Wasted Days and Wasted Nights: Why the Land Acts Failed

Marion W. Benfield
Wasted Days and Wasted Nights: Why the Land Acts Failed

Marion W. Benfield, Jr.*

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 1037
II. BACKGROUND ............................................ 1039
III. DECISION TO DRAFT A PARTICULAR STATUTE .......... 1041
   A. Beginning of the Land Acts Process .................. 1042
   B. The Drafting Process ................................. 1043
   C. The Content of the Acts ............................. 1045
      1. Article 2 of the ULTA .............................. 1045
      2. Article 3 of the ULTA and ULSIA ................. 1048
      3. The USLTA ......................................... 1051
   D. Reasons for Failure of Jurisdictions to Adopt
      the Land Acts ......................................... 1052
      1. Generally ........................................... 1052
      2. Article 2 of the ULTA .............................. 1054
      3. Article 3 of the ULTA and ULSIA ................. 1056
      4. The USLTA ......................................... 1060
IV. CONCLUSION ............................................. 1060

I. INTRODUCTION

In the years from 1969 to 1978 the National Conference of Commissioners on Uniform State Laws ("Conference") engaged in a massive project, the drafting of uniform laws covering the selling of, and creation of security interests in, real estate, and most of the public record and priority aspects of real estate conveyancing. The initial result of that project was three acts:

* Professor, Wake Forest University School of Law, Winston-Salem, North Carolina. A.B., 1953, University of North Carolina, Chapel Hill; LL.B., 1959, Wake Forest University; LL.M., 1965, University of Michigan, Ann Arbor. Professor Benfield was Commissioner from Illinois to the National Conference of Commissioners on Uniform States Laws from 1973-1990 and from North Carolina since 1990. He was also co-reporter for the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act 1970-1977. The author thanks Normak Klick, Jr., who provided research assistance for the article.
the Uniform Land Transactions Act ("ULTA"), the Uniform Simplification of Land Transfers Act ("USLTA"), and the Uniform Condominium Act ("UCA"). The ULTA covers sales and the creation of security interests. The USLTA covers various aspects of the conveyancing system including formal requisites for land transfers, recording and priority rules, marketable title, mechanics liens, and provisions concerning the operation of the recording office. Later, in the face of massive indifference of legislatures to the ULTA and the USLTA, the Conference separated from the ULTA the part on security interests and promulgated it, with some changes, as the Uniform Land Security Interest Act ("ULSIA"), and separated from USLTA the mechanics lien provisions as the Uniform Construction Lien Act, and the provisions on marketable title as the Uniform Marketable Title Act. The Uniform Condominium Act project led to three other related acts: the Model Real Estate Cooperative Act, the Uniform Planned Community Act, and the Uniform Common Interest Ownership Act.

After promulgation of the three original acts, the Conference and the American Bar Association established the Joint Editorial Board for the Uniform Real Property Acts ("Board"). The Board is now composed of members from the Conference, the American Bar Association, and the American College of Real Estate Lawyers. The Board was largely responsible for the promulgation of Article 3 of the ULTA as the Uniform Land Security Interest Act and of Article 5 of the USLTA as the Uniform Construction Lien Act ("UCLA"). With the exception of the UCLA and related acts which have been adopted in a total of fourteen states, the

10. See UNIFORM LAW COMMISSIONERS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1995-96 REFERENCE BOOK [hereinafter NATIONAL CONFERENCE] (naming current members of the Joint Editorial Board).
other land acts have had only one adoption, Article 5 of the USLTA (Construction Lien Act), in Nebraska,\textsuperscript{12} and little legislative activity in the other states.\textsuperscript{13}

During the years from 1970 to 1975, the participants in the process spent a collective total of tens of thousands of hours drafting, re-drafting, reading, and debating the acts. The result was one enactment of one spin-off act. If the hours spent on the project had been billed at lawyers' average hourly rates, they would have cost, no doubt, millions of dollars. That extensive effort made a tiny impact on the law in this country. Since the author was a major participant in the process and a disproportionate number of those hours were his, it is with particular pain that he recalls those "wasted days and wasted nights."

This article will review the background and drafting of the uniform land acts, summarize briefly the major provisions of the ULTA and the USLTA, and discuss the reasons for the failure of those acts, and the separately promulgated Uniform Land Security Interest Act and Uniform Construction Lien Act, to receive legislative acceptance.\textsuperscript{14}

II. BACKGROUND

The Conference was organized in 1892 and is composed of commissioners from all the states, Puerto Rico, the Virgin Islands, and the District of Columbia. The commissioners are appointed by the governor or other officials of the jurisdiction, the number of which are left to the appointing

\begin{itemize}
  \item[12.\textsuperscript{12}] NEB. REV. STAT. § 52-125ff (1984). Nebraska adopted Article 5 of the USLTA before the separate promulgation of Article 5 as the Uniform Construction Lien Act.
  \item[13.\textsuperscript{13}] In the early 1990s the Connecticut Law Revision Commission attempted to achieve a consensus among borrowers and lenders regarding modifications to the Uniform Land Security Interest Act which would make it acceptable in that state. The effort failed because of inability of lenders to agree among themselves. Interview with William Breetz, Chair of the Connecticut Law Revision Commission, in San Antonio, Tex. (July 12, 1993). There have also been Bar Association study committees in Illinois, New York, Minnesota, and Oregon studying the possibility of introducing a form of the ULSIA in their states. See Norman Geis, \textit{Escape from the 15th Century: The Uniform Land Security Interest Act}, 30 \textit{REAL PROP. PROB. \\& TR. J.} 289, 314-17 (1995) (discussing the efforts in Illinois, Minnesota, and New York).
  \item[14.\textsuperscript{14}] This article will not further discuss the Uniform Condominium and related acts.
\end{itemize}
jurisdiction. Currently, the Conference has over 300 members. The stated purpose of the Conference is to “promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.” The Conference strives for that goal through the drafting of uniform or model acts which are then offered to the states for adoption. Since 1892, the Conference has drafted hundreds of uniform or model acts, many of which have received widespread adoptions. However, many other acts have had few or no adoptions. Acts in the areas of commercial law, judicial procedure, and interstate cooperation have had the most success. The first product of the Conference, the Uniform Negotiable Instruments Law, promulgated by the Conference in 1896, just four years after the Conference was founded, was adopted in all states. The Uniform Sales Act, promulgated in 1906, was adopted in thirty-two states. The Uniform Commercial Code (“UCC”), first promulgated in 1951 (but amended a number of times), has now been adopted in all states and the District of Columbia. The Uniform Arbitration Act has been adopted in forty-nine jurisdictions, the Child Custody Jurisdiction Act in fifty-two jurisdictions, and the Enforcement of Foreign Judgments Act in forty-seven jurisdictions. There are other procedural acts with similar records. On the other hand, the Conference has been least successful

15. See NATIONAL CONFERENCE, supra note 10, at 6-20 (listing of present commissioners).
16. Id. at 56.
17. Id. at 82. An act is designated as a “uniform act” if achievement of uniformity among the states is a principal objective and there is reason to expect adoption in a large number of jurisdictions. An act is designated as a “model” act if uniformity is not a principal objective, or the act may promote uniformity and minimize diversity even though a substantial number of jurisdictions may not adopt the act in its entirety, or the purpose of the act can be achieved, though it is not adopted in its entirety by every state. That is, the Conference designates acts as uniform acts only if it believes that a substantial number of states will adopt the act. However, many uniform acts have few adoptions. The reference table of uniform acts in the 1995-96 version of the National Conference indicates that 43 uniform acts have been adopted in fewer than 10 jurisdictions, and that 10 acts have no adoptions. Id. at 84-88.
18. Id. (listing all current uniform acts and states in which they have been adopted).
19. Twenty acts promulgated more than three years ago have been adopted in three or less states, including several which have no adoptions. NATIONAL CONFERENCE, supra note 10, at 84-88.
22. NATIONAL CONFERENCE, supra note 10, at 84-90 (listing all acts which the conference is still sponsoring and the states in which they are adopted).
when it proposes uniform legislation dealing with issues which are the subject of intense public debate and disagreement or involve strong lobbying by opposing interests. The Uniform Marriage and Divorce Act\textsuperscript{23} for example, was adopted in only eight states, and the Uniform Consumer Credit Code\textsuperscript{24} in only eleven.

III. DECISION TO DRAFT A PARTICULAR STATUTE

The Conference process for approving drafting projects is careful and thorough. Proposed drafting projects must be approved by two committees, the Scope and Program Committee, and the Executive Committee. Under the Conference rules, the Scope and Program Committee first considers proposals for drafting projects. If it approves, the proposal is then presented to the Executive Committee. Some drafting projects approved by the Scope and Program Committee are rejected by the Executive Committee, either because the Executive Committee disagrees with the Scope and Program Committee evaluation of the proposal, or because the Conference has other more pressing projects.\textsuperscript{25} The committees act on proposals made either by members of the Conference, or by groups or persons outside the Conference. A substantial number of proposals made to the two committees are rejected. A major criterion in deciding whether projects should be undertaken is the likelihood that the resulting uniform law will be widely adopted.\textsuperscript{26} However, as the above review of the acceptance of conference acts indicates, the Conference has drafted and promulgated a significant number of acts which would not have been approved by the Scope and Program and Executive Committees had they known the actual degree of acceptance the acts would receive.

If a drafting project is approved, a drafting committee and a reporter are appointed for the act. Sometimes two or three reporters (usually law professors) serve as drafters for a drafting committee. Under Conference procedure, the reporters to a committee prepare drafts which are thoroughly discussed and criticized at committee meetings. The reporters then follow the instructions of the committee in preparing additional drafts. All members of the drafting committee must be members of the Conference. However, the Conference makes intensive efforts to secure input from

\begin{itemize}
\item \textsuperscript{24} 7A U.L.A. 1 (1968) (amended 1974).
\item \textsuperscript{25} The author has personal knowledge from having been a member of both committees in recent years.
\item \textsuperscript{26} See NATIONAL CONFERENCE, supra note 10, at 80.
\end{itemize}
interested groups outside the Conference. A drafting committee with seven or so committee members will often have thirty or more observers and advisors attending a committee meeting. Those advisors and observers will have privileges of the floor, and often they are asked to vote on issues before the committee, so that the committee can be advised as to the views of those in attendance. Committees will typically meet three times a year, for two and a half day meetings, for two or more years, before an act is finally approved. Also, all acts have to be read line by line at two annual meetings of the Conference before they are approved. At those readings there is often intense debate on the floor regarding various provisions of the act and, frequently, committee positions are rejected by the full Conference.

A. Beginning of the Land Acts Process

In the late 1960s, Allison Dunham, Professor of Law at the University of Chicago and Executive Director of the Conference from 1963 to 1969, proposed that the Conference undertake the drafting of a uniform land transactions act. The Conference was celebrating its crowning achievement and greatest success, the UCC, which by then had been adopted in fifty jurisdictions, with only Louisiana not in the fold. Professor Dunham had been, along with Grant Gilmore, the drafter of Article 9, the most imaginative and ground-breaking article of the UCC. Professor Dunham had for many years taught real property and mortgages courses and was author of a casebook, Modern Real Estate Transactions. His dual experience as drafter of Article 9 of the Code, and expertise in real estate transactions, led him to believe that a national uniform law governing real estate transactions in the way that the UCC governs sales of, and security interests in, personal property, would encourage a national mortgage market, better protect buyers and sellers of real estate, and modernize the law of real estate transactions. He also believed that the UCC was a good model for a uniform law governing real estate transactions.

In 1969, the Scope and Program and Executive Committees of the Conference approved a proposal by Professor Dunham that a drafting committee be appointed to prepare the Uniform Land Transactions Act.

27. See id.
Approval was given even though the Conference had attempted earlier to secure adoption of legislation in the real estate area without success. In the 1920s, 30s, and 40s, acts proposed by the Conference in the real property area had met with dismal success (or lack thereof). In 1927, the Conference proposed a Uniform Real Estate Mortgages Act which received no adoptions.31 The Conference was so desperate to show action in the real estate area that in the 1930s it listed Minnesota as adopting the Real Estate Mortgages Act, though Minnesota in fact adopted only one of the forty-three sections of the Act.32 The section Minnesota adopted set out a statutory short-form mortgage.33 In 1932, a Uniform Mechanics’ Lien Act was proposed34 and was adopted in Florida.35 Florida amended the Uniform Act in 1953 so extensively that it was, in effect, replaced.36 Finally, in 1940, the Conference proposed a Model Power of Sale Foreclosure Act which apparently had no adoptions.37 The Real Estate Mortgage Act and the Mechanics’ Lien Act were withdrawn by the Conference in 1943.38 History certainly suggested danger ahead regarding the proposed land acts, but there was a belief that the continuing integration of the national economy would make things different this time.

B. The Drafting Process

In 1969, the ULTA special drafting committee was appointed39 and the following year drafting commenced. Professor Dunham, who initially

32. Uniform Law Commissioners, National Conference of Commissioners on Uniform State Laws 66 (1943) [hereinafter 1943 National Conference].
33. Id.
34. Uniform Law Commissioners, National Conference of Commissioners on Uniform State Laws 50 (1932).
35. Id.
37. See Uniform Law Commissioners, National Conference of Commissioners on Uniform State Laws 256 (1940).
39. The members of the original committee include: Harold E. Read, chair, Robert Braucher, professor of law at Harvard Law School, William Campbell, United States District Court Judge, and attorneys Henry S. Fraser, John F. Hanson, George C. Keely, Ellsworth E. Lonabaugh, Talbot Rain, Hiroshi Sakai, and William H. Wood.
served as reporter, recruited the present author as co-reporter. As is usual Conference practice, a large group of advisors representing various industry groups and consumer representatives were appointed and asked to meet with the committee.

The reporters commenced work by using Articles 1, 2 and 9 of the UCC as a template within which to fit cognate real estate rules. The basic assumption of the drafters was that the UCC rules should be adopted unless the difference between real estate and personal property required a different rule.

In the years from 1970 to 1975, many draft versions of the Act were prepared and reviewed by the drafting committee. The representatives of industry and consumer groups were invited to, and attended, Committee meetings, and offered their comments and suggestions as the drafting proceeded. The following groups were represented: the American Bar Association, the National Association of Real Estate Boards, the American Bankers Association, the Center for Responsive Law (a consumer group), the National Association of Home Builders, the American Land Title Association, the American Life Convention, the United States Savings and Loan League, the National Association of Mutual Savings Banks, the American Subcontractor's Association, and the Life Insurance Association of American. Representatives from the following federal agencies and instrumentalities also attended committee meetings: Federal Home Loan Bank Board, U.S. Department of Housing and Urban Development, and the

40. Professor Dunham wanted a co-reporter who had Commercial Code experience and some real estate experience. I had been teaching the Code courses at the University of Illinois and had also taught the first year property course.

Federal National Mortgage Association. As the list of groups suggests, essentially all relevant perspectives on the law of land transfer and finance were represented.

It is fair to say that, with the exception of mortgage lenders, federal agencies included in mortgage lending, and a small number of other individual advisors, the attitude of the advisors was one of wary caution. Some were opposed to a uniform law in the area and others were skeptical of either the need for such an act, or of the willingness of states to accept it, or both. All, however, wanted to keep an eye on the project to protect what they perceived as their interests in case the Act was adopted in the states.

C. The Content of the Acts

1. Article 2 of the ULTA

As noted above, the ULTA was patterned after Articles 2 and 9 of the Uniform Commercial Code. Therefore, many provisions of the Code were carried over to the ULTA without change. For example, section 2-202 of the UCC on the parol evidence rule appeared in the ULTA nearly verbatim as section 1-306. Section 2-209 of the UCC on contract modification appeared essentially unchanged as section 1-310 of the ULTA. Other concepts of the Code such as the right to cure (section 2-508), and the right to demand assurances (section 2-609), were carried over to the ULTA and modified to fit land transactions. The ULTA, anticipating the later adoption of Article 2A of the UCC to cover personal property leases, included leases within the coverage of Article 2 of the ULTA. The Act also contained express and implied warranty of quality provisions modeled on those contained in Article 2. Under section 2-309:

a seller, other than a lessor in the business of selling real estate, impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by [the seller] ... and completed no earlier than 2 years before .

[the sale of] the contract to convey is made, will be free from

44. Id. art. 2, 13 U.L.A. at 680. In the Act, “real estate” is defined as including the interest of a landlord or tenant, and Article 2 of the ULTA applies to contracts to convey real estate. Therefore, leases are contracts to convey real estate under the Act. Id.
defective materials; and [is] constructed in accordance with applicable law, according to sound engineering and construction standards; and in a workmanlike manner.\(^{46}\)

Warranty disclaimers are permitted under rules similar to those of section 2-316 of the UCC, but with respect to home purchasers (called a "protected party"):\(^{47}\)

no disclaimer of implied warranties of quality in general language or in the language of the warranty provided in this Act is effective, but a seller may disclaim liability for a specific defect or failure to comply with applicable law if the defect or failure entered into and became a part of the basis of the bargain.\(^{48}\)

Under the Act, warranties of quality automatically pass to subsequent purchasers and disclaimers of warranties are not effective against subsequent protected party purchasers unless the subsequent party had reason to know of the disclaimer at the time of purchase.\(^{49}\) These warranty provisions are no doubt the most important substantive provisions of Article 2. However, the warranty provisions were only a little different from the implied warranty of habitability in the sale of new homes being developed by the courts during the 1960s and 70s.\(^{50}\)

In addition to the warranty provisions, Article 2 makes several significant changes in the remedies rules as they exist in most states. First, under the ULTA, if a buyer wrongfully rejects, repudiates, or otherwise materially breaches, so that a seller is excused from conveying to a buyer, the buyer can recover as damages the difference between the resale price and the original contract price, if the seller conducts a resale which complies with the statutory requirements.\(^{51}\) However, under the common law in

---

46. Id. § 2-309, 13 U.L.A. at 533.
47. The definition of protected party is somewhat complex; the term includes those who buy for close relatives and corporations that buy residences for controlling shareholders, but excludes real estate of more than three acres, or real estate which contains more than four dwelling units, or which contains non-residential units for which the protected party is a lessor. U.L.T.A. § 1-203, 13 U.L.A. at 490-92.
48. Id. § 2-311(c), 13 U.L.A. at 536.
49. Id. § 2-312(c), 13 U.L.A. at 538. The subsection further provides that the subsequent purchaser has reason to know of a disclaimer if it appears in the recorded deed in the original transaction.
most states, a seller’s remedy for buyer’s breach is a recovery of the difference between the contract price and the market price, and the actual resale price is only evidence of the market price. Second, under the law in many states “earnest money” deposits made by a buyer can, on breach by the buyer, be retained by the seller without proof of actual damages or a valid liquidated damages clause. Under the Act, such amounts must be returned to the breaching buyer unless they can be retained under a valid liquidated damages clause or the seller proves actual damages. Third, the Act rejects the merger by deed doctrine under which a buyer who accepts a deed of conveyance is treated as having waived any rights he had under the contract of conveyance if they are not repeated in the deed. Under the merger by deed doctrine, if, for example, a seller promised to convey fifty acres and the buyer accepted a deed conveying only forty, the buyer would be precluded from asserting a breach based on the shortage in acreage. Fourth, an unconscionability section, similar to section 2-301 of the UCC, is included.

The Act also liberalized the requirements for enforcing contracts with incomplete terms by providing that a contract of sale could be enforced even though the price was not fixed, or other terms were missing, so long as the court could provide an appropriate remedy. The Act also contains a modern statute of frauds which provides a new start for judicial interpretation, replacing the 300 year accretion of cases and qualifying rules under the original real estate statute of frauds in effect in most states. There are also other, more modest changes, from the usual common law rules.

54. Id. § 1-309, 13 U.L.A. at 500.
57. Id. §§ 2-202, -203, 13 U.L.A. at 514-16.
58. Id. § 2-201, 13 U.L.A. at 512; see ARTHUR L. CORBIN, CORBIN ON CONTRACTS 355-433 (1952) (devoting 98 pages to a discussion of the original real estate statute of frauds). The original English statute of frauds was adopted in 1677 and all states except Louisiana, Maryland, and New Mexico have adopted a statute similar to the English statute. Maryland and New Mexico have treated the English statute as a part of their common law. See RESTATEMENT (SECOND) OF CONTRACTS 281-83 statutory notes (1977).
59. For example, under § 2-302, form contract provisions reading “time is of the essence” are not sufficient to effectively provide that failure to perform on the specified day is a material breach.
2. Article 3 of the ULTA and ULSIA

Article 3 of the ULTA (and the ULSIA) is patterned after Article 9 of the UCC. Because of major differences in the issues which arise in personal property security and in real estate security, there is much less congruence between the ULSIA sections and those of Article 9 of the UCC than there is between UCC Article 2 and ULTA Article 2. However, the ULSIA adopts the basic terminology of Article 9 of the UCC. The single term "security agreement" replaces "mortgage," "deed of trust," "contract for deed," "installment land contract," and other terms for land security devices in use in various states. Also, following Article 9 of the UCC, the ULSIA applies the same rules to all forms of land security interests. Therefore, there is no difference in the Act between the rights of the parties under a mortgage and their rights under an installment land contract or deed of trust. The Act's major changes from existing law are found in the foreclosure rules. However, there were a few significant changes in other areas, some pro-mortgagee and some pro-mortgagor. One pro-mortgagor provision allows a mortgagor, after granting the security interest, to enter into leases which take priority over the mortgage, if the term is not longer than two years, and a reasonable rent is reserved and is paid quarterly or more often. A pro-mortgagee provision gives the mortgagee a security interest in: 1) rights which the mortgagor has against a seller for breach of warranty or other breach; 2) any claim of the mortgagor for payment for parts of the real estate taken by eminent domain; 3) insurance payable to the mortgagor because of loss or damage to the real estate; and 4) any claim of the mortgagor against third parties because of loss or damage to the real estate. ULSIA also contains a provision which clarifies the law regarding the priority of future advances over intervening parties. It repeals any existing usury statute which applies to commercial loans secured by real estate, but allows states to set usury rate for consumer transactions.

60. As noted earlier, in 1985 the Conference carved out Article 3 of the ULTA as a free standing act, the Uniform Land Security Interest Act ("ULSIA"). In the following discussion, citations will be to the ULSIA and, where there is a difference between ULTA and ULSIA, the substantive provision referred to will be that of ULSIA.

62. Id. § 102(b).
63. See discussion infra accompanying notes 67-75 and 114-121.
65. Id. § 210, 7A U.L.A. at 243.
66. Id. § 301, 7A U.L.A. at 245.
By far the most important provisions of the ULSIA are those permitting a mortgagee (secured party) to foreclose a mortgage (security interest) by non-judicial sale. At the time the ULTA was being drafted, about half the states permitted non-judicial power of sale foreclosure. All those power of sale states contained a statutorily prescribed method of sale which typically required an auction sale at some specified place, often the county courthouse, after a prescribed series of auction announcements in the legal advertisement section of a local newspaper. The remaining jurisdictions required a judicial action to foreclose. Of the twenty-seven states which used non-judicial power of sale foreclosure, nine permitted the mortgagee to redeem after the sale, within periods ranging from seventy-five days to two years. The ULSIA, as noted, permits private power of sale foreclosure, but under rules very different from those that apply under the power of sale statutes of most states. The ULSIA, does not set out in detail how the sale is to be conducted, but, following Article 9, requires only that the sale be held in a reasonable manner. The ULSIA comments say that for a sale to be made in a reasonable manner, the foreclosing party must to advertise in the same manner that a seller selling his own property would advertise. The Act also permits sale by private negotiation, which could include listing the property for sale through a real estate agent. Also, the ULSIA does not permit redemption after sale. The ULSIA denies a deficiency judgment after foreclosure of purchase money security interests in homes occupied by the debtor or persons related to the debtor.
The ULSIA provisions on foreclosure are based on the assumption that it is beneficial to both the creditor and the debtor that foreclosure sales be efficient, inexpensive, and handled in a manner that is likely to produce as high a sales price as possible. Judicial foreclosure is expensive and is likely to result in substantial delay. Power of sale foreclosure, with an auction sale at the courthouse after advertisement in the legal notices section of a local newspaper, is not conducive to creating the degree of prospective buyer interest which a person selling her own land would wish to generate. Giving the debtor a right to redeem the property for some period after the foreclosure sale surely depresses the price which a buyer would be willing to pay since possession and use must be effectively delayed until the end of the redemption period. The ULSIA drafters believed that the Act's power of sale provisions would minimize the cost of foreclosure and maximize the price received.\textsuperscript{77}

Foreclosure procedures which delay the time of foreclosure and periods of redemption after the sale during which the defaulting mortgagor can redeem the property (retain possession) are clearly advantageous to mortgagors who default. In a partial trade-off for taking away from home mortgagees the advantages of longer foreclosure periods and right of redemption, the ULSIA denies deficiency judgments to home mortgagees in the case of purchase money mortgages.\textsuperscript{78}


\textsuperscript{78} U.L.S.I.A. § 511(b), 7A U.L.A. at 264. Deficiencies are available for foreclosure of non-purchase money mortgages because lenders may be willing to lend sums in excess of the value of mortgaged property and there was no wish to discourage that practice.
3. The USLTA

The USLTA brings together in a single statute a number of provisions relating to the land transfer system: priorities,\textsuperscript{80} liens against land including mechanics' liens,\textsuperscript{81} recording,\textsuperscript{82} \textit{lis pendens} notice,\textsuperscript{83} formal requirements for deeds,\textsuperscript{84} marketable title,\textsuperscript{85} and land records.\textsuperscript{86} Other than the mechanics' lien provisions, there is little in the USLTA that is controversial.

The mechanics' lien article, called Construction Liens in the ULSIA, is a detailed, relatively complete coverage of liens against real estate on behalf of persons whose labor or materials go into improvements on real estate. All states have mechanics lien statutes under which contractors, subcontractors, and materialmen, even those who did not contract directly with the owner of the real estate under certain circumstances, have a lien against the real estate being improved for any part of the price of their work or materials not paid for by the person with whom they contracted.\textsuperscript{87} Under many of those statutes, the priority of the lien dates from commencement of the work, a non-record event.\textsuperscript{88} Under such systems, a lender or buyer cannot by a search of the public land records determine whether a mechanics' lien claim might exist. Also, under many statutes, the lien of an unpaid subcontractor or materialman attaches to the owner's land even...
though the owner in good faith, without knowledge of the lien claim, paid the full price of the improvement to the prime contractor. 89 The drafters of the UCLA concluded that both rules were unfair to owners and third parties who deal with the land. Therefore, under the UCLA (and Article 5 of ULSIA) an owner is protected to the extent the owner pays the prime contractor without notice of a lien claim by a subcontractor or materialman, 90 and the lien claimant’s priority against third parties who deal with the owner dates from the time of a public filing, which indicates that construction lien claims may exist.91

D. Reasons for Failure of Jurisdictions to Adopt the Land Acts

1. Generally

The drafters assumed that uniformity of land transactions law in the various states would be beneficial to both parties in real estate transactions, just as the near universal adoption of the UCC has been beneficial in personal property transactions. While land does not move, people do, and mortgage lenders often lend in more than one jurisdiction. Therefore, uniformity of laws would simplify the operations of persons who have real estate transactions in various states, and make the law more understandable for those who move from state to state and buy real property. Further, the existence of a national secondary mortgage market in which lenders who generate mortgages can sell them, could make more money available to finance land, particularly home purchases. 92 At the time the ULTA was being drafted, federal mortgage agencies were supportive of the effort. They believed that uniformity of law would be beneficial to the further development of a national secondary market in mortgages. 93 Particularly, it was believed differences in losses on mortgage foreclosure arising out of differences in state laws would make underwriting of mortgages in different

89. Id. at 540 n.72.
90. U.C.L.A. § 207 alt. A, 7 U.L.A. at 348. There is a slightly less owner-protective alternative offered to the states under which a subcontractor or materialman has a lien claim against the owner for goods or services rendered within 20 days before he notifies the owner. Id. § 207 alt. B, 7 U.L.A. at 351.
91. Id. § 208(b), 7 U.L.A. at 353.
93. See James E. Murray, The Proposed Uniform Land Transactions Act, 7 Real Estate Rev. 64 (1977). At the time he wrote the article, Mr. Murray was Senior Vice-President and General Counsel of the Federal National Mortgage Association.
states difficult, and would discourage lenders from lending in states with unfamiliar foreclosure laws. Similarly, it was believed that secondary market participants would be discouraged from buying mortgages from states whose laws were unfamiliar.  

However, after the acts were promulgated, no significant support appeared for uniformity in land transactions law. Banks and other lenders apparently did not consider uniformity sufficiently important to urge adoption of the ULTA, even though the substantive provisions of the ULTA could hardly have been viewed as harmful to lenders. In fact, nationalization of the mortgage market occurred rapidly beginning in the 70s, without the benefit of uniform real estate law.

Secondary mortgage market activity exploded during this period. From 1970 to 1984, the proportion of all fixed rate residential mortgage loans sold through the secondary market increased from 32% to 61%. In the early 1980s less than 5% of all newly originated, conventional fixed rate home mortgage loans were securitized. This proportion increased to over one-half by 1987.

Therefore, it appears that lack of uniformity is not a substantial impediment to a national mortgage market. Further, it can be argued, though this author does not agree, that the differences in economic, social, and political conditions in the various states are so substantial that uniform real estate transactions law in all of them would be bad public policy, and that the costs of non-uniformity are trivial.

In any event, no ground swell for uniformity developed, though some lawyers continue to stress uniformity as a value to be achieved through the adoption of, at least, the ULSIA. The following discussion of Article 2 of the ULTA, Article 3 of the ULTA-ULSIA, and of the USLTA-UCLA, focuses on substantive objections to those acts which, in the eyes of many, made them unacceptable.

---

96. Michael Schill makes exactly that argument. Id.
97. Gels, supra note 13, at 289.
2. Article 2 of the ULTA

Many real estate lawyers disagree with a number of the policy choices made in the Act, including the use of the UCC template for the legislation. They are reasonably satisfied with existing law, believing that the costs of learning and applying new law outweigh the benefits to be derived from the law, and are reasonably satisfied with existing law. Disagreement with policy choices made in Article 2 of the ULTA is well represented by a resolution of the Real Property Law Section of the New York Bar Association ("Section") prepared for consideration at a Section meeting on June 19, 1976.98 The resolution proposed that the New York State Bar Association vote against approval of ULTA at the American Bar Association's annual meeting in July, 1976. The Section disagreed with most of the changes in the law which the drafting committee viewed as desirable modernization of the law. Some examples follow. The ULTA proposes to abolish the doctrine of merger by deed.99 The Section rejected abolition of merger by deed as an erosion of "the certainty which is desirable when dealing commercially with substantial interests in real estate."100 The Section also objected to the revision of the statute of frauds,101 the grant to the court of the power to fill in contract terms if there is a reasonable certain basis for giving a remedy,102 and a provision making options enforceable without consideration.103 They also objected to the idea in the ULTA that warranties of quality would automatically pass to subsequent purchasers.104

In the years when the ULTA was being adopted, if there was one thing which nearly all commentators agreed on, it was that the old caveat emptor rules which had generally been applied to real estate sales, were no longer appropriate. Therefore, one might have thought that the quality warranty

100. See New York State Bar Ass'n, Report of the Special Committee to Review the Uniform Land Transactions Act 5 (July 21, 1976) (unpublished report, on file with NYSBA, Albany, N.Y.) [hereinafter Committee on ULTA].
101. Id. at 8-9.
102. Id. at 10. "The Committee is shocked that [ULTA] gives a judge the power to fill in a contract where the parties have omitted terms." Id. The rule in question has been a part of U.C.C. § 2-204 since its inception and opposition has died away.
103. Id. at 11.
104. Committee on ULTA, supra note 100, at 16; see U.L.T.A. § 2-312 (a), 13 U.L.A. at 538.
provisions of the ULTA would be a substantial plus factor leading to enactments. However, adoption of the Act would have merely accelerated a development which was already in progress in the courts. By the mid-1970s, a number of courts had abandoned the traditional *caveat emptor* rule in real estate sales and had instead imposed a warranty of habitability on professional sellers of real estate, at least as to new construction.\(^{105}\) Therefore, a proponent of implied warranty liability in sales of real estate might reasonably have concluded that there was a better chance of rapid adoption of that rule in the courts, than through attempts to secure the adoption of the ULTA,\(^ {106}\) or that there was no significant advantage in adopting the Act to achieve changes which were likely to come in short order anyway.

The Section was, however, opposed to the warranty of quality provisions of Article 2 of the ULTA.\(^ {107}\) But those favorable to quality warranties also attacked the Act. Professor John A. Spanogle, speaking on behalf of the Public Interest Research Group, a consumer oriented research group, attacked the Article 2 warranty provisions (and the abolition of the merger doctrine) as not being sufficiently protective of consumers.\(^ {108}\) As is not uncommon when changes in law are proposed, the ULTA quality warranties alienated both those representing sellers and those representing consumer buyers.

Lawyers, particularly, are understandably wary of changes in the law which render their learning obsolete and which require that they learn new and unfamiliar concepts with the attendant pain and possibility of error.\(^ {109}\)

---


109. Rightly or wrongly, there are those who are opposed to any change in the law; [sic] however, because the existing law is known and understood, and any new statute will take new learning and new interpretations before it can be relied
Many lawyers, therefore, no doubt preferred the old land law which they knew, over the new law which they did not know.

In short, there has been essentially no support for Article 2 of the ULTA. It is worth noting, however, that the quality warranties of the ULTA, slightly modified, appear in the Uniform Condominium Act, the Uniform Common Interest Ownership Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act.

3. Article 3 of the ULTA and ULSIA

The key provisions of Article 3 (Security Interests) of the ULTA (and of the ULSIA) are their provisions on foreclosure. The drafters of the ULTA strongly believed that real estate mortgage foreclosure sales should be reasonably rapid, free from the costs of judicial procedure, and there should be no right of redemption by the mortgagor after a foreclosure sale. Also, the drafters believed that foreclosure sales need not be conducted as auctions with elaborate statutory procedures which effectively withdraw mortgage foreclosures from the usual real estate market. Therefore, the ULTA permits mortgages to contain a power of sale clause under which the foreclosing mortgagee need not institute a judicial proceeding, and there is no right of redemption by the mortgagor after a foreclosure sale. At the same time, the mortgagor’s obligation is to conduct a reasonable sale using methods which might be used in the usual, non-foreclosure sale context. The drafters believed that foreclosing real estate lenders should not be prevented, by rigid statutory foreclosure rules, from being able to sell in the

upon. This does not mean that any new legislation is to be rejected out of hand, but it does mean that such new laws or proposed laws must be critically analyzed, particularly in connection with land law. Land historically has been so important to our agrarian economy that there is a certainty in that law in most states that may be lacking in other law.


113. MODEL REAL ESTATE COOPERATIVE ACT §§ 4-113 to -116, 7B U.L.A. 225, 330-336 (1981). As noted earlier, those acts have been adopted in a total of 14 states. See supra note 11.

114. Recall that in 1985, Article 3 of the ULTA, with some changes, was promulgated as a separate act, the Uniform Land Security Interest Act.

https://nsuworks.nova.edu/nlr/vol20/iss3/5
way best calculated to secure the same price that a seller, selling on the seller’s own behalf, could achieve. Therefore, the ULSIA encourages foreclosing sellers to sell through real estate brokers and requires that they advertise, not just in the legal advertising section of a local newspaper, but in places in which a real estate seller selling for her own account would advertise.115

Unfortunately for the prospects of the ULSIA, there is a sharp division of opinion concerning whether mortgagees should be permitted to foreclose without judicial supervision.116 In the early 1970s, about half the states permitted private power of sale foreclosure, and about half required judicial foreclosure.117 Though there were significant variations among the power of sale statutes, particularly regarding the time required to complete the sale and gain possession,118 the time periods in the ULSIA were not sufficiently different from those acts to create a strong incentive for adoption of the ULSIA provisions in states which already had a power of sale foreclosure. States which required judicial sale were not likely to be easily convinced that power of sale was better.119

The underlying assumption of the ULSIA was that quick, inexpensive foreclosure procedures translated into lower costs for lenders and therefore, into lower interest rates, or lower credit standards for borrowers on real estate collateral. Unfortunately for the prospects for the ULSIA, there are no good studies which controlled for other variables, and which are able to document a clear difference in rates between states with long, expensive foreclosure proceedings and those with short, less expensive procedures.120 One analysis suggests that requiring judicial foreclosure and increasing the time to foreclose by one year would increase mortgage costs (spread over all home mortgages) by only eighteen basis points.121 Other studies have indicated a somewhat higher figure for anti-deficiency legislation and long (one year or so) periods for mortgagor redemption after sale.122 In any

115. See supra text accompanying notes 72-77.
117. Bauer, supra note 116, at 3 n.7.
118. Id.
119. Id. at 1.
120. See Schill, supra note 116, at 496-500 (discussing some of the studies).
121. Id. at 505.
122. Id. at 496-97. The studies summarized suggest a statutory right of redemption that delayed by 11 months a buyer’s right to possession of property bought on foreclosure would
event, there are no good studies which show that states which are committed
to judicial sale or long statutory redemption periods after sale, or both, are
imposing significant additional costs on borrowers of that state.

However, in recent years, Congress has passed legislation which
preempts state foreclosure law as to certain Housing and Urban Develop-
ment ("HUD") insured mortgages, and permits non-judicial sales with no
right of redemption. In 1981, such a statute applicable to multi-family
(apartment) mortgages was passed. In 1994, the Single Family Mort-
gage Foreclosure Act of 1994, which gives HUD the power to foreclose
some HUD related mortgages on single family homes by power of sale with
no right of redemption, was passed. The first section of the 1994 Act states,
that "Congress finds that . . . the disparate State laws under which
mortgages are foreclosed on behalf of the Secretary [of Health and Human
Services] . . . increase the costs of collecting obligations; and . . . generally
are a detriment to the community in which the properties are located." Further, the Act states that long redemption periods lead to deterioration in
the condition of the properties involved, necessitate substantial federal
holding expenditures, increase the risk of vandalism and waste of the
properties, and adversely affect the neighborhoods in which the properties
are located.

The justifications for power of sale foreclosure given by Congress are
equally applicable to any foreclosure, but as noted, they have not led to
enactment of the ULSIA, nor in any change in the number of states in
which power of sale foreclosure is available However, there has been
some reduction in the number of states in which there is no right of
redemption after the foreclosure sale In spite of the reduction in the
increase mortgage costs by 17.42 basis points.

126. Id.
127. Geis, supra note 13, at 321-22. This article lists 33 states in which power of sale
foreclosure is available. The number is based on a state by state summary of foreclosure
laws in SIDNEY A. KEYLES, FORECLOSURE LAW & RELATED REMEDIES (1995). However,
an examination of the state summaries in Keyles indicates that of the 33 states with power
of sale statutes, the procedure is not used in seven. The seven are: Hawaii, Iowa, Maryland,
New Mexico, New York, Oklahoma, and Wisconsin. See generally id.
128. In 1968, a summary of state laws indicated that there was a statutory right of
redemption after foreclosure in 23 states. Committee on Mortgage Law and Practice, supra
note 69, at 414. In 1995, it was reported that 16 states have a statutory right of redemption
number of states which permit redemption by the mortgagor after the foreclosure sale, the evidence is that states which have judicial sale and redemption periods are hesitant to change their law.

In states which already have power of sale statutes, there would be a relatively small gain from adoption of the ULSIA. The provisions of the ULSIA permitting foreclosure by private sale, rather than at auction, and requiring advertisement of the foreclosure sale in the real estate sections of newspapers,\textsuperscript{129} would probably tend to produce higher prices. However, many mortgagors would still probably prefer to sell at auction and might view the uncertainties of the requirement that their sale be “reasonable” to be a detriment.

Other provisions of ULSIA, such as the right to take possession without the appointment of a receiver, or the priority rules as to future advances, might be valuable but law review comments on the non-foreclosure provisions of ULSIA were mixed.\textsuperscript{130}

Several years ago, the American College of Real Estate Lawyers Law Reform Committee, under the leadership of Norman Geis, a Chicago attorney, undertook to secure adoption of the Uniform Land Security Act in the various states.\textsuperscript{131} The effort lead to substantial studies of the act in New York, Illinois, Minnesota, Oregon, and other states, but no enactments.\textsuperscript{132} Mr. Geis is still actively working for adoption of the ULSIA and there is a current effort in Minnesota to adopt a modified version of the ULSIA which may be successful.\textsuperscript{133}

\textsuperscript{129}. See also supra notes 114-23 and accompanying text.


\textsuperscript{131}. Telephone Interview with Norman Geis, Counsel, Miller, Shakman, Hamilton, Kurtzon & Schlifke, Chicago, Illinois.

\textsuperscript{132}. See REPORT OF THE ACREL 1990-91 UNIFORM REAL PROPERTY ACTS COMMITTEE (on file with the Nova Law Review).

\textsuperscript{133}. See Geis, supra note 13, at 314.
4. The USLTA

The most important part of the Uniform Simplification of Land Transfers Act is part 5, Construction Liens. As noted earlier, in 1987, the Uniform Laws Conference promulgated Article 5 of the USLTA as a freestanding act, the Uniform Construction Lien Act. The rest of this discussion will consider only mechanics liens. The other provisions of the USLTA would make modest improvements in the conveyancing and real estate lien law, but probably not enough to justify the inevitable disruption caused by a wholesale revision of conveyancing and real estate lien law. 134

All states have acts called mechanics lien acts or construction lien acts, under which persons who supply labor or materials for specific construction on real estate can, without the owner’s consent, acquire a lien against the property to secure the money owed to them for their work on the project. There is much diversity among the states as to exactly which parties get liens, the extent of the lien, the liability of the owner, the priority of the lien over third parties, the requirements for perfection of the lien, and the foreclosure procedures. 135 Therefore, the Construction Lien Act would have brought order out of chaos, but it would also have changed, more or less significantly, the law of every state. The huge difference in the laws of the various states in the mechanics lien area is the result of continual ferment and change as the different interest groups involved (lenders, subcontractors, contractors, and title companies) secure legislation favorable to the interest group. Therefore, the major impediment to the enactment of the USLTA is the presence of the construction lien article. Since the political power of the different interest groups varies from state to state and from time to time, and since the interest groups are well organized and active, it would be exceedingly difficult to secure wide enactment of a uniform version of a construction lien law. 136

IV. CONCLUSION

This article has tried to provide some answers to the question of why the Uniform Land Transactions Act, the Uniform Simplification of Land Transfers Act, and the Uniform Construction Lien Act were not enacted. The reasons given are twofold: (1) The differences among the states in the mechanics lien laws are so great that it is difficult to reconcile them, and (2) The force of vested interests in the mechanics lien laws has been too strong to overcome. 137


135. See generally Benfield, supra note 79, at 531-35.

136. In spite of the truth of the comments in the text, the UCLA provisions of USLTA are so far the only parts of the USLTA to be adopted. See Neb. Rev. Stat. § 52-125ff (1984).
Transfers Act, and their spin-offs, the Uniform Land Security Interest Act and the Uniform Construction Act, have had a total of only one adoption in the various states. I have suggested that there is no constituency for the acts. There is no group of buyers or sellers who are natural constituencies for Article 2 of the ULTA. Buyers and sellers of real estate act in that capacity so rarely that they are not likely to develop views regarding the desirability of legal change. Consumer lobbying groups might be thought to be interested in changes which are more protective of home buyers than existing law. However, even though there were such provisions in Article 2 of the ULTA, no consumer group support has developed. Other than consumer groups, the only people likely to be interested in Article 2 are lawyers, and many lawyers do not agree with the changes in law made by Article 2, or if they do agree with some changes, they think that the costs of changing the legal rules outweigh any benefits.

Lenders are a natural constituency for Article 3 of the ULTA and its spin-off, the Uniform Land Security Interest Act. The drafters believed that the benefits of uniformity and of a rapid, inexpensive foreclosure process would cause lenders to be sufficiently interested in adoption of the Act to lead to an effort to secure adoptions in the various states. That has not occurred. Perhaps the benefits of uniformity were over-estimated by the drafters, or perhaps lenders have not yet realized that there are substantial benefits from uniformity. In any event, a strong national secondary market for mortgages has developed without the benefit of uniform mortgage laws. Similarly, lenders who lend in states with expensive, time-consuming judicial foreclosure of mortgages, have not been sufficiently interested in the advantages of the ULTA-ULSIA foreclosure system to press for adoption of one of the Acts. That failure may be due, in part, to the belief that states with judicial foreclosure so strongly believe in the additional protection it provides to defaulting mortgagors that change is not likely to be secured in any event.

The UCLA covers an area in which there are strong competing, even opposite, interest groups: lenders, owners, contractors, subcontractors, and materialmen. Presently, mechanics lien laws are diverse, and frequently changing as one interest group or another convinces a legislature to give it an advantage. Because of the strong opposing interests, and the varying attitudes toward those interests in the various states, mechanics’ lien law is a particularly unpromising area for national uniformity.

If the drafters had thought more about the hurdles they faced in securing enactment of the land acts, they might have initially chosen to undertake some more modest efforts such as a Uniform Real Estate Quality Warranty Act or a Uniform Power of Sale Act. The Uniform Commercial
Code, after all, dealt with areas in which there was previous piece-meal legislation which could be modernized and unified into a single Code. The Uniform Sales Act was the precursor to Article 2, the Uniform Negotiable Instruments Act to Article 3, the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act to Article 7, and the Uniform Conditions Sales Act to Article 9. There was similar history of uniform codification in the land area.

Perhaps the continuing efforts to secure enactments of the ULSIA will eventually bear fruit. Passage of other parts of the land acts package seems more unlikely. Perhaps, in another thirty years, the Uniform Laws Conference will return again to law reform and unification in the land area. I hope someone then reads this article, or they may have “wasted days and wasted nights.”