dated May 1. The original signed collateral mortgage note was delivered to Bank and the mortgage was properly recorded on the same day. Construction work commenced on May 15, 15 days after Bank's mortgage was recorded. After some delay due to ABC's failure to produce financial information, Bank approved the loan and issued a binding loan commitment on July 15. The loan was not funded until August 1. ABC subsequently defaulted under the loan and declared bankruptcy before the construction was completed. Two adverse claimants assert competing claims in the bankruptcy case: (i) XYZ, a subcontractor, asserting a privilege as a result of non-payment of amounts owed to XYZ for work performed, and (ii) the Internal Revenue Service, asserting that the IRS filed a tax lien against ABC and its properties on June 1—31 days after Bank's mortgage was recorded.

Question 1: Who has priority: XYZ, an unpaid subcontractor, or Bank, which recorded its mortgage on May 1 before commencement of work on the project? Answer: XYZ asserting a subcontractor's lien notwithstanding the fact that Bank's collateral mortgage was recorded 15 days before construction work commenced. Reason: Section 4821(A)(3) of the Louisiana Private Works Act<sup>115</sup> provides that real estate construction mortgages are entitled to priority over the competing claims of contractors, subcontractors, suppliers, and others (with the exception of certain tax liens and claims of unpaid laborers) only if such mortgages become effective against third persons before work on the project commences.<sup>116</sup> As a general rule, a mortgage is effective and takes its ranking priority against competing third persons from the time the mortgage is recorded in the

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114. LA. REV. STAT. ANN. § 9:4801 (2007) (enacted by Act No. 724, 1981 La. Acts 1400).

115. LA. REV. STAT. ANN. § 9:4821(A)(3) (2002).

116. See Michael H. Rubin, *Ruminations on the Louisiana Private Works Act*, 58 LA. L. REV. 569, 608 (1998) (“[If] a mortgage or privilege on immovable property is effective [as against third persons] before . . . ‘work’ begins, it will outrank all lien claimants except . . . ad valorem taxes and local assessments . . . and [claims of unpaid] laborers.”).

parish mortgage records.<sup>117</sup> This general rule, however, applies only to ordinary conventional mortgages and to multiple indebtedness mortgages and does not apply to collateral mortgages, which become effective and take their ranking priority vis-à-vis third persons from the time the mortgage is recorded of record, or the time that the secured party's UCC security interest in the pledged collateral mortgage note becomes fully perfected, whichever is last to occur. If and when a construction collateral mortgage is recorded prior to initial funding of the loan, or before the issuance of a binding forward commitment, there is no present giving of value, meaning that the UCC pledge of the debtor's collateral mortgage note is not fully perfected until a later uncertain date. It then necessarily follows that Bank's construction collateral mortgage would not be entitled to ranking priority ahead of competing contractor, subcontractor, and supplier claims notwithstanding the fact that Bank's mortgage was recorded prior to commencement of work on the project. For this reason, collateral mortgages should not be used in construction financings when there is delayed initial funding or no loan commitment.<sup>118</sup>

Question 2: Who has priority: the IRS filing a tax lien against ABC and its assets on June 1, or Bank under its May 1 collateral mortgage? Answer: The IRS will have priority over Bank even though the IRS filed its tax lien on June 1—31 days after Bank recorded its mortgage. Although Bank's collateral mortgage was recorded on May 1, the mortgage did not become effective against third persons, including the IRS, until July 15 when Bank approved the loan and issued a binding loan commitment, and thus gave value. At that moment in time (July 15), Bank's UCC security interest in the pledged collateral mortgage note became fully perfected, and Bank's May 1 collateral mortgage first became effective against third persons (including the IRS). As such, the IRS's later-in-time (June 1) federal tax lien was entitled to ranking priority head of Bank's earlier-in-time (May 1) recorded collateral mortgage.

Question 3: Would the result be the same if these same facts occurred in 1989 before Louisiana UCC Article 9 and the Louisiana collateral mortgage statute first took effect on

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117. See LA. CIV. CODE art. 3307(3) (2015).

118. See also *supra* Part IV.B.4.

January 1, 1990? Answer: No, the result would have been different. There was no requirement under the previously applicable 1870 Civil Code pledge articles that a secured party initially fund a loan or loan advance or issue a binding commitment to lend at a future date in order for a pre-1990 Civil Code pledge of a collateral mortgage note and accessory collateral mortgage to become effective and take its ranking priority vis-à-vis competing third persons. The giving of value is a UCC-imposed requirement that did not apply to pre-1990 pledges of collateral mortgage notes and accessory collateral mortgages.<sup>119</sup>

Question 4: Would the result be different if Bank's construction loan had been secured by a multiple indebtedness mortgage rather than a collateral mortgage? Answer: Yes, for the reasons more fully discussed in Part III.C of this Article.

## II. SIGNIFICANT COLLATERAL MORTGAGE CASE LAW DEVELOPMENTS SINCE 1994

What follows is a discussion of significant Louisiana collateral mortgage cases decided since 1994 that apply to post-1989 collateral mortgages subject to Louisiana UCC Article 9 and the Louisiana collateral mortgage statute.

### A. Diamond Services Corporation v. Benoit

The most significant collateral mortgage case decided in the past 20 years is *Diamond Services Corp. v. Benoit*,<sup>120</sup> in which the Louisiana Supreme Court faced the issue of whether a third-party collateral mortgage and collateral mortgage note somehow imposed

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119. See *People's Bank & Trust Co. v. Campbell*, 374 So. 2d 741, 743-44 (La. Ct. App. 1979). In *Campbell*, the Third Circuit was faced with an anticipatory credit situation incident to a pre-1990 collateral mortgage. *Id.* at 742. The court upheld the effectiveness of the pledge and mortgage based on statement of intent language included in the debtor's collateral mortgage agreement to the effect that the debtor was mortgaging his property to secure any and all present and future indebtedness of the debtor to the secured party. *Id.* at 744. Note that the Third Circuit's holding in *Campbell* applies only to pre-1990 pledges of collateral mortgage notes subject to the pledge articles of the 1870 Louisiana Civil Code and has no applicability to post-1989 collateral mortgages subject to Louisiana UCC Article 9 and the Louisiana collateral mortgage statute, which require that there be an initial loan advance or commitment to lend as preconditions of a collateral mortgage becoming effective as against third persons. See also Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 15.

120. 780 So. 2d 367 (La. 2001).

personal (in personam) liability on a third-party mortgagor/debtor granting the mortgage on the debtor's property to secure the indebtedness of another person, when the mortgagor/debtor did not otherwise agree to personally guarantee the secured mortgage debt.<sup>121</sup>

### 1. Facts and Disposition

The facts of *Benoit* are relatively straightforward. In 1993, William Davenport obtained separate loans from Morgan City Bank (MCB) and Diamond Services Corp. The MCB loan was secured by a third-party collateral mortgage and UCC pledge of a collateral mortgage note granted by Delores Benoit, a business associate of Davenport. The Diamond Services loan was secured by Benoit's separate third-party collateral mortgage encumbering Benoit's other property. Davenport subsequently defaulted under both the MCB loan and the Diamond Services loan. MCB later sold/assigned Davenport's defaulted MCB loan to Diamond Services, and Diamond Services commenced foreclosure under both loans and mortgages.<sup>122</sup> The mortgaged properties eventually were sold at a judicial foreclosure sale, resulting in a deficiency balance owed. Diamond Services then filed suit against Benoit claiming that, by signing the two collateral mortgage notes, Benoit became personally liable to MCB and Diamond Services notwithstanding the fact that Benoit never cosigned Davenport's hand notes or executed a separate written guaranty agreement guaranteeing payment.<sup>123</sup> Benoit objected to Diamond Services' claim, asserting that it was never her intent or agreement to assume personal liability for Davenport's loans. The trial court held in Benoit's favor, and Diamond Services appealed to the Louisiana Third Circuit Court of Appeal.<sup>124</sup>

### 2. The Third Circuit's Decision in Benoit

The Third Circuit reversed the trial court's decision, holding that, as maker of the two collateral mortgage notes, Benoit was

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121. See Jason R. Johanson, *Diamond Services Corp. v. Benoit: The Louisiana Supreme Court Limits Liability for the Third-Party Maker of a Collateral Mortgage Note*, 76 TUL. L. REV. 819 (2002). Several other sources have discussed the personal liability issue. See Rubin, *1978-1979 Term*, *supra* note 24, at 581-83; Nathan & Dunbar, *supra* note 43, at 43-45; Rubin & Strohchein, *supra* note 97, at 639.

122. *Diamond Servs. Corp. v. Benoit*, 757 So. 2d 23, 25 (La. Ct. App. 1999), *rev'd*, 780 So. 2d 367 (La. 2001); *Benoit*, 780 So. 2d at 369-70.

123. *Benoit*, 780 So. 2d at 369-70.

124. *Benoit*, 757 So. 2d at 25.



personally liable to Diamond Services for up to the \$650,000 combined collateral mortgage note amounts, notwithstanding that Benoit had never agreed to be personally obligated on Davenport's debt to MCB and to Diamond Services. As stated by the court, "[t]his circuit has been consistent in holding that a third party maker of a collateral mortgage note, pledged to secure the indebtedness of another, will be held personally liable."<sup>125</sup> The Third Circuit cited its prior decision in *Concordia Bank & Trust Co. v. Lowry*<sup>126</sup> as authority, in which the court concluded:

[While] it is established that the hand note is the debt instrument in a collateral mortgage arrangement, it is equally clear that the maker of the collateral mortgage note is personally liable thereon. *A collateral mortgage note . . . is a negotiable instrument.* The mere fact that it is paraphed for identification with a collateral mortgage does not alter its nature or effect. *Accordingly, the collateral mortgage note creates a personal obligation for which the maker is liable.* It therefore follows that even though the debt is incurred in connection with the hand note in a collateral mortgage arrangement, the maker of the collateral mortgage note is personally liable for the indebtedness owed. However, such personal liability is limited to the lesser of the face amount of the collateral mortgage note and the amount owed in connection with the hand note.<sup>127</sup>

### 3. *The Louisiana Supreme Court's Decision in Benoit*

The Louisiana Supreme Court granted writs in order to resolve a split in the circuits between the Third Circuit's decision in *Benoit* and the Fifth Circuit's contrary decision in *Bank of New Orleans & Trust Co. v. H.P.B. Jr. Development Co.*,<sup>128</sup> in which the Fifth Circuit held that a third-party maker of a collateral mortgage note has no personal liability when the note is pledged to secure the debt of another person.<sup>129</sup> In a flawed opinion, the Supreme Court concluded in *Benoit* that:

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125. *Id.* at 27.

126. 533 So. 2d 170 (La. Ct. App. 1988), *rev'd on other grounds*, 539 So. 2d 46 (La. 1989). *See also* *Bank of Lafayette v. Bailey*, 531 So. 2d 294 (La. Ct. App. 1987).

127. *Concordia Bank & Trust Co. v. Lowry*, 533 So. 2d 170, 172–73 (La. Ct. App. 1988) (emphasis added).

128. 427 So. 2d 486 (La. Ct. App. 1983).

129. *See also* *Commercial Nat'l Bank v. Succession of Rodgers*, 628 So. 2d 33, 36–37 (La. Ct. App. 1993) (holding that the maker of a third-party collateral

[T]he maker of a collateral mortgage note, paraphed ne varietur for identification with the act of collateral mortgage, is not personally liable beyond the value of the mortgaged property when the collateral mortgage note is pledged to secure the debt of a third party, absent some additional agreement so binding the maker of the collateral mortgage note.<sup>130</sup>

Personal or in personam liability necessarily means that the secured mortgage debt can be satisfied out of any and all of the third-party mortgagor's assets without the secured party's default remedies being limited solely to recourse foreclosure against the mortgaged property as would be the result in the case of an in rem mortgage.<sup>131</sup> The following examples illustrate this point.

Example 1: Debtor grants an ordinary conventional mortgage in favor of SP to secure a \$100,000 mortgage note for which Debtor is personally obligated as maker. Debtor defaults under the loan and note and SP accelerates payment. Under these facts, SP has the option of foreclosing under the mortgage and causing the mortgaged property to be seized and sold at judicial foreclosure sale. If the proceeds of the judicial sale are not sufficient to fully satisfy the mortgage debt, Debtor remains personally liable for any resulting deficiency, which can be satisfied out of the Debtor's other assets. Under this example, SP also has the option of foregoing foreclosure and initially suing Debtor to collect the amount owed under the mortgage note.

Example 2: Debtor grants a third-party ordinary conventional mortgage in favor of SP to secure ABC's loan and note. Debtor does not agree to personally guarantee ABC's loan. ABC defaults and SP forecloses against the mortgaged property. The property is sold at a judicial sale with the sale proceeds being insufficient to fully satisfy ABC's mortgage debt. Under these facts, as compared to Example 1 above, Debtor is not personally liable on the debt and cannot be

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mortgage note is personally liable to the mortgagee only up to the value of the mortgaged property).

130. *Diamond Servs. Corp. v. Benoit*, 780 So. 2d 367, 382 (La. 2001).

131. See LA. CIV. CODE art. 3182 (1870); LA. CIV. CODE art. 3133 (2015) (enacted under Act No. 281, §1, 2014 La. Acts, effective Jan. 1, 2015) ("Whoever is personally bound for an obligation is obligated to fulfill it out of all of his property, movable and immovable, present and future.").

held liable to pay the deficiency balance remaining owed.

Example 3: Assume the same facts as Example 2 above except that Debtor's mortgage is in the form of a collateral mortgage. Debtor signs a collateral mortgage note, a collateral pledge/UCC security agreement, and a collateral mortgage encumbering Debtor's property. Debtor pledges the collateral mortgage note to SP to secure ABC's loan. Debtor does not cosign or agree to personally guarantee ABC's loan. ABC subsequently defaults and SP forecloses against Debtor's mortgaged property, with the judicial sale proceeds being insufficient to fully pay and satisfy ABC's debt.

The question presented before the Supreme Court in *Benoit* was whether Diamond Services (the SP in Example 3 above) could attempt to hold Benoit (the Debtor) personally liable for the resulting deficiency solely as a result of Benoit signing the collateral mortgage note, with Diamond Services then seeking to satisfy the deficiency amount owed out of Benoit's other assets. The Supreme Court held that Benoit was in fact personally liable to Diamond Services as a result of Benoit signing the collateral mortgage note, subject to the caveat that Benoit's personal liability was limited to the value of the mortgaged property, whatever that amount may be.<sup>132</sup>

#### 4. Critique of Benoit

The Supreme Court's in personam holding in *Benoit* is flawed in the following respects.

First, a collateral mortgage note is not a real note. It does not and never is intended to evidence any indebtedness of the maker in favor of the named secured party or any other future holder or holders of the pledged note. In truth and in fact, a collateral mortgage note is a legal fiction, a contrivance intended solely to serve as collateral to secure payment of the obligor's true secured indebtedness evidenced by one or more hand notes. Nathan and Marshall were correct when they twice concluded in their landmark article, *The Collateral Mortgage*:

The collateral mortgage note, i.e., the "ne varietur" note, is not the indebtedness; it is merely the security that will be pledged

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132. See discussion *infra* note 147 (questioning how the value of the mortgaged property is determined when the mortgagee by-passes the mortgage foreclosure process, and initially elects to sue the mortgagee on a personal liability basis to collect payment on the collateral mortgage note).

as collateral for the true debt.<sup>133</sup> \*\*\* In the collateral mortgage situation, the “ne varietur” note is not the indebtedness at all; the “ne varietur” note, rather, is only to be used as collateral, the security that is pledged to the creditor to secure another note. The true indebtedness is the debt that the collateral mortgage “ne varietur” note is pledged to secure. Thus, while the “ne varietur” note is generally a note payable on demand, it does not represent a specific debt.<sup>134</sup>

The Supreme Court failed to recognize that, in a third-party collateral mortgage arrangement, no funds are ever advanced or intended to be advanced to the debtor evidenced by the pledged collateral mortgage note, and no indebtedness is ever incurred or intended to be incurred thereunder.<sup>135</sup> As a general rule of law, a promissory note evidences the indebtedness of the maker to the note holder only to the extent that funds are actually advanced and owed thereunder. If no funds are ever advanced under a note, no indebtedness is ever created that will trigger in personam liability on the part of the maker.<sup>136</sup>

Second, the Supreme Court’s in personam holding in *Benoit* is inconsistent with the Court’s prior pronouncement in *Bozorg* that a collateral mortgage note represents “a fictitious debt that can be pledged as collateral security for the real debt.”<sup>137</sup> The Supreme Court further concluded in *Alford* that a collateral mortgage note is “not a debt instrument but a security device, a pledge instrument.”<sup>138</sup> If, as stated by the Supreme Court in *Bozorg*, and again in *Alford*, a collateral mortgage note is a legal fiction and is not a “debt instrument,” then how can a collateral mortgage note confer in personam liability on the maker solely as a result of signing a fictitious note under which no funds are ever borrowed or ever owed to the secured party?

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133. Nathan & Marshall, *supra* note 20, at 502.

134. *Id.* at 505.

135. In a collateral mortgage situation, the borrower borrows funds, and the lender lends under the hand note(s). The debtor never borrows any funds, and the lender never lends under the collateral mortgage note, which again is a legal contrivance/security instrument that never is intended to evidence the borrower’s obligation to repay any specific indebtedness.

136. By way of example, ABC executes a \$10,000 promissory note payable to the order of XYZ. XYZ commits to, but never advances funds to ABC under the note. Under these facts, ABC never owes any money to XYZ under the note or otherwise, and ABC does not incur personal liability simply by executing the note and delivering it to XYZ.

137. *Tex. Bank of Beaumont v. Bozorg*, 457 So. 2d 667, 671 (La. 1984).

138. *First Guaranty Bank v. Alford*, 366 So. 2d 1299, 1303 (La. 1978).

Third, an additional argument can be made that a collateral mortgage granted to secure the debt of a third person gives rise to an in rem only obligation on the part of the mortgagor that is enforceable solely by foreclosing against the mortgaged property.<sup>139</sup> This argument is based on the black letter language of Civil Code article 3295 (mortgage securing another's obligation),<sup>140</sup> and the Louisiana State Law Institute's 1991 Revision Comment (a) thereto, which provide that the grant of a third-party mortgage to secure the debt of another does not give rise to in personam liability on the part of the mortgagor. This argument is further supported by the Louisiana State Law Institute's 1991 Revision Comment (b) to Civil Code article 3297.<sup>141</sup> "As is discussed more fully in the *Expose des Motifs*, a mortgage does not create personal liability on the part of the [mortgagor]<sup>142</sup> for the principal obligation (whether or not it is his or that of a third person)."<sup>143</sup>

Fourth, Diamond Services' collection lawsuits against Benoit were subterfuges and must be viewed in the proper context.<sup>144</sup> In truth and in fact, Diamond Services' suits against Benoit were not attempts to collect payment under the pledged notes as independent debt instruments. Rather, the suits were disguised attempts by Diamond Services to collect from Benoit the deficiency balance that remained owed on Davenport's loans after the judicial sales of the mortgaged properties, which Diamond Services otherwise was

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139. An in rem mortgage, authorized under Louisiana Civil Code article 3297, is a mortgage that can be satisfied solely by the exercise of default foreclosure remedies against the mortgaged property, without the mortgagor being personally liable for any resulting deficiency. See Max Nathan, *The "In Rem" Mortgage*, 44 TUL. L. REV. 497 (1970); see also Michael H. Rubin & E. Keith Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sales: The Ramifications of Mennonite*, 48 LA. L. REV. 535, 545 (1988); *La. Nat'l Bank of Baton Rouge v. O'Brian*, 439 So. 2d 552 (La. Ct. App. 1983).

140. LA. CIV. CODE art. 3295 (2015).

141. LA. CIV. CODE art. 3297 (2015).

142. The Louisiana State Law Institute 1991 Revision Comment (b) to Louisiana Civil Code article 3297 contains an obvious reference error, referring to the "mortgagee" when it clearly intends to refer to the "mortgagor." See LA. CIV. CODE art. 3297 cmt. b (2015).

143. A collateral mortgage is a mortgage within the context of Louisiana Civil Code articles 3295 and 3297, and the fact that the debtor signs a fictitious collateral mortgage note and delivers the note in pledge to the secured party should not change the in rem nature of the mortgage.

144. Diamond Services filed two separate collection lawsuits against Benoit; the first being a collection action filed in Acadia Parish seeking to enforce payment of the MCB pledged note, and the second being a separate collection action filed in Lafayette Parish seeking to collect payment on the Diamond Services pledged note. *Diamond Servs. Corp. v. Benoit*, 780 So. 2d 367, 369 (La. 2001).

unable to collect from Davenport. Diamond Services sued Benoit in a secondary obligor capacity<sup>145</sup> for the deficiency balance owed by Davenport in the same way that Diamond Services might have otherwise sued Benoit had she personally guaranteed Davenport's loans.<sup>146</sup> As the facts of the case demonstrate, Benoit never intended or agreed to personally guarantee Davenport's loans, and the Court never should have allowed Diamond Services to assert a back-ended deficiency judgment claim against Benoit under the pretense of suing to independently collect payment of the pledged collateral mortgage notes.

Based on the foregoing analysis, the Supreme Court clearly misspoke in *Benoit* when it concluded that Benoit was "personally liable" up to the value of the mortgaged property as a result of Benoit signing the two collateral mortgage notes at issue, and then pledging the notes to MCB and Diamond Services, respectively, to secure the debts of a third person (Davenport). Although a third-party collateral mortgage admittedly has the effect of obligating the mortgagor on an in rem basis, a third-party collateral mortgage in no way imposes in personam liability on the mortgagor.

### 5. *Additional Comments*

Some might ask whether it makes any difference if a third-party mortgagor like Benoit is liable on an in personam or on an in rem basis under a third-party collateral mortgage. Is the result not the same? To respond, it does make a difference. First, it is incorrect to say that a third-party mortgagor is personally liable on the debt for any amount. As stated in the Louisiana State Law Institute's 1991 Revision Comment (a) to Civil Code article 3295 and Revision Comment (b) to article 3297, a third-party mortgage is an in rem mortgage instrument, which does not, in and of itself, create personal liability on the part of the mortgagor. Second, the Supreme Court's personal liability holding can lead to litigation abuse worse than that which occurred in *Benoit* when Diamond Services sued Benoit in a back-ended attempt to collect the deficiency balance that remained owed after the mortgaged

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145. A guarantor or surety is obligated for payment of the principal obligor's guaranteed indebtedness on a secondarily/derivative liability basis. See LA. CIV. CODE arts. 3035–3037 (2015).

146. It is important to note that Davenport was the sole party contractually obligated to pay the deficiency balance that was still owed after the mortgaged properties were sold at judicial foreclosure sale. The fact that Benoit mortgaged her property to secure Davenport's debts did not result in Benoit becoming personally obligated on the mortgage debt or for the deficiency balance remaining owed to Diamond Services.

properties were sold at judicial sale. If a third-party mortgagor such as Benoit can be held personally liable simply by executing a collateral mortgage note and delivering the note in pledge to the mortgagee, there would be nothing to prevent a mortgagee (such as Diamond Services) from bypassing the mortgage foreclosure process altogether and instead initially filing suit against the mortgagor to independently enforce payment of the pledged note.<sup>147</sup> Nathan and Dunbar speculated to this effect in their article, *The Collateral Mortgage: Logic and Experience*.<sup>148</sup>

But in the context of [a third-party mortgage] mortgaging property to secure someone else's debts, the arrangements may be different. If the collateral mortgage were granted by S [a fictitious mortgagor] on Blackacre, and S pledged his collateral mortgage and collateral mortgage note to C [the mortgagee] to secure D's [the third party obligor] debts, then C might well have a good reason to sue on the *ne varietur* note [rather than foreclosing under the mortgage]. It is axiomatic that a person may grant a mortgage on his property for the benefit of another. Suppose that . . . S granted a \$100,000 mortgage on Blackacre and pledged the mortgage note to secure a \$75,000 hand note given by D to C. Now further suppose that the value of Blackacre has declined and the property is worth only \$50,000, less than the principal debt. C is not limited to enforcement of his personal obligation against D on the hand note, nor is he limited to foreclose of the mortgage on Blackacre. He has an additional remedy, for he may, if he chooses, sue S on the *ne varietur* note, which is . . . a separate negotiable instrument enforceable in accordance with its terms. Thus, in reality what has happened is that S has become a kind of surety for D. He has not merely exposed his immovable property, Blackacre, for D's debt, but he is, in addition, personally liable on the *ne varietur* note.<sup>149</sup>

It is doubtful that the Supreme Court ever intended to permit a mortgagee to initially file suit against a third-party mortgagor to

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147. The Supreme Court held in *Benoit* that a third party mortgagor incurs personal liability under the pledged collateral mortgage note up to the value of the mortgaged property. *Benoit*, 780 So. 2d at 383. An open question remains: How is the value of the mortgaged property determined if and when the mortgagor by-passes the mortgage foreclosure process and initially sues the third party mortgagor to directly collect the pledged note? Is value determined based on the then appraised value of the property, or otherwise?

148. Nathan & Dunbar, *supra* note 43.

149. *Id.* at 43.

independently enforce payment on a pledged collateral mortgage note in lieu of foreclosing under the mortgage and having the mortgaged property seized and sold at judicial sale.<sup>150</sup> As argued above, Civil Code articles 3295 and 3297 clearly provide that a third-party mortgage results in an in rem only obligation on the part of the mortgagor and does not subject the mortgagor to in personam liability, which—as demonstrated under the facts of *Benoit*—may be contrary to the mortgagor’s intent and agreement.<sup>151</sup> This result is further contrary to Louisiana Civil Code article 3038,<sup>152</sup> which provides that “[s]uretyship must be express and in writing.” The Louisiana State Law Institute’s 1987 Revision Comment (b) to article 3038 further explains: “It is sometimes doubtful whether an individual has guaranteed payment of another’s debt . . . . In such cases doubts are resolved against holding the individual as a surety on the theory that suretyship is a burden that one does not lightly undertake.”

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150. The following example further illustrates the type of mortgagee abuse that is possible under this logical extension of the supreme court’s personal liability holding in *Benoit*:

ABC borrows \$1 million from Bank. ABC’s loan is secured by XYZ’s third-party collateral mortgage on XYZ’s property. ABC is a good customer of XYZ, and XYZ is persuaded to grant a third-party mortgage on XYZ’s property to keep ABC in business. XYZ does not agree to personally guarantee ABC’s loan and is verbally assured by Bank and Bank’s counsel that signing the collateral mortgage note will not result in XYZ becoming personally liable for payment of ABC’s indebtedness to Bank. XYZ signs a \$5 million collateral mortgage note and delivers it in pledge to Bank. XYZ’s UCC pledge/agreement contains future advance/cross-collateralization language, and XYZ’s collateral mortgage contains a \$50 million credit cap. The mortgaged XYZ property has a current appraised value of \$10 million. ABC subsequently defaults and Bank considers what to do. At that time, XYZ has \$5 million on deposit in its operating account with Bank, and Bank considers whether it can legally setoff what XYZ owes Bank under the XYZ \$5 million pledged collateral mortgage note as an independent debt instrument against XYZ’s funds then on deposit with Bank. XYZ’s deposit account agreement with Bank contains contractual right of offset and grant of UCC security interest language, meaning that Bank has setoff rights under Louisiana Revised Statutes section 6:316. Bank elects to go the setoff route, which is an immediate remedy not requiring court approval or the procedural delays and complexity of judicial foreclosure against the XYZ mortgaged property. Bank offsets \$1.35 million from XYZ’s deposit account to pay the \$1 million defaulted loan, plus interest, costs, and 25% attorneys’ fees. XYZ vehemently objects and immediately files suit against Bank arguing that it was never XYZ’s intent or agreement to assume personal liability of ABC’s loan. Bank cites *Benoit* as authority.

151. *Benoit* repeatedly stated that she never intended nor agreed to personally guarantee Davenport’s debt. *Benoit*, 780 So. 2d at 369.

152. LA. CIV. CODE art. 3038 (2015).



### 6. Significance of Benoit

The Supreme Court's decision in *Benoit*, despite its flaws, is significant because of the Court's judicial recognition that the pledge aspects of post-1989 collateral mortgages are now exclusively subject to Louisiana UCC Article 9 and are no longer subject to the pledge articles of the Louisiana Civil Code.<sup>153</sup> The Court further recognized that collateral mortgages are now statutorily based rather than jurisprudential in nature, with post-1989 collateral mortgages being subject to the Louisiana collateral mortgage statute.<sup>154</sup>

#### B. Alaska Southern Partners v. Baxley

The Louisiana Second Circuit Court of Appeal in *Alaska Southern Partners v. Baxley*<sup>155</sup> denied the plaintiff the right to sue to collect payment of the debtor's collateral mortgage note without properly suing to collect under the third-party obligor's hand note. The Second Circuit held that a collateral mortgage note is not a real note (i.e., an evidence of indebtedness) but a security instrument that can be pledged to secure payment of the obligor's true indebtedness. As such, it was improper for the plaintiff to attempt to substitute the defendant's collateral mortgage note for the debtor's hand note, which the plaintiff could not locate. As the court stated, "[t]he collateral mortgage note was not conceived as being a separate enforceable instrument like other promissory notes. Standing alone, it has no actual value. Accordingly, and contrary to Alaska's assertions, without proof of the underlying debt, the collateral mortgage note is not an enforceable obligation."<sup>156</sup>

#### C. Hibernia National Bank v. Contractor's Equipment & Supply, Inc.

The Louisiana Third Circuit Court of Appeal refused to allow the plaintiff bank in *Hibernia National Bank v. Contractor's Equipment & Supply, Inc.*<sup>157</sup> to independently enforce payment of a third-party collateral mortgage note against a debtor, who had not personally guaranteed the third-party obligor's hand note. The Third Circuit affirmed that the "maker of a collateral mortgage note . . . is not

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153. *Benoit*, 780 So. 2d at 379.

154. *Id.* at 379–80.

155. 799 So. 2d 680 (La. Ct. App. 2001).

156. *Id.* at 683.

157. 804 So. 2d 760 (La. Ct. App. 2001).

personally liable beyond the value of the mortgaged property when the collateral mortgage note is pledged to secure the debt of a third party.”<sup>158</sup>

*D. Ellis Construction, Inc. v. Vieux Carre Resort Properties, L.L.C.*

The Louisiana Fourth Circuit Court of Appeal recognized in *Ellis Construction, Inc. v. Vieux Carre Resort Properties, L.L.C.*<sup>159</sup> that the pledge aspects of post-1989 Louisiana collateral mortgages are subject to Louisiana UCC Article 9. The plaintiff, Ellis Construction (EC), was unable to locate the defendant’s, Vieux Carre Resort Properties, L.L.C. (VCRP), hand note at the time EC instituted an executory process foreclosure action against the mortgaged property. VCRP attempted to enjoin the foreclosure sale, claiming that EC had not procedurally complied with the strict requirements of executory process set forth under the Louisiana Code of Civil Procedure, which required that EC introduce authentic evidence of the plaintiff’s secured indebtedness in the form of the hand note.<sup>160</sup> The Fourth Circuit rejected this argument, holding that, since the pledge of VCRP’s collateral mortgage note was subject to Louisiana UCC Article 9, all that EC was required to do under Louisiana UCC section 9-629<sup>161</sup> was to file a verified affidavit with the court attesting to the fact that (1) EC has a UCC security interest in the defendant’s pledged collateral mortgage note, (2) the pledged note secures VCRP’s indebtedness owed to EC, (3) VCRP is presently in default in paying that indebtedness, and (4) the amount of the secured indebted due and owing is \$XXX, plus continued accrual of interest, fees, charges, costs, and expenses.<sup>162</sup>

The Fourth Circuit’s decision in *Ellis Construction* is correct with respect to the court’s holding that Louisiana UCC Article 9 applied to VCRP’s pledge of the collateral mortgage note. The court, however, was incorrect in holding that Louisiana UCC section 9-629 applied to EC’s executory process foreclosure action against the mortgaged real estate. First and foremost, a mortgagee (in this case, EC) does not foreclose against the pledged collateral mortgage note when there is a default under a real estate loan secured by a collateral mortgage. The mortgagee instead forecloses against the mortgaged property by filing an executory process petition before the court in the same manner as a mortgagee might

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158. *Id.* at 763.

159. 934 So. 2d 206 (La. Ct. App. 2006).

160. *Id.* at 209. *See* LA. CODE CIV. PROC. arts. 2635–2637 (2015).

161. LA. REV. STAT. ANN. § 10:9-626 (Supp. 2015).

162. *See id.* § 10:9-629(a); *see also* Stuckey, *supra* note 58, at 854–56.

otherwise foreclose under an ordinary conventional mortgage or a multiple indebtedness mortgage. Second, Louisiana UCC section 9-629 does not apply when a secured party seeks to assert default remedies against pledged notes—instruments under the UCC. The proper UCC default remedy that can be asserted against pledged notes/instruments is the collection of the notes from the payment obligors thereunder as provided under Louisiana UCC section 9-607(a).<sup>163</sup> Non-uniform Louisiana UCC section 9-629 does not apply to real estate mortgage foreclosures and is limited to executory process foreclosure actions against non-possessory goods collateral—such as inventory, equipment, farm products, and consumer goods—on which the secured party has a file-perfected only UCC security interest. Executory process foreclosure remedies were inserted into Louisiana UCC Article 9 as a means of foreclosing against goods collateral then in the debtor's possession that the secured party otherwise was prohibited from seizing on its own initiative as a result of Louisiana's public policy against the exercise of self-help repossession remedies.<sup>164</sup> Louisiana UCC executory process foreclosure remedies were borrowed from the default remedies that apply to real estate mortgage foreclosures and from the executory process foreclosure remedies that once applied, prior to January 1, 1990, to old style chattel mortgages and collateral chattel mortgages that were completely replaced by UCC Article 9 security interests effective January 1, 1990.<sup>165</sup>

#### E. *Gutierrez v. Baldrige*

The Louisiana Third Circuit Court of Appeal correctly held in *Gutierrez v. Baldrige*<sup>166</sup> that Baldrige and his construction company failed to acquire an enforceable collateral mortgage against Gutierrez's property because Baldrige could not prove that he ever physically possessed Gutierrez's pledged collateral mortgage note and could not produce the original signed collateral mortgage note at time of foreclosure.<sup>167</sup> The court rejected Baldrige's assertion that Louisiana Revised Statutes section 13:3741<sup>168</sup> applied under the circumstance, holding that Baldrige

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163. LA. REV. STAT. ANN. § 10:9-607(a) (Supp. 2015).

164. *See id.* § 10:9-609 cmts.

165. *See* WILLENZIK, LOUISIANA SECURED TRANSACTIONS, WEST GROUP PRACTICE GUIDE §§ 8:9–8:21 (2005) (explaining the reasons why executory process foreclosure remedies were included in Louisiana UCC Article 9); *see also* Stuckey, *supra* note 58, at 859–61.

166. 105 So. 3d 156 (La. Ct. App. 2011).

167. *See id.* at 160; *supra* note 81 (additional discussion of *Gutierrez*).

168. LA. REV. STAT. ANN. § 13:3741 (2006) (suit on lost note).

did not have an enforceable security interest under Gutierrez's collateral mortgage in the first place because Baldrige never possessed the collateral mortgage note in pledge.<sup>169</sup>

#### F. Sciortino v. Bank of Louisiana

The Louisiana Fourth Circuit Court of Appeal correctly held in *Sciortino v. Bank of Louisiana*<sup>170</sup> that Sciortino's December 14, 1990 collateral mortgage additionally secured repayment of Sciortino's subsequent contingent obligations under a letter of credit facility as a result of the inclusion of broadly drafted future advance/cross-collateralization language in Sciortino's collateral pledge/UCC security agreement.<sup>171</sup> The Fourth Circuit nonetheless erred in basing its decision in *Sciortino* on pre-1990 collateral mortgage cases (including *Silversmiths*, *Alford*, *Bozorg*, and *Coates*), which no longer apply to post-1989 collateral mortgages.<sup>172</sup> As repeatedly stated in this Article<sup>173</sup> and in the 1994 Willenzik Article,<sup>174</sup> these prior cases should no longer be cited as authority, other than in a historical context, with respect to post-1989 collateral mortgages granted on and after January 1, 1990.<sup>175</sup>

### III. MULTIPLE INDEBTEDNESS MORTGAGES<sup>176</sup>

Louisiana multiple indebtedness mortgages are a direct and convenient substitute for old style, future advance collateral mortgages discussed in Parts I and II of this Article.

#### A. History and Purpose

Multiple indebtedness mortgages<sup>177</sup> were first authorized by the 1991 comprehensive revisions to the mortgage articles of the

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169. *Gutierrez*, 105 So. 3d at 162, 164.

170. 705 So. 2d 813 (La. Ct. App. 1998).

171. *Id.* at 817.

172. *Id.* at 816.

173. See *supra* text accompanying note 51 and *infra* text accompanying note 230.

174. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 33, 47, 61.

175. Sciortino's collateral mortgage was granted on December 14, 1990, after Louisiana UCC Article 9 and the Louisiana collateral mortgage statute became effective.

176. For a discussion of multiple indebtedness mortgages, see Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 48–61; RUBIN, *supra* note 21, ¶ 13.3; Rubin et al., *supra* note 2.

Louisiana Civil Code, in which the Louisiana State Law Institute and the Legislature eliminated the rule of former Civil Code article 3285 that a lien of an ordinary conventional mortgage is automatically reduced on a *pro tanto*, dollar-for-dollar basis as principal payments are made on the mortgage note, which in turn had prevented ordinary conventional mortgages from directly securing future advances and other cross-collateralized debt.<sup>178</sup> The 1991 Civil Code mortgage revisions also added revised Civil Code article 3298, which for the first time permits Louisiana conventional mortgages to directly secure future loans and other obligations on an open-end basis. Multiple indebtedness mortgages are a special purpose form<sup>179</sup> of open-end, future advance mortgage, which are authorized under Louisiana Civil Code article 3298, and which the Law Institute intended to be a “direct and convenient substitute” for old style collateral mortgages first developed in the mid-19th century.<sup>180</sup>

*B. Ability to Secure Future Advances on a Retroactive Priority Basis*

Revised Civil Code article 3298 permits multiple indebtedness mortgages to secure the mortgagor’s<sup>181</sup> (or as applicable, a third-

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177. Multiple indebtedness mortgages are sometimes referred to as “future advance mortgages,” which is a misnomer and easily confused with staged-advance mortgages. See LA. CIV. CODE art. 3298 cmts. (2015) (referring to multiple indebtedness mortgages as “future obligation mortgages”); see also *supra* note 21 (discussing staged-advanced mortgages).

178. See *supra* discussion in text accompanying note 17.

179. Louisiana State Law Institute 1991 Revision Comment (b) to Louisiana Civil Code article 3298 emphatically states that multiple indebtedness mortgages are not a “distinct or different form of mortgage,” presumably using the word “form” in the substantive sense. The author here uses the word “form” in a documentary sense because multiple indebtedness mortgage agreements typically contain different contractual provisions than those found in ordinary conventional mortgage and collateral mortgage agreements. For suggested contractual provisions typically included in multiple indebtedness mortgage agreements, see *infra* Part III.D.

180. See LA. CIV. CODE art. 3298 cmt. a (2015).

181. This article refers to the mortgagor under a multiple indebtedness mortgage as a “mortgagor,” and to the named mortgagee (and its successors and assigns) as a “mortgagee.” This should not be confused with the fact that this article refers to the mortgagor under a future advance collateral mortgage as a “debtor,” and the mortgagee as a “secured party.” Mortgagor and mortgagee are proper mortgage terms; whereas, debtor and secured party are proper UCC terms, which is correct in the case of a collateral mortgage when the secured party’s primary security interest is the UCC pledge of the debtor’s collateral mortgage note.

party obligor's)<sup>182</sup> future advances and other cross-collateralized debt with retroactive ranking priority vis-à-vis competing third persons back to the time the mortgage was originally recorded in the parish mortgage records:

Art. 3298. Mortgage may secure future obligations

A. A mortgage may secure obligations that may arise in the future.

B. As to all obligations, present and future, secured by the mortgage, notwithstanding the nature of such obligations or the date they arise, the 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. . . .<sup>183</sup>

The Louisiana State Law Institute's 1991 Revision Comments (a) through (d) to article 3298 further state:

(a) . . . Article [3298], and certain supplemental legislation adopted with it (R.S. 9:5555-5557),<sup>184</sup> is intended to provide a direct and convenient substitute for the so-called collateral mortgage, which in recent years has become widely used, and to permit a person to mortgage his property to secure a line of credit, or even to secure obligations that may not then be contemplated by him except in the broadest sense of an expectation that he may someday incur an obligation to the mortgagee.

(b) . . . A 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. The matter is one of contract, not law . . . .

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182. See LA. CIV. CODE art. 3295 (2015) (providing that a mortgage may secure third party debt).

183. LA. CIV. CODE art. 3298(A), (B) (2015).

184. LA. REV. STAT. ANN. § 9:5555 (2007) (providing that there is no requirement that mortgage notes be paraphrased *ne varietur* for identification with accessory mortgages secured thereby in order for the mortgagee to have the right to foreclose under the mortgage utilizing Louisiana executory process procedures). Section 9:5555 is consistent with Louisiana Civil Code articles 3298(C) and 3325, both of which provide that paraphrasing of mortgage notes with accessory mortgages is no longer required.

(c) Paragraph B declares that a 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. . . .

(d) The effect and rank of a 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, with the exception that the Article does not require that there initially be a debt or commitment in order to give vitality to the mortgage. Of course the contract of mortgage must be in existence and, to affect third persons acquiring rights in and to the thing mortgaged, it must be recorded. Once recorded, however, it serves as notice to the world that, until released or cancelled, it encumbers the property it describes to secure the obligations it contemplates.<sup>185</sup>

The *Expose des Motifs* accompanying Act 652 of 1991 provides additional guidance: “If the mortgagor incurs an obligation that the 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.”

Reading the above quoted provisions together, a multiple indebtedness mortgage is able to secure future advances and other cross-collateralized debt with retroactive ranking priority back to the time of original mortgage recordation, provided that (1) the mortgage agreement contains expansive future advance/cross-collateralization language,<sup>186</sup> (2) the mortgage is properly recorded in the parish mortgage records,<sup>187</sup> and (3) the ten-year inscription of the mortgage is not allowed to lapse.<sup>188</sup>

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185. LA. CIV. CODE art. 3298 cmts. a–d (2015).

186. The inclusion of expansive future advance/cross-collateralization language in the mortgage agreement is the key contractual provision that permits a multiple indebtedness mortgage to secure multiple present and future indebtedness of the mortgagor to the mortgagee. As stated in Revision Comment (b), when the mortgage agreement so provides, a multiple indebtedness mortgage is able to contractually secure existing obligations, obligations contemporaneously incurred at the time the mortgage is granted, other specifically identifiable or particular and limited future obligations, general and indefinite future obligations, or any combination of the foregoing.

187. LA. CIV. CODE art. 3298(B) (2015) (providing that a multiple indebtedness mortgage becomes effective and takes ranking priority as against third persons from the time the contract of mortgage is filed for registry in the parish mortgage records).

188. See LA. CIV. CODE art. 3357 (2015). The inscription of a recorded multiple indebtedness mortgage lapses, and the mortgage ceases to be effective

### C. Comparison with Collateral Mortgages

A Louisiana collateral mortgage is able to secure future advances and other cross-collateralized debt only by securing a fictitious, contrived collateral mortgage note, which is then pledged under an equally contrived collateral pledge/UCC security agreement to secure the debtor's true indebtedness evidenced by one or more hand notes or some other writing. There are at least four documents in a typical collateral mortgage package: (1) a collateral mortgage, (2) a collateral mortgage note, (3) a collateral pledge/UCC possessory security agreement, and (4) one or more hand notes or other writing evidencing the obligor's true indebtedness. The real security interest in a collateral mortgage arrangement is the UCC pledge of the debtor's collateral mortgage note, with the debtor's accessory collateral mortgage following the pledged note to indirectly secure the obligor's true indebtedness.

By way of comparison, there are only two documents in a typical multiple indebtedness mortgage package: (1) a multiple indebtedness mortgage, and (2) one or more hand notes or other writings giving rise to or evidencing the secured indebtedness. The mortgagor's multiple indebtedness mortgage directly secures the mortgagor's true secured indebtedness<sup>189</sup> as defined in the mortgage agreement.<sup>190</sup> There is no collateral pledge/UCC security agreement and no fictitious, contrived collateral mortgage note to be delivered in pledge to the mortgagee and physically retained until such time as the mortgage is released and cancelled. Additionally, there is no collateral mortgage note for the

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against third persons if and when the mortgage is not reinscribed on the public mortgage records every ten years *counting from the date the mortgage was originally executed rather than the date that the mortgage was first recorded. Id.* The fact that the ten-year inscription period of a recorded mortgage starts from the "date of the instrument" rather than from the date of original recordation, is an easily confused and overlooked requirement.

189. A multiple indebtedness mortgage is able to do directly what a future advance collateral mortgage is able to do only on an indirect basis; that is, to secure present and future indebtedness up to the maximum limit provided in the mortgage agreement on a retroactive priority basis back to the time the mortgage was originally recorded in the parish mortgage records.

190. For a suggested contractual definition of "secured indebtedness" to be included in a well drafted multiple indebtedness mortgage agreement, see *infra* Part III.D.2. A multiple indebtedness mortgage may secure any then existing or future debt or performance obligation. See LA. CIV. CODE arts. 3294, 3298(A), (B) (1990). There is no requirement that the secured indebtedness be evidenced by one or more hand notes.



mortgagee to lose or misplace, or to be barred by the five-year prescriptive period of Civil Code article 3498.

Furthermore, there is no requirement that the mortgagee under a multiple indebtedness mortgage initially give value by funding a mortgage loan or issuing a binding loan commitment. As previously discussed in Part I.D.6 of this Article with respect to delayed, anticipatory credit situations, a collateral mortgage becomes effective and takes its priority ranking vis-à-vis third persons from the time that the mortgage is recorded in the parish mortgage records, or the time that the secured party's possessory UCC security interest in the pledged collateral mortgage note becomes fully perfected, whichever is the last to occur.<sup>191</sup> Full perfection requires that the secured party give value either by initially funding a loan or loan advance or issuing a binding loan commitment to lend at a later date. By way of comparison, a multiple indebtedness mortgage becomes effective and takes its ranking priority from "the time the contract of mortgage is filed for registry,"<sup>192</sup> and there is no requirement that "there initially be a debt or commitment in order to give vitality to the mortgage."<sup>193</sup>

Additionally, there is no concern that a multiple indebtedness mortgage may cease to be effective vis-à-vis third persons when the balance of the secured mortgage indebtedness subsequently is reduced to \$0.00, and there then is no binding forward commitment to lend additional funds to the mortgagor, e.g., a lapsed credit situation previously discussed in Part I.D.5 of this Article. As Civil Code article 3298(E) affirms, a recorded multiple indebtedness mortgage continues to be effective against third persons until terminated by the mortgagee or his successor. Louisiana State Law Institute 1991 Revision Comment (f) to Civil Code article 3298(E) further explains:

Paragraph E reinforces the principle implicit in Paragraphs B and C of this Article as discussed in the preceding comment, and more fully explained in the *Expose des Motifs*, that the mortgage is fully in existence, though its enforcement may be conditional, and even though no obligations are then secured. . . . Resort must be had to the contract of mortgage to see what obligations it may secure. . . . If on the other hand, the mortgage secures future, indefinite obligations with a maximum limit on their aggregate balance from time to time, then in essence, the mortgage continues indefinitely until it is

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191. See *supra* Part I.D.6.

192. LA. CIV. CODE art. 3298(B) (2015).

193. LA. CIV. CODE art. 3298 cmt. d (2015).

terminated by notice of the mortgagor or the consent of the parties, or in some other manner recognized by law.<sup>194</sup>

*D. Form and Content Requirements Applicable to Multiple Indebtedness Mortgage Agreements*

There are certain form and content requirements that apply to multiple indebtedness mortgage agreements as compared to those that apply to ordinary conventional mortgage and collateral mortgage agreements.

*1. Title and Definition of Mortgagee*

A well-drafted multiple indebtedness mortgage agreement should bear the following caption title:

Multiple Indebtedness Mortgage  
By: [name of mortgagor]  
In favor of [name of initial named mortgagee]  
and its successors and assigns

The purpose of titling the mortgage as a “Multiple Indebtedness Mortgage” is to distinguish the mortgage on the public record from an ordinary conventional mortgage so as to place potential third persons on public notice that the mortgage may secure future debts and other obligations up to the maximum dollar limit specified in the mortgage agreement. Third persons searching the public mortgage records need to be aware of the special nature of a multiple indebtedness mortgage as an open-end mortgage instrument when evaluating the merits of taking a junior secured position on the same property.<sup>195</sup>

The purpose of stating that the mortgage is granted in favor of a named mortgagee, as compared to the old practice of granting a collateral mortgage in favor of “any person, firm or corporation,”<sup>196</sup> is to comply with the mortgage cancellation procedures of Louisiana Revised Statutes section 9:5169,<sup>197</sup> which require that a mortgage cancellation certificate be signed by the “obligee of record of the mortgage,” meaning the named mortgagee or its successor or assignee filing an assignment of mortgage in the public mortgage

194. LA. CIV. CODE art. 3298 cmt. f (2015).

195. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 57–58; see also RUBIN, *supra* note 21, ¶ 13.3(a).

196. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 12–13 (discussing so-called “landed mortgages”).

197. LA. REV. STAT. ANN. § 9:5169 (2005).

records. Granting the mortgage in favor of a named mortgagee also serves to alert potential third persons of the named mortgagee's identity so that the named mortgagee may be provided with so-called Mennonite notices<sup>198</sup> should the mortgaged property ever be seized and sold at a foreclosure or tax sale.<sup>199</sup>

The purpose of including successors-and-assigns language in the title of a multiple indebtedness mortgage, and in the definition of the "Mortgagee,"<sup>200</sup> is to emphasize that the mortgage is being granted not only to secure loans and loan advances extended by the named mortgagee, but also to secure loans and loan advances extended by the named mortgagee's successors and assigns. This was an issue in *Bozorg*,<sup>201</sup> a collateral mortgage case discussed in the 1994 Willenzik Article,<sup>202</sup> and in *KeyBank National Association v. Perkins Rowe Associates, LLC*,<sup>203</sup> a multiple indebtedness mortgage case discussed in Part IV.B of this Article.

## 2. Definition of the Secured Indebtedness

A well-drafted multiple indebtedness mortgage agreement should include a broad, expansive definition of the indebtedness secured by the mortgage. Suggested language is as follows:

Indebtedness. The word "Indebtedness" as used in this Mortgage means individually, collectively and interchangeably (i) any and all present and future loans, advances and/or other extensions of credit obtained and/or to be obtained by

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198. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). See Rubin & Carter, *supra* note 139; see also *Davis Oil v. Mills*, 873 F.2d 774 (5th Cir. 1989) (holding that a seizing creditor has a duty to provide notice to persons having an interest in property to be sold at foreclosure or tax sale, provided that the identity of such interested persons is known to the seizing creditor or is otherwise reasonably ascertainable).

199. See *Sec. First Nat'l Bank v. Murchison*, 739 So. 2d 803 (La. Ct. App. 1999) (dealing with a situation in which an old-style collateral mortgage was granted in favor of "any person, firm, or corporation," as compared to being granted in favor of a named mortgagee, resulting in the taxing agency being uncertain as to proper person to send a required Mennonite notice to in connection with a forced tax sale of the mortgaged property).

200. The inclusion of successors-and-assigns language in the definition of "Mortgagee" reinforces the position that the mortgage not only secures indebtedness owed to the mortgagee named in the title and preface to the mortgage agreement, but also secures indebtedness owed to the named mortgagee's successors and assigns.

201. *Tex. Bank of Beaumont v. Bozorg*, 444 So. 2d 698 (La. Ct. App.), *rev'd in part*, 457 So. 2d 667 (La. 1984).

202. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 20–21.

203. *KeyBank Nat'l Ass'n v. Perkins Rowe Assocs.*, 823 F. Supp. 2d 399 (M.D. La. 2011).

Mortgagor (or by a third party obligor or obligors designated by Mortgagor) from Mortgagee, as well as from Mortgagee's successors and assigns, from time to time, one or more times, now and in the future, under any and all promissory notes evidencing such present and/or future loans, advances and/or other extensions of credit, including without limitation, a promissory note dated \_\_\_\_\_, in the principal amount of \$\_\_\_\_\_, and any and all amendments thereto and/or substitutions therefor, and any and all renewals, extensions and refinancings thereof; as well as (ii) any and all other obligations and liabilities that Mortgagor (or a third party obligor or obligors designated by Mortgagor) may now and/or in the future owe to and/or incur in favor of Mortgagee, as well as in favor of Mortgagee's successors or assigns, whether direct or indirect, or by way of assignment or purchase of a participation interest, and whether related or unrelated, or committed or purely discretionary, and whether absolute or contingent, liquidated or unliquidated, voluntary or involuntary, due or to become due, and whether now existing or hereafter arising, of every nature and kind whatsoever, and whether Mortgagor is obligated alone or with others on a joint and several or solidary basis as a surety, guarantor, or endorser; with all of the foregoing loans, loan advances, extensions of credit, and other and future indebtedness, obligations, and liabilities referenced in (i) and (ii) above, being subject to a maximum principal dollar limitation of \$\_\_\_\_\_, as may be outstanding from time to time, one or more times, and with all interest, fees, charges, costs, and expenses relating thereto being additionally secured by the lien of this Mortgage up to a maximum amount equal to twice (2X) the foregoing principal dollar limit.<sup>204</sup>

This broad, expansive definition of the secured indebtedness is critical to permitting a multiple indebtedness mortgage to secure present and future indebtedness and other cross-collateralized debt as provided under Civil Code article 3298.<sup>205</sup> Civil Code article

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204. This same definition of "indebtedness" may be included in a well-drafted collateral pledge/UCC security agreement found in a collateral mortgage package, with the possible exception that there is no requirement under Revised UCC Article 9 that a UCC collateral pledge/security agreement specify the maximum amount of the secured indebtedness.

205. LA. CIV. CODE art. 3298 cmt. b (2015) (stating that the parties to a multiple indebtedness mortgage must contractually agree that the mortgage will

3288 requires that a multiple indebtedness mortgage agreement specify “the maximum amount of the obligations that may be outstanding at any time and from time to time that the mortgage secures.”<sup>206</sup> The purpose of including successors-and-assigns language in the above definition is once again to affirm that the secured indebtedness additionally includes loans and other indebtedness owed to the named mortgagee’s successors and assigns.

### 3. *Grant of Mortgage*

Every mortgage must include granting language under which the mortgagor grants a security interest in the form of a mortgage on the mortgaged property in favor of the named mortgagee and its successors and assigns to secure payment of the secured indebtedness. Suggested granting language is as follows:

Grant of Mortgage. In order to secure the prompt and punctual payment and satisfaction of the Indebtedness (as defined herein) in principal, interest, costs, expenses, attorneys’ fees and other fees and charges, and additionally to secure all Additional Advances<sup>207</sup> that Mortgagee may make on Mortgagor’s behalf, together with interest thereon,

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secure the mortgagor’s present and future indebtedness as defined in the mortgage agreement).

206. Louisiana Civil Code article 3288 requires that a mortgage agreement securing future advances and other cross-collateralized debt affirmatively state the maximum secured amount. *See* LA. CIV. CODE art. 3288 (2015). Article 3288 however is unclear and provides no guidance as to whether this dollar limit includes principal only, or additionally includes interest, fees, charges, costs and expense that the mortgagor may owe to the mortgagee. Many mortgage creditors set this dollar limit at an arbitrarily high amount (e.g., \$50 million) in order to protect themselves from running out of space under the credit cap. *See* RUBIN, *supra* note 21, ¶ 13.11(a).

207. A mortgage agreement typically obligates the mortgagor to maintain insurance on the mortgaged property and to pay taxes and other assessments and keep the mortgaged property in good repair and condition, so long as the mortgage remains in effect. The mortgage agreement further typically provides that, should the mortgagor fail to do any of the foregoing for any reason, the mortgagee may step in and purchase forced-placed insurance, pay taxes, and make necessary repairs to the mortgaged property, for and on behalf of the mortgagor and at the mortgagor’s expense. “Additional Advances” typically represent funds advanced by the mortgagee for such purposes, and are subject to reimbursement by the mortgagor, together with interest thereon, with the mortgagor’s reimbursement obligations being additionally secured by the mortgage. *See* LA. REV. STAT. ANN. § 9:5389 (2007) (mortgage securing additional advances for payment of insurance, taxes, etc.).

Mortgagor does hereby grant to and in favor of Mortgagee and Mortgagee's successors and assigns, a mortgage encumbering any and all of Mortgagor's present and future rights, title and interest in and to the Mortgaged Property as more fully described herein, or in an exhibit attached hereto and made a part hereof, all to the maximum extent permitted under applicable Louisiana law.

*4. Declaration of Intent that the Mortgage Secure Future Advances*

A well-drafted multiple indebtedness mortgage agreement additionally should contain an affirmation on the part of the mortgagor that the mortgage is being granted to secure the mortgagor's (or third-party obligor's) present indebtedness as well as indebtedness that may arise in the future, with the continuing preferences and priority as provided under Louisiana Civil Code article 3298 and other applicable law.<sup>208</sup> Suggested (but in no way mandatory) language is as follows:

Mortgage Securing Future Indebtedness. This Mortgage is being granted by Mortgagor pursuant to Article 3298 of the Louisiana Civil Code for the purpose of securing Indebtedness that may now be existing or that may arise in the future, with the continuing preferences and priority provided by applicable law. However, nothing under this Mortgage shall be construed as limiting the duration of this Mortgage or the purpose or purposes for which the Indebtedness may be requested or extended. Mortgagor's additional Indebtedness will automatically be secured by this Mortgage without the

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208. The purpose of including an affirmative declaration of this type in a well-drafted multiple indebtedness mortgage agreement is to counter any subsequent assertion on the part of the mortgagor, or by a third person, or by a court of law or in bankruptcy, that the mortgagor never understood, intended, or agreed that the mortgage and the mortgaged property would secure repayment of other and future indebtedness up to the maximum limit provided in the mortgage agreement. As recognized in Louisiana State Law Institute 1991 Revision Comment (b) to Louisiana Civil Code article 3298, the ability of a multiple indebtedness mortgage to secure other and future indebtedness is a "matter of contract." In Louisiana, persons are obligated under the clear and unambiguous language of contracts they sign unless such covenants are deemed to be against public policy. As stated in former Louisiana Civil Code article 3158(C)(2) (1870), cross-collateralization is not, and never has been, against Louisiana public policy. There absolutely is no requirement that a multiple indebtedness mortgage agreement make mention of, or state that the mortgage is granted under and pursuant to, Louisiana Civil Code article 3298. The foregoing is merely suggested language.

necessity that Mortgagor agree, consent to, reaffirm or acknowledge such result at the time or times that additional Indebtedness is incurred,<sup>209</sup> or that the note or notes evidencing such additional Indebtedness reference the fact that such note or notes are secured by this Mortgage.<sup>210</sup> Mortgagor recognizes, covenants and unconditionally agrees that Mortgagor may not subsequently have a change in mind and insist that any such additional Indebtedness not be secured by this Mortgage unless Mortgagee shall otherwise agree in writing.<sup>211</sup>

### 5. Duration of Mortgage

A well-drafted multiple indebtedness mortgage agreement should also include a Duration section providing to the following effect:

Duration of Mortgage. This Mortgage will remain in effect until such time as the inscription of this Mortgage is cancelled and terminated on the public mortgage records in the manner prescribed by law.

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209. The purpose of including language in the declaration to the effect that the mortgagor is not required to reaffirm each time a subsequent loan is made that the subsequent indebtedness is secured by the mortgagor's then-existing multiple indebtedness mortgage is to pretermitt any potential argument, such as that made in *Coates*, that the mortgagor's reaffirmation is in fact required. See generally *Citizens Nat'l Bank v. Coates*, 563 So. 2d 1265 (La. Ct. App. 1990). Although *Coates* was a pre-1990 collateral mortgage case, it is possible that the holding of *Coates* may be incorrectly extended by a court to additionally apply to multiple indebtedness mortgages. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 27–30 (critically discussing *Coates*); see also discussion *supra* Part IV.B (discussing the *KeyBank* decision in which an Acknowledgement of Mortgage played a key role).

210. See LA. CIV. CODE art. 3298(C) (2015) (providing that a mortgage note need not be paraphed *ne varietur* for identification with the mortgage, or recite that the note is secured by the mortgage).

211. The reason why this non-back-out covenant is included in the declaration of intent is to prevent the mortgagor from later insisting that a subsequent loan not be secured by the mortgagor's existing multiple indebtedness mortgage (unless the mortgagee should otherwise agree in writing). Although the mortgagor has the right to prepay the secured indebtedness in full and to insist that the mortgage be terminated and cancelled on the public records, the mortgagor should not have the right to unilaterally pick and choose which subsequent loans are secured by the existing mortgage and which are not. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 58–59.

### 6. Mortgage Cancellation

Civil Code article 3298(D)<sup>212</sup> and Louisiana Revised Statutes sections 9:5163–5173<sup>213</sup> set forth the procedures for cancelling the inscription of a multiple indebtedness mortgage on the public records. Some multiple indebtedness mortgage agreements contain contractual mortgage cancellation covenants, while others do not. The following suggested language is for those mortgage lenders who chose to include mortgage cancellation provisions in their multiple indebtedness mortgage agreements:

Mortgage Cancellation. Mortgagor may request Mortgagee to terminate, and to cause the inscription of this Mortgage to be cancelled from the public mortgage records, provided that Mortgagee is satisfied in its reasonable judgment that (i) all of the Indebtedness secured by this Mortgage has been fully paid and satisfied (or in the case of the contingent obligations that have yet to accrue, adequate reserves have been established in the form of escrow deposits or third-party guarantees in favor of Mortgagee), and (ii) there is no then agreement or commitment on the part of Mortgagee to advance additional funds to or on Mortgagor's behalf. Both of the above conditions must be satisfied in Mortgagee's reasonable judgment in order for Mortgagee to undertake to cancel this Mortgage. Mortgagor agrees that Mortgagee may delay cancelling this Mortgage on the public records for up to thirty days (or longer if necessary) following receipt of Mortgagor's initial cancellation request, which delay period shall constitute reasonable advance notice to Mortgagee for all purposes.<sup>214</sup>

### 7. No Ne Varietur Paraph

It is neither necessary nor appropriate for a promissory note evidencing a loan secured by a Louisiana multiple indebtedness mortgage to be paraphed *ne varietur* for identification with the

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212. See LA. CIV. CODE art. 3298 cmt. e (2015) (regarding cancellation of multiple indebtedness mortgages).

213. LA. REV. STAT. ANN. §§ 9:5163–5173 (2011).

214. See LA. CIV. CODE art. 3298(D) (2015) (providing that the parties may contractually agree that the mortgagee has a reasonable period of time following receipt of the mortgagor's initial request within which to cancel the mortgage on the public mortgage records).



mortgage.<sup>215</sup> The reason why is to prevent the mortgagor from canceling the mortgage on the public records by presenting a paraphed note marked paid in full without authority to do so.<sup>216</sup>

#### IV. SIGNIFICANT MULTIPLE INDEBTEDNESS MORTGAGE CASES

There are three significant multiple indebtedness mortgage cases that were decided over the past 23 years since the 1991 comprehensive revisions to the mortgage articles of the Louisiana Civil Code first became effective.

##### A. *In re Hari Aum*

###### 1. *Facts and Disposition*

The facts of the *In re Hari Aum*<sup>217</sup> bankruptcy case are as follows. In January 2005, the debtor,<sup>218</sup> Hari Aum, LLC, obtained a \$1.8 million loan from First Guaranty Bank of Hammond (FGB) secured by a Louisiana multiple indebtedness mortgage (the “Louisiana Mortgage”) dated January 27, 2005, on the debtor’s motel property (the “Deluxe Motel”) in Slidell, Louisiana. The mortgage instrument was a Louisiana LaserPro multiple indebtedness mortgage form,<sup>219</sup> which contained a broad, expansive definition of the secured indebtedness, and which further contained future advance/cross-collateralization language.<sup>220</sup> The Louisiana Mortgage was properly recorded in the St. Tammany Parish mortgage records on February 1, 2005. In May 2006, the owner and sole member of Hari Aum,

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215. See LA. CIV. CODE art. 3298(C) (2015) (providing that a note secured by a multiple indebtedness mortgage need not be paraphed *ne varietur* for identification with the mortgage).

216. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 55.

217. No. 10–12931, 2011 WL 2746149 (Bankr. E.D. La. July 12, 2011), *aff’d*, 714 F.3d 274 (5th Cir. 2013). The author has elected to discuss the *Hari Aum* bankruptcy case before discussing the *KeyBank* case, which technically was decided before *Hari Aum*. For a discussion of *KeyBank*, see *infra* Part IV.B.

218. The term “debtor” as used within Part IV.A refers to Hari Aum in its capacity of debtor in possession in the debtor’s Chapter 11 bankruptcy case. The term debtor as used herein should not be confused with use of the term debtor in Parts I and II of this article to refer to the party granting a UCC security interest in collateral and the party granting a Louisiana collateral mortgage on its property.

219. LaserPro is a computerized loan documentation system used by FGB and numerous other Louisiana banks, and self-generates customized loan documents based on criteria inputted by the user.

220. To view the future advance/cross-collateralization provisions of the Hari Aum mortgage, see *In re Hari Aum*, 2011 WL 2746149, at \*6; *In re Hari Aum*, 714 F.3d at 276–77.

Sam Bhula, applied for an additional loan from FGB to acquire a motel in Hattiesburg, Mississippi. Bhula then formed a new company, Mississippi Hospitality Services, LLC (MHS), to be the borrower under the additional FGB loan and to be the owner of the Hattiesburg motel property. This additional loan in the amount of \$4.9 million (the “Mississippi Loan”) was secured by a Mississippi deed of trust on the Hattiesburg motel, which was properly recorded in the Forrest County, Mississippi, public records. At the time that Bhula applied to FGB for the Mississippi Loan, it was agreed that Hari Aum’s existing Louisiana Mortgage on the Slidell motel property would additionally secure MHS’s subsequent Mississippi Loan to acquire the Hattiesburg motel. FGB’s loan commitment to Bhula with respect to the \$4.9 million Mississippi Loan clearly provided to that effect.<sup>221</sup> Both the Hari Aum original loan and the MHS Mississippi Loan were refinanced in April 2009, at which time Bhula personally guaranteed the Hari Aum loan and executed an Acknowledgement of Existing Multiple Indebtedness Mortgage<sup>222</sup> (the “Acknowledgement”) on behalf of Hari Aum in which Bhula on behalf of Hari Aum acknowledged and affirmed that Hari Aum’s existing Louisiana Mortgage additionally secured the MHS Mississippi Loan. MHS’s refinancing note dated April 21, 2009, further referenced the fact that the MHS Mississippi Loan additionally was secured by the Hari Aum Louisiana Mortgage. Hari Aum and MHS later experienced financial difficulty, and Hari Aum ultimately filed for Chapter 11 bankruptcy protection from creditors. The *Hari Aum* bankruptcy case was heard before the United States Bankruptcy Court for the Eastern District of Louisiana and decided in a Memorandum Opinion dated July 12, 2011.<sup>223</sup> Hari Aum subsequently appealed the Bankruptcy Court’s decision to the United States Court of Appeals for the Fifth Circuit, which affirmed the Bankruptcy Court’s decision in favor of FGB.<sup>224</sup>

## *2. The Bankruptcy Court’s Decision*

Hari Aum, in its capacity as Chapter 11 debtor in possession, made a number of assertions before the Bankruptcy Court denying that its January 2005 Louisiana Mortgage on the Slidell motel

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221. FGB’s loan commitment to Bhula required that Hari Aum’s existing Louisiana Mortgage additionally would secure the MHS Mississippi Loan. Bhula accepted the FGB loan commitment, and thus agreed to that requirement. Bhula was the sole LLC member/owner of Hari Aum, and thus had the authority to bind and obligate his own company.

222. The Acknowledgement also was a LaserPro computer-generated form.

223. *In re Hari Aum*, 2011 WL 2746149.

224. *In re Hari Aum*, 714 F.3d at 274.

property additionally secured the \$4.9 million Mississippi Loan that FGB subsequently made to MHS. The debtor argued that, although the language of the Louisiana Mortgage clearly provided that the mortgaged property would secure the debts of third-party obligors to the extent that Hari Aum also was personally obligated on such third-party debts, the mortgage provided that the mortgaged property would additionally secure third-party debt only to the extent that Hari Aum was personally liable for payment either as a co-borrower or as a guarantor. Note that Hari Aum never executed a separate guaranty agreement personally guaranteeing payment of the MHS Mississippi Loan.<sup>225</sup> The debtor further argued that, as Bhula's subsequent agreement to permit Hari Aum's existing Louisiana Mortgage to additionally secure MHS's Mississippi Loan (presumably referring to the Acknowledgement)<sup>226</sup> had the effect of enlarging the scope of the existing Louisiana Mortgage, this agreement should have been in the form of a formal amendment to the Louisiana Mortgage, executed in authentic form before a notary public and two witnesses, and filed in the St. Tammany Parish mortgage records. The debtor additionally argued that Bhula had no authority to agree on behalf of Hari Aum that the debtor's existing Louisiana Mortgage additionally would secure MHS's subsequent Mississippi Loan. The Bankruptcy Court rejected all of Hari Aum's assertions, ultimately ruling in favor of FGB.<sup>227</sup>

The court began by noting that multiple indebtedness mortgages were first authorized under the 1991 comprehensive revisions to the Civil Code mortgage articles as "a direct and convenient substitute

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225. See *infra* Part IV.A.5 (suggesting that the contentious issue of whether Hari Aum's existing Louisiana mortgage additionally secured MHS's subsequent Mississippi Loan could have been avoided had FGB required Hari Aum to personally guarantee the MHS Mississippi Loan by signing a separate guaranty agreement).

226. Hari Aum's agreement that the debtor's existing Louisiana Mortgage would additionally secure the MHS subsequent Mississippi Loan was not (as the debtor claimed) agreed to under the Acknowledgement, but instead was a condition of FGB's May 2006 loan commitment to make an additional \$4.9 million Mississippi Loan to a to-be-formed Mississippi company (later organized as MHS), which condition was agreed to by Bhula on behalf of Hari Aum at the time Bhula accepted FGB's loan commitment. See *In re Hari Aum*, 2011 WL 2746149, at \*7 n.12. The Acknowledgement, which was later executed in April 2009 at the time that the Hari Aum loan and MHS Loan were refinanced, merely reconfirmed Bhula's and Hari Aum's prior cross-collateralization agreement agreed to three years earlier as a result of Bhula's acceptance of the FGB May 2006 loan commitment.

227. *In re Hari Aum*, 2011 WL 2746149, at \*9 ("The court finds that the Deluxe Motel [Slidell, LA] property secures both FGB's loan to the debtor and FGB's loan to MHS.").

for so-called collateral mortgages.”<sup>228</sup> The court further noted that, until the filing of the present bankruptcy case, multiple indebtedness mortgages had been largely untested by the courts.<sup>229</sup> The court then commented on the ability of multiple indebtedness mortgages to secure future advances and other cross-collateralized debt on a retroactive priority basis, quoting from the 1994 Willenzik Article<sup>230</sup> as follows:

If a multiple indebtedness mortgage is properly executed and filed, and if the mortgage contains broadly drafted future advance/cross-collateralization language, then any and all present and future extensions of credit and other obligations the borrower may obtain 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 back to the time the mortgage originally was filed in the public records.<sup>231</sup>

The court then proceeded to reject the debtor’s argument that the future advance/cross-collateralization language of the Hari Aum Louisiana Mortgage was not sufficiently broad to encompass FGB’s subsequent \$4.9 million Mississippi Loan to MHS. The court examined the future advance/cross-collateralization language of the mortgage agreement, together with confirmatory language of the Acknowledgement, and found them to be sufficient to express Bhula’s and Hari Aum’s intent and agreement that the Hari Aum Louisiana Mortgage would additionally secure the MHS subsequent Mississippi Loan:

The bank’s main contention that the MIM<sup>232</sup> signed by the debtor, along with the promissory note signed by MHS and the Acknowledgement signed by the debtor are enough to create a valid mortgage on the Deluxe Motel to be used later to secure the loan from FGB to MHS. The court agrees. The

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228. *Id.* at \*4.

229. *Id.*

230. The Bankruptcy Court and the Fifth Circuit cited the 1994 Willenzik Article as secondary authority for certain of the legal conclusions forming the bases of the courts’ opinions. See *In re Hari Aum*, 2011 WL 2746149, at \*3, \*5; *In re Hari Aum*, 714 F.3d at 274, 283–84.

231. See *In re Hari Aum*, 2011 WL 2746149, at \*3, \*5; *In re Hari Aum*, 714 F.3d at 274, 282–84 (quoting Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 50–51).

232. The Hari Aum Bankruptcy and Fifth Circuit Opinions refer to multiple indebtedness mortgages as “MIM’s.”

MIM clearly states that it secures all indebtedness of the debtor, whether the debtor is, “obligated alone or with others on a ‘solidary’ or ‘joint and several’ basis, as principal obligor or as a surety, guarantor, or endorser, of every nature and kind whatsoever.” The MIM was properly recorded on February 1, 2005, serving as notice to any potential creditors that the debtor’s property was encumbered up to the amount of \$50 million for any present and future loans from FGB. Additionally, the promissory note dated April 21, 2009 clearly lists the MIM as one of the pieces of collateral for the MHS loan. Finally, the Acknowledgement lists Hari Aum as the Grantor and MHS as the Borrower, and it grants a mortgage to FGB on the Deluxe Motel to secure the note executed by MHS.<sup>233</sup>

The court additionally found that Hari Aum had in fact agreed to be personally obligated on the MHS Mississippi Loan as a result of language included in the Acknowledgement that Bhula signed on behalf of Hari Aum in April 2009:

The provision [of Hari Aum’s multiple indebtedness mortgage] envisioning that the parties were contemplating future debts of entities other than just Hari Aum was fulfilled in 2009 when MHS refinanced its loan with FGB . . . . The Acknowledgement executed in 2009 by Bhula on behalf of Hari Aum names MHS as the Borrower and Hari Aum as the Grantor, identifies and describes the MIM of 2005 and then provides that the MIM was intended to secure any and all of MHS’s (and Hari Aum’s) debts, present and future, to FGB. The Acknowledgement goes on to provide, in a paragraph entitled Waivers, that Hari Aum shall remain bound with MHS on a joint and several or solidary basis. This waiver language is sufficient, in this court’s opinion, to bind Hari Aum on a personal basis (in solido) for the debts of MHS and affect a cross-collateralization whereby the Deluxe Motel is mortgaged to secure the MHS debt to FGB.<sup>234</sup>

The court further rejected the debtor’s assertion that Bhula and Hari Aum’s subsequent agreement that the Louisiana Mortgage would additionally secure the MHS Mississippi Loan should have been in the form of a formal amendment to the mortgage agreement, executed in authentic form, and recorded in the parish mortgage records. As stated by the court:

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233. *In re Hari Aum*, 2011 WL 2746149, at \*8.

234. *Id.* at \*6.

If the prior practice [referring to future advances under old style Louisiana collateral mortgages] did not require an additional recordation when a future advance was made and if the amendment to article 3298 and the statutory provisions for a MIM were to make the securitization of future loans easier and more adaptable to modern day financing, it is difficult to understand Hari Aum's arguments that another note or an amendment to the MIM was necessary for the Deluxe Motel in Slidell to serve as security for the FGB loan to MHS.<sup>235</sup>

The court further stated, "the major advantage of the multiple indebtedness mortgage . . . is that [it] 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."<sup>236</sup>

Finally the court rejected the debtor's argument that Bhula did not have authority to agree on behalf of Hari Aum that the debtor's existing Louisiana Mortgage would additionally secure FGB's subsequent Mississippi Loan to MHS. The court noted that Bhula was the sole owner/member of Hari Aum (a single-member limited liability company) and thus clearly had the right, power, and authority to bind his own company.<sup>237</sup>

### 3. The Fifth Circuit's Decision

The Fifth Circuit affirmed the Bankruptcy Court's decision in *Hari Aum* in favor of FGB. The primary argument that the debtor made before the Fifth Circuit was that FGB's failure to file the Acknowledgement and the MHS April 2009 refinancing note in the St. Tammany Parish mortgage records somehow violated the Louisiana public records doctrine.<sup>238</sup> The debtor argued that the Acknowledgement modified the mortgage and therefore was required to be recorded in the public mortgage records in order to

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235. *Id.* at \*4 (quoting Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 51).

236. *Id.* The fact that Hari Aum subsequently agreed under the "waiver" language of the Acknowledgement to be solidarily liable on the MHS Mississippi Loan along with MHS, made it unnecessary for the parties to formally amend the Louisiana Mortgage. Reason: the Louisiana Mortgage already provided that the mortgaged property would secure third party debt for which Hari Aum was personally obligated.

237. *Id.* at \*6-7.

238. *In re Hari Aum*, 714 F.3d 274, 287 (5th Cir. 2013).

be effective as against third persons.<sup>239</sup> In rejecting Hari Aum's public record doctrine argument, the Fifth Circuit concluded:

Just as the amendments to the mortgages and promissory notes in *KeyBank* did not require recordation, neither the Acknowledgement nor the 2009 MHS [refinancing] promissory note here required recordation, as long as these alternations did not exceed the total indebtedness permitted under the pre-existing 2005 MIM [\$50 million], which they did not. Indeed it would be counter-intuitive to require that the Acknowledgement be recorded, as a mere pledge of an existing, unaltered mortgage, while amendments to a mortgage would not need to be recorded. As the Comments to Article 3298 clearly state, "Once recorded . . . (the mortgage securing future obligations) serves notice to the world that, until released or cancelled, it encumbers the property it describes to secure the obligations it contemplates."<sup>240</sup>

The Fifth Circuit finally concluded:

Hari Aum's arguments that additional documents needed to be recorded are red herrings. There is no new mortgage here. Moreover, based on the structure of the MIMs under the Civil Code and related statutes, the bankruptcy court is correct that "[m]any, if not all, of the [Hari Aum's] arguments are inapplicable if the MIM is compared to and recognized to be an improvement of, the collateral mortgage/pledge agreement previously used by banks and other lenders in Louisiana." As Hari Aum validly agreed to be jointly and severally liable for MHS's loan and to secure MHS's loan with the MIM, that loan simply constitutes part of Hari Aum's future "Indebtedness" that the 2005 MIM contemplates. As a result, the MIM and, thus, the Deluxe Motel, secures MHS's loan from FGB.<sup>241</sup>

#### 4. *Significance of Hari Aum*

The *Hari Aum* decisions are significant because *Hari Aum* is the first reported case to fully consider the impact of the 1991 comprehensive mortgage revisions on the ability of mortgage lenders to use a single mortgage instrument (e.g., a multiple indebtedness mortgage) to secure present and future loans, loan advances, and other

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239. *Id.*

240. *Id.* at 288–89 (citations omitted).

241. *Id.* at 289.

cross-collateralized debts on a retroactive priority basis, without going through the contrivance of having the mortgagor execute a fictitious collateral mortgage note and then pledging that note to secure the mortgagor's true indebtedness. Although multiple indebtedness mortgages have been authorized since January 1, 1992, when the Civil Code mortgage revisions first took effect, until 2011 when *Hari Aum* and the *KeyBank* cases were decided, there had been no judicial recognition of the ability of multiple indebtedness mortgages to directly secure multiple present and future indebtedness under a single instrument. As Louisiana State Law Institute 1991 Revision Comment (a) to Civil Code article 3298 affirms, multiple indebtedness mortgages are intended to "provide a direct and convenient substitute for the so called collateral mortgage," with the same legal consequences and the same retroactive priority rights as old style collateral mortgages, but on a more modern and easier to achieve, direct basis. The *Hari Aum* and *Key Bank* decisions recognized, expanded upon, and most importantly, blessed this result.<sup>242</sup>

### 5. Critique of *Hari Aum*

The result reached by the Bankruptcy Court and by the Fifth Circuit in *Hari Aum* is correct under both the law and the facts of the case. Nonetheless, the *Hari Aum* decisions are not free from criticism.

A glaring error contained in both the Bankruptcy Court and the Fifth Circuit opinions in *Hari Aum* is the unfortunate misuse of the term "pledge" to describe Bhula and *Hari Aum*'s subsequent agreement that *Hari Aum*'s existing Louisiana Mortgage would additionally secure the MHS Mississippi Loan.<sup>243</sup> As the Bankruptcy Court stated in its opinion, "*Hari Aum* has mortgaged its property and *pledged* that mortgage to secure the debts of MHS to FGB."<sup>244</sup> As the Fifth Circuit further stated, "the Resolution, the Acknowledgement, and MHS's 2009 [refinancing] note clearly illustrate *Hari Aum*'s agreement to *pledge* the MIM to secure MHS's loan."<sup>245</sup> The Fifth

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242. Certain practitioners and mortgage lenders have refused to use multiple indebtedness mortgages in place of old-style collateral mortgages until such time as they were satisfied that multiple indebtedness mortgages had been properly vetted before the courts. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 52. Hopefully, the *Hari Aum* and *KeyBank* decisions will satisfy even the most overly cautious attorneys and mortgage lenders that multiple indebtedness mortgages do in fact work as described.

243. *In re Hari Aum*, 2011 WL 2746149, at \*4.

244. *Id.* (emphasis added).

245. *In re Hari Aum*, 714 F.3d at 288 (emphasis added).



Circuit further mis-cited former Civil Code article 3133 as authority for the position that Hari Aum *pledged* its existing mortgage to FGB.<sup>246</sup> As previously discussed in this Article,<sup>247</sup> Louisiana UCC Article 9 replaced the pledge articles of the Louisiana Civil Code with respect to post-1989 pledges of collateral subject to Louisiana UCC Article 9 security interests.<sup>248</sup> The Fifth Circuit failed to recognize this very important and significant change in the law.

It is incorrect to say that a person can “pledge” a mortgage to secure another person’s debt. The correct term is that a person “grants” a mortgage or that a person “mortgages its property” to secure third-party debt. The reason why it is important to use correct terminology when describing the effects of certain commercial financing transactions is to guard against practitioners and judges being confused as to which laws and legal precedents apply and which do not apply as a result of having been superseded by subsequent legislation or intervening judicial decisions. As more fully discussed in Part V of this Article, the greatest risk faced by practitioners and mortgage lenders who continue to use old-style collateral mortgages is a tendency of litigators and the courts to mis-cite and misapply the Civil Code pledge articles and the pre-1990 collateral mortgage decisions thereunder<sup>249</sup> to post-1989 UCC secured transactions. To repeat, the pledge articles of the Civil Code no longer apply to post-1989 UCC pledges of collateral, which are now (since January 1, 1990) exclusively subject to Louisiana UCC Article 9.

The Fifth Circuit’s opinion in *Hari Aum* also can be criticized to the extent that the court may have held that a multiple indebtedness mortgage must contain a specific reference to the fact that the mortgage is being granted pursuant to Civil Code article 3298.<sup>250</sup> Although it is good practice for the mortgage agreement to reference article 3298, such a reference is in no way required.

A third comment (not rising to criticism) involves the Bankruptcy Court’s and the Fifth Circuit’s holding that the waiver language included in Bhula’s and Hari Aum’s April 2009 Acknowledgement

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246. *Id.* (emphasis added).

247. *See supra* Part I.C.1.

248. *See* LA. CIV. CODE art. 3133.1 (1990) (enacted by Act No. 137, 1989 La. Acts 527).

249. *See, e.g.,* Tex. Bank of Beaumont v. Bozorg, 457 So. 2d 667, 671 (La. 1984); New Orleans Silversmiths v. Toups, 366 So. 2d 1299, 1303 (La. 1978); First Guaranty Bank v. Alford, 366 So. 2d 1299, 1303 (La. 1978); Citizens Nat’l Bank v. Coates, 563 So. 2d 1265 (La. Ct. App. 1990); Odom v. Cherokee Homes, 165 So. 2d 855, 865 (La. Ct. App. 1964).

250. *In re Hari Aum*, 714 F.3d at 283.

somehow expressed Bhula's and Hari Aum's agreement that Hari Aum would be jointly, severally, and solidarily liable along with MHS for MHS's Mississippi Loan indebtedness to FGB.<sup>251</sup> It again must be noted that Hari Aum never signed a separate guaranty agreement personally guaranteeing MHS's Mississippi Loan to FGB. The only evidence of Hari Aum's agreement to be solidarily obligated on the Mississippi Loan was a vague reference to Hari Aum's assumption of personal liability contained in the waiver section of the Hari Aum Acknowledgement. This purported personal liability agreement on the part of Hari Aum thus triggered the cross-collateralization provisions of Hari Aum's Louisiana Mortgage, thereby resulting in the Hari Aum Louisiana Mortgage securing MHS's Mississippi Loan on a third-party mortgage basis.

It was extremely fortunate for FGB that Bhula agreed to sign the Acknowledgement in April 2009 when the Hari Aum loan and the MHS Loan were being refinanced. Furthermore, it was fortunate for FGB that the waiver section of the LaserPro Acknowledgement form contains personal liability language, without which the Bankruptcy Court and the Fifth Circuit could have reached a different result.<sup>252</sup> The cross-collateralization language of the Hari Aum Louisiana Mortgage agreement clearly was limited to securing third-party debt for which Hari Aum also was personally liable on a joint, several, and solidary basis. But for the personal liability language of the Acknowledgement, Hari Aum arguably would not have been personally liable on the MHS debt, and the MHS Mississippi Loan would not have been secured by the Hari Aum Louisiana Mortgage.

FGB's conduct also can be criticized on a 20–20 hindsight basis. FGB could have avoided what turned out to be a close call by requiring Hari Aum to personally guarantee the MHS Mississippi Loan either at the time the Mississippi Loan was funded in May 2006 or in April 2009 when the Mississippi Loan was refinanced. FGB also could have insisted that the Hari Aum Louisiana Mortgage be amended to provide that the mortgage additionally secured the MHS Mississippi Loan on a third-party mortgage basis. Either of these steps could have avoided what turned out to be a long and costly lesson for FGB even though FGB ultimately prevailed in the Bankruptcy Court and before the Fifth Circuit.

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251. *See supra* note 225. As previously discussed, it appears that Bhula may have previously agreed that the Hari Aum Louisiana Mortgage would additionally secure MHS's subsequent Mississippi Loan at the time Bhula accepted FGB's Mississippi Loan commitment in May 2006. *See supra* text accompanying note 234.

252. *See supra* note 234 and accompanying text.

6. *Question Raised by Hari Aum: Is It Necessary or Good Practice for the Mortgagor to Execute an Acknowledgement of Mortgage Each Time that an Additional Advance is Made?*<sup>253</sup>

It certainly was beneficial and fortuitous to FGB that Bhula agreed to sign an Acknowledgement form at the time the Hari Aum loan and the MHS Mississippi Loan were refinanced in April 2009. As previously discussed,<sup>254</sup> but for the personal liability language of the Acknowledgement, the Bankruptcy Court and the Fifth Circuit could have held in favor of the debtor and against FGB on the basis that the clear language of the Louisiana Mortgage was limited to securing third-party debt for which Hari Aum also was personally obligated.

Nonetheless, notwithstanding the obvious importance of Hari Aum's Acknowledgement in this case, there is no requirement whatsoever that the mortgagor agree, concur, affirm, or acknowledge each time a future loan or advance is made that such a loan or advance is secured by the mortgagor's then-existing multiple indebtedness mortgage. This again assumes that the mortgage agreement contains broadly drafted future advance/cross-collateralization language such as included in the FGB LaserPro mortgage and such as suggested in Part III.D.2 of this Article. Any thought that there must be some type of contemporaneous manifestation of intent or affirmation<sup>255</sup> that a subsequent loan advance be secured by an existing multiple indebtedness mortgage is completely misplaced and is an obvious vestige of the *Citizens National Bank v. Coates* decision, which was legislatively overruled by the 1989 UCC Implementation Bill,<sup>256</sup> and which has no applicability whatsoever to Louisiana multiple indebtedness mortgages.<sup>257</sup>

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253. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 57.

254. See *supra* note 252.

255. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 47 (discussing non-Louisiana UCC cases holding to this effect).

256. See *id.* at 27–30 (discussing the legislative correction of *Coates* under the 1989 UCC Implementation Bill).

257. See *supra* note 209.

B. KeyBank National Association v. Perkins Rowe Associates, LLC

1. Facts and Disposition

The facts of the *KeyBank National Association v. Perkins Rowe Associates, LLC*<sup>258</sup> case are as follows. Perkins Rowe is a multi-use, commercial and residential, multi-million dollar development in South Baton Rouge (the “Project”). The developer, Perkins Rowe Associates, LLC, and related entities (collectively “PRA”), sought to obtain interim construction financing and initially contacted Wachovia Bank, N.A., (Wachovia) and other potential lenders, including KeyBank National Association (KeyBank). In anticipation of obtaining financing, and to permit the construction lender or lending group to have a first priority mortgage ahead of potentially competing contractors, subcontractors, and material suppliers asserting liens under the Louisiana Private Works Act,<sup>259</sup> PRA granted a Louisiana multiple indebtedness mortgage on the Project in favor of Wachovia (the “Wachovia Mortgage”).<sup>260</sup> The Wachovia Mortgage purported to secure PRA’s future indebtedness in favor of Wachovia and its successors and assigns up to a maximum amount outstanding of \$200 million. The Wachovia Mortgage was recorded in the East Baton Rouge Parish mortgage records on September 14, 2005, prior to commencement of work on the Project.<sup>261</sup> PRA executed a \$1,000 token, demand promissory note in favor of Wachovia as the named mortgagee (the “Wachovia Note”) at the time that the Wachovia Mortgage was signed.<sup>262</sup> PRA subsequently granted a separate multiple indebtedness mortgage in favor of JTS Realty Services, L.L.C. (JTS). This separate mortgage (the “JTS Mortgage”) purported to secure PRA’s present and future indebtedness in favor of JTS and its successors and assigns up to a maximum of \$20 million. The JTS Mortgage was recorded in the East Baton Rouge Parish mortgage records on April 25, 2006, again prior to commencement of work, which was delayed due to the effects of Hurricane Katrina. PRA executed a \$10,000 demand note in favor of JTS (the “JTS Note”) at the time that the JTS Mortgage

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258. 823 F. Supp. 2d 399 (M.D. La. 2011), *aff’d*, 502 F. App’x 407 (5th Cir. 2012).

259. See LA. REV. STAT. ANN. § 9:4801 (Supp. 2015).

260. *KeyBank*, 823 F. Supp. 2d at 403.

261. *Id.*

262. *Id.*

was signed.<sup>263</sup> Neither Wachovia nor JTS ever funded any money to PRA under their respective mortgage notes.<sup>264</sup>

In July 2006, PRA completed negotiations with KeyBank, which resulted in KeyBank committing to make a \$170 million interim construction loan to PRA. On July 21, 2006, KeyBank either purchased or accepted the assignment of Wachovia's lien position under the then-recorded Wachovia Mortgage.<sup>265</sup> This was done in order for construction loan advances to be funded by KeyBank to have priority over the competing rights of lien creditors filing construction related liens against the Project under the Louisiana Private Works Act. On the same date, KeyBank acquired JTS's lien rights under the JTS Mortgage. KeyBank then consolidated the Wachovia Mortgage and the JTS Mortgage into a single amended and restated multiple indebtedness mortgage (the "KeyBank Mortgage").<sup>266</sup> The KeyBank Mortgage contained an anti-novation clause under which PRA agreed and acknowledged that PRA's execution of the KeyBank Mortgage was not intended to effectuate, and did not result in, novation or complete replacement of PRA's obligations and agreements under the prior Wachovia Mortgage and the prior JTS Mortgage.<sup>267</sup> The consolidated KeyBank Mortgage provided that the mortgage secured PRA's present and future indebtedness in favor of KeyBank up to a maximum amount outstanding of \$500 million, which represented an increase of \$280 million over the \$200 million prior credit limit of the Wachovia Mortgage and the \$20 million prior credit limit of the JTS Mortgage. The consolidated KeyBank Mortgage was recorded in the East Baton Rouge Parish mortgage records in July 2006 after construction had commenced on the Project. PRA also executed a substitute mortgage note in favor of KeyBank evidencing PRA's \$170 million construction loan.<sup>268</sup>

PRA later experienced financial difficulty over the course of construction and development of the Project, leaving a number of unpaid contractors, subcontractors, and materials suppliers who filed construction liens under the Private Works Act. ThornCo, L.L.C. (Thorn), a subcontractor on the Project, was one of the unpaid lien creditors. PRA subsequently filed for Chapter 11 bankruptcy relief from creditors, and Thorn commenced litigation against KeyBank claiming that Thorn's construction lien against

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263. *Id.*

264. *Id.* at 404, 406–08.

265. *Id.* at 404.

266. *Id.*

267. *Id.* at 404, 408–10.

268. *Id.* at 404.

the Project was entitled to priority over the competing rights of KeyBank under the KeyBank Mortgage. The matter was ultimately decided by the United States District Court for the Middle District of Louisiana in an opinion dated October 11, 2011, in which the court held in KeyBank's favor.<sup>269</sup> Thorn then appealed that decision to the United States Court of Appeals for the Fifth Circuit, which affirmed the lower court's decision in an unpublished *per curiam* opinion.<sup>270</sup>

## 2. The District Court's Decision

Thorn made a number of arguments before the district court: (1) the Wachovia Note was an obvious sham that was never intended to produce legal results;<sup>271</sup> (2) Wachovia's failure to lend money to PRA under the Wachovia Note resulted in the Wachovia Mortgage being unenforceable for failure of cause (consideration);<sup>272</sup> (3) the Wachovia Note and Mortgage were simulations under Louisiana law and therefore of no effect as to third persons (including Thorn);<sup>273</sup> (4) the Wachovia Mortgage was ineffective because Wachovia never accepted the Mortgage in its capacity as mortgagee;<sup>274</sup> (5) the consolidation of the Wachovia Mortgage and the JTS Mortgage into a single consolidated KeyBank Mortgage resulted in a novation and completely new mortgage that was not entitled to retroactive ranking priority vis-à-vis competing third persons (including Thorn) back to the date that the Wachovia Mortgage was first recorded (September 14, 2005);<sup>275</sup> (6) the increase in the maximum secured amount of the KeyBank Mortgage (to \$500 million from \$220 million under the combined Wachovia Mortgage and JTS Mortgage) had the effect of triggering the applicability of Louisiana Revised Statutes section 9:5390(B),<sup>276</sup> resulting in the reprioritization of the KeyBank Mortgage from September 14, 2005, the date the Wachovia Mortgage was originally filed of record, to July 2006 when the KeyBank Mortgage was recorded;<sup>277</sup> and (7) the Wachovia Mortgage was recorded after work had begun on the Project in the

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269. *Id.* at 404, 410–11.

270. *KeyBank Nat'l Ass'n v. Perkins Rowe Assocs.*, 502 F. App'x 407 (5th Cir. 2012).

271. *KeyBank*, 823 F. Supp. 2d at 407–08.

272. *Id.* at 406–07.

273. *Id.* at 407.

274. *Id.* at 406.

275. *Id.* at 408–10.

276. LA. REV. STAT. ANN. § 9:5390(B) (2007).

277. *KeyBank*, 823 F. Supp. 2d at 410–11.

form of site preparation by Lemoine Company (Lemoine), the initial general contractor on the Project, thus resulting in the Wachovia Mortgage and later the consolidated KeyBank Mortgage ranking behind the competing claims of unpaid contractors, subcontractors, and materials suppliers (again including Thorn).<sup>278</sup> The court rejected all of Thorn's arguments and ultimately held that the KeyBank Mortgage was entitled to ranking priority back to the September 2005 date on which the Wachovia Mortgage was originally recorded, ahead of Thorn's Private Works Act construction lien on the Project.<sup>279</sup>

The court initially analyzed the law that applied to the Wachovia and KeyBank multiple indebtedness mortgages. Quoting from the court's opinion:

This new version of mortgage has remarkable vitality, as the code envisions this mortgage exists from its creation "until it is terminated by the mortgagor or his successor" or "extinguished in some other lawful manner." . . . In other words, absent affirmative termination of the mortgage . . . the mortgage may continue indefinitely. . . . Thus, "the mortgage is fully in existence, though its enforcement may be conditional." . . . Moreover, "[a]s to all obligations, present and future, secured by a mortgage, *notwithstanding the nature of such obligations or the date they arise*, the mortgage has effect . . . as to third persons from the time the contract of mortgage is filed for registry. This provision "declares that a 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."<sup>280</sup>

The court rejected Thorn's argument that the Wachovia Note did not create a real obligation on the part of PRA so that the later assignment of the Wachovia Note and Mortgage created a sham transaction. As the court stated in its opinion:

Article 3298 declares a policy demanding recognition of a mortgage at its date of recordation, regardless of when the obligation [that the mortgage secures] is actually incurred. Of course, the obligation must eventually arise for the mortgage to be enforceable. The Wachovia promissory note satisfies that requirement. While ThornCo argues no evidence exists

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278. *Id.* at 411–15.

279. *Id.* at 415.

280. *Id.* at 405 (citations omitted).

that funds were ever lent [under the Wachovia Note], it cites no authority which establishes the handing-over of money as a prerequisite to incurring an obligation.<sup>281</sup>

The court additionally rejected Thorn's lack of funding/failure of cause argument, holding that, although Wachovia never lent funds to PRA on the Wachovia Note, the Wachovia Mortgage nevertheless remained valid because there was a reasonable expectation that Wachovia (or in this case, Wachovia's assignee, KeyBank) might someday lend money to PRA secured by the mortgage, which is all that Civil Code article 3298 requires. As stated by the court:

ThornCo argues the Wachovia mortgage could not be legally established because no obligation ever existed for which the mortgage could serve as security. Comment (a) to [Civil Code article 3298] clarifies that a mortgage to secure future obligations remains valid "even to secure obligations that may not then be contemplated by [the mortgagor] except in the broadest sense of an expectation that he may someday incur an obligation to the mortgagee."<sup>282</sup>

The court rejected Thorn's simulation argument, holding that there was no simulation under the simulation articles of the Louisiana Civil Code.<sup>283</sup> "While Wachovia's loan never came to fruition, no evidence exists which tends to show the parties never intended the note and mortgage to have legal effect."<sup>284</sup>

The court further rejected Thorn's argument that the Wachovia Mortgage was invalid because Wachovia never formally accepted the Mortgage in its capacity as mortgagee. The court cited Civil Code article 3289<sup>285</sup> and the *Expose Des Motifs* to the 1991 Civil Code mortgage revisions as authority that acceptance of a mortgage is presumed under law, and there is no requirement that the mortgagee intervene under the act of mortgage to accept the benefits of the mortgage.<sup>286</sup>

The court additionally rejected Thorn's novation argument, holding that a novation, or the complete replacement of an existing

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281. *Id.* at 408. The court was clearly wrong in holding that a debt obligation is created under an evidentiary promissory note without the lender actually advancing funds to the borrower. A promissory note is evidence of indebtedness, and unless and until the lender actually advances funds to the borrower, no indebtedness is ever created or exists, and the note is just a piece of paper.

282. *Id.* at 406–07.

283. LA. CIV. CODE arts. 2025–2028 (2015).

284. *KeyBank*, 823 F. Supp. 2d at 407–08.

285. LA. CIV. CODE art. 3289 (2015).

286. *KeyBank*, 823 F. Supp. 2d at 406. *See also* RUBIN, *supra* note 21, ¶ 12.6.



obligation with a new obligation,<sup>287</sup> is never presumed and must be proved by clear and unequivocal evidence of the parties' intent (citing Civil Code article 1880<sup>288</sup> as authority). The court held that the anti-novation clause included in the KeyBank Mortgage was sufficient to evidence PRA and KeyBank's intent that the consolidation of the Wachovia Mortgage and the JTS Mortgage into a single mortgage did not result in a novation of PRA's prior obligations in favor of Wachovia and JTS.<sup>289</sup>

The court further rejected Thorn's increase in maximum secured amount/reprioritization argument, holding that the pertinent statute, Louisiana Revised Statutes section 9:5390(B), provides that, when a mortgage is amended to increase the maximum secured amount thereunder, the mortgage retains its original ranking priority vis-à-vis third persons as to funds advanced to the mortgagor up to the original secured limit specified in the mortgage instrument and reranks (reprioritizes) from the date the amendment is filed of record only with respect to funds advanced that exceed the original secured amount.<sup>290</sup> The court recognized that, although the KeyBank Mortgage provided for an increased \$500 million secured amount limit (as compared to the prior \$200 million maximum limit under

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287. See LA. CIV. CODE art. 1879 (2015) (defining novation).

288. LA. CIV. CODE art. 1880 (2015).

289. *KeyBank*, 823 F. Supp. 2d at 408–10.

290. *Id.* at 410–11. The following example illustrates the proper application of Louisiana Revised Statutes section 9:5390(B):

Bank makes a loan to ABC secured by a Louisiana multiple indebtedness mortgage on ABC's property. The mortgage contains a \$1 million maximum limitation on the amount of the secured indebtedness. Bank records ABC's mortgage on June 1, 2014. Bank makes a \$500,000 loan to ABC secured by the mortgage, which loan remains outstanding as of September 1, 2015. On that date, Bank makes an additional \$2 million dollar loan to ABC and wants the additional \$2 million loan to be secured by ABC's existing mortgage. The \$2.5 million combined amounts of the first loan and the second loan exceed the maximum \$1 million secured amount limitation under the mortgage, necessitating that the Bank and ABC agree to amend the mortgage to increase the maximum secured amount thereunder to \$4 million, which they do. The mortgage amendment is filed on September 1, 2015. Under these facts, the mortgage ranks vis-à-vis potential competing third persons from the date of original recordation (June 1, 2014) only with respect to funds advanced to ABC up to the original \$1 million maximum secured amount stipulated in the pre-amended mortgage. The mortgage reranks (reprioritizes) with respect to additional amounts advanced to ABC that exceed the \$1 million original maximum secured amount (in this case, \$1.5 million) from the date the mortgage amendment is filed of record. In other words, the first \$1 million advanced to ABC is secured by the mortgage on a ranking priority basis back to June 1, 2014, and all additional amounts advanced to ABC in excess of \$1 million rank from September 1, 2015, the date the mortgage amendment was filed of record.

the Wachovia Mortgage), the amount of KeyBank's loan to PRA—\$170 million—clearly fell within the original \$200 million secured credit limit of the Wachovia Mortgage. Therefore, there was no reranking (reprioritization) under Louisiana Revised Statutes section 9:5390(B) or otherwise.<sup>291</sup> Quoting from the court's opinion:

The Court finds the amendments and modifications to the previous notes and mortgages were not invalid and did not defeat KeyBank's right to use the date of the original Wachovia mortgage to determine its priority position. The Wachovia mortgage stated the maximum principal amount of the secured debt as \$200 million, and KeyBank's [loan] obligations never surpassed that amount. Therefore, La. R.S. 9:5390 is not implicated here.<sup>292</sup>

Finally, the court rejected Thorn's argument that the Wachovia Mortgage was filed in the mortgage records after work had commenced on the Project, thus resulting in the lien of the Wachovia Mortgage and the replacement KeyBank Mortgage being junior and inferior to Thorn's competing lien priority rights as an unpaid subcontractor on the Project. The court held that the initial site preparation work began by Lemoine, the first general contractor on the Project, before Wachovia recorded its mortgage, "must be considered a separate 'work.'"<sup>293</sup> This meant that the Wachovia Mortgage was filed of record in a timely manner before other "work" commenced on the Project, thus resulting in the Wachovia Mortgage and the consolidated KeyBank Mortgage priming construction-related liens asserted against the Project under the Private Works Act.<sup>294</sup>

### 3. *Significance of the KeyBank Decision*

The *KeyBank* decision is significant because of the court's tacit approval of a common practice by commercial real estate developers and construction lenders under which the developer grants a mortgage on the project before work commences, and often before the developer obtains a binding loan commitment from a lender to provide interim construction financing.<sup>295</sup> The

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291. *KeyBank*, 823 F. Supp. 2d at 411.

292. *Id.*

293. *Id.* at 413–14.

294. *Id.* at 414–15.

295. Typically, a developer obtains interim construction financing from a bank or other short-term lender to finance initial construction of a project. The interim construction loan is replaced (taken out) with a long-term permanent

obvious purpose of granting and recording a mortgage before work commences is so that the construction lender's mortgage will prime and have priority over the competing liens of contractors, subcontractors, and materials suppliers under Section 4821(A)(3) of the Louisiana Private Works Act, which is exactly what transpired in *KeyBank*.<sup>296</sup> The identity of the interim construction lender is often unknown to the developer at the time the mortgage is executed and recorded, necessitating that the mortgage initially be granted in favor of a nominee or related person. The mortgagor also typically signs some type of promissory note in some nominal amount, payable to the named mortgagee on demand and secured by the mortgage. When an interim construction lender is identified and a binding loan commitment is issued, the initial note and mortgage are assigned by the named mortgagee to the construction lender, with the parties then amending and restating the mortgage to conform to the lender's requirements. The initial note<sup>297</sup> also is replaced with a substitute construction staged-advance note or a master note evidencing a secured line of credit.

Three forms of mortgage may be used in connection with such interim construction loans: (1) a staged-advance mortgage, (2) a future advance collateral mortgage, and (3) a multiple indebtedness mortgage. Multiple indebtedness mortgages are the preferable form of mortgage to be used in a delayed, anticipatory funding situation such as described above. Unlike some non-self-replenishing, staged-advance mortgages, multiple indebtedness mortgages are able to secure additional loan advances needed to complete the project, or that may otherwise exceed the original principal amount of the mortgage note, without the necessity of amending the mortgage to secure the additional outstanding amount.<sup>298</sup> This is not possible under a closed-end, staged-advance mortgage.<sup>299</sup> Multiple indebtedness mortgages also are superior to future advance collateral

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loan at the time that construction is completed and the constructed project is accepted by the owner.

296. LA. REV. STAT. ANN. § 9:4821(a)(3) (Supp. 2015).

297. For the reasons more fully discussed in Part IV.B.4, it is good practice for the named mortgagee to fully fund the initial note prior to the transfer and assignment of the initial note and mortgage to the construction lender. In this way, the construction lender arguably can avoid the naked assignment issue faced by *KeyBank*.

298. This assumes that the maximum secured credit limit under the mortgage is sufficiently large to secure the increased loan amount.

299. A closed-end mortgage secures only the debt evidenced by the mortgage note, and does not contractually provide that the mortgage will additionally secure other future indebtedness on a future advance/cross-collateralization basis.

mortgages because a multiple indebtedness mortgage takes its ranking priority vis-à-vis competing third persons—in this case, contractors, subcontractors, and materials suppliers—from the time the mortgage is recorded in the public mortgage records, which, if timed correctly, can be before work commences on the project. By way of comparison, a future advance collateral mortgage takes its ranking priority from the later in time of mortgage recordation or the time an initial advance is funded under the secured loan, or a binding commitment to lend is issued, which can be weeks and even months after the mortgage is recorded and after work on the project has commenced. Additionally, multiple indebtedness mortgages are able to secure indefinite future loans and advances so long as there is a reasonable expectation on the part of the mortgagor that one day the mortgagor might obtain a loan from the named mortgagee, or from the named mortgagee's successor or assign, whether the identity of the ultimate lender is known or unknown to the mortgagor at the time the mortgage is granted.

*4. Question: Can Mortgage Priority Rights be Transferred on a Naked Assignment Basis Independently of the Secured Debt?*

A concern has been raised by certain practitioners and legal scholars that the court did not thoroughly consider the following two questions when deciding the *KeyBank* case: (1) whether KeyBank could have validly accepted the transfer of security and priority rights under the Wachovia Mortgage on a “naked assignment” basis without also acquiring the outstanding PRA indebtedness secured thereby, and (2) whether KeyBank could have validly acquired rights under the Wachovia Mortgage in light of the fact that nothing was owed under the Wachovia Note at the time of the purported assignment. These are not trivial concerns because it is feared that, if unchecked, the naked assignment implications of the *KeyBank* decision could lead to the trafficking of mortgage lien positions,<sup>300</sup> thus potentially undermining the basic principle of Louisiana mortgage law that mortgages rank in priority to one another in the order of their recordation.<sup>301</sup>

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300. Mortgage priority rights are not commodities that can be sold or traded from one mortgage lender to another.

301. LA. CIV. CODE art. 3307(3) (2015). It clearly is permissible for mortgage holders to contractually agree among themselves to subordinate lien positions. For example, assume that there are three mortgage holders with competing mortgages on the same property. MH1 is the first to file, MH2 is second, and MH3 is third. In a subordination situation, MH1 can agree to subordinate its first priority lien position to MH2's second priority mortgage, in which event MH2's mortgage priority rights will come ahead of MH1's subordinated rights. MH3

Recall that KeyBank acquired the Wachovia Mortgage for no or nominal consideration at a time when nothing was owed under the Wachovia Note. In fact, nothing was ever owed under the Wachovia Note, which was for a nominal \$1,000 amount and totally unfunded. The obvious purpose of KeyBank acquiring the Wachovia Mortgage was to allow KeyBank to advance funds to PRA under PRA's \$170 million construction loan secured by the lien of the consolidated KeyBank Mortgage with retroactive ranking priority vis-à-vis competing third persons back to September 14, 2005, which was the day that the Wachovia Mortgage was originally recorded in the East Baton Rouge Parish mortgage records. It was critical that KeyBank be able to latch on to Wachovia's earlier September 2005 mortgage filing date in order for the KeyBank Mortgage to have ranking priority over the rights of unpaid contractors, subcontractors, and materials suppliers filing construction related liens against the Project under the Louisiana Private Works Act. As previously stated, a real estate construction mortgage has priority over the competing rights of unpaid contractors, subcontractors, and materials suppliers under section 4821(A)(3) of the Private Works Act only if and when the mortgage is filed of record and thereby becomes effective against third persons before work commences on the project. The Wachovia Mortgage was recorded in September 2005 before work commenced, and the consolidated KeyBank Mortgage was recorded in July 2006 after work had started. Had KeyBank not been able to acquire the Wachovia Mortgage and to latch on to its earlier September 2005 filing date, KeyBank's mortgage lien rights against the Project would have been inferior to the competing rights of Thorn and other similarly situated lien creditors, and KeyBank likely would not have agreed to make the loan.

Those practitioners and legal scholars who have expressed concern over the naked assignment implications of the *KeyBank* decision have questioned whether it is permissible under Louisiana law to assign security and priority lien rights under a recorded Louisiana mortgage without also transferring—by purchase or otherwise—rights to the debt that the mortgage secures, i.e., a naked assignment. As a follow-up question, can a mortgage be assigned when there is no outstanding secured mortgage debt at the

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will remain in third position. However, what if MH3 wants to come ahead of both MH1 and MH2, and MH2 will not agree to subordinate. The question raised here is whether MH3 can simply purchase MH1's first priority lien position on a naked assignment basis without also purchasing the secured debt that the mortgagor then owes to MH1?

time of assignment, or when there never was any debt secured by the mortgage in the first place?

The answers to these questions are found under the assignment of rights<sup>302</sup> and mortgage<sup>303</sup> articles of the Louisiana Civil Code. Civil Code article 3282 states that “[a] mortgage is accessory to the obligation it secures.”<sup>304</sup> Article 2645 provides that “[t]he assignment of a right also includes its accessories such as security rights.”<sup>305</sup> Article 3312 additionally provides that “[t]he transfer of an obligation secured by a mortgage includes the transfer of the mortgage.”<sup>306</sup> Reading these three articles together, it then follows that, if and when a transferee acquires the mortgage debt from the then-debt owner, the transferee automatically acquires the transferor’s security and priority ranking rights under the mortgage without further formality.<sup>307</sup> In other words, the mortgage follows the debt. But can the transferee acquire rights under the mortgage without also acquiring the mortgage debt, and can the transferee acquire rights under the mortgage if and when there is no mortgage debt? The answer to both questions is “no.” There is nothing under the Louisiana Civil Code or otherwise that would permit the independent transfer and assignment of security and priority rights under a recorded mortgage without a simultaneous, corresponding transfer and assignment of rights to and under the secured debt. In other words, there can be no assignment of mortgage rights in Louisiana without the assignee also acquiring rights to the secured debt from the then-debt owner. It further follows that there can be no transfer and assignment of mortgage rights when there is no secured debt owed to the debt owner at the time the assignment takes place, because there is no debt to assign for the mortgage to then follow. It appears to make no difference whether the assignee also accepts the assignment of a promissory note purporting to evidence the mortgage debt so long as nothing is owed under the mortgage note at the time of its assignment. This again is what happened in *KeyBank*. A promissory note is a writing that evidences a debt

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302. See LA. CIV. CODE arts. 2642–2654 (2015).

303. See LA. CIV. CODE arts. 3278–3298 (2015).

304. LA. CIV. CODE art. 3282 (2015).

305. LA. CIV. CODE art. 2645 (2015).

306. LA. CIV. CODE art. 3312 (2015).

307. There is no requirement that an assignee file an assignment of mortgage in the mortgage records in order to place third persons on public notice that the assignee is now the mortgage holder of record. Nonetheless, assignees routinely file mortgage assignments of record even though technically not required to do so.

obligation, assuming that an outstanding indebtedness exists. If and when there is no debt, a promissory note is just a piece of paper.<sup>308</sup>

Although the court mentioned the assignment of rights provisions of Civil Code articles 2342 and 2345 on two occasions in its opinion,<sup>309</sup> there is nothing in the *KeyBank* opinion or otherwise to indicate that the court ever considered whether KeyBank could validly succeed to Wachovia's security and priority rights under the Wachovia Mortgage on a naked assignment basis at a time when nothing was owed to Wachovia. It appears that the naked assignment issue either was never raised by Thorn or the debtor or that the Court simply accepted this result without comment.<sup>310</sup>

Although there are no Louisiana naked assignment mortgage cases on point, a number of UCC cases, including a Louisiana case, *Barcosh, Ltd. v. Dumas*,<sup>311</sup> have considered whether naked assignments of the lien priority rights under file-perfected UCC security interests are permissible without the assignee also acquiring the underlying secured indebtedness from the assigning secured party.<sup>312</sup> The majority of these cases have concluded that UCC file-perfected priority rights cannot be assigned on a naked assignment basis independently of the obligations they secure,<sup>313</sup> while other cases have held that the practice of "leapfrogging" UCC secured priority positions is a permissible, although frowned

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308. The assignment of rights articles of the Louisiana Civil Code generally do not apply to transfers and assignments of promissory notes, which instead are subject to Article 3 of the Louisiana UCC. *See* LA. REV. STAT. ANN. § 10:3-101 (1994).

309. *KeyBank Nat'l Ass'n v. Perkins Rowe Assocs.*, 823 F. Supp. 2d 399, 406, 408 (M.D. La. 2011).

310. The court did consider the fact that Wachovia never lent any funds to PRA under the original Wachovia Note when considering whether the lack of funding somehow had an effect on the validity of the Wachovia Mortgage as a viable mortgage instrument. *Id.* at 406–07. There is no reason to believe, however, that the court ever considered the completely different question raised here as to whether Wachovia's lack of funding had a negative effect on the ability of Wachovia to assign its security and lien priority rights under the Wachovia Mortgage to KeyBank on a naked assignment basis.

311. *Barcosh, Ltd. v. Dumas*, No. 06–616–JJB, 2010 WL 3172984 (M.D. La. Aug. 11, 2010) (holding that a UCC security interest cannot be assigned without also assigning the secured debt).

312. *See generally* B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 2.16 (3d. ed. A.S. Pratt 2014).

313. *See In re Leisure Time Sports, Inc.*, 194 B.R. 859 (B.A.P. 9th Cir. 1992); *In re Belize Airways, Ltd.*, 7 B.R. 604 (Bankr. S.D. Fla. 1980).

upon, application of the first-to-file-or-perfect rule of UCC section 9-322(a)(1).<sup>314</sup>

The *Barcosh* case is noteworthy because it was decided by the same federal district judge who decided the *KeyBank* case, although admittedly in a different, but related, context. The court in *Barcosh* was called upon to decide whether Regions Bank, as successor by merger to Union Planters Bank, had the right to latch on to a prior Union Planters' first filed UCC-1 financing statement to leapfrog ahead of Barcosh's later-in-time UCC filing. The court rejected Regions' contention that it gained the benefit of the Union Planters' first-in-time filing as a result of the merger of Union Planters into Regions. The court reasoned that priority rights under Union Planters' first-filed UCC-1 financing statement did not transfer to Regions "because there was no indebtedness to maintain a security interest at the time of the merger"<sup>315</sup>—in other words, a naked assignment.

Although *Barcosh* involved a naked assignment of a filed UCC-1 financing statement, and *KeyBank* involved a naked mortgage assignment, the same Louisiana Civil Code assignment-of-rights principles discussed above should apply in both related circumstances. That being said, Louisiana law does not permit naked transfers and assignments of security and priority rights under mortgages as well as under the Louisiana UCC without the transferee also acquiring the secured indebtedness from the transferor, and if there is no secured debt at that time, no transfer and assignment of security rights is possible. Naked assignments of lien priority rights under file-perfected UCC security interests, such as occurred in *Barcosh*, are directly analogous to naked assignments of priority rights under recorded real estate mortgages, which is what occurred in *KeyBank*. It is difficult to explain why the court may have held one way in *Barcosh* and another way in *KeyBank* other than to speculate that the naked assignment issue was not raised or argued before the court in *KeyBank*.<sup>316</sup>

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314. The practice of trafficking in UCC secured positions has been criticized by both practitioners and legal scholars as violating the UCC requirement of good faith and fair dealing as provided in UCC 1-203. See LA. REV. STAT. ANN. § 10:1-203 (Supp. 2015) (Louisiana enactment); CLARK, *supra* note 312, ¶ 2.16; see, e.g., *In re Camp Town, Inc.*, 197 B.R. 139 (Bankr. D. N.M. 1996).

315. *Barcosh*, 2010 WL 3172984, at \*1.

316. The naked assignment of mortgage issue was not discussed in the *KeyBank* opinion leading to doubt whether this issue was ever raised before the Court. In addition, *Barcosh* is not an easily found opinion, and is available only through Westlaw, and discoverable though a vague footnote in the Clark UCC treatise. See CLARK, *supra* note 312, ¶ 2.16, at 2-153 n.441.



With the benefit of 20–20 hindsight, KeyBank arguably could have avoided the above discussed naked assignment issue by having Wachovia fund the \$1,000 amount of the Wachovia Note before the assignment took place, and then purchasing the Wachovia Note from Wachovia for \$1,000. This strategy arguably would have worked to avoid a naked transfer of the Wachovia Mortgage, assuming that the court agreed (as it did) that a \$1,000 note was a sufficient amount to initially establish mortgage priority in connection with a \$170 million construction loan.<sup>317</sup>

### 5. *Additional Concerns*

An additional concern has been raised by practitioners and legal scholars that the ability of a mortgagor to grant a multiple indebtedness mortgage on an uncertain, anticipatory basis before the identity of the ultimate mortgage lender is determined can lead to abusive practices where a mortgagor may attempt to shield its assets from the claims of creditors by granting a mortgage on its property in favor of a related mortgagee under what is commonly referred to as a “brother-in-law” mortgage. While this type of abusive practice can certainly be attempted, there appear to be adequate remedies available under law that can effectively counter any such attempted fraud on creditors, including actions based under the simulation<sup>318</sup> and revocatory action<sup>319</sup> articles of the Louisiana Civil Code, and the voidable preference<sup>320</sup> and fraudulent conveyance<sup>321</sup> sections of the Bankruptcy Code. The language of Louisiana State Law Institute 1991 Revision Comment (a) to Civil Code article 3298 confirming that a person may grant a multiple indebted mortgage to secure indefinite future obligations “that may not be then contemplated by [the mortgagor] except in the broadest sense of an expectation that he may someday incur an obligation to the mortgagee,” must be read and applied within the context of a person’s overriding obligation to act in good faith and to deal fairly

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317. There is an ancient principle under common law contracts that a “peppercorn” is sufficient consideration to bind an obligor to a contractual undertaking. Suffice it to say that a \$1,000 unfunded note was sufficient consideration in the Court’s opinion to bind PRA under what turned out to be a \$170 million construction mortgage in the same way a peppercorn is sufficient to bind a contract at common law.

318. LA. CIV. CODE arts. 2025–2028 (2015).

319. LA. CIV. CODE arts. 2036–2043 (2015).

320. 11 U.S.C. § 543 (2012).

321. 11 U.S.C. § 548 (2012).

with others.<sup>322</sup> Fraudulently shielding one's assets from the claims of creditors simply is not permitted

C. JAB of Oakdale, LLC v. Oakwood Inn Development Corp.<sup>323</sup>

### *1. Facts and Disposition*

On December 12, 2003, Oakwood Inn Development Corp. (Oakwood) granted a Louisiana multiple indebtedness mortgage to secure loans and other funding to be extended to Oakwood by JAB of Oakdale, LLC (JAB). The Oakwood mortgage agreement provided that the mortgage secured “any and all present and future loans, extensions of credit, liabilities and obligations of every nature and kind that *I* [referring to Oakwood] may now and/or in the future owe to or incur *in favor of mortgagee* [referring to JAB], including without limitation, the loan evidenced by my promissory note dated, this date of signing, in the amount of \$103,000.”<sup>324</sup> JAB never made this \$103,000 loan or any other loan to Oakwood, but instead extended credit to Hab Karam and Amy Karam (the “Karams”) in their individual capacities and to Hab Karam Construction Company (HKC), which was another company owned by the Karams. JAB later sued Oakwood to enforce the Oakwood mortgage presumably to secure unpaid amounts owed to JAB by the Karams personally and by HKC. The trial court held in favor of Oakwood, and JAB then appealed to the Louisiana Third Circuit Court of Appeal, which affirmed the lower court's decision.

### *2. The Third Circuit Decision*

The Third Circuit ruled in an unpublished opinion that, under the express language of the mortgage, the Oakwood mortgage secured only loans and other obligations owed by Oakwood to JAB, and did not secure other debts owed by the Karams in their individual capacities, and by HKC.<sup>325</sup>

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322. See LA. CIV. CODE art. 1759 (2015); LA. CIV. CODE art. 1983 (2015) (“Contracts must be performed in good faith.”); see also LA. REV. STAT. ANN. § 10:1-203 (Supp. 2015). “Every contract or duty within this Title [10 of the Louisiana Revised Statutes] imposes an obligation of good faith in its performance and enforcement.” See also Stuckey, *supra* note 58, at 803.

323. JAB of Oakdale, LLC v. Oakwood Inn Dev. Corp., No. 07-1426, 2008 WL 597193 (La. Ct. App. Mar. 5, 2008).

324. *Id.* at \*4 (emphasis added).

325. *Id.*

## V. ARE COLLATERAL MORTGAGES OBSOLETE?

The 1994 Bar Journal Article asked the question “is the collateral mortgage obsolete?”<sup>326</sup> The answer to that question, both today and 20 years ago, is “no.” Collateral mortgages remain available as viable and enforceable, open-end mortgage instruments, even though collateral mortgages are no longer the sole, or even the preferred, form of open-end mortgage available to Louisiana lending lawyers and their clients. More and more practitioners and mortgage lenders are using multiple indebtedness mortgages in place of old-style collateral mortgages, particularly since multiple indebtedness mortgages have now been tested before the courts in *Hari Aum*, *KeyBank*, and *JAB of Oakdale*. Additionally, there have been hundreds of multiple indebtedness mortgage foreclosures since 1992, none of which has yet to result in a reported decision challenging the ability to foreclose under a multiple indebtedness mortgage using Louisiana executory process foreclosure procedures. The Louisiana State Law Institute and its Security Device Committee declared their intent that multiple indebtedness mortgages be a direct and convenient substitute for the so-called collateral mortgage,<sup>327</sup> and multiple indebtedness mortgages have successfully proved to be just that.

The advantages of using multiple indebtedness mortgages to secure revolving lines of credit and other future cross-collateralized debt are clear and irrefutable. First, multiple indebtedness mortgages are easier and simpler to use as compared to old-style collateral mortgages. There are only two documents for the mortgagor to sign: the mortgage agreement and a promissory note or other written evidence of indebtedness secured by the mortgage. There is no collateral mortgage note and collateral pledge/UCC security agreement, and there is no need for the debtor to pledge a collateral mortgage note to secure the real indebtedness. Second, there is no need to explain why it is necessary for the debtor/mortgagor to sign two separate notes: one evidencing the mortgage loan and the other in the form of a collateral mortgage note, which may be in an amount greater than the mortgage loan.<sup>328</sup> Third, there is no collateral mortgage note for the mortgage lender to lose or misplace, which can have disastrous consequences resulting in a collateral mortgage ceasing to be effective as between the parties and as affecting third persons just

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326. Rubin et al., *supra* note 2.

327. LA. CIV. CODE art. 3298 cmt. a (2015).

328. See RUBIN, *supra* note 21, ¶ 13.11(a) (discussing the amount of the collateral mortgage note).

as if the mortgage had never been granted in the first place.<sup>329</sup> Fourth, a multiple indebtedness mortgage is effective against third persons and takes its ranking priority from the time the mortgage is recorded in the public mortgage records regardless of any initial or intermediate time when there is no mortgage debt and there is no then-binding commitment to lend funds at a later date. This is a definite advantage when using a multiple indebtedness mortgage in a construction loan situation where the goal is to make the mortgage effective against third persons before work commences on the project. And finally, multiple indebtedness mortgages are based solely on statutory authority, meaning that it is less likely that multiple indebtedness mortgages will be subject to uncertain and unpredictable interpretation and application by practitioners and by the courts.

Those practitioners and mortgage lenders who continue to use old-style collateral mortgages will continue to face the uncertainty and risks of misinterpretation and misapplication of the rules that apply to post-1989 collateral mortgages. The most serious risk to lending lawyers and their clients is that the courts will continue to misapply the pledge articles of the Louisiana Civil Code and the pre-1990 collateral mortgage cases, including *Odom v. Cherokee Homes*, *New Orleans Silversmiths v. Toups*, *First Guaranty Bank v. Alford*, *Texas Bank of Beaumont v. Bozorg*, and *Citizens National Bank v. Coates*, to post-1989 collateral mortgages granted on and after January 1, 1990.<sup>330</sup> *Sciortino v. Bank of Louisiana*<sup>331</sup> is an example of just such a case.

Collateral mortgages are obsolete in the same way that a 20-year old Toyota Camry is obsolete. If it works, someone surely will try to drive it. Collateral mortgages still work, but like a 20-year old Toyota Camry works—cumbersomely and, at times, with unpredictable results. Nevertheless, despite the obvious advantages of using multiple indebtedness mortgages, some lawyers surely will continue to use old style collateral mortgages out of a reluctance to change what they have been doing for years, and because they think they know how collateral mortgages work, with some lawyers not fully understanding or appreciating the nuances of Louisiana collateral mortgage law and how collateral mortgage law significantly changed in 1990 with the enactment of Louisiana UCC Article 9 and the Louisiana collateral mortgage statute.

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329. See *supra* Part I.D.3.

330. See Willenzik, *Future Advance Priority Rights*, *supra* note 1, at 47–48.

331. 705 So. 2d 813 (La. Ct. App. 1998) (discussed *supra* in Part I.F of this article).

