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Secured Transactions: Enforcing a Security Interest After Default Under UCC Article 9

Navigating the Notice Requirements, Remedies and Enforcement Rules

THURSDAY, MAY 24, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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UCC Article 9

Default, Enforcement and Remedies

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May 24, 2012

Default

- Gateway into part 6 of Article 9
- Need a default under the security agreement
- What is a default?
 - Notice
 - Lapse of time
 - Cure
- Must the default be material?

Examples of Consequences of Default

- No right to future advances
- Acceleration
- Increased pricing
- Reimbursement of expenses
- Elimination of certain exceptions from negative covenants (e.g., distributions)
- Blockage of payments on subordinated debt
- No borrower consent for assignment of loan
- Exercise of rights of setoff
- Recourse to secondary obligors
- Recourse to collateral

Remedies

- Collection under 9-607
- Repossession under 9-609
- Disposition under 9-610
- Retention under 9-620
- Other remedies available to the secured party
- Remedies of the debtor and others for secured party misbehavior

Collection

- As between the secured party and the debtor
 - Right to notify account debtors and other persons obligated on the collateral
 - Right to exercise the debtor's rights, including the right to look to collateral and supporting obligations
 - Non-judicial enforcement of a mortgage
 - Right to exercise rights under deposit account control arrangements
- No requirement of prior notification to the debtor or other secured parties

Collection

- Where there is recourse to the debtor, collection must be made in a commercially reasonable manner
 - Non-waivable
- Sale of receivables

Collection

- Claims and defenses of the account debtor
 - Account debtor's right of recoupment
 - Account debtor's right of setoff
- Effect of a triangular setoff clause under the contract from which an account or payment intangible arises or contained in chattel paper
 - When the account debtor is not in bankruptcy
 - Commerce Bank, N.A. v. Chrysler Realty Corporation, 244 F.3d 377 (10th Cir. 2001)
 - When the account debtor is in bankruptcy
 - In re SemCrude, L.P, 399 B.R. 388 (Bankr. D. Del., 2009), *aff'd* 428 B.R. 590 (D. Del. 2010).

Collection

- Application of proceeds under 9-608
 - Waterfall
 - Expenses, secured obligations, junior secured obligations, surplus (deficiency)
 - Treatment of noncash proceeds
- Position of senior secured party when the junior secured party collects

Repossession

- Secured party cannot proceed without judicial process if there would be a breach of the peace
 - Non-waivable
- Repossession is not a condition to the exercise of the remedies of disposition or retention

Disposition

- “Sale” or other disposition
- Preparation for disposition
- Commercial reasonableness requirement
- Public vs. private sale
- Purchase by the secured party
- Disposition warranties

Disposition

- Notification of disposition
 - Persons entitled
 - Debtor (waivable after default)
 - Secondary obligor
 - Secured party or lien holder (by request or of record)
 - Timeliness of notification
 - Must be a “reasonable time” before disposition
 - Ten days is “per se” reasonable in a non-consumer transaction

Disposition

- Contents of notification
 - 9-613 (general) and 9-614 (consumer-goods)
- Exceptions from notification requirement
- Application of proceeds under 9-615
 - Waterfall
 - Expenses, secured obligations, junior secured obligations, surplus (deficiency)
 - Treatment of noncash proceeds
- Position of senior secured party when the junior secured party disposes

Disposition

- Low price foreclosure dispositions under 9-615(f)
 - If the disposition is to the secured party, a person related to the secured party or a secondary obligor
- Recalculation of the deficiency claim
- Title clearing under 9-619

Disposition

- Effect of disposition
 - Transfers the debtor's interest
 - Discharges the security interest
 - Discharges any subordinate security interest or lien
- Transferee must act in good faith

Retention

- Retention in total or partial satisfaction in a non-consumer transaction
- Retention in total satisfaction in a consumer transaction
- Agreement of debtor for partial satisfaction
- Agreement of debtor or notification with no objection for full satisfaction
 - Still need to notify others

Retention

- Notification of retention
 - Persons entitled
 - Debtor (waivable after default)
 - Secondary obligor (to get the proposal)
 - Secured party or lien holder (by request or of record)
 - Timeliness of notification
 - At least 20 days before retention
 - Ability to object

Retention

- No deemed retention
- Effect of retention
 - Transfers the debtor's interest
 - Discharges the security interest
 - Terminates any subordinate security interest or lien

Other Remedies

- Judicial remedies
- Other remedies provided in the security agreement
 - See 9-601

Redemption

- The debtor has a right to redeem collateral until
 - The collateral has been collected
 - Disposition has been made
 - The secured party has entered into a contract to dispose of the collateral
 - The secured party has retained the collateral

Secured Party Misbehavior - General

- Right to enjoin enforcement
- Debtor, obligor, secured party or lien holder is entitled to be compensated for any loss
 - Other, non-UCC remedies?
- If non-compliance is placed at issue, secured party has the burden of persuasion
- Rebuttable presumption test as damage formula for non-consumer transactions

Secured Party Misbehavior - Consumer

- What is the damage formula for consumer transactions?
- Penalty for consumer goods collateral

Secured Party's Rights and Obligations Generally

- Commercial Reasonableness
 - Highest price
 - Disposition in the usual manner in a recognized market
 - Judicial or creditors' committee approval
- Preservation of the collateral
- Redemption of the collateral
- Non-waivable provisions

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