When 'Qualified Transferees' Can Chill UCC Foreclosures

By **Joshua Wurtzel** (March 27, 2026)

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What happens when an intercreditor agreement contains limitations on who may bid at a Uniform Commercial Code foreclosure auction? Does it matter if, as is always the case, the mezzanine borrower — the equity of which is being sold at the auction — had no say in these limitations? And what if those limitations no longer make economic sense at the time of the foreclosure, and will instead merely chill bidding?

A Jan. 26 decision by Justice Andrea Masley of the Supreme Court of the State of New York, County of New York, Commercial Division, in WWP Mezz LLC v. WWP Mezz Investment Co. LLC, put these questions on full display.

As explained below, though Justice Masley initially granted a temporary restraining order adjourning a noticed UCC foreclosure auction for a short time, she ultimately held that the mezzanine lender's adherence to the "qualified transferee" requirement in the applicable intercreditor agreement did not render the sale commercially unreasonable.

Thus, going forward, mezzanine borrowers should beware of the immense power of the UCC foreclosure as a lender remedy. And though the lender won here, lenders should also consider taking some fairly easy steps to completely eliminate any similar arguments by borrowers in the future.

The UCC's Commercial Reasonableness Requirement

Under the UCC, every aspect of a UCC foreclosure must be commercially reasonable, including the "method, manner, time, place, and other terms" of the foreclosure.[1]

A foreclosure satisfies this standard if it is made (1) "in the usual manner on any recognized market"; (2) "at the price current in any recognized market at the time of the disposition"; or (3) "otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."[2]

In other words, perfection is not required. The sale must simply be done in the way similar sales in the relevant market are conducted.

Presence and Requirements of an Intercreditor Agreement

Most UCC foreclosures are done by mezzanine lenders — the loans of which are secured by only a pledge of the mezzanine borrower's equity interest in the fee owner.

But when there is both a mortgage and mezzanine lender, there is also often an intercreditor agreement — which is an agreement among those two lenders, and any additional junior lenders, describing the lenders' respective rights and remedies as among themselves.

One common term in an intercreditor agreement is that the mezzanine loan and the collateral securing it, i.e., the equity of the fee owner, may be transferred only to a qualified

transferee, including as a result of a UCC foreclosure. This was exactly the situation addressed in WWP Mezz.

While the requirements to be a qualified transferee may vary from deal to deal, as was the case in WWP Mezz, this definition typically requires that any transferee be a large institution or an entity with significant investment or management experience and significant assets, either in its own name or under management.

This minimum-assets requirement is often well into the hundreds of millions of dollars.

By design, requiring that any transferee of the equity of the fee owner, including the winning bidder at a UCC foreclosure auction, be a qualified transferee substantially limits the universe of prospective bidders.

Critically, however, the original mezzanine lender is often automatically deemed to be a qualified transferee in the intercreditor agreement.

Presence of a Qualified-Transferee Requirement in a UCC Foreclosure Auction

So how does this work in practice?

When noticing a UCC foreclosure, if there is a qualified-transferee requirement in an intercreditor agreement, the mezzanine lender will include a requirement in the terms of sale for the auction that only those prospective bidders that meet the definition of qualified transferee will be permitted to bid.

This is because if a winning bidder doesn't meet this definition, the mortgage lender could have a claim against the mezzanine lender for breach of the intercreditor agreement, or could even seek injunctive relief to prevent the transfer.

And of course, as a practical matter, most mezzanine lenders conducting a UCC foreclosure are happy to credit bid for the collateral themselves — and so having fewer, if any, other bidders is acceptable.

But doesn't this hurt the borrower?

Indeed, the borrower wants a robust bidding process to generate the highest possible price for the collateral in the hope that there will be a surplus, or at least little (or no) deficiency for which any guarantor may be liable. And the borrower is also entitled to have its equity disposed in a manner that is commercially reasonable.

The short answer is yes. But there is little the borrower can do.

Recent Commercial Division Decision Upholds Qualified-Transferee Requirement in Terms of Sale

In a dispute that Justice Masley described as a "battle between two titans in the New York real estate community," SL Green Realty Corp. (the mezzanine borrower) and Extell Development Co. (the mezzanine lender) faced off in a highly watched UCC foreclosure of SL Green's equity in the entity that owned Worldwide Plaza.

In seeking a temporary restraining order and preliminary injunction of the UCC foreclosure auction that was scheduled to take place in January, SL Green argued that Extell's terms of

sale chilled bidding, because, among other things, prospective bidders had to satisfy the intercreditor agreement's qualified transferee definition, which required (1) total assets, in name or under management, of over $655 million; and (2) capital surplus, shareholders' equity or market capitalization of over $500 million.

And while SL Green recognized that the concept of a qualified transferee is common and makes sense in other contexts, it argued that this monetary criterion was too high here, given the substantial decrease in the property's value since the intercreditor agreement was entered into.

While Justice Masley originally granted a temporary restraining order enjoining the sale for a short time, she ultimately denied SL Green's motion for a preliminary injunction and allowed the sale to go forward.

In doing so, Justice Masley rejected SL Green's "invitation to rewrite" the intercreditor agreement simply because the parties "could have anticipated a downturn in the market when they negotiated" the agreement.

Indeed, according to Justice Masley, "there is no requirement that the parties to the Intercreditor Agreement modify" the qualified transferee definition "because of market changes." And, critically, Justice Masley also held that the terms of sale for this auction "appear[ed] to be consistent with other UCC sales."

How Future Borrowers and Mezzanine Lenders Should Address a Qualified-Transferee Requirement

So where does this leave a borrower like SL Green? Out of luck, mostly.

Even though a borrower has no role in negotiating, and usually doesn't even see, the intercreditor agreement, as this case shows, prospective buyers of the borrower's equity at the foreclosure auction will still be subject to the intercreditor agreement's requirements.

But what if the intercreditor agreement here stated that only the mezzanine lender would be a qualified transferee? This would have limited the universe of prospective bidders to only one: the mezzanine lender.

Though no court, to our knowledge, has addressed a situation like this, there's a good chance the outcome would have been different.

Part of Justice Masley's reasoning was that the qualified transferee definition here was consistent with other auctions. That would not be true of a qualified transferee definition that permitted only the mezzanine borrower to bid at auction.

And while Justice Masley refused to rewrite the intercreditor agreement to modify the definition of a qualified transferee, there's a good chance a court would hold that a mezzanine lender can't give itself carte blanche to act commercially unreasonably by including commercially unreasonable limitations in an intercreditor agreement years earlier.

Conclusion

The takeaway here for mezzanine borrowers is that, as most lawyers litigating UCC foreclosure issues know, stopping a UCC foreclosure auction is really hard.

But on the flip side, going forward, mezzanine lenders can easily cut off arguments similar to those made by the mezzanine borrower here. Indeed, mezzanine lenders would be wise to write to the mortgage lender and ask for its consent to modify or waive the qualified-transferee requirement.

Though not necessary, there's usually little downside in doing so (most mortgage lenders will refuse), and the mezzanine lender will be able to say that it did all that it could.

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[1] U.C.C. § 9-610(b).

[2] U.C.C. §9-627(b).