"AFTER THE DEFAULT: LITIGATION UNDER UCC ARTICLE 9"

DEFAULT RIGHTS AND REMEDIES UNDER UCC ARTICLE 9

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I. Introduction

A. Overview

This paper will discuss selected enforcement provisions of Article 9 of the Uniform Commercial Code ("Article 9") insofar as they apply to commercial secured transactions. (Consumer secured transactions are discussed briefly in Section III, below.) It is not an exhaustive treatment, but instead is intended to provide a brief overview of the default provisions of Article 9, with an emphasis on the remedies available to a secured party upon the default of a secured obligation.

B. The Parties to a Secured Transaction

Article 9 describes the parties to a secured transaction. A "secured party", as used therein, is the party to whom a security interest in collateral has been granted. U.C.C. § 9-102(a)(72)(A). Under Article 9, a "debtor" simply holds an interest (typically, an ownership interest), as opposed to a security interest or other lien, in the collateral. U.C.C. § 9-102(a)(28)(A).[1] Additional parties defined in Article 9 include: the "obligor," or, simply put, the party who owes the obligation secured by the collateral (and who may or may not also be the "debtor"), and the "secondary obligor," a sub-class of obligors, who is essentially a guarantor or surety of the obligation secured. U.C.C. § 9-102(a)(59) and (71). Article 9 generally provides that a guarantor is entitled to the same notices and protection as a debtor under its Part 6. U.C.C. §§ 9-601(d) and 9-602.

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[1] Article 9 also includes within the definition of a "debtor" (a) a seller of accounts, chattel paper, payment intangibles or promissory notes, and (b) a consignee. U.C.C. § 9-102(a)(28)(B) and (C). It should be noted that the enforcement provisions contained in Part 6 of Article 9 do not apply to (a) consignors or (b) a buyer of accounts, chattel paper, payment intangibles or promissory notes except as to a buyer's obligation to use commercial reasonableness in the collection of the collateral where the buyer has a right of chargeback on uncollected receivables or instruments or full or limited credit recourse to the debtor or secondary obligor. U.C.C. §§ 9-601(g) and 9-607(c).

II. The Default Provisions of Article 9: A Selective Review

A. Overview

A security interest becomes enforceable when it attaches to the debtor's rights in the collateral. Upon a default, the secured party is entitled to pursue the rights and remedies against the collateral as set forth in the security agreement and in Article 9. U.C.C. § 9-601(a). The secured party's entitlement to the full exercise and enjoyment of these remedies, however, is contingent upon the extent to which it has complied with Article 9's provisions governing the enforcement of a security interest. The enforcement provisions of Article 9 addresses, among other things: (a) the duties imposed upon a secured party and the rights of debtors and obligors; (b) the standards by which a secured party's performance of its duties will be measured; and (c) the consequences of a secured party's failure to meet these standards of conduct.

B. Default

The enforcement provisions of Article 9 are triggered by a default under the security agreement. U.C.C. § 9-601(a). Article 9 does not define or otherwise list the incidents which will constitute a default, leaving the contracting parties to decide for themselves by agreement the events which will constitute a default. U.C.C. § 9-601, cmt. 3. Typical events of default include a failure to make payment of the secured obligation when due; a breach of non-payment contractual obligations, warranties or covenants; or the occurrence of an event which causes the secured party to deem itself insecure, such as a downturn in the debtor's business. It is not unusual for the parties' agreement to provide for either or both notice and an opportunity to cure an event of default before a default will occur.

C. "Good Faith"

Article 9 defines "good faith" in both subjective and objective terms, as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 9-102(a)(43).[2] This dual standard is used to measure a secured party's actions under Article 9, including decisions as to whether to accelerate a debtor's payment obligation and when and whether to pursue its contractual and statutory remedies. It should be noted that the Uniform Commercial Code prohibits a waiver of the obligation of "good faith." U.C.C. § 1-102(3).

By way of example, security agreements may reserve to the secured party the right under certain circumstances to accelerate the debtor's obligation and demand full payment of the balance due. Article 1 of the Uniform Commercial Code provides that a contractual term which permits a party to "accelerate payment . . . 'at will' or 'when he deems himself insecure' . . . shall be construed to mean that he shall have the power to do so only if he in good faith believes that the prospect of payment or performance is impaired." U.C.C. § 1-208. Accordingly, under Article 9, a secured party's acceleration of an obligor's obligations and enforcement of rights against the debtor under those circumstances may be measured according to both an objective and a subjective standard.

D. Rights and Remedies of Secured Party Upon Default

Upon a default, the secured party "may reduce a claim to judgment, foreclose, or otherwise enforce the claim [or], security interest . . . by any available judicial procedure." U.C.C. § 9-601(a)(1). Depending upon the types of collateral securing the debt, the secured party may have several options upon a default. Where the collateral consists of a right to payment, the secured party may collect from account debtors and other persons obligated to

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[2] This definition was also included in the proposed 2001 amendments to UCC Article 1. See UCC § R1-201(b)(20).

make payment to the debtor and apply the proceeds against the secured debt. U.C.C. § 9-607. The secured party may take possession of the collateral by judicial process (such as by obtaining an order of seizure or replevin) or without judicial process if such action will not cause a breach of the peace. U.C.C. § 9-609. The secured party may then sell or otherwise dispose of the collateral and apply the proceeds in satisfaction of the secured debt, or the secured party may retain the collateral in satisfaction of the secured debt. U.C.C. §§ 9-610 and 9-620. Finally, the secured party may decide not to foreclose on the collateral, but instead to obtain a judgment on the secured debt and then execute its judgment upon the collateral. U.C.C. § 9-601(f). Such execution sale will not be governed by Article 9, although the judicial lien created by such execution is deemed a continuation of the original security interest (if perfected) and not the acquisition of a new interest. U.C.C. § 9-601, cmts. 6 and 8. The secured party typically will be required to account to the debtor for any surplus in the collection or disposition of the collateral and the debtor and obligor will be liable to the secured party for any deficiency. U.C.C. §§ 9-608 and 9-615(a).

Article 9 provides that a secured party's rights to pursue its contractual and Article 9 remedies are "cumulative". U.C.C. § 9-601(c). Thus, the secured party may both enforce its rights in collateral and seek to obtain a money judgment on the debt in one action. A secured party, however, is expressly permitted to exercise its rights "simultaneously" provided that, in so doing, "the secured party acts in good faith." U.C.C. § 9-601(c), cmt. 5. The official comments, also reflect that Article 9 is not intended to supersede any non-UCC law which may prohibit under certain circumstances the simultaneous exercise of rights against a defendant. U.C.C. §9-601.

E. Rights of Debtors and Obligors Upon Default

Article 9 provides that after a default, the debtor has the rights and remedies provided in its Part 6, the security agreement and Section 9-207 (Rights and Duties of Secured Party Having Possession or Control of Collateral). U.C.C. §9-601. These rights and remedies are extended to both debtors and obligors, thus entitling a guarantor to the protections afforded under Article 9. U.C.C. § 9-601(d). Article 9, however, relieves a secured party of its duties toward an "unknown" debtor or obligor as defined in Section 9-605. U.C.C. §§ 9-605 and 9-628.

Article 9 specifies certain rights of the debtors and obligors and duties of the secured party that may not be waived or varied by the debtor or guarantor. U.C.C. § 9-602. These rights and duties include the duty to collect and dispose of collateral in a commercially reasonable manner; the implicit duty to refrain from the breach of the peace in taking possession of the collateral; and the right to hold a secured party liable for the failure to comply with Article 9. U.C.C. § 9-602. In all, Article 9 lists twenty provisions (most of which are contained in Part 6) which are not waivable. Id. Article 9 does provide that three of the non-waivable provisions set forth in Section 9-602 may be waived by an agreement entered into after default. U.C.C. § 9-624. Those provisions consist of the right of a debtor or secondary obligor to notification of the disposition of collateral; the debtor's right to mandatory disposition of consumer goods; and the right of a debtor or secondary obligor to waive its redemption rights. U.C.C. § 9-624. The Official Comments to Article 9 cautions a court to carefully scrutinize post-default waivers that appear in agreements "that also address many additional or unrelated matters". U.C.C. § 9-602, cmt. 5.

Article 9 allows the parties to determine by agreement the standards measuring the fulfillment of the rights and duties imposed by Article 9, provided such agreed standards are not "manifestly unreasonable." U.C.C. § 9-603(a); see also Burns v. Anderson, 123 Fed. Appx. 543

(4th Cir. 2004) (court found that disposition of collateral was commercially reasonable since the secured party took title to collateral for an independently appraised value, which was the method agreed to by the parties in their agreement). Article 9, however, expressly prohibits the parties from specifying in their agreement the standards measuring fulfillment of the secured party's duty to take collateral without breaching the peace. U.C.C. § 9-603(b). The Official Comments to Article 9 indicate that while the specified rights and duties may not be waived by the debtor or obligor, the parties are not restricted from settling, compromising or waiving any past conduct that may have constituted a violation or breach of those rights and duties. U.C.C. § 9-602, cmt. 3.

F. Collection and Enforcement of Performance by Secured Party

Article 9 provides that, in the event of default and where the collateral consists of a payment obligation owed to the debtor, the secured party may collect payments directly from account debtors or persons obligated to make payment to the debtor by notifying these parties to pay the secured party directly. U.C.C. § 9-607(a).[3] Further, a secured party may notify any party that owes a performance obligation to the debtor on any of the collateral and request that party to render performance to, or for the benefit of, the creditor. U.C.C. § 9-607(a)(1). Moreover, under Article 9 a secured party is permitted to enforce this payment or performance obligation by exercising any rights that the debtor might have against the obligated party. U.C.C. § 9-607(a)(3). For example, if the collateral consists of equipment, the secured party may enforce a claim for a breach of the manufacturer's warranty. Article 9 does not determine whether the party obligated on collateral owes a duty to the secured party. U.C.C. § 9-607(e).

[3] Section 9-607 applies to the collection of collateral before default where the parties have agreed the secured party may collect the collateral.

Section 9-607 requires a secured party, which "undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral" and "is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor," to exercise its rights in a "commercially reasonable manner." U.C.C. § 9-607(c)(1) and (2). This duty may not be waived or varied. U.C.C. § 9-602(c).

A secured party has the right to deduct from its collections its "reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party." U.C.C. § 9-607(d). As the Official Comments makes clear, however, the attorney's fees and legal expenses that a secured party may recover under this section are limited to those "incurred in proceeding against account debtors or other third parties." U.C.C. § 9-607, cmt. 10.[4] Section 9-607(d) is an exception to the general rule that a secured party may not recover its reasonable legal expenses and fees incurred in enforcing its rights against the collateral unless provided for in the parties' agreement. U.C.C. §§ 9-608(a)(1)(A) and 9-615(a).

G. Possession or Control of Collateral by Secured Party

Article 9 affords the secured party, after default, the right to take possession of the collateral through self-help or through judicial process. U.C.C. § 9-601(a). Under Article 9 a secured party's right to engage in self-help repossession of collateral without judicial process is subject to two express limitations. U.C.C. § 9-609. First, a secured party cannot seize the collateral unless a default has occurred. U.C.C. § 9-609(a). Second, the secured party may take possession of the collateral or "without removal, may render equipment unusable and dispose of collateral on a debtor's premises" only if it can do so without committing a breach of the peace.

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[4] Article 9 also provides to the secured party that is an assignee of an obligation secured by a real estate mortgage the right to become the mortgagee of record upon the debtor's default in order to foreclose non-judicially on the mortgage. U.C.C. § 9-607(b). Also, a secured party may receive and apply against the secured debt funds in a deposit account over which the secured party has control. U.C.C. §§ 9-607(a)(4) and (5).

U.C.C. § 9-609. Article 9 does not define what constitutes a "breach of the peace." In Allen v. First National Bank of Monterrey, 845 N.E.2d 1082 (Ind. Ct. App. 2006), the court found that the secured party's actions constituted a breach of the peace when it proceeded to repossess its collateral (a backhoe) in the face of verbal protests. The case was remanded to the trial court to ascertain whether another party who claimed an interest in the collateral may recover damages against the secured party under Section 9-625. See also Callaway v Whittenton, 892 So. 2d 852 (Ala. Sup. Ct. 2003), reh'g denied, 2004 Ala. LEXIS 322 (Ala. May 14, 2004) (finding that secured creditor's use of physical force to overcome debtor's efforts to prevent removal of collateral from debtors' premises constituted a breach of the peace and that secured party may be liable for "wrongful-repossession").

If possession or control cannot be obtained without a breach of the peace, the secured party must avail itself of judicial intervention, such as by commencing an action to have the collateral seized. A secured party that removes collateral is obligated to reimburse the owner of real property, other than the debtor, for the cost of repair of any physical damage caused by the removal. U.C.C. § 9-604(d). In CLA-MIL East Holding Corp. v. Medallion Funding Corp., 846 N.E.2d 431 (N.Y. Ct. App. 2006), the court found that the secured party was not liable to a landlord for damage to property caused by the City Marshal in repossessing collateral on the secured creditor's behalf pursuant to a court order.

A secured party has the right under Article 9 to require a debtor to assemble and make the collateral available upon default, even if not provided for in the parties' agreement. U.C.C. § 9-609(c). However, both before and after default, the secured party has the duty to use reasonable care in the custody and preservation of collateral in its possession. U.C.C. §§ 9-601(b) and 9-207.

H. "Strict Foreclosure" and the Acceptance of Collateral in Partial Satisfaction

Article 9 permits a secured party the option of retaining (referred to as acceptance in Article 9) the collateral and foregoing any claim for a deficiency judgment, provided that the secured party complies with the rules governing the notification if its intent to retain or accept the collateral and no timely objection is made. U.C.C. § 9-620, cmt. 2. The secured party need not be in possession of the collateral to exercise this "strict foreclosure" remedy. U.C.C. § 9-620, cmt.7. Also, the secured party, upon notice and affirmative consent, may retain the collateral in partial satisfaction of the secured obligation. U.C.C. § 9-620(a).

Under Article 9, a secured party will not be deemed to have accepted the collateral in satisfaction of the secured debt by taking possession thereof unless the secured party takes the affirmative steps specified in Article 9. U.C.C. § 9-620(b). The secured party's delay in disposing of collateral in its possession, however, will be " a factor relating to whether the secured party acted in a commercially reasonable manner for purposes of Section 9-607 or 9-610." U.C.C. § 9-620, cmt. 5.

I. Disposition of Collateral by Secured Party

1. A Secured Party's Right of Disposition

Article 9 permits a secured party, after default, to "sell, lease, license or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." U.C.C. § 9-610(a). The secured party may sell or otherwise dispose of the collateral by a public or private disposition, and apply the proceeds (net of reasonable expenses) against the secured debt. U.C.C. §§ 9-610(b) and 9-615(a). A public disposition is described in the Official Comments as one at which the price is determined by competitive bidding by the public. U.C.C. § 9-610, cmt. 7.

"Every" aspect of a private or public disposition, "including the method, manner, time, place, and other terms, must be commercially reasonable." U.C.C. § 9-610(b). Section 9-627 of Article 9, discussed in J(2) below, provides some guidance for determining the circumstances under which a disposition is "commercially reasonable." It bears observation that, while Article 9 does not impose upon a secured party a duty to prepare or process the collateral, a secured party "may not dispose of collateral 'in its then condition'" when to do so would be "commercially unreasonable." U.C.C. § 9-610, cmt. 4. The obligation of the secured party to exercise commercial reasonableness in the disposition of the collateral may not be waived. U.C.C. § 9-602(7).

Unless the collateral is perishable or threatens to decline speedily in value or is of the type customarily sold on a recognized market, the secured party must send the debtor and certain other persons reasonable notification of the time and place of any public disposition or the time after which any private disposition is to take place. U.C.C. § 9-611(d). (Notification is discussed below in (2)). See also CIT Group/Equipment Financing v. Elliott, 2005 Mich. App. LEXIS 1742 (Mich. Ct. App. 2005) (finding that because the sale that took place was private, the secured party was only obligated to provide notice of the date after which the sale would take place and not notice of the time and place of sale)). The secured party may purchase the collateral at a public sale, but may not purchase collateral at a private sale unless the collateral is of a kind customarily sold on a recognized market or is the subject of a standard price quotation. U.C.C. § 9-610(c). A secured party sale generally discharges all subordinate interests in the collateral. U.C.C. § 9-617(a).

Section 9-610 of Article 9 does impose a burden upon secured parties, however, providing that "[a] contract for sale, lease, license, or other disposition includes the warranties

relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract." U.C.C. § 9-610(d). Article 9, however, eases this burden by permitting a secured party to disclaim these warranties by any lawful method or "by communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties." U.C.C. § 610(e). Article 9 further provides that a disclaimer in a "record"[5] is sufficient if it indicates "there is no warranty relating to title, possession, quiet enjoyment, or the like in the disposition" or uses words of similar import. U.C.C. § 9-610(f).

2. Notice of Disposition

Article 9 requires that, unless the collateral is perishable or threatens to decline speedily in value or is of the type customarily sold on a recognized market, a secured party that elects to exercise its right to dispose of collateral must notify certain parties as to the forthcoming disposition. U.C.C. § 9-611(b),(d). A secured party must send a "reasonable authenticated notification of disposition" to the debtor and the secondary obligor. U.C.C.§ 9-611(c)(1),(2). The duty to send such notice may be dispensed when the debtor or secondary obligor are unknown to the secured party. U.C.C. § 9-605. In addition, the debtor and secondary obligor may waive the rights to such notice by agreement entered into after default. U.C.C. § 9-624(a). Note that Article 9 does not require that a secured party notify the obligor, or, the party obligated on the debt (if this same party is not both the obligor and debtor) of the disposition. Further, Article 9 imposes upon secured parties two obligations: the duty to notify other secured parties of the disposition, and the duty to search for these secured parties. U.C.C. § 9-611(c)(3).

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[5] Under Article 9, a "record" means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in a perceivable form. U.C.C. § 9-102(a)(69).

Article 9, however, somewhat eases the secured party's burden of searching for other secured parties by including a "safe harbor" provision, according to which a secured party will have satisfied its statutory search duty as a matter of law if:

> (1) not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name [in the appropriate office]; and
>
> (2) before the notification date, the secured party:
>
> > (A) did not receive a response to the request for information; or
> >
> > (B) received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response[.]

U.C.C. 9-611(e).

3. Contents of Notice of Disposition

Under Article 9, a notice of disposition will be "sufficient" as a matter of law if it

> (A) describes the debtor and the secured party;
>
> (B) describes the collateral that is the subject of the intended disposition;
>
> (C) states the method of intended disposition;
>
> (D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
>
> (E) states the time and place of a public disposition or the time after which any other disposition is to be made.

U.C.C. § 9-613(1). Helpfully, Article 9 provides a form of notification for secured parties to follow. Id.

Article 9 makes clear that whether a form that lacks the foregoing information is "nevertheless sufficient is a question of fact," and that a form that contains "minor errors that are not seriously misleading" will be sufficient as a matter of law. U.C.C. § 9-613(2) and (3)(B).

4. Timeliness of Notification

Article 9 provides that "whether a notification is sent within a reasonable time is a question of fact"; however, "a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time." U.C.C. § 9-612(b).

5. Application of Non-Cash Proceeds

If the secured party receives non-cash proceeds, such as a promissory note, upon the disposition of the collateral, the secured party need not "apply or pay over" for application non-cash proceeds from the disposition unless the failure to do so would be commercially unreasonable. U.C.C. § 9-615(c). If it does "apply or pay over" non-cash proceeds, the secured party must do so in a commercially reasonable manner. Id. A similar provision applies to non-cash proceeds from the secured party's collection of collateral. U.C.C. § 9-608(3).

6. Other Provisions

Other provisions relevant to the disposition of collateral includes Section 9-617 (Rights of Transferee of Collateral) and Section 9-619 (Transfer of Record or Legal Title).

J. The Consequences of a Secured Party's Non-Compliance

1. Remedies for a Secured Party's Non-Compliance with Article 9

Article 9 authorizes an aggrieved party to seek, and a court to grant, injunctive relief against a secured party, prior to the disposition of the collateral, if the aggrieved party establishes "that [the] secured party is not proceeding in accordance with *this article*." U.C.C. § 9-625(a) (emphasis added). In addition, under Article 9 a debtor is able to request a court to order or restrain both the "collection" and "enforcement" of collateral as well as the "disposition" of collateral. Id.

Under Article 9 a secured party is potentially liable for any loss caused by its failure to comply with any provision of Article 9, such as Section 9-207 (duties of secured party in possession of collateral). U.C.C. § 9-625(b) and cmt. 2; see also R&J of Tennessee, Inc. v. Blankenship-Melton Real Estate, Inc., 166 S.W.3d 195 (Tenn. Ct. App. 2004), appeal denied, 2005 Tenn. LEXIS 421 (Tenn. May 9, 2005) (appellate court remanded case for hearings on damages that guarantor may be entitled to recover by reason of secured party's failure to give reasonable notice of collateral's sale). The damages for which the secured party may be liable "are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred." U.C.C. § 9-625, cmt. 3.

Article 9 specifies the list of parties who are entitled to recover damages due to a secured party's non-compliance with this article. It provides that "a person that, at the time of [the secured party's failure to comply], was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages . . . for its loss." U.C.C. § 9-625(c)(1). The secured party, however, will not be liable to any of the above parties who was not "known" to it. U.C.C. § 9-628(a) and (b). Article 9 also provides that in addition to any actual damages recoverable under Section 9-625(b), a secured party is liable for $500 in statutory damages for its failure to comply with specific provisions of Article 9. U.C.C. § 9-625(e). For example, the failure of a secured party to file a termination statement when required to do so under Section 9-513 will render the secured party liable to the debtor for the $500 statutory damages, irrespective of any actual damages suffered by the debtor. U.C.C. § 9-625(e)(4).

2. The "Commercial Reasonableness" Standard

Article 9 provides that a secured party may pursue a deficiency action against the debtor and any other obligor if the proceeds collected and applied do not extinguish the debtor's entire unpaid obligation. U.C.C. §§ 9-608(4) and 9-615(d). A secured party's entitlement to a

deficiency judgment against a debtor and obligor, however, is contingent upon its observance of "commercially reasonable" standards of conduct relating to the enforcement of its rights under Article 9. See Consumer Finance Corp. v. Reams, 158 S.W. 3d 792 (Mo. Ct. App. 2005) (denying deficiency judgment against obligor where the secured party did not dispose of repossessed collateral in a commercially reasonable manner).

Article 9 provides that "a disposition of collateral is made in a commercially reasonable manner if the disposition is made . . . in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." U.C.C. § 9-627(b)(3).[6] Under Article 9,

> [t]he fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition or acceptance was made in a commercially reasonable manner.

U.C.C. § 9-627(a). According to the Official Comments, however, "[w]hile not itself sufficient to establish a violation of [Part 6], a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." U.C.C. § 9-627, cmt. 2.

Article 9 adopts the "rebuttable presumption rule" (discussed in (4) below), which effectively focuses on the impact of a secured party's non-compliance with the enforcement requirements of Part 6 on the price obtained from the foreclosure sale. Moreover, Article 9

[6] Article 9 Section 9-627 specifies that certain dispositions are commercially reasonable if made (1) in the usual course on any recognized market; (2) at the price current in any recognized market at the time of disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. U.C.C. § 9-627(b). In addition, a "collection, enforcement, disposition or acceptance" of collateral is commercially reasonable if it has been approved (1) in a judicial proceeding; (2) by a bona fide creditors' committee; (3) by a representative of creditors; or (4) by an assignee for the benefit of creditors. U.C.C. § 9-627(c). The absence of such approval does not mean that the collection, enforcement, disposition or acceptance is not commercially reasonable. U.C.C. § 9-627(d).

recognizes that a debtor or obligor may recover its actual and provable damages resulting from the secured party's non-compliance with the foreclosure procedures even if such non-compliance did not affect the foreclosure sale price.

The principle of commercial reasonableness is illustrated under the facts in R&J of Tennessee, Inc. v. Blankenship-Melton Real Estate, Inc., 166 S.W.3d 195 (Tenn. Ct. App. 2004), appeal denied, 2005 Tenn. LEXIS 421 (Tenn. May 9, 2005). That case involved an action by a secured party against a guarantor seeking a deficiency judgment following a foreclosure sale of collateral securing the guaranteed loan. The guarantor argued that the foreclosure sale was not commercially reasonable because the secured party, among other things, delayed over seven-months in foreclosing upon the collateral (consisting of a truck, tractor and mobile home) and allowed other guarantors to use the collateral during that period, thereby accelerating the collateral's depreciation in value. The appellate court, in agreeing with the guarantor, reversed the finding of the trial court and found that the foreclosure sale was not commercially reasonable. The court explained that while the U.C.C. does not provide explicit guidelines for conducting a foreclosure sale, the aggregate facts presented sufficiently demonstrated that the sale was not commercially reasonable. These facts included: (1) the secured party's failure to provide adequate notice of the sale by not advertising the sale in a newspaper, (2) the secured party's failure to use an experienced auctioneer at the sale, (3) the increase of the deficiency due because of the secured party allowing the guarantors to continue using the collateral pending the sale, and (4) the secured party's failure to seek an independent appraisal for the sale. The court noted that "the policy of the Uniform Commercial Code, as to the disposition of collateral, is to balance and protect the rights of both debtor and creditor, while maximizing the recovery from the disposition of the collateral for the benefit of all parties". The case was thus remanded to the