

UCC Article 9 Secured Party Sales

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A Practice Note discussing a secured creditor's rights under UCC Article 9 to enforce its security interest by foreclosing on collateral. This Note addresses the basic timeline, process, and requirements for conducting an Article 9 sale.

Article 9 of the Uniform Commercial Code (UCC) provides a comprehensive statutory scheme for the regulation of creating, perfecting, and enforcing security interests in personal property and fixtures (see Practice Note, UCC Creation, Perfection, and Priority of Security Interests ([6-381-0551](#))). Under Article 9, a lender seeking to secure its debt with the personal property of a debtor may:

- Negotiate and memorialize its security interest in an agreement.
- Perfect its position as a secured lender relative to other interests in the property.
- Enforce its security interest by repossessing and disposing of the property securing its loan if the debtor defaults on the loan.

This Practice Note provides an understanding of a secured creditor's right under UCC Article 9 to enforce its security interest by foreclosing on its collateral after a debtor defaults (Article 9 Sale). It addresses the basic timeline, process, and requirements for conducting an Article 9 Sale through the following four key steps:

- Repossession of collateral.
- Notice of the sale.
- Sale of collateral in a commercially reasonable manner.
- Disposition of sale proceeds.

As with the general purpose of the UCC, Article 9 is intended to create a uniform system across the country for creating, perfecting, and enforcing security interests in personal property. Although Article 9 has been adopted by every state, some states have made modifications to the law or have not adopted the most recent version of the law. Counsel must therefore consult local law whenever conducting an Article 9 Sale. All section references contained in this Note refer to Article 9 of the New York State iteration of the UCC.

ARTICLE 9 SALES

Article 9 sets out a framework that permits a secured creditor to repossess and dispose of its collateral efficiently and inexpensively while providing the debtor with various procedural protections. The trigger for the sale is the debtor's default on its obligations to the lender under the applicable loan documents. Once the secured creditor takes the required action for establishing a default under its loan documents with the debtor, it may proceed to:

- Repossess and dispose of the assets that comprise its collateral.
- Apply the net proceeds of any sale to the outstanding indebtedness owed to the lender.

Determining whether an Article 9 Sale is a secured creditor's best option depends on specific practical considerations that it must evaluate in each situation (see Advantages and Disadvantages of Conducting Article 9 Sales).

ARTICLE 9 SALE TIMELINE

Following a debtor's default, a secured creditor must take several steps to properly effectuate the sale of its collateral under Article 9. Although repossessions and collateral sales can differ based on the facts and circumstances, all repossessions and sales follow the same basic timeline. A secured creditor must:

- **First properly repossess the collateral.** A secured creditor generally has several options for repossessing collateral, including the option to forego repossession. Certain types of collateral require the creditor to employ specific methods of repossession (see Repossession).
- **Then give reasonable notice to the debtor and other parties with interests in the collateral of its intent to sell the collateral.** What constitutes reasonable notice varies depending on the type of collateral and the circumstances surrounding the sale of the collateral. However, a secured creditor is generally deemed to have given reasonable notice if the secured creditor provides at least ten days' notice of the sale to the debtor and other interested parties (see Notice of Sale).
- **Next use reasonable efforts to maximize the proceeds of the collateral sale.** The sale of collateral by a secured creditor must be "commercially reasonable." Article 9 does not specifically define this term, but a secured creditor can typically protect itself

by seeking to sell its collateral on the most recognized market for the collateral, in the manner that the collateral is normally sold, and taking steps to maximize the profit on the sale. The disposition may be handled through a private or public sale (UCC § 9-610(b)). The lender has the right at a public sale to purchase the collateral (UCC § 9-610(c)(1)), while at a private sale the lender only has the right to purchase certain kinds of collateral, such as publicly traded securities (UCC § 9-610(c)(2); see Commercial Reasonableness).

■ **Then properly apply the proceeds of the sale of the collateral.**

Creditors must first apply sale proceeds to any costs and legal fees associated with repossessing, holding, preparing, processing, and selling the collateral and then apply the proceeds of the sale to the secured obligation. The creditor next must distribute the proceeds to junior interests in the collateral and return any excess sale proceeds to the debtor (see Disposition of Proceeds).

REPOSESSION

Article 9 provides a secured creditor with the advantage of taking possession of collateral immediately on a debtor's default. While the security agreement between the secured creditor and the debtor must specify certain remedies permitted by Article 9, a secured creditor has the right to repossess collateral unless the parties have expressly agreed otherwise (UCC § 9-609).

A secured creditor may repossess collateral under Article 9 by:

- Exercising its right to self-help repossession (see Self-Help Repossession).
- Requiring the debtor to assemble and deliver the collateral (see Right to Make Debtor Assemble Collateral).
- Resorting to a traditional judicial foreclosure (see Judicial Foreclosure).

A secured creditor must also be aware that specific categories of collateral require certain actions for repossession, such as self-help.

SELF-HELP REPOSESSION

The two categories of collateral that may be subject to repossession through self-help are:

- Inventory and equipment (see Inventory and Equipment).
- Accounts (see Accounts).

Inventory and Equipment

A secured creditor may repossess a piece of inventory or equipment or render a piece of equipment unusable on the debtor's premises by exercising self-help without judicial process (UCC § 9-609(b)(2)). Self-help repossession is the easiest, quickest, and most cost-effective means of repossessing inventory and equipment because it does not require the time and expense of obtaining a court order.

However, self-help repossession typically poses risks because the creditor must ensure that it does not breach the peace when taking action. If the creditor or its agent causes a breach of the peace or wrongly repossesses the collateral, the creditor may be

liable for conversion damages and possibly punitive damages (see Repossession Advantages and Disadvantages).

The term "breach of the peace" is not defined in the UCC or another statute. The prohibition also cannot be waived by agreement between the parties nor may the parties determine by agreement what constitutes a breach of the peace. The prohibition therefore has been the subject of significant litigation, and case law is the only guidance for secured creditors. Courts generally define "breach of the peace" broadly to mean "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which by causing consternation and alarm, disturbs the peace and quiet of the community" (*People v. Most*, 171 N.Y. 423 (1902)). For example, repossessions occurring over a debtor's oral protests have been found to be a breach of the peace. Secured creditors must consider discontinuing a self-help repossession attempt when faced with even a small amount of resistance from a debtor or third party.

Actions that courts have found typically breach the peace in a self-help repossession include:

- A uniformed police officer accompanying the secured creditor without a court order.
- Failing to adhere to representatives of the debtor when being told to stop.
- Involving a nearby police officer.
- Cutting a chain securing a gate and leaving the debtor's other property unprotected.
- Breaking a window.
- Breaking into a closed garage.

Acceptable means of repossession that do not breach the peace include:

- Tricking the debtor.
- Entering onto property that is not locked.
- Taking a vehicle from an open garage.

A secured creditor may also exercise self-help by disabling a piece of equipment and then disposing of the equipment through a sale while the equipment remains on the debtor's premises. Disabling the equipment may help preserve the value of the equipment.

The self-help remedy is only available to secured creditors that have a security interest in the actual piece of equipment. For example, while a secured creditor may disable and dispose of a forklift used in warehouse operations on the debtor's property, it cannot do the same with a forklift that is held for resale in a business engaged in equipment sales because that forklift may be deemed inventory.

Accounts

Section 9-607 of the UCC provides that when a defaulting debtor has pledged its accounts as collateral, the secured creditor has the right to collect payment directly from those accounts. A secured creditor that knows the identity of the debtor's account debtors (which typically comprise the debtor's customers but generally refers to any

person or entity that owes the debtor money) may provide written authenticated direction to the account debtor to pay the secured creditor directly.

Once a secured creditor has provided that notice, the secured creditor must be repaid by the account debtor. An account debtor that does not repay the secured creditor directly remains liable for its debt to the secured creditor, even if the account debtor repays the debtor (UCC § 9-406(a)).

An account debtor may request proof of assignment of its account by the debtor to the secured creditor (UCC § 9-406(c)). The proof of assignment must only be reasonable and may consist of a copy of the security agreement signed by the debtor.

While accounts are easily convertible to cash and their collection cannot result in a breach of the peace, a secured creditor faces certain risks when sending out notices to account debtors because account debtors:

- Often do not feel obligated to repay the secured creditor.
- Typically have valued business relationships with their own creditors.
- May be concerned that the secured creditor will not honor warranties made by the debtor and may withhold payments from the secured creditor to protect itself from bearing the cost of defective goods.
- May not believe that the secured creditor will pursue payment.

A secured creditor should consider protecting itself by requiring:

- The debtor to maintain accurate records, which can be used to pursue account debtors refusing to pay. These records should include purchase orders, invoices, signed contracts, and any other records that the debtor may keep to prove the account debtor's obligation.
- A lockbox arrangement, which generally requires that the account debtor make payments to a location only accessible by the secured party. Under the lockbox arrangement, the secured

creditor first pays itself and then remits the surplus to the debtor. With this arrangement, a secured creditor is relieved of:

- the concern that the debtor is misappropriating funds; and
 - the obligation to notify account debtors to change payment locations.
- Lockbox arrangements must typically be negotiated with the security agreement.

RIGHT TO MAKE DEBTOR ASSEMBLE COLLATERAL

A secured creditor may require a debtor to assemble the collateral and make it available at a mutually convenient place designated by the secured creditor when:

- The security agreement signed by the debtor grants the secured creditor that right.
- The debtor defaults.

(UCC § 9-609(c).)

If a debtor is willing to assemble equipment, it is the preferred method of repossession under Article 9. However, debtors often do not comply with this requirement, and a secured creditor typically resorts to self-help or judicial intervention. Counsel and creditors should be aware that demanding a debtor assemble collateral may risk giving the debtor the opportunity and time to secrete or transfer collateral, thereby making other repossession methods more difficult.

JUDICIAL FORECLOSURE

Another method of repossessing collateral is through a judicial foreclosure, which allows the secured creditors to seek a court order:

- Requiring a debtor to turn over the collateral.
- Authorizing a sheriff or officer of the law to repossess the collateral on behalf of the secured creditor.

While judicial foreclosures may take significant time and be costly, they avoid the potential problems that can occur in self-help repossession, such as liability for conversion or breach of the peace.

REPOSESSION ADVANTAGES AND DISADVANTAGES

The following chart lists the advantages and disadvantages associated with the various methods of repossession.

Repossession Method	Advantages	Disadvantages
Self-Help	<ul style="list-style-type: none"> ■ Fast and inexpensive to achieve. 	<ul style="list-style-type: none"> ■ Risk of breaching the peace or improperly repossessing property, which may result in significant liability.
Requesting Debtor Assemble Collateral	<ul style="list-style-type: none"> ■ wFast, inexpensive to achieve, and bears no risk of breaching the peace. 	<ul style="list-style-type: none"> ■ Requires cooperation from the debtor.
Disable Collateral	<ul style="list-style-type: none"> ■ Fast and inexpensive to achieve. 	<ul style="list-style-type: none"> ■ Possession remains with the debtor. This recourse is only available for equipment.
Notify Account Debtors	<ul style="list-style-type: none"> ■ Fast, inexpensive to achieve, and bears no risk of breaching the peace. 	<ul style="list-style-type: none"> ■ Risk of nonpayment from account debtors.
Judicial Foreclosure	<ul style="list-style-type: none"> ■ Bears no risk of breaching the peace and secured creditor may use police or marshal to repossess collateral. 	<ul style="list-style-type: none"> ■ Takes considerable time and expensive.

NOTICE OF SALE

In most circumstances, a secured creditor must send a reasonable authenticated notification of disposition of the collateral (UCC § 9-611(c)). The purpose of the notice is to provide the debtor and other interested parties with an opportunity to:

- Monitor the disposition of the collateral.
- Purchase or redeem the collateral.
- Demand any surplus proceeds recovered from the sale.

The notice must be reasonable regarding the manner, content, and time. Because the notice must be authenticated, a secured creditor cannot give verbal notice to the debtor, and notice must be made either electronically or in writing. A creditor that fails to provide this reasonable notice can potentially be held liable for any loss created by failure to give proper notice.

WHO MUST RECEIVE NOTICE

The UCC provides that parties who must receive notice include:

- The debtor (UCC § 9-611(c)(1)).
- Any secondary obligor (UCC § 9-611(c)(2)).
- If the collateral is anything other than consumer goods, any other:
 - party from which the secured party received an authenticated notification of a claim of an interest in the collateral before the notification date (UCC § 9-611(c)(3)(A));
 - secured party or lienholder that, ten days before the notification date, held a security interest or other lien on the collateral perfected by the filing of a financing statement that identified the collateral, was indexed under the debtor's name as of that date, and was properly filed against the debtor (UCC § 9-611(c)(3)(B)); and
 - secured party that, ten days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in UCC Section 9-311(a) (UCC § 9-611(c)(3)(C)).

The foreclosing creditor should quickly identify the parties that require notice because it may affect whether an Article 9 Sale is a feasible option. To accomplish this, the secured creditor should conduct a thorough lien and judgment search in the debtor's state of incorporation or formation. Recognizing that a creditor may want to conduct a lien search more than ten days before it sends notice, UCC Section 9-611(e) contains a safe harbor for the permitted time frame within which the foreclosing creditor may conduct a lien search and satisfy the notice requirement. The section provides that if a lien search is conducted between 20 to 30 days before the notification of the sale and the creditor notifies all secured parties or lienholders identified as of that time, the creditor satisfies UCC Section 9-611(c)(3)(B).

A secured creditor cannot rely on a pre-default waiver of notification. UCC Section 9-611 provides that a debtor, secondary obligor, or other party holding an interest in the collateral only validly waives notice post-default.

EXCEPTIONS TO NOTICE REQUIREMENT

A secured creditor is exempt from providing reasonable notice of a sale if the collateral either:

- Is perishable, such as fruits, vegetables, and dairy.
- Threatens to rapidly decline in value, such as publicly traded stocks and bonds.
- Is sold on a recognized market, such as seasonal products that lose value if sold too late in season.

(UCC § 9-611(d).)

A secured creditor also does not owe a duty to notify an unknown debtor of a disposition of the secured creditor's collateral. While it seems counterintuitive that a secured creditor would not know the identity of the debtor, Article 9 broadly defines the word debtor to mean "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor" (UCC § 9-102(28)). Based on this definition, a debtor generally is a person with an ownership interest in the collateral. If a debtor transfers or assigns its interest in collateral to another party without notifying the secured creditor, the purchaser or assignee therefore becomes the debtor under Article 9. Because the secured party would not be able to identify the new debtor in these circumstances, UCC Section 9-605(a) absolves the secured creditor from providing notice to the unknown debtor.

The same applies to unknown creditors. If a creditor sells or assigns its security interest without the knowledge of the secured creditor, the secured creditor does not have an obligation to send notice to the unknown creditor (UCC § 9-605(b)).

A foreclosing creditor satisfies its obligations to discover creditors with liens on its collateral if it performs a search of appropriate public records in the state of formation of the known debtor between 20 and 30 days before providing the required notice (UCC § 9-611(e); see Who Must Receive Notice).

FORM OF NOTICE

Notice to parties must be reasonable, which is determined by the timing, contents, and manner of notice.

UCC Section 9-612(a) states that reasonable timeliness is generally considered a question of fact, and UCC Section 9-612(b) provides that ten days' notice before the earliest disposition described in the notice is considered reasonable. However, this ten-day notice period only applies to the reasonableness of the notice of the sale. A foreclosing creditor must also ensure that the sale itself is conducted in a commercially reasonable time period and that there is adequate notice to potential buyers.

UCC Section 9-613 and UCC Section 9-614 establish the information that a secured creditor must include in a notice for it to be deemed reasonable and sufficient. To comply, a secured creditor must send notice that includes:

- A description of the debtor and the secured party (UCC § 9-613(1)(A)).

- A description of the collateral (UCC § 9-613(1)(B)).
- The method of intended disposition (UCC § 9-613(1)(C)).
- A statement informing the debtor that it is entitled to an accounting of the unpaid debt, together with the charge, if any, for the accounting (UCC § 9-613(1)(D)).
- The time and place of a public sale or the date after which the collateral will be sold in a private disposition (UCC § 9-613(1)(E)).

A secured creditor's notice may still be considered sufficient even if the notice does not meet the requirements of UCC Section 9-613(1). However, that determination is a question of fact (UCC § 9-613(2)). Notice is also considered sufficient if it contains substantially the information specified in UCC Section 9-613(1) but also includes minor errors that are not seriously misleading or extraneous information (UCC § 9-613(3)).

To ensure that a notice contains sufficient information, a creditor should review the form of notice provided in UCC Section 9-614(3).

COMMERCIAL REASONABLENESS

Except in the case of a strict foreclosure where the creditor takes possession of the collateral in full or partial satisfaction of the debt (see Practice Note, Non-Bankruptcy Alternatives to Chapter 11 Restructurings and Asset Sales: Strict Foreclosure ([w-006-9306](#))), the collateral is typically sold by the creditor to a third party.

The UCC provides a secured creditor with significant flexibility in determining:

- The method of disposing of collateral, such as in a public or private sale and in aggregate or single units.
- The time, place, and manner of the collateral disposition, such as selling the collateral as is or repairing the collateral and applying the proceeds of the sale to the repairs.

Within the confines of these freedoms, a secured creditor must focus on ensuring that the sale is commercially reasonable by maximizing the proceeds of the disposition. However, Article 9 does not expressly define what constitutes a commercially reasonable sale.

Parties to a security agreement cannot waive the requirement of a commercially reasonable disposition. However, a debtor or secondary obligor may agree:

- That a disposition was reasonable.
- What standard constitutes a commercially reasonable sale before the sale commences.

However, even with an agreement, a sale cannot be completed on standards that are manifestly unreasonable.

For a form security agreement, see Standard Document, Security Agreement ([9-383-2165](#)).

FACTORS FOR DETERMINING WHETHER SALE IS COMMERCIALY REASONABLE

While commercial reasonableness is generally a case-by-case concept, courts have considered:

- **Price.** The price at which a secured creditor sells its collateral is indicative but not solely determinative of whether the creditor makes a commercially reasonable sale. Because most secured creditor sales result in below fair market value returns, a secured creditor should not concern itself if its sale does not meet market standards. However, a secured creditor must be aware that a low disposition price will likely cause the court to closely scrutinize the sale and the sale procedures.
- **The manner of disposition.** A secured creditor may choose to dispose of its collateral in either a public or private sale if every aspect of the disposal is commercially reasonable. Courts generally find a public sale commercially reasonable if the secured creditor provides sufficient notice to the public. While a secured creditor cannot typically control the price at a sale, it can control the notice of sale and often protect itself by:
 - holding a public sale;
 - providing at least ten days' notice; and
 - advertising the sale in appropriate media.
- A secured creditor's sale may be considered a public sale if:
 - there is a meaningful opportunity for competitive bidding;
 - there is some form of advertising notifying the public of the sale; and
 - access is granted to the public.
- Courts generally find that a sale is not truly a public sale if only a portion of the public, such as dealers only, is permitted to attend. Courts also tend to scrutinize private sales more closely than public sales and are generally interested in determining how extensively the secured creditor marketed the collateral before the private sale. If conducting a private sale, a secured creditor should demonstrate that it solicited multiple offers for the collateral before making a sale.
- **The time of disposition.** When disposing of collateral, a secured creditor must ensure that it acts reasonably concerning:
 - the amount of time that it holds the collateral after the repossession;
 - the economic conditions at the time of the sale; and
 - the type of collateral that it is selling.
- For example, it is not commercially reasonable for a secured creditor to let produce rot before disposing of it. Conversely, a secured creditor is deemed to have acted reasonably when it sells seasonal products shortly before the start of the season.
- **Maximizing sale proceeds.** Because every aspect of a collateral disposition must be commercially reasonable, a secured creditor must carefully consider whether all of its choices regarding the sale are reasonable and focused toward maximizing the proceeds of the sale. This includes making a determination of whether the creditor should repair the collateral or sell it as is. While Article 9 does not require a secured creditor to repair collateral, a secured creditor must maximize proceeds and act in a commercially reasonable manner. Failure to make inexpensive repairs that would significantly increase the value of the collateral sale jeopardizes those objectives. Similarly, a

creditor does not act in a commercially reasonable manner when it fails to clean the collateral before an auction or inspection by a potential buyer.

(UCC § 9-610(b).)

DISPOSITION OF PROCEEDS

SALE BY SENIOR SECURED CREDITOR

UCC Section 9-615(a) requires a secured creditor to distribute proceeds of a collateral sale to, in order of priority:

- **Costs and expenses.** Sale proceeds must first be applied to any reasonable expenses of retaking, holding, or preparing the collateral for disposition, disposing of the collateral, and any other reasonable expenses associated with the repossession and disposition of the collateral. A secured party must be mindful when including attorneys' fees and legal expenses in this bucket of costs because they may only be included if they are provided for in the security agreement and are not otherwise prohibited by law (UCC § 9-615(a)(1)).
- **Secured debt.** After paying reasonable costs, a secured party must apply the proceeds of the sale to the debt or obligation secured by the security interest. If there is no cross-collateralization or other similar clause, a secured party foreclosing under several different security agreements must apply the proceeds of each piece of collateral to the specific debt secured by the security agreement covering that particular collateral. A secured creditor cannot apply the proceeds of the distribution to a debt not specifically secured by a security agreement (UCC § 9-615(a)(2)).
- **Lower priority security interests.** A secured party must then apply any remaining cash proceeds to any lower priority security interests or liens on the property if the secured creditor receives an authenticated demand from the holder of subordinate interests or liens before the secured creditor completes the distribution of the proceeds (UCC § 9-615(a)(3)). A secured creditor should request, either verbally or in writing, that any potential subordinate interest or lien holder making an authenticated demand provide reasonable proof of their asserted security interest or lien. Proof should consist of the security agreement entered into between the junior interest or lien holder and the debtor or some other documents evidencing the creation of a lien, such as a judgment from a court of competent jurisdiction. By obtaining proof, a secured creditor:
 - receives assurances of the validity of the interest; and
 - protects itself against a debtor that disputes the subordinate interest or the amount of the interest.
- While Article 9 does not require the subordinate interest to provide this reasonable assurance, a secured party need not make a distribution until it receives reasonable proof. However, a secured creditor is liable for any unpaid security interest if it does not make a distribution to a subordinate interest that properly makes an authenticated demand and provides reasonable proof of its interest.
- **Consigned goods.** The remaining proceeds are distributed to a secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for

proceeds before distribution of the proceeds is completed (UCC § 9-615(a)(4)).

DEFICIENCY CLAIMS, SURPLUS, AND APPLICATION OF PROCEEDS

If the sale of collateral is not sufficient to cover the entire cost of the debt, the secured creditor will want the right to pursue the debtor for the balance of the claim (an exception is a complete strict foreclosure where the entire claim is extinguished and no deficiency claim exists). Anticipating this, the UCC specifies how the proceeds of the sale are to be allocated and how the parties should address any deficiency or surplus. UCC Section 9-615(d) generally provides for the debtor to receive any surplus and to be liable for any deficiency.

The UCC also provides for special treatment to determine the amount of any deficiency or surplus when the secured creditor or a person related to the creditor purchases the collateral at its own foreclosure. In this situation, a foreclosing creditor may lack the incentive to maximize the proceeds of a disposition. UCC Section 9-615(f) provides that the deficiency must be calculated as if the disposition was made to an unrelated party (see Practice Note, [Mezzanine Loan Foreclosures: Mezzanine Lender as Purchaser of Collateral \(8-385-3969\)](#)).

A secured creditor's failure to follow all of the sale requirements in the UCC, including providing proper notice and making a commercially reasonable sale, affects a creditor's ability to recover a deficiency claim. A secured creditor that fails to comply with the requirements of Article 9 faces a rebuttable presumption that the amount of proceeds that should have been produced by the sale is equal to the secured obligation plus costs (UCC § 9-626(a)(3)), leaving the secured creditor without a deficiency claim. A secured creditor is wise to follow the provisions of Article 9 to prevent from having to spend time and money attempting to rebut the Section 9-626(a)(3) presumption.

SALE BY JUNIOR SECURED CREDITOR

A secured creditor with an interest that is subordinate to another interest in the collateral may foreclose on a piece of collateral without participation from the senior creditor. Article 9 does not require a secured creditor to make a distribution to a senior security interest. However, an Article 9 Sale only has effect if discharging interests junior to the foreclosing creditor so any sale of collateral would be subject to the senior creditor's security interest.

RECEIPT OF PROCEEDS BY JUNIOR CREDITOR

A junior secured party that receives a disposition of cash proceeds erroneously but in good faith and without knowledge of the violation of the senior party's rights is not obligated to return the funds or account to the senior party (UCC § 9-615(g)). Junior secured creditors should be comforted that cash distributions received from collateral sales conducted without knowledge of violations of a senior creditor's rights will not be disgorged.

COLLATERAL REPURCHASE BY SECURED CREDITOR

SECURED CREDITOR REPURCHASE THROUGH SALE

A secured creditor that wants to repurchase the collateral securing a loan transaction does not have the same flexibility in selling

collateral to itself as it does in a disposition to a third party. It instead must follow specific rules under Article 9. For example, a secured creditor may only purchase its own collateral through a private sale if the collateral is of the type that is customarily sold on a recognized market or subject to widely distributed price quotations. The secured creditor otherwise must conduct a public sale (UCC § 9-610(c)).

To hold a public sale, a secured creditor must:

- Advertise or give public notice of the sale.
- Provide the general public with access to the sale. For example, dealers-only sales are not generally considered public sales.
- Determine the price of the collateral after the public has had a meaningful opportunity for competitive bidding.

SECURED CREDITOR OR RELATED-PARTY REPURCHASE

When a secured creditor or a party related to the secured creditor purchases the collateral at a price that is significantly below the range of proceeds that would have been produced at a sale to a third party, the secured creditor must calculate its deficiency or surplus based on what a properly conducted sale to a third party would have produced (see Deficiency Claims, Surplus, and Application of Proceeds). This rule protects the debtor from excessive deficiency claims resulting from artificially low-priced sales. A secured creditor buying its own collateral or selling collateral to a related party must be careful to sell the collateral at a reasonable price, or it risks the ability to collect a deficiency.

The secured creditor should be able to demonstrate to a court:

- The price at which the collateral would sell to a third party.
- That the price paid by the secured creditor or related party for the collateral is not significantly below the price that a third party would have paid.

ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION

Section 9-620 of the UCC gives a secured creditor the option to accept its collateral in full or in partial satisfaction of its debt. This is commonly known as strict foreclosure. In a non-consumer goods transaction, the creditor must only obtain the debtor's consent if the creditor did not receive a timely notification of objection from another party having an interest in the collateral.

The debtor typically must consent through an authenticated record accepting the secured creditor's proposal. A secured creditor usually must receive an affirmative acceptance of its proposal. However, a debtor may be deemed to have accepted a secured creditor's offer if:

- After default, the creditor sent the debtor a proposal to accept the offer in satisfaction of the debt.
- The proposal was only conditioned on the creditor's receipt of all of its collateral in exchange for the debt relief.
- The debtor did not send an authenticated notice of objection to the creditor.

Under UCC Section 9-621(a), parties that are entitled to notification of a secured creditor's proposal to accept the collateral in full or partial satisfaction of its debt are any:

- Person from whom the secured creditor received authenticated notice of a claim of interest in the collateral (UCC § 9-621(a)(1)).
- Secured party or lienholder that has perfected by filing a financing statement within the ten days before the debtor consented to acceptance (UCC § 9-621(a)(2)).
- Secured party or lienholder that has perfected under UCC Section 9-311(a) (UCC § 9-621(a)(3)).

A secured creditor can generally ensure that it notices these three groups of parties by performing a UCC financing statement search after the debtor consents and then sending the proposal to any party that was perfected in the ten days earlier.

The secured party that seeks to accept collateral in partial satisfaction of the obligation it secures must send its proposal to any secondary obligor.

For more information on strict foreclosures, see Practice Note, Mezzanine Loan Foreclosures: Strict Foreclosure ([8-385-3969](#)).

ADVANTAGES AND DISADVANTAGES OF CONDUCTING ARTICLE 9 SALES

In deciding whether to pursue an Article 9 Sale of collateral, creditors must consider both the advantages and disadvantages of Article 9 Sales as opposed to seeking to enforce their security interests through a section 363 sale.

ADVANTAGES OF ARTICLE 9 SALES

The general advantages of an Article 9 sale relative to a section 363 sale are:

- **Faster process.** A conveyance of collateral under Article 9 may be accomplished in weeks, which is significantly less than the time necessary to conduct a section 363 sale (for a timeline of a typical section 363 sale, see Timeline of a Section 363 Sale).
- **Lower costs.** The costs of collateral repossession and sale are significantly less than the costs associated with a bankruptcy and section 363 sale.
- **Fewer constituencies.** Only the secured creditors generally participate in the process, and it is possible to do a private sale under Article 9. In contrast, a bankruptcy sale typically requires an auction process, with the involvement of the bankruptcy court, the creditors' committee, and a US Trustee. These additional parties can cause numerous difficulties to arise during the course of a bankruptcy case and add to the costs.

For more information on the disadvantages of section 363 sales, see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Disadvantages of Section 363 Sales ([1-385-0115](#)).

DISADVANTAGES OF ARTICLE 9 SALES

The general disadvantages of an Article 9 sale relative to a section 363 sale are:

- **Inability to sell entire business.** It is difficult and often impossible to sell an entire business using Article 9, particularly when the sale involves coordinating a conveyance of additional assets not subject to the secured creditor's security interests. In bankruptcy, a debtor can sell all or substantially of its assets under a plan of

reorganization (see Practice Note, Buying Assets Under a Chapter 11 Plan ([2-548-9145](#))) or to any good faith purchaser in a section 363 sale.

- **No protection from other creditors.** The company may be subject to additional collection efforts from other creditors, eviction proceedings, and foreclosure actions, which may interfere with the creditor's ability to conduct its Article 9 sale. By contrast, in bankruptcy, the automatic stay is triggered immediately on the filing of the bankruptcy petition and stops almost all acts and proceedings against the company, including virtually all creditor collection activities (see Practice Note, Automatic Stay: Lenders' Perspective ([9-380-7953](#))).

- **Liens on sold assets and fraudulent transfer risk.** It is possible that liens and security interests remain on assets sold under Article 9. The buyer also faces a potential risk that the sale may later be attacked as a fraudulent transfer (see Practice Note, Fraudulent Conveyances in Bankruptcy: Overview ([4-382-1268](#))). However, in bankruptcy, if certain conditions are satisfied, a bankruptcy court can deliver the assets free and clear of liens and most post-sale claims, including successor liability and fraudulent conveyances.

For more information on the advantages of section 363 sales, see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Key Advantages of Section 363 Sales ([1-385-0115](#)).

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