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### SECURED TRANSACTIONS

# Enforcing Security Interests Under Article 9 of the UCC

Current market conditions have precipitated borrower defaults under many secured credit facilities, a circumstance that is obliging creditors to revitalize workout and enforcement skills that atrophied in the flush economy prevailing before the crash of 2008. Article 9 of the Uniform Commercial Code provides a suite of remedies in its Part 6.<sup>1</sup> Today, we dust off and survey the fundamental remedies with respect to non-consumer collateral that Part 6 affords to secured parties where the collateral is pledged to secure a debt or other obligation<sup>2</sup> and enforcement is not stayed under bankruptcy<sup>3</sup> or other non-UCC law.

#### Background

The predicate rules of Part 6 are found in Sections 9-601 and 9-602. Section 9-601 states (inter alia) that, after default, a secured party: has the rights provided (or incorporated by reference) in Part 6 and, except as limited by Section 9-602, those provided by agreement of the parties; may reduce a claim to judgment, foreclose, or otherwise enforce the claim or security interest<sup>4</sup> by any available judicial procedure; may proceed either as to the documents or as to the goods they cover, if the collateral is documents; and has the rights provided in Section 9-207 regarding collateral in its possession or control under



By  
**Alan M.  
Christenfeld**



And  
**Barbara M.  
Goodstein**

any of Sections 9-104 through 9-107.<sup>5</sup> These rights are cumulative and may be exercised simultaneously. Conversely, Section 9-601 states that, after default, debtors<sup>6</sup> generally have the rights provided (or incorporated by reference) in Part 6 and those provided by agreement of the parties. Structurally, therefore, the creditor's rights are circumscribed by rights



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expressly granted to the debtor by contract or Part 6 (including by reference) and by duties expressly imposed upon the creditor by contract or Part 6 (including by reference, such as the duties imposed by Section 9-207 regarding collateral in a creditor's possession or control). Section 9-602, moreover, prohibits the waiver or variance of most of these debtor

rights and creditor duties, either pre- or post-default, although Section 9-603(a) generally permits the parties to determine by agreement the standards for measuring the fulfillment of such rights and duties "if the standards are not manifestly unreasonable."

Although Part 6 is entitled "Default," Article 9 does not define when a default occurs. Rather, that is left to the agreement of the parties.<sup>7</sup> Moreover, although the titles of various sections and subsections of Part 6 include the word "default" and thereby imply that the creditor's rights granted therein can be exercised only after default, creditors in fact can invoke several remedies under Article 9 in the absence of a default if the parties have so agreed.

#### Collection of Liquid Assets

The first of these remedies is set forth in Section 9-607, which relates to collecting collateral consisting of accounts, other rights to payment and deposit accounts.<sup>8</sup> Subsection (a) of Section 9-607 empowers a secured party, either after default or (if the parties have so agreed) pre-default, to notify account debtors<sup>9</sup> on the collateral to make payment or otherwise render performance to the creditor; take any proceeds to which the creditor is entitled under Section 9-315; enforce the debtor's rights with respect to the account debtor's obligations to make payment or otherwise render performance to the debtor, and with respect to any property that secures those obligations; and apply, or direct the application of, the balance of such deposit accounts to the obligations secured by them. Subsection (c) of Section 9-607 requires that a creditor's collection and enforcement rights under Subsection (a) be exercised in a commercially reasonable manner.<sup>10</sup> Unsurprisingly, Subsection

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ALAN M. CHRISTENFELD is senior counsel at Clifford Chance US. BARBARA M. GOODSTEIN is a partner at Dewey & LeBoeuf. THOMAS K. SCHULTE, a partner at Clifford Chance, co-authored this article, and LEWIS KAMINSKI, a summer law clerk at Clifford Chance, assisted in its preparation.

(d) permits creditors to deduct from the collections made pursuant to subsection (c) their reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses.

#### Assembly of Collateral

Another remedy that Part 6 sanctions before as well as after default is set forth in Section 9-609, which effectively is applicable to tangible collateral that is not in the secured party's possession. Subsection (c) of Section 9-609 authorizes a creditor, either pre-default (if the parties have so agreed) or after default, to require the debtor to assemble the collateral and make it available to the creditor at a place designated by the creditor that is reasonably convenient to both parties. The comments give as an example the debtor's agreement to make available to a secured party, pre-default, any instruments or negotiable documents the debtor receives on account of collateral. It is also customary for debtors to agree to turn over pre-default proceeds of or substitutes for collateral that the creditor perfected by possession, such as certificated securities. Nonetheless, the collateral subject to Subsection (c) is not limited in kind; theoretically, at least, it could include inventory and equipment, whose pre-default removal from service for assembly offsite could bring the debtor's business to a halt, thereby potentially precipitating a default that might otherwise not occur and for which the creditor might incur liability. In the authors' experience, well-drafted security agreements limit pre-default assembly rights to collateral that in practice is not necessary for a debtor's daily operations. If a creditor has more expansive pre-default assembly rights, it should exercise them cautiously so as to avoid creating issues imprudently.

#### Repossession of Collateral

The other provisions of Section 9-609 are exercisable only post-default. Subsection (a) of Section 9-609 authorizes secured parties, after default: to take possession of the collateral and remove it from the debtor's location; and (2) without removal, to render equipment unusable and dispose of collateral on the debtor's premises under Section 9-610. The right to disable collateral in place can be particularly useful where its size, weight or location make removing it for storage offsite pending disposition uneconomic or impractical. Subsection (b) permits creditors to proceed under Subsection (a) via judicial process. They may also proceed non-judicially, if they act without "breach of the peace." The UCC does

not define or explain what conduct constitutes "breach of the peace," and Section 9-603(b) bars the parties from establishing contractual standards measuring the fulfillment of the creditor's duty to refrain from breaching the peace. The issue is thus left for determination by caselaw, which varies somewhat from state to state and should thus be reviewed carefully before action is taken. Comment 3 to Section 9-609 nevertheless notes that courts should hold secured parties responsible for the repossession or disablement actions of others (including independent contractors) taken on their behalf. It also makes clear that creditors who repossess without judicial process violate Section 9-609 if they use the assistance of law-enforcement officers. Accordingly, creditors who cannot take non-judicial repossession or disablement action successfully without the aid of police officers and without breaching the peace ought to proceed by judicial process rather than by using self-help.

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Although many credit facilities that are in or approaching default are restructured successfully, creditors should take inventory of the remedies that may be available to them should workout negotiations fall short.

#### Disposition of Collateral

The disposition of collateral after default is generally addressed in Section 9-610, Subsection (a) of which authorizes secured parties, 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. This standard may require that some preparation or improvement be performed if, under the circumstances, selling the collateral without such processing would be commercially unreasonable.<sup>11</sup> Subsection (b) permits a collateral disposition to be by public or private proceedings, by one or more contracts, as a unit or in parcels, at any time and place and on any terms, but it expressly requires that every aspect of the disposition, including the method, manner, time, place, and other terms, be commercially reasonable. Thus, for example, whether collateral may be disposed of privately or must be subject to a public disposition might depend on whether a private sale of such collateral would be commercially reasonable.

The UCC does not define "commercially reasonable," again leaving the issue to caselaw development, but Section 9-627 gives guidance for courts in three respects. First, it provides that the fact that a greater amount could have been obtained at a different time or by a disposition method different from that selected by the creditor is not of itself sufficient to preclude the creditor from establishing that its conduct was commercially reasonable. Second, it deems a disposition to be commercially reasonable if it is made in the usual manner on any recognized market, at the price current in any recognized market at the time of the disposition, or otherwise in conformity with reasonable commercial practices among dealers in the type of property being disposed. Third, it renders any collection, enforcement, disposition, or acceptance automatically commercially reasonable if it has been approved in a judicial proceeding or by a bona fide creditors' committee, a representative of creditors or an assignee for the benefit of creditors. Moreover, secured parties, channeling Section 9-603(a), routinely include in security agreements purported standards as to what constitutes a commercially reasonable disposition. Nevertheless, the relative lack of clarity regarding what does and does not constitute a commercially reasonable sale is the largest source of potential liability to secured creditors attempting to dispose of collateral.<sup>12</sup> Accordingly, notwithstanding the disposition standards specified in a security agreement, careful consideration to the particular facts should be given before the method, manner, time, place, and other terms of disposition of particular collateral are determined.

A secured party that intends to dispose of collateral under Section 9-610 must give notice of the proposed disposition, unless the collateral is perishable, threatens to decline speedily in value or is of a type customarily sold on a recognized market.<sup>13</sup> Sections 9-611 through 9-614 specify various requirements regarding the form and contents of such notice, the persons to whom it must be sent, the timing of the notice and other related matters. Creditors seeking to effect a disposition that requires notice should, of course, take appropriate steps to comply with these notice requirements.

Subsection (a) of Section 9-615 specifies the order in which the cash proceeds of the disposition are to be applied to the obligation secured by the collateral, reasonable expenses of preparing the collateral for disposition and

disposing of it, the secured party's reasonable legal fees and expenses (to the extent provided for in the security agreement and not prohibited by law), other debts secured by junior liens on the collateral, and other claims. Notably, Subsection (a) is not listed in Section 9-602, so debtors are permitted to agree to a different order of application of proceeds. Pursuant to Section 9-615(c), non-cash proceeds need not be applied, unless not doing so would be commercially unreasonable. Any application of non-cash proceeds must be done in a commercially reasonable manner. Subsection (d) of Section 9-615 generally requires secured parties to account for and pay to the debtor any surplus, and holds the debtor liable for any deficiency that exists after proceeds are applied in accordance with Subsections (a) and (c). Although the debtor's right to be paid such surplus cannot be waived or varied, creditors are free to limit or eliminate their recourse to the debtor for any deficiency.

Subsection (d) of Section 9-610 affords transferees of dispositions the benefit of warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany voluntary transfers of property of the kind being disposed. Those warranties can, however, be disclaimed pursuant to Subsection (e). Especially in private dispositions, the extent of these and other warranties given or disclaimed is often heavily negotiated by the disposing creditor (who wants to sell "if is, as is, where is" and to disclaim any and all warranties) and the transferee (who desires a comprehensive set of representations covering the collateral, the propriety of the creditor's lien on and disposition of the collateral, and various other matters). If the transferee has the leverage to insist upon robust warranties, a creditor who has a cooperative debtor may prefer to avoid foreclosing on and disposing of the collateral itself and, instead, have the debtor agree to make the transfer and representations directly to the transferee.

The UCC does not define "public disposition," but the comments to Section 9-610 describe a process that requires public access and results in a price determined after the public has had a "meaningful opportunity" for competitive bidding.<sup>14</sup> The minimum requirement for such meaningful opportunity is advertising or public notice of the sale. Most courts have held that restricting access to a sale results in a private sale, notwithstanding the presence

of competitive bidding.<sup>15</sup> Nevertheless, private placements of securities qualify as public sales even though bidding access is restricted by reason of the securities laws.<sup>16</sup> The UCC similarly does not define "private disposition," though logically a private disposition is any disposition that is not a public disposition.<sup>17</sup>

The distinction between public or private dispositions is significant for two reasons. First, Section 9-610(c) permits secured creditors to purchase collateral being sold at public dispositions but limits what they may purchase at private dispositions to collateral that is of a kind customarily sold on a recognized market or the subject of widely-distributed standard price quotations. A "recognized market" is one in which the items sold are fungible and prices are not individually negotiated. Moreover, even if the items sold on a market are subject to widely-disseminated price guides or are sold through dealer auctions, that market is not a "recognized market" if its prices are individually negotiated or the items sold on it are not fungible.<sup>18</sup> Second, the notice of the timing of the collateral disposition to which debtors are entitled under Section 9-613(1)(E) differs; for public sales, the notice must state the "time and place" of the public sale whereas for any other disposition the notice must state the "time after which" any such other disposition is to be made.<sup>19</sup> Notably, however, the distinction does not affect the calculation of a surplus to be paid to the debtor or a deficiency still owing to the creditor that Section 9-615(f) requires whenever the secured party, someone related to the secured party, or a secondary obligor acquires the collateral at a foreclosure disposition. Whether such transaction is public or private, it is vulnerable to claims that the price paid was too low. Section 9-615(f) permits a court to recalculate the surplus or deficiency based upon the proceeds that would have been received in a disposition complying with Part 6 to someone other than the secured party, a related party, or a secondary obligor, if it finds that the proceeds received were "significantly below" the range of proceeds that a disposition complying with Part 6 to someone other than the secured party, a related party, or a secondary obligor would have brought.

A disposition of collateral after default pursuant to Section 9-610 transfers to the transferee all of the debtor's rights in the collateral, discharges the security interest under which the disposition is made, and

discharges any subordinate security interest or other subordinate lien on the collateral.<sup>20</sup>

### Strict Foreclosure

Another option available to secured creditors after a default is strict foreclosure, a venerable procedure long pre-dating the UCC via which the secured party acquires collateral in full or partial satisfaction of the secured obligation without the need for a disposition under Section 9-610.<sup>21</sup> The rules regarding full or partial strict foreclosure are set forth in Sections 9-620 through 9-622. Although those sections never use the phrase "strict foreclosure," referring instead to the secured party's "acceptance of collateral" in full or partial satisfaction of the secured obligation, the official comments use the words "strict foreclosure" liberally and make clear that it is what is under discussion.

The effectiveness of any strict foreclosure, whether full or partial, is subject to several conditions, including the debtor's consent to the creditor's acceptance of the collateral, the creditor's giving to certain interested claimants specified in Section 9-621 notice of its proposal<sup>22</sup> to accept collateral, and the creditor's not receiving from any such claimant an authenticated objection to the proposal within the time specified in Section 9-620(d). The most important distinction between full and partial strict foreclosure is the nature of the consent required from the debtor. For full strict foreclosure, the debtor's consent can be expressed, if given in a record authenticated by the debtor after default; or implied, if post-default the creditor sends to the debtor a proposal to accept collateral in full satisfaction of the secured obligation, the proposal is unconditional or subject only to a condition that collateral not in the creditor's possession be preserved or maintained, and the creditor does not receive an objection authenticated by the debtor within 20 days after the proposal is sent.<sup>23</sup> For partial strict foreclosure, however, the debtor's consent cannot be implied; it must be provided expressly in a record authenticated by the debtor after default.<sup>24</sup>

A strict foreclosure discharges the debtor's obligation to the extent consented to by the debtor; transfers to the creditor all of the debtor's rights in the collateral; and discharges the security interest that is the subject of the debtor's consent and any other subordinate security interest in or lien on, or other subordinate interest in, the collateral.<sup>25</sup>

## Execution Sale

In an execution (or “judicial”) sale, a creditor sues the debtor to collect the secured obligation and, after it has obtained judgment, seeks to liquidate the collateral under a writ of execution. Execution sales are expressly acknowledged by Section 9-601, which both authorizes a secured party after default to reduce a claim to judgment, foreclose, or otherwise enforce the claim or security interest “by any available judicial procedure” and states that a “sale pursuant to an execution is a foreclosure of the security interest...by judicial procedure within the meaning of this section.” Execution sales are thus appropriate methods of foreclosure contemplated by Part 6. Nevertheless, they are governed by law other than Article 9.<sup>26</sup>

Execution sales are often considered more expensive and time-consuming than non-judicial remedies. They may, however, have certain advantages. Since court and law enforcement officers oversee the process of judgment on a debt and execution on the judgment, for example, creditors eliminate the risk of conducting a repossession or disposition under Part 6 improperly. In particular, dispositions pursuant to execution sales are automatically deemed commercially reasonable. Moreover, unlike with most private dispositions, secured creditors may purchase the collateral sold in execution sales.<sup>27</sup> For certain types of collateral, therefore, judicial foreclosure may be an attractive strategic option. It may be the only option, indeed, if an uncooperative debtor refuses to assemble collateral and prevents the secured party from repossessing it without breaching the peace.

## Redemption

Section 9-623 affords to a debtor, any secondary obligor, or any other secured party or lienholder a right to redeem collateral as long as the secured party has not collected, disposed or contracted to dispose of, or accepted the collateral pursuant to Sections 9-607, 9-610 or 9-622. A redeeming party must tender fulfillment of all obligations secured by the collateral and the creditor’s reasonable expenses and attorney’s fees described in Section 9-615(a). Suffice to say this does not occur nearly as often as creditors wish it would.

## Conclusion

Although many credit facilities that are in or approaching default are restructured successfully, creditors should take inventory of the remedies that may be available to them should workout negotiations fall short. Accordingly, secured creditors ought to reacquaint themselves with the various rights and remedies that Article 9 affords to them with respect to their collateral.



1. Part 6 contains two subparts: Subpart 1 (U.C.C. §§9-601 - 9-624) establishes certain rights and duties of the parties upon default, and Subpart 2 (U.C.C. §§9-625 - 9-628) deals with the consequences of failure to comply with the requirements of Subpart 1. We focus on Subpart 1. For discussions of Subpart 2, see D.J. Rapson, *Default & Enforcement of Security Interests* under Revised Article 9, 74 CHI.-KENT L. REV. 893 (1999); and S. Stern, *Default: Enforcement and Remedies*, in *STRUCTURING AND DRAFTING COMMERCIAL LOAN AGREEMENTS* (A.S. Pratt & Sons 2005).

2. Article 9 treats as secured transactions true sales of accounts, chattel paper, payment intangibles and promissory notes, as well as most consignments, and treats the buyers or consignors in such transactions as secured parties. Although denominated “secured parties,” these buyers and consignors own the entire interest in the property sold or consigned and, thus, generally are permitted by Part 6 to enforce their rights against such property without having to comply with the duties imposed on secured parties toward debtors. Discussion of the remedies, rights and duties of these buyers and consignors is beyond the scope of this article, which is concerned exclusively with Article 9 remedies against non-consumer collateral that secures a debt or other obligation. Also, we assume that all security interests are duly created and perfected, since the failure to do either can impair the exercise of the remedies discussed herein in ways that are beyond this article’s scope. Creditors are, of course, advised to verify the perfected status of their liens routinely, especially as their debtors’ financial condition worsens. Finally, since this column surveys the basic remedies under Part 6, we omit discussion of the intercreditor issues that Part 6 addresses when multiple creditors claim security interests in or liens on the same collateral.

3. See 11 U.S.C. §362. Discussion of the effects of bankruptcy laws on a creditor’s ability to exercise remedies and retain the proceeds resulting therefrom is beyond the scope of this article.

4. Part 6 also deals with agricultural liens, but for brevity we limit our discussion to remedies in respect of security interests.

5. U.C.C. §§9-104 through 9-107 deal with control of deposit accounts, electronic chattel paper, investment property and letter-of-credit rights.

6. Part 6 also deals with creditors’ rights against and duties to, and the rights of, secondary obligors of secured debts, but for clarity we limit our discussion to the primary debtors.

7. U.C.C. §9-601, Official Cmt. 3.

8. The comments to U.C.C. §9-607 note both that (a) collateral consisting of rights to payment is not only a typical debtor’s most liquid asset but, in contrast to tangible goods, is also property that may be collected without interrupting its business; and (b) it is not unusual for debtors to agree that secured parties may collect and enforce rights against account debtors pre-default. See U.C.C. §9-607 Official Cmts. 2 and 4. Indeed, the lender’s pre-default daily collection and application of the proceeds of the borrower’s receivables is an essential “cash dominion” element of asset-based loan facilities.

9. “Account debtor” is defined in U.C.C. §9-102(a). For brevity in this paragraph, we include within the term any person who is secondarily obligated on the account.

10. Official Cmt. 9 to U.C.C. §9-607 specifically highlights settling and compromising claims against account debtors when discussing the creditor’s commercial reasonableness duty.

11. U.C.C. §9-610, Official Cmt. 4.

12. See, generally, S. Stern, *supra* note 1. Secured creditors may be liable to borrowers for conversion in connection with improper collateral dispositions.

13. U.C.C. §§9-611(b) and (d).

14. U.C.C. §9-610, Official Cmt. 7.

15. See, e.g., *Bank of Am. v. Lallana*, 19 Cal. 4th 203, 212 (1998) (“a public sale is open to the general public or a major segment thereof, and thus contemplates advertising of the notice, time, and place of the sale”); *Beard v. Ford Motor Credit Co.*, 41 Ark.App. 174 (1993) (car auction open only to car dealers is not a public sale). But see *Continental Ill. Nat. Bank & Trust Co. v. Hyder*, 150 Ill.App.3d 911, 914 (1986) (“By ‘public’ sale is meant a sale by auction. A ‘private’ sale may be effected by solicitation and negotiation conducted either directly or through a broker.”).

16. U.C.C. §9-610, Official Cmt. 8.

17. *Lallana*, 19 Cal. 4th at 213 (“a private sale is best described as any transaction that is not a public sale”).

18. See U.C.C. §9-610, Official Cmt. 9, which identifies the New York Stock Exchange as an example of a “recognized market.”

19. Of course, the other notice requirements of U.C.C. §§9-611 through 9-614 must be satisfied whether the disposition is public or private.

20. U.C.C. §9-617(a).

21. Strict foreclosure is expressly encouraged in the UCC and is believed often to produce better results than a disposition of collateral. U.C.C. §9-620, Official Cmt. 2.

22. “Proposal” means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to sections 9-620, 9-621 and 9-622.” U.C.C. §9-102(a). A proposal need not take any particular form, provided it specifies the terms under which the creditor is willing to accept collateral in satisfaction. Nevertheless, it should specify the amount (or a means of calculating the amount) of the debt to be satisfied, the conditions (if any) on which it may be revoked, and any other conditions. U.C.C. §9-620, Official Cmt. 4.

23. U.C.C. §9-620(c)(2).

24. U.C.C. §9-620(c)(1).

25. U.C.C. §9-622(a).

26. U.C.C. §9-601, Official Cmt. 8.

27. U.C.C. §9-601(f).