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A Commercially Reasonable Sale under Article 9: Commercial, Reasonable, and Fair to All Involved

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A COMMERCIALY REASONABLE SALE UNDER ARTICLE 9: COMMERCIAL, REASONABLE, AND FAIR TO ALL INVOLVED

*Maury B. Poscover**

I. HYPOTHETICAL

Debtor, a road contractor, falls behind in payments to Equipment Financier, a secured creditor. Equipment Financier exhorts Debtor to bring payments current or Equipment Financier will have no choice but to foreclose on the collateral—road construction equipment—and sell it to reduce the debt. After much cajoling Equipment Financier and Debtor enter into an extension agreement providing for a small payment and restructuring of the debt. Six months later Debtor falls behind again, resulting in more exhortations and, finally, a demand letter that the debt be brought current or Equipment Financier will take action. Debtor seeks additional capital or, alternatively, a buyer for the equipment. The equipment is not properly maintained because Debtor's cash flow is poor. At the eleventh hour, shortly before Equipment Financier files a replevin action against Debtor, Debtor voluntarily surrenders the collateral to Equipment Financier.

To prepare the equipment for sale, Equipment Financier cleans the equipment and applies a little paint here and there. To determine a "good" price, Equipment Financier contacts dealers in road construction equipment. A "good" price may not be the highest possible price but is reasonable under the circumstances and clearly exceeds a firesale price. To determine whether the equipment can best be sold via a private sale, Equipment Financier calls dealers and other road contractors to elicit offers to purchase the equipment. Equipment Financier also encourages Debtor and any guarantors to seek buyers. If a "good" price is offered, Equipment Financier gives notice of a

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private sale to be held on or after a certain date and then sells the equipment.

If a "good" price cannot be obtained by agreement in advance, Equipment Financier publishes notice in several newspapers of a public sale to be held on a certain date at the facilities of a reputable dealer of the equipment. Equipment Financier notifies everyone who will listen of the sale. Equipment Financier continues to encourage Debtor and any guarantors to elicit active bidding. Although some bottom fishers show up for the sale, a number of road contractors and dealers actively bid for each piece of equipment. The proceeds of the sale cover the expenses of the sale and almost satisfy the debt.

II. THE UCC'S FRAMEWORK

Although the hypothetical does not describe all sales under section 9-504¹ of the Uniform Commercial Code (UCC), it reflects a fairly typical situation. The language of sections 9-504(3)² and 9-507(2),³ requiring that the sale be conducted in a commercially reasonable manner, establishes a framework which, although not perfect, is conducive to protecting the interests of the affected parties and to obtaining a relatively fair price for the collateral.

The procedures dictated by the UCC and refined by the courts encourage the debtor to keep payments to the secured lender current. The secured lender's primary concern is maintaining a stream of payments. If the debtor falls behind in payments, at least one extension or restructuring is inevitable. Although no rule requires such an extension or restructuring, in practice, one usually occurs. Given the lender's desire to be paid and the economic reality that the primary source of payment is the debtor, the lender typically agrees to terms and conditions for repayment which attempt to enhance the likelihood of the debtor making continued payments.

If the debtor is unable to make the necessary payments and the secured lender repossesses the collateral, the lender is in a much better position than the debtor to do what is necessary to sell the collateral at the highest possible price under the circumstances. With some help, the lender ascertains the best vehicle for publicizing the private or public sale of the equipment. While the secured lender may not be familiar with the debtor's particular industry, it has the financial

1. U.C.C. § 9-504 (1990).

2. See *infra* part III for the general language of § 9-504(3).

3. U.C.C. § 9-507(2).

wherewithal, the knowledge, and the access to consult with the debtor, any guarantors, and others in the industry. If appropriate, the secured lender has the cash to clean, repair, or otherwise prepare the collateral for sale. The secured lender also has the leverage to keep the debtor and any guarantors involved in the disposition process.

The secured lender's objective is to obtain a price that is at least equal to the amount owed the secured lender including the costs of sale. The secured lender recognizes that to recover the debt from the proceeds of a collateral sale is easier than to pursue the debtor or any guarantor.

When the secured creditor is not being paid, it is likely there are unpaid unsecured creditors as well. Unsecured creditors are minimally involved in most collateral sales. In a public sale they may have notice of what is occurring via the publication. Typically they are in contact with the debtor and have some knowledge of the situation. The more thorough the unsecured creditor's credit inquiries, the more knowledgeable that creditor is of the debtor's financial condition. The debtor should keep major unsecured creditors advised as to the debtor's economic condition and prospects. The secured lender frequently encourages such flow of information knowing that uneasy unsecured creditors can be impediments to, first, the initial restructuring of debt, and later, if necessary, an orderly sale. If an unsecured creditor believes it is not being treated fairly, the creditor may initiate a bankruptcy to protect its interest.⁴ On the other hand, informed unsecured creditors may support the lender's efforts and solicit purchasers and others in the industry for the collateral or the whole business.

III. SECTION 9-504(3)

Without restating the UCC provision in its entirety, section 9-504(3) provides that

- (1) disposition of the collateral may be by public or private sale;
- (2) the sale may be as a unit or in parcels;
- (3) the sale may occur at any time and place;
- (4) the sale may occur under any terms, provided that every aspect of the disposition, including the method, manner, time, place, and terms are commercially reasonable;
- (5) unless the collateral is perishable, or its value declines speedily, or is of a type customarily sold on a recognized

4. 11 U.S.C. § 303 (1988).

market, reasonable notification to the debtor is required of the time and place of the sale;

(6) the debtor may, after default, sign a statement renouncing or modifying his or her right to notification; and

(7) the secured party may

(a) buy at a public sale, or

(b) buy at a private sale if the collateral is of a type customarily sold in a recognized market or the subject of widely distributed standard price quotations such as publicly traded stock.⁵

A. *Commercially Reasonable*

All aspects of an Article 9 sale must be commercially reasonable but substantial flexibility exists within that framework. As section 9-504(3) indicates, secured lenders have a great deal of flexibility as to how they dispose of collateral. The overriding and seemingly simple requirement is that the sale be conducted in a commercially reasonable manner.

The UCC does not precisely define "commercially reasonable." Section 9-507(2),⁶ however, makes it clear that the fact that a better price could have been obtained by a sale at a different time or by a different method is insufficient to establish that the sale was not made in a commercially reasonable manner.⁷ In complying with section 9-507(2), courts focus on the procedures followed in the sale of collateral rather than the price received at the sale.⁸ The keys are whether the secured party (1) sells the collateral in the usual manner in a recognized market;⁹ (2) sells at the current price in such market; and (3)

5. U.C.C. § 9-504(3).

6. *Id.* § 9-507(2).

7. *Id.*

8. *See, e.g.,* *Personal Jet, Inc. v. Callihan*, 624 F.2d 562, 568-69 (5th Cir. 1980) (holding that "sale is commercially reasonable where it is done in public, during business hours, upon adequate notice within a reasonable time of repossession, and under conditions reasonably calculated to bring a fair market price") (citing *General Elec. Corp. v. Bo-Mar Constr. Co.*, 72 Cal. App. 3d 887, 140 Cal. Rptr. 417 (1977)); *In re Zsa Zsa Ltd.*, 352 F. Supp. 665, 671 (S.D.N.Y. 1972) (upholding public foreclosure sale for 10% of goods' retail value); *Sierra Fin. Corp. v. Brooks-Farrer Co.*, 15 Cal. App. 3d 698, 704, 93 Cal. Rptr. 422, 426 (1971) (upholding public foreclosure sale where \$500 was received for collateral valued at \$27,616 because (1) no fraud by creditors was shown; (2) interested parties were notified of sale; (3) debtor's president was present at sale; and (4) no pre-sale inspection of collateral was available because parties challenging sale had refused to release collateral).

9. A recognized market is one where there is no haggling over price, no competitive bidding, and where marketing efforts will not affect the price received at the sale. *Kitmitto v. First Pa. Bank, N.A.*, 518 F. Supp. 297, 302-03 (E.D. Pa. 1981).

conforms with commercially reasonable practices among dealers in the type of property sold.¹⁰ Courts will give closer scrutiny to the sale and require an explanation from the secured creditor if a very low price, relative to the collateral's appraised value, is received.¹¹

Secured creditors have a "reasonable" time period in which to dispose of repossessed collateral. What is a reasonable time period will vary for different types of collateral. For example, compared to an airplane, a grocery store's inventory will be treated differently because of its perishability.¹²

Courts have indicated that the commercially reasonable standard of section 9-504(3) may impose a duty on the secured creditor to process or to repair collateral prior to the sale.¹³ Such a duty stems from the secured creditor's obligation to obtain a fair price for the collateral. The circumstances in *Credit Alliance Corp. v. Timmco Equipment, Inc.*¹⁴ illustrate a commercially unreasonable repossession sale due to the secured creditor's failure to repair the collateral. In *Credit Alliance* the secured creditor sold a fire-damaged loader without making any effort to repair it.¹⁵ The secured creditor was the successful bidder at the sale, and later resold the loader for three times the amount it had paid at the sale.¹⁶ Not surprisingly, the court held that the secured creditor's sale of the collateral was commercially unreasonable because the sale price was unfair and could have been raised by repairing the collateral prior to the sale.¹⁷

The cases uniformly hold that the burden of proof is on the secured creditor to establish that the sale was conducted in a commercially reasonable manner, at least where the secured creditor is seek-

10. See *ITT Indus. Credit Co. v. Rector*, [1981-87 Transfer Binder] Secured Transactions Guide (CCH) ¶ 53,723 (Tenn. Ct. App. 1982); *Mallicoat v. Volunteer Fin. & Loan Corp.*, 415 S.W.2d 347 (Tenn. Ct. App. 1966).

11. See *Bank Josephine v. Conn*, 599 S.W.2d 773, 775 (Ky. Ct. App. 1980) (holding that wide disparity between price received at repossession sale and resale price *after* sale raised presumption that sale was not commercially reasonable).

12. *Ruchaber v. Short*, 630 P.2d 915, 917 (Or. Ct. App. 1981) (holding that where collateral is perishable, secured creditor may be obligated to dispose of collateral promptly).

13. See, e.g., *Liberty Nat'l Bank & Trust Co. v. Acme Tool Div. of the Rucker Co.*, 540 F.2d 1375, 1381 (10th Cir. 1976) (affirming that failure to clean and paint drilling rig did not conform to "reasonable commercial practices among oil field equipment dealers"); *Weiss v. Northwest Acceptance Corp.*, 546 P.2d 1065, 1072 (Or. 1976) (holding that commercially reasonable preparation of collateral for sale might include washing and cleaning).

14. 507 So. 2d 657 (Fla. Dist. Ct. App. 1987).

15. *Id.* at 659-60.

16. *Id.* at 660.

17. *Id.*

ing a deficiency judgment following the sale of the collateral.¹⁸ *Daniell v. Citizens Bank*¹⁹ provides an example of what does *not* satisfy a creditor's burden of proof. The court in *Daniell* determined that the secured creditor failed to satisfy the burden where it merely submitted an affidavit of a bank officer.²⁰ Without indicating when, where, or under what conditions the sale took place, the affidavit stated only that the collateral was sold in a commercially reasonable manner because the bank accepted the highest offer.²¹

B. Notice

Notice of a public or private sale must be given unless the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market.²² The UCC does not establish any precise time for notice so long as it is reasonable. Courts determine what is reasonable on a case-by-case basis.²³ In a private sale, for example, if the debtor agrees to one day's notice, then the sale would be commercially reasonable.²⁴ If there is a guarantor, the guarantor must also agree.

The nature of the notice that lenders must give is set forth in section 9-504(3).²⁵ Lenders may include additional information in the notice and in the publication of a sale, provided, again, that the notice meets commercially reasonable standards. Because lenders desire to optimize the price, they solicit input from the debtor, dealers in the goods, and other contacts as to the best vehicle for publicizing the sale. Lenders frequently publish in a trade journal to stimulate inter-

18. See *In re Hamby*, 19 B.R. 776, 783 (Bankr. N.D. Ala. 1982); *American Business Credit Corp. v. Kirby*, 122 Cal. App. 3d 217, 220, 175 Cal. Rptr. 720, 722-23 (1981); *Richard v. Fulton Nat'l Bank*, 281 S.E.2d 338, 340 (Ga. 1981); *Federal Deposit Ins. Corp. v. Herald Square Fabrics Corp.*, 439 N.Y.S.2d 944, 955 (1981); *Hall v. Crocker Equip. Leasing, Inc.*, 737 S.W.2d 1, 3 (Tex. Ct. App. 1987).

19. 754 S.W.2d 407 (Tex. Ct. App. 1988).

20. *Id.* at 410.

21. *Id.*

22. U.C.C. § 9-504(3) (1990).

23. See *In re Concord Coal Corp.*, 81 B.R. 863, 869-70 (S.D. W. Va. 1988) (holding three days sufficient); *Buran Equip. Co. v. H & C Inv. Co.*, 142 Cal. App. 3d 338, 341, 190 Cal. Rptr. 878, 881 (1983) (holding that five days' notice adequate in light of five-day standard set forth in California's version of UCC § 9-504(3)); *First Nat'l Bank v. Rose*, 249 N.W.2d 723, 726 (Neb. 1977) (stating that three days' notice not necessarily sufficient); *Sumner v. Extebank*, 34 U.C.C. Rep. Serv. (Callaghan) 375, 375 (N.Y. App. Div. 1982) (approving four days' notice).

24. *In re Nellis*, 22 U.C.C. Rep. Serv. (Callaghan) 1318, 1320-21 (Bankr. E.D. Pa. 1977) (stating that same-day formal notice with knowledge of intent to foreclose was reasonable).

25. U.C.C. § 9-504(3).

est in the collateral. For certain types of equipment, such as airplanes, trucks, or specialized manufacturing equipment, publication in trade publications is critical to obtaining active bidders for the collateral.

A recent case provides some guidance as to commercially reasonable notice to co-makers and guarantors under Article 9. In *Commerce Bank of St. Louis, N.A. v. Dooling*,²⁶ the Missouri Court of Appeals found that mailing a notice to the address specified in the loan document did not necessarily satisfy the requirement of "reasonable notification" where the lender knew prior to the sale that the co-maker had not received actual notice.²⁷ Pointing to the UCC's policy of reasonableness and good faith, the court stated that the lender's notices to the co-maker were not reasonable because the lender knew she had moved and had talked to her at her job.²⁸

The bank sent two notices. The first one was returned by the post office bearing an incorrect label. The second one was returned marked "no such address."²⁹ At a minimum, the lender should use readily available information, such as a work telephone number. The additional steps required in this case are easily accomplished and fair to a lender, typifying the reasonableness with which the court has construed commercial reasonableness.

IV. THE UCC'S EFFECTIVENESS

After observing secured lenders of all sizes and types dispose of personal property of all types, ranging from office equipment to airplanes, my conclusion is that there are dramatic advantages to an Article 9 sale. The advantages are particularly apparent when contrasted with sales under foreclosure provisions of real property law.³⁰ The single greatest advantage of the Article 9 sale is its flexibility. The flexibility is apparent both in terms of the sale itself and in the procedures leading up to the sale.

A. *Alternative to Bankruptcy Proceedings*

For a secured lender an Article 9 sale offers a viable alternative to bankruptcy proceedings when a debtor is unable to pay its debts and prefers to sell its business as an ongoing concern. The use of Article 9 as part of a nonbankruptcy workout provides a cost-effective vehicle

26. 875 S.W.2d 943 (Mo. Ct. App. 1994).

27. *Id.* at 947.

28. *Id.*

29. *Id.* at 945.

30. See *infra* part V for a comparison to real estate foreclosure statutes.

for selling an ongoing business with minimal disruption to third parties—such as employees—particularly if a lender is undercollateralized.

A negotiated nonbankruptcy sale under Article 9 arises most often when a debtor and a secured creditor are working together to attract purchasers of the business. If the whole business, or substantially all of it, is and will be economically viable, then an Article 9 sale may be rapidly consummated. In that situation the reason the business is in trouble may be because of a shortage of capital or other problem that can be promptly remedied. Bidding for the business can be accomplished while the business continues to operate. Any business stoppage accompanying the sale can be minimal. Frequently, the doors are closed on a Friday evening, the debtor voluntarily surrenders the collateral to the lender under a written agreement, the sale occurs over the weekend, and the business is open and running in the purchaser's hands on Monday morning.

Because the business is ongoing, the prospective purchaser has an opportunity to inspect the collateral and the business on an operating basis. Also, the secured lender and the debtor have an opportunity to contact the unsecured creditors to disclose the financial circumstances. This disclosure would lead the unsecured creditors to conclude that their best opportunity for recovery will be to do business with the successor entity.

Junior secured creditors³¹ are given notice of any private or public sale and have an opportunity similar to that of the unsecured creditors to obtain data. If the junior secured and the unsecured creditors are not satisfied with a private sale and believe they are not getting an appropriate share of the proceeds, they may initiate a bankruptcy and subject the sale to the scrutiny of a bankruptcy trustee or those with an interest in the bankruptcy process.

B. Private Sales v. Public Sales

Article 9 provides for private or public sales.³² Private sales of collateral have certain advantages over public sales. Prospective pur-

31. The term "junior secured creditor" refers to any secured creditor who is next in line after the senior secured creditor.

32. U.C.C. § 9-504(3) (1990). The UCC does not define "public sale." Based on case law decisions, James White and Robert Summers explain that "[t]he essence of a public sale is that the public is not only invited to attend and bid but is also informed when and where the sale is to be held." 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 27-10 (3d ed. 1988) (footnote omitted). Moreover, "a public sale is

chasers have a better opportunity to thoroughly inspect the collateral. This opportunity is particularly significant where a prospective purchaser needs to inspect not only the collateral but documents relating to it—such as maintenance records and flight logs. A private sale also creates an environment in which a lender is inclined to provide favorable financing terms to a qualified purchaser, resulting in both reasonable financing for the purchaser and greater proceeds for the buyer.

If all or a substantial portion of a business is sold at a private sale, the trade creditors have an ongoing customer and many employees of the debtor may retain their jobs. The secured lender gets paid. The sale is quick and the conveyance of title is clean.

Although I have participated in public sales under Article 9 that have produced relatively good prices for collateral, public sales frequently provide a less productive atmosphere than private sales. Inspection of the collateral is sometimes more cumbersome for the prospective bidders unless the notice of sale indicates that inspection is permitted and the collateral is easily accessible prior to the sale. If a large crowd appears, then the atmosphere is conducive to active bidding. Without a crowd, bidding can be very quiet. Article 9, however, provides flexibility so that if the crowd is insufficient or the price unsatisfactory, the secured lender can republish and set another sale,³³ provided that the lender or auctioneer so announces before the commencement of the auction.

In a public sale the secured lender selects the auctioneer. The cases indicate that the auctioneer's experience with respect to the particular equipment is to be considered in determining commercial reasonableness.³⁴ My experience is that the better the auctioneer, the better the price, provided that a crowd arrives. I have attended auctions for restaurant equipment where individuals bid up the prices on tables and chairs in excess of retail prices. On more than one occasion, I witnessed experienced dealers getting caught up in the fervor

one open to the general public or a major segment thereof, and thus contemplates advertising of the notice, time and place of the sale." *Id.* (footnote omitted).

33. See *United States v. Gore*, 437 F. Supp. 344, 348 (E.D. Pa. 1977) (holding that newspaper advertising of liquidation sale at public auction on three different occasions, direct mailings to tradespeople, notification of sale to defendant, as well as manner in which sale conducted more than fulfilled requirements of commercial reasonableness).

34. See *United States v. Warwick*, 695 F.2d 1063, 1066, 1072 (7th Cir. 1982); *First Nat'l Bank v. G.F. Clear, Inc.*, [1981-87 Transfer Binder] *Secured Transactions Guide* (CCH) ¶ 53,918 (N.Y. 1983); see also *Personal Jet, Inc. v. Callihan*, 624 F.2d 562, 569 (5th Cir. 1980) (stating that professional appraiser and auctioneer were retained to inventory, advertise, and display collateral before sale at public auction).

of the moment and bidding more than what they could buy or sell the collateral for at wholesale prices. Again, if there is a small crowd, the bidding can be quiet.

Prior to the commencement of the auction, the auctioneer must notify the bidders of the procedures that will be followed. Depending on the nature of the collateral and those present at a public sale, a secured lender can sell the entire collateral as a unit. In some situations a lender can package some of the property in an attractive manner and sell those items as parcels, while other items are sold individually. For example, if the collateral consists of forty chairs and ten tables, bids may be taken for the forty chairs and ten tables together in one unit, or four chairs and one table, or each chair and table individually. At the completion of the sale, the lender would take the greater of the bulk sale price or the aggregate price of the individual items.³⁵

The location of the public sale is subject to the standard of commercial reasonableness. Much collateral is best sold in the storage facilities of dealers or at the retail sale locations of the debtor.

Because a secured lender does not want to purchase the collateral at the sale or to store it for any longer than is necessary, the economic pressures on the lender encourage an expedited sale and, again, the optimum price. In general, with mercantile items and disposable goods, the maintenance and storage costs, plus the tendency for the value of the goods to decrease over time, makes expedited sales attractive to secured lenders.³⁶

V. REAL ESTATE FORECLOSURE COMPARISON

In sharp contrast to the flexibility provided for in Article 9, foreclosures of real property are governed by state statutes and the custom and practice in individual states and counties where the property is located. Although to some extent the foreclosure statutes are being updated to incorporate concepts of commercial reasonableness, for the most part they still contain archaic requirements with respect to the time, place, and manner of sale and must be followed to the letter.

35. See *United States v. Champion Sprayer Co.*, 500 F. Supp. 708, 710 (E.D. Mich. 1980).

36. This rule is industry specific. For example, a secured lender may benefit from holding onto the collateral for a longer period of time. This benefit would most likely occur in the barge and airline industries when the industries are suffering a glut of barges or airplanes.

There are basically two types of foreclosures. One is judicial and the other is nonjudicial. A judicial foreclosure such as that in Illinois³⁷ is a lawsuit not unlike other lawsuits, except that it is governed by a specific statutory provision applying to the entry of a judgment of foreclosure involving real property.³⁸ The time and place for the sale is set by the court. The judge or the sheriff of the county in which the property is located handles the sale. The statute sets forth what must be included in the notice of sale and how it must be published. In the county where the real estate is located, the notice is published in the section of a newspaper where legal notices are commonly placed.³⁹

The other common statutory foreclosure is nonjudicial such as that in Missouri.⁴⁰ The common practice in Missouri is for the interest in real property to be evidenced by a three-party deed of trust with the power of sale vested in a designated trustee. No suit is required to initiate the foreclosure. Instead, after a default has occurred under the terms of a deed of trust, the trustee publishes a notice which must contain a variety of information including a full legal description of the property in metes and bounds and the terms and place of the sale.⁴¹ Notice is typically published in a legal newspaper.⁴²

In Missouri, Illinois, and most other states, the sale must be on a day in which the courthouse is open which precludes Sunday, legal holidays, and usually Saturdays. The sale is held in front of a door of the courthouse in the county in which the property is located. The door is supposed to be the one through which the greatest amount of foot traffic passes, the logic being that this door is the focal point for business and activities involving the populace. That may have once been true. In each county a certain hour is established as customary, the thought being that a predictable hour facilitates attendance at a sale. Although the statutes do not always require a specific hour, Missouri courts have set aside sales where the sale occurred an hour or more different from what is customary.⁴³

37. ILL. ANN. STAT. ch. 735, §§ 5/15-1101 to -1706 (Smith-Hurd 1992).

38. A suit is filed against the mortgagor, the mortgagee has time to respond to the suit, a trial occurs, and a judgment is entered that the property shall be sold at a judicial sale in accordance with the statute. By statute the mortgagor has the right to redeem the property for a stated period of time unless such right of redemption is waived. *Id.* § 5/15-1603.

39. *Id.* § 5/15-1507.

40. MO. REV. STAT. §§ 443.010 to -440 (1986).

41. *Id.* § 443.320.

42. *Id.* (stating that publication in "some daily newspaper" is sufficient).

43. *West v. Axtell*, 17 S.W.2d 328 (Mo. 1929); *Lunsford v. Davis*, 254 S.W. 878 (Mo. 1923); *Hanson v. Neal*, 114 S.W. 1073 (Mo. 1908); *Stoffel v. Schroeder*, 62 Mo. 147 (1876).

The statutory notice required in real estate foreclosures tends to attract only bottom fishers or curiosity seekers because appropriate publication and lapse of time must occur without regard to economic conditions and the parties' desires. Frequently, no one is present on the courthouse steps other than the foreclosing trustee and lender. At the courthouse steps the bidders cannot see the land or any buildings on it to develop a more accurate sense of its value. Rarely, if ever, is the price obtained at the sale more than the minimum necessary to avoid a claim of an improper sale. Typically, lenders are the successful bidders at foreclosure sales. After buying the property the lenders take the property into their portfolios. They then can take such action as is necessary to obtain a fair price, such as publicizing the availability of the property in publications likely to engender interest in the property. Frequently, they hire real estate agents to locate prospective purchasers. Interestingly, they follow procedures similar to what is now customary as part of an Article 9 commercially reasonable sale.

Although lenders may appreciate the certainty of being able to follow statutory procedures to insure an acceptable sale, a recent situation exemplifies why real property foreclosures do little to optimize the price obtained. A lender recently foreclosed on nine lots of a lakefront development in the Lake of the Ozarks area. These lots were attractively located adjacent to a popular recreational spot. Following Missouri law and the custom in that particular county, the foreclosure occurred on a Thursday at noon on the west courthouse steps, forty miles from where the property was located. Likely bidders from St. Louis or Kansas City were unlikely to take a day off to drive to a city in mid-Missouri—which happened to be the county seat—to bid on lakefront lots. In fact, the only bidders were the lender and a local real estate speculator. The lender bid in a portion of its debt at foreclosure.

Several months later the lender, in conjunction with two other lenders having similar properties, put together a colorful pictorial brochure describing the properties and held an auction of the properties on a Sunday afternoon at a nice hotel in St. Louis. Many people attended and the prices obtained were dramatically higher than the amount bid at the original foreclosure.

VI. THE UCC'S POTENTIAL DRAWBACKS

Article 9 sales are not without their disadvantages. The secured lender lacks the absolute certainty and security of following precise guidelines as set forth in real estate foreclosure statutes. In a real es-

tate foreclosure, the lender merely has to prove it followed the statutory procedures.⁴⁴ In an Article 9 sale, however, if the secured lender pursues a deficiency suit, the lender will have the burden of proving that the sale was commercially reasonable.

When the UCC, including Article 9, was first adopted in the various states, the lack of certainty was a legitimate concern of secured lenders. With the passage of time and increased familiarity with the parameters of Article 9, lenders have developed a comfort level. Lenders recognize that the sale prices achieved in Article 9 sales are sufficient to outweigh the desire for a feeling of certainty.

If the secured lender is inexperienced or the collateral is unusual, the secured lender may not be aware of the best way to dispose of the collateral for the optimum price. The more experienced or knowledgeable the lender is in determining the best vehicle for the sale, the higher the proceeds. In the case of large items such as airplanes or other expensive pieces of equipment, locating and attracting bidders is more difficult. The secured lender must make extensive efforts to insure a "good" sale.

VII. CONCLUSION

Few cases exist that alone provide guidance as to the specifics of a commercially reasonable sale. In the states that include major commercial centers—New York, California, Illinois—substantially more courts have interpreted UCC provisions. In the aggregate, courts have developed a substantial body of law providing guidance. In any event, even in the states where there is not a substantial body of law, the cases interpreting the UCC have consistently sanctioned reliance on decisions of other states construing similar provisions of the UCC.

Based on slightly more than twenty-five years of experience, my observation is that the way lenders approach an Article 9 sale has evolved relatively rapidly from that of a cautious uneasiness about the proper procedures to a willing acceptance of the benefits of a commercially reasonable sale. Initial questions as to what must be done to meet the minimal requirements of commercial reasonableness have evolved into lively discussions of the desired procedures for encouraging active interest in the collateral to be sold. The drafters of Article 9 wisely established a flexible framework that has allowed economic

44. *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994). The Court deemed that "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id.*

forces to shape the manner in which lenders' collateral is effectively and efficiently disposed. I am not so naive as to conclude that nirvana has been reached, but all in all, the system works and it works for all the parties.