

UCC ARTICLE 9: FIXTURES, LIENS, FORECLOSURES & REMEDIES

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1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. **(60 minutes)**

Foreclosing fixtures and other property under UCC Article 9 can be a time consuming, complicated, contentious and expensive process. Creditors can lose substantial value during the process with debtors fighting the foreclosure and either senior or junior creditors slowing or compromising the process. This highlights the need for effective planning and drafting during the lien process in anticipation of the foreclosure and sale of property. Effective imposition of liens and planning the foreclosure process can save a creditor's claim and preserve value. This program will provide you with a practical guide to effective imposition of liens, increasing their enforceability, drafting in anticipation of default and foreclosure, and cost saving techniques for foreclosures and sales.

- Best practices for imposing liens on fixtures and other personal property under UCC Article 9
- Drafting tips to aid enforceability and contain foreclosure costs
- Legal and practical framework for foreclosing fixtures, equipment, inventory and other personal property
- Essential elements of foreclosure process, including notice and seizure
- Online sales and retention of collateral to satisfy debt
- Rights of junior v. senior creditors and rights of debtor to redeem

Speaker:

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Enforcing UCC Article 9 security interests

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Overview

- General rules
- Foreclosure choices
 - Collection
 - Sale or other disposition
 - Retention of collateral
- Special rules for specific collateral
- Rights of junior secured party
- Rights of buyers

➤ General rules

- Good faith (§ 1-304)
- Commercial reasonableness (§ 9-610(b))
 - Applies to “every aspect” of disposition



Waivers

- Generally may vary terms of UCC by agreement
- Commercial reasonableness (§ 9-610(b))
 - Applies to ‘every aspect’ of disposition



Establishing standards

- May agree on standards to fulfill non-waivable obligations (§ 9-603)
 - Does not apply to obligation not to breach peace in connection with obtaining possession of collateral (§ 9-603(b))
- Standards may not be ‘manifestly unreasonable’

Mixed collateral

- May proceed under UCC as to personal property or under real property law as to personal and real property collateral (§ 9-604)
- Decision on how to proceed itself must be commercially reasonable



Collection

- Part 6 of Article 9 does not apply to a buyer of payment rights (§ 9-601(g))
 - If buyer has recourse to seller, then commercial reasonableness applies to collections (§ 9-607(c))
- If collect, subject to risk of debtor's bankruptcy and application of automatic stay to post-filing collection efforts

Obtaining possession of collateral

- Secured party may use self help (§ 9-609)
 - Unless there's a 'breach of the peace' or a risk of a breach of the peace (§ 9-609(b)(2))
 - Duty not to breach the peace is not waivable (§ 9-602(6))

Secured party's choices: disposition

- Methods (§ 9-610(a))
 - Sale
 - Lease
 - License
 - 'Otherwise dispose'
- Commercial reasonableness applies to 'every aspect' (§ 9-610(b))

‘Public’ or ‘private’ disposition?

- Disposition may be ‘public’ or private’ (§ 9-610(b))
- Effects:
 - Secured party cannot buy at a private disposition in most circumstances
 - Information in notice to debtor and others differs
 - Timing
- Decision whether to have a public or private sale itself must be commercially reasonable

What is a ‘public’ and a ‘private’ disposition?

- ‘Public disposition’ is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding (§ 9-610, Comment 7)
- ‘Meaningful opportunity’ is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale
- ‘Private’ disposition is a disposition that is not ‘public’

When can the secured party buy the collateral?

- Private disposition
 - ‘Only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.’
- Public disposition
 - Secured party may purchase collateral at a public disposition



Notice to debtor and others

- Don't confuse with advertising (discussed below)
- Notice not required if collateral perishable or threatens to decline speedily in value (§ 9-611(d))

Notice to debtor and others - who gets notice

- Who gets the notice (§ 611(c)):
 - Debtor
 - Secondary obligor
 - Anyone who has asked in an authenticated record
 - Another secured party or lienholder with filing 10 days before notification date
 - Safe harbor (§ 9-611(e))



Notice to debtor and others - when

- When does the notice go out (§ 9-611(b)):
 - ‘Reasonable’ time
 - 10-day safe harbor (§ 9-612(b))

Notice to debtor and others - content

- What does the notice say? (§ 9-613)
 - Indicates whether ‘public’ or ‘private’ disposition
- Private:
 - Time after which disposition may be made
- Public:
 - Time and place of disposition
- Different rules for consumer-goods transaction (§ 9-614)

Advertising the sale

- Commercially reasonable test
- Where?
- How often?
- Take into account likelihood of competitive bidding as against likely credit bid

Advertising the sale when collateral is interest in entity

- Consider underlying collateral (*i.e.*, what does the entity own)
- Providing data about the entity
 - To the extent available
 - Non-disclosure agreement
 - Typically real estate
- Disclosure risks?
- Commercial reasonableness risks?

Rights of secured party prior to completion of foreclosure

- Debtor is owner of collateral until foreclosure is completed
 - Does not matter that collateral may have been registered in name of secured party for perfection or protective purposes (e.g., certificate of title or stock)
- Obtain proxy to vote interests in entity?
 - Look at entity law to see if proxy will be effective

Compliance with the securities laws

- If the collateral is a ‘security’ under federal or state securities law foreclosure sale may need to comply with securities laws
- Can the secured party make a ‘public’ sale of unregistered securities?
 - Depending on several factors, Rule 144 may permit public resales by the secured party:
 - Is the issuer a reporting company?
 - Is the debtor an “affiliate” of the issuer?
 - How long has the debtor held the stock?
 - Secured party can “tack” holding period of debtor

If Rule 144 not available, use SEC no-action letters

- Permit a ‘public’ UCC sale if:
 - Not a subterfuge to make a public offering
 - Securities typically sold in a block
 - Bidders and buyers are financially sophisticated
 - Securities typically sold to a single purchaser
 - Securities acquired with investment intent
 - Securities subject to transfer restrictions following sale

Examples of procedures

- Secured party used appraisal process to sell thinly-traded stock, as provided for in the security agreement
- Significant marketing process, including use of investment bank, by secured party to sell interests of partnership units was commercially reasonable)
- Use of a ‘market maker’ with expertise in the relevant industry) to advise on the conduct of the sale of the collateral (stock traded on NASDAQ) was commercially reasonable)

Provisions in security agreement on standards

- Previously noted: secured party and debtor may agree on standards for fulfillment of rights of debtor if standards are not ‘manifestly unreasonable’ (§ 9-603)
- Consider:
 - Provision where debtor acknowledges that: secured party will need to comply with government rules (e.g., FDA or SEC)
 - Compliance with rules may affect foreclosure sale price
 - Debtor agrees that sale in compliance with rules can still be commercially reasonable

Acceptance of collateral

- When makes sense (§ 9-620)
 - Can be very fast (if no one objects)
 - Cheaper
- Can be full or partial
- Proposal needed if debtor does not affirmatively consent in authenticated record

Acceptance of collateral

- Content of proposal:
 - Terms of the proposal (§ 9-102(a)(66))
 - Should include (§ 9-620, Comment 4):
 - Amount owed
 - Any conditions

Acceptance of collateral

- Who gets notice (§ 9-621(a))
 - Debtor
 - Anyone who claims an interest in the collateral and asked in authenticated record
 - Anyone who was perfected by filing 10 days before debtor consents
 - Secondary obligor if acceptance is partial

Acceptance of collateral

- Consent (§ 9-620):
 - Debtor does not object within 20 days after notification sent of unconditional proposal
 - Debtor consent in authenticated record
 - Other persons who receive notice do not object within 20 days of notice being sent to them

Rights of other secured parties

- Disposition ‘subject to’ rights of senior secured party (§ 9-617(a)(3))
- Junior secured party turnover of collateral to senior secured party (§ 9-608. Comment 5)
 - Disposition payments are ‘proceeds’ of collateral (§ 9-608, Comment 4)
- Junior secured party may be able to require senior secured party to marshal assets (§ 1-103)

Rights of other secured parties

- Retention of collected funds (§ 9-607, Comment 5; § 9-608, Comment 5)
 - § 9-330 priority?
 - Holder in due course (*see* § 9-331)?
 - § 9-615(g) priority (similar to § 9-330)



Rights of buyers and others

- Rights of transferee upon disposition:
 - All of debtor's rights
 - Discharges security interest being foreclosed
 - Discharges junior interests
- If secured party not in compliance, transferee still has rights if in good faith

Rights of secured party that accepts collateral

- Rights of transferee upon disposition:
 - All of debtor's rights
 - Discharges security interest being foreclosed
 - Discharges junior interests
- If secured party not in compliance, other security interests still discharged or terminated

Secured party and buyer risks

- Secured party liable for damages *caused* by any non-compliance (§ 9-625)
- May be different rules for consumer transaction (§ 9-626(b))
- Lender liability issues?
- Successor liability?



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