

# Sales Under Article 9 of the Uniform Commercial Code



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Among the remedies that Article 9 of the Uniform Commercial Code provides to a secured party is the right, under Section 9-610, to sell personal property collateral after default.<sup>1</sup> This non-judicial remedy allows a secured party to monetize its collateral and apply the proceeds to its debt, or to credit bid all or a portion of its debt and purchase title to its collateral. Article 9 provides flexibility to secured parties as to the form of the sale. It may be public or private, by one or more contracts, in one or more parcels, at any time or place, and on any terms, so long as it is commercially reasonable. A sale conducted pursuant to the provisions of Article 9 transfers all of the debtor's rights in the collateral to the purchaser, discharges the security interest under which the sale is made, and discharges junior security interests (other than any liens that applicable law provides are not discharged, see, e.g., Section 9-617(a)(3) as adopted by applicable state law).

One of the first steps that a secured party should take when selling its collateral is to review the default and remedy provisions of its loan documents. The secured party should confirm that it has complied with all applicable notice and grace periods before commencing enforcement proceedings. The secured party should also review the granting language of its security agreement to confirm the extent of the collateral, and confirm that its financing statement has not lapsed and all the information it contains is correct. Finally, if the secured party is a party to any intercreditor agreement, it should confirm that it has complied with all of its applicable provisions.

When planning the sale, a secured party should always consider its duty of commercial reasonableness. Indeed, as Section 9-610(b) states, "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." Commercial reasonableness is a question of fact. However, with respect to the manner of the sale, Section 9-627(b) does provide some specific examples of commercial reasonableness including sales made: "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was

the subject of the disposition." (1) and (2) above are generally limited to sales of fungible property that can be sold through recognized exchanges.

Section 9-627(c) provides that a sale is commercially reasonable if approved in judicial proceeding or by a bona fide creditors' committee, a representative of creditors, or an assignee for the benefit of creditors. However, such approvals are not required to prove commercial reasonableness and may even be uncommon in sales under Article 9. The fact that a higher price may have been obtained by another method or at a different time does not, by itself, mean that the sale was not commercially reasonable.

Next, the secured party must send an authenticated notification of disposition. Section 9-613 sets forth the required contents of the notice, and also provides the basic form of notice that the secured party may adapt for its sale. Section 9-611 sets forth the parties that must be notified, which include the debtor, any secondary obligor, any person who sent the secured party an authenticated notification of a claim of interest in the collateral, and other secured parties with perfected security interests as of ten days before the notification date who perfected either through the filing of a financing statement or by other applicable law. In order to comply with the notification requirement to other secured parties who have filed financing statements, Section 9-611(e) provides (in language that should be clarified) a "safe harbor" setting forth the procedure for ordering a search of the records. Whether the secured party sends the notice of disposition within a reasonable period of time is a question of fact; however, Section 9-612 provides a "safe harbor" for notices sent after default and ten days or more before the earliest time of the sale. The secured party should also consult its security agreement for any alternative notice requirements. If the collateral is perishable, threatens to decline speedily in value, or is of the type customarily sold on a recognized market, the notification of disposition otherwise required by Section 9-611 is unnecessary.

When determining the type of sale, the secured party should always consider what is most commercially reasonable. In some situations, it will be a public sale, which is open to the public and provides the opportunity for competitive bidding. For such sales, the secured party should provide public notice, such as advertising the sale in one or more appropriate publications. Notifying other potentially interested parties of the sale may also be appropriate. However, there may be situations where a

<sup>1</sup> All article and section references are to the Uniform Commercial Code. This article is intended to provide a brief, general summary of, and some suggestions for, the sale process under Article 9 for non-consumer goods transactions (transactions involving consumer goods have certain separate requirements). Practitioners should consult all applicable law, including the Uniform Commercial Code as adopted in their states, before conducting a sale under Article 9.



private sale will result in a higher price; therefore, so long as it is commercially reasonable, the sale may be private. For such private sales, the secured party will want to be able to prove that it made reasonable efforts to find interested buyers. If the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations, the secured party may even purchase it at a private sale; however, these transfers are rare and are usually made under the strict foreclosure procedures of Article 9. It should also be noted that Section 9-610(d) provides that contracts for sale include certain warranties that are included by operation of law in voluntary dispositions. Significantly, however, Sections 9-610(e) and (f) provide instructions for how the secured party may disclaim such warranties.

If the sale is a public auction, the secured party will generally want a court reporter present to generate a transcript of the proceeding. The secured party will have flexibility in where, when, and how the auction is conducted, so long as it is commercially reasonable.

Section 9-615 provides the waterfall for the proceeds of the sale after receipt by the secured party. First they are applied to the reasonable expenses of the secured party (including attorney's fees and legal expenses if provided for by agreement and not prohibited by other law), second is to the satisfaction of the obligations secured by the security agreement (see Section 9-615(a) for consignor provisions), third is to subordinate security interests in certain circumstances, and fourth is to the debtor subject to the exceptions of Sections 9-615(e) and (f). In order for a holder of a subordinate security interest to receive proceeds from the sale from the secured party after payment of senior claims, it must make an authenticated demand upon the secured party for proceeds prior to their distribution by the secured party. If the proceeds of the sale are insufficient to satisfy the debt, subject again to the exceptions of Sections 9-615(e) and (f), the obligor is liable to the secured party for the deficiency. Section 9-615 does not require the payment of senior lien holders if the sale

is conducted by a junior lien holder; however, the senior lien will not be extinguished nor will a senior lien holder lose its other rights with respect to the collateral (including its right to repossess and sell) once it is transferred to the transferee unless the senior lien holder consents. A similar result arises in a sale by a lien holder of equal priority.

A transfer statement, made pursuant to Section 9-619, entitles the transferee to the transfer of record of all rights of the debtor in the collateral that it purchased in any official filing, recording, registration, or certificate-of-title system covering the collateral. The transfer statement is a record, authenticated by the secured party, stating: (1) that the debtor has defaulted in connection with an obligation secured by specified collateral; (2) that the secured party has exercised its post-default remedies with respect to the collateral; (3) that, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and (4) the name and mailing address of the secured party, debtor, and transferee.

Upon completion of its sale, the secured party is free to pursue any other remedies available to it by law, including bringing separate actions for deficiency against the obligors.

#### ABOUT THE AUTHOR



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Matthew Olins is a partner in the Chicago office of Duane Morris LLP. Mr. Olins practices in the areas of business reorganization, financial restructuring, commercial finance, secured transactions, and creditors' rights. He represents lenders, special servicers, and various types of other business organizations in loan workouts, business bankruptcy cases, commercial finance transactions, commercial foreclosure, and litigation. Mr. Olins also represents business organizations in reorganizations and liquidations.