PERSONAL PROPERTY FORECLOSURES IN TEXAS UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

ROGER A. BARTLETT
2301 S. Capital of Texas Highway, Suite H102
Austin, Texas 78746
roger@rablaw.com

Presented to
COLLECTIONS AND CREDITORS' RIGHTS COURSE 2008
May 9, 2008
San Antonio, Texas

CHAPTER 12

ROGER A. BARTLETT

2301 S. Capital of Texas Highway, Suite H102
Austin, Texas 78746
(512) 236-9363 (phone)
(512) 476-9991 (fax)
roger@rablaw.com

Education

- Juris Doctor, University of Texas at Austin, May 1974

Professional Activities

- American Bar Association
- Austin Bar Association (Past Chairman, Financial Institutions Section)
- College of the State Bar of Texas
- State Bar of Texas
- Texas Association of Bank Counsel (Director, 1998-2001)
- Texas Bar Foundation (Sustaining Life Fellow)
- Texas Center for Legal Ethics and Professionalism
- Member, Commercial Code Committee of the Business Law Section of the State Bar of Texas, 1995-present (Chairman, Commercial Code Committee, 2002-2006) (Chairman, Article 9 Subcommittee, 2001-2006)
- Council Member, Business Law Section of the State Bar of Texas, 2005-present
- Vice-Chair, Business Law Section of the State Bar of Texas, 2007-2008

Publications, Institute Papers, Programs, Etc.

- Editor, *Texas Collections Manual, Second Edition* (State Bar of Texas, 1987, 2 vols.) and subsequent supplements
- Coauthor, with Roy Ryden Anderson (Professor of Law, Dedman School of Law, SMU, Dallas, Texas) and W. David East (Professor of Law, South Texas College of Law, Houston, Texas), *Anderson, Bartlett & East's Texas Uniform Commercial Code Annotated* (Thomson West 2007) (published annually since 2002)
- Course Director, Second Annual Advanced Creditors' Rights Course (State Bar of Texas, 1987)
- Author and speaker, "Remedies Under Article 9 of the Uniform Commercial Code," Third Annual Advanced Creditors' Rights Course (State Bar of Texas, 1988)
- Author and speaker, "Self-Help Repossession," Fifth Annual Advanced Creditors' Rights Course (State Bar of Texas, 1990)
- Panelist, "Business Law," Legislative Update satellite broadcast/webcast (State Bar of Texas, 2003)
- Author and speaker, "Texas Choice of Law, Including Recent Legislative Changes," Advanced Business Law Course (State Bar of Texas, 2003)
- Author and panelist, "Business Law," Legislative Update satellite broadcast/webcast (State Bar of Texas, 2005)
- Author, "2005 Amendments to Texas Uniform Commercial Code," 41 Texas Journal of Business Law 231 (2006)
- Planning committee chair, Advanced Business Law Course (State Bar of Texas, 2008)

TABLE OF CONTENTS

FORECLOSURE PERSONAL PROPERTY

I. INTRODUCTION

This material will primarily cover nonjudicial foreclosure of consensual security interests governed by Article 9 of the Texas Uniform Code (Chapter 9, Texas Business & Commerce Code). It will not cover foreclosure of liens in real property, judicial foreclosure of Article 9 security interests, or foreclosure of nonconsensual liens, such as ad valorem tax liens.

II. SOME GENERAL RULES AND CONCEPTS

A. Mixture of Personal Property and Real Property

In a situation in which the secured party has a security interest in real property as well as personal property and the liens arise out of a single document, such as a deed of trust, the secured party may elect to proceed under Article 9 as to its remedies against personalty and under the deed of trust and applicable real property law as to its remedies against realty; or it may elect to proceed as to both the personalty and realty under the deed of trust and applicable real property law, in which case Article 9 will not otherwise apply. Tex. Bus. & Com. Code Ann. § 9.604(a) (Vernon 2002).

The same rule applies if the secured party does not have a lien on realty other than a security interest under Article 9 in goods that have become fixtures. If the security interest in the fixtures as priority over all owners and encumbrancers of the real property, the secured party may remove the fixtures after default but must promptly reimburse the owner or encumbrancer for any damage to the real property caused by the removal (but not for any diminution in value of the real property caused by the absence of the removed goods or by the necessity of replacing them). *Id*. § 9.604(c). One entitled to reimbursement may refuse to allow the removal until the secured party gives "adequate assurance" that it will be able to reimburse. *Id*. § 9.604(d). The Code does not define "adequate assurance."

Courts have held that the holder of a mechanic's or materialman's lien on fixtures may remove them only if removal does not damage the fixtures or the real property (including the improvements). Presumably that rule does not apply to the removal of fixtures subject to an Article 9 security interest, as this section contemplates that damage to the real property may occur.

Real property foreclosures are subject to Chapter 51 of the Texas Property Code and are not covered by this paper.

B. Persons to Whom Duties Are Owed

A secured party proceeding under Article 9 does not owe any duties under Article 9 unless the secured party knows the person is a debtor or obligor under Article 9, knows the person's identity, and knows how to communicate with him. Tex. Bus. & Com. Code Ann. § 9.605(1) (Vernon 2002).

(Remember that under Article 9 an "obligor" is one who owes payment or performance of an obligation (*id*. § 9.102(a)(60)) and a "debtor" is a person having an interest in the collateral (*id*. § 9.102(a)(28)).)

Nor does the secured party owe any duties under Article 9 to another secured party who has filed a UCC1 financing statement unless the secured party knows that the named debtor is in fact a debtor and knows the person's identity. *Id*. § 9.605(2).

The secured party's lack of duty under this section is based on its not knowing certain information. The knowledge must be actual, not constructive, to impose the duty. See i*d*. § 1.201 (Supp. 2006). Unfortunately the Code does not provide guidance on what effort the secured party must make to obtain actual knowledge.

C. Requirement of Default

1. What Constitutes Default

Article 9 does not define default but leaves it to the parties' agreement. Tex. Bus. & Com. Code Ann. § 9.601 comment 3 (Vernon 2002).

2. Waiver of Default

A default described in the security agreement or other agreement may have been waived by the parties' conduct. Tex. Bus. & Com. Code Ann. § 9.601 comment 3 (Vernon 2002). If, for example, the promissory note requires payment on the first day of each month but the secured party has acquiesced in the debtor's habit of paying on the tenth day, the secured party probably has waived its right to declare a default based on yet another payment made on the tenth day. *See* Ford Motor Credit Co. v. Washington, 573 S.W.2d 616 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.); Vaughn v. Crown Plumbing & Sewer Serv., Inc., 523 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

It is possible that a secured party that by its conduct has waived its right to repossess can regain that right by notifying the debtor, after acquiescing in prior defaults, that it demands strict compliance in the future; the secured party must allow the debtor a reasonable time to comply, and its insistence on strict compliance probably will not be effective as a defense to its prior waiver unless the secured party can establish that the debtor actually received the notice. *See* Ford Motor Credit Co. v. Washington, 573 S.W.2d 616 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

3. Notice of Default

Texas case law requires that the lender provide a debtor with notice of default, notice of intent to accelerate, and notice of acceleration but permits waiver of those notices in advance. Shumway v. Horizon Credit Corp., 801 S.W.2d 890 (Tex. 1991); Ogden v. Gibraltar Sav. Ass'n., 640 S.W.2d 232 (1982).

Also there are some statutory requirements for notice, which probably cannot be waived. For example, Texas statutes on manufactured home financing provide:

> An action to repossess a manufactured home, foreclose a lien on a manufactured home, or accelerate payment of the entire unpaid balance of a credit transaction must comply with the regulations of the Office of Thrift Supervision relating to the disclosure required for repossession, foreclosure, or acceleration except in extreme circumstances, including abandonment or voluntary surrender of the manufactured home. Tex. Fin. Code Ann. § 347.356 (Vernon 1998).

The Texas statute no doubt refers to the regulation that requires thirty days' notice stating the nature of the default, what the debtor must do to cure the default, what the secured party intends to do if the default is not cured, and the debtor's right to redeem, which must be given, "except in the case of abandonment or other extreme circumstances," before the secured party takes any action to accelerate the debt, repossess, or foreclose. 12 C.F.R. § 590.4(h) (2001).

D. Exercise of Multiple Remedies

Article 9 has always provided that the secured party's rights thereunder are cumulative, but, as Comment 5 notes, revised Article 9 has added in Section 9.601(c) an explicit statement that these rights may be exercised simultaneously. Tex. Bus. & Com. Code Ann. § 9.601(c) (Vernon 2002); *id*. Comment 5. That authorization does not extend to an action or combination of actions having the effect of harassing the debtor. Hubbard v. Lagow, 576 S.W.2d 1683 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.). Thus, for example, the secured party may repossess collateral during the pendency of a suit on the debt. McIlroy Bank & Trust v. Seven Day Builders of Arkansas, Inc., 613 S.W.2d 837 (Ark. Ct. App. 1981); *see also* Farmers State Bank v. Ballew, 626 P.2d 337 (Okla. Ct. App. 1981).

It also appears that the secured party may file suit and obtain an order directing an officer to seize the collateral and deliver it to the secured party for disposition in accordance with Article 9. Hubbard v. Lagow, 576 S.W.2d 1683 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

E. Redemption of Collateral

A debtor, any secondary obligor, or any other secured party or lien holder may redeem collateral upon timely tender of the required amount. Tex. Bus. & Com. Code Ann. § 9.623(a) (Vernon 2002).

Redemption under Section 9.623 must occur before—

- The secured party has collected collateral (such as accounts) under Section 9.607 (see II.G. below);
- The secured party has disposed of the collateral or entered into a contract for its disposition under Section 9.610 (see II.B. below); or
- The secured party has accepted the collateral in full or partial satisfaction of the secured debt under Section 9.622 (see III.F.5. below). *Id.* § 9.603(c).

Redemption under Section 9.623 requires tender of—

- The fulfillment of all obligations secured by the collateral; and
- The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral and (to the extent provided for by agreement and not prohibited by law) reasonable attorney's fees and legal expenses incurred by the secured party. *Id.* § 9.603(b).

In a consumer-goods transaction, the secured party is required to include in its notification of intended disposition a statement of the debtor's redemption rights. *Id*. § 9.614(1)(C).

In a transaction other than a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under Section 9.623 if the waiver occurs after default. *Id*. § 9.624(c). Otherwise, the debtor or obligor may not waive or modify the secured party's obligations under Section 9.623. *Id*. § 9.602(11).

Article 9 does not specify sanctions for the secured party's refusal or inability to return redeemed collateral. However, some courts have found such an action to be a conversion and have awarded damages. Clark v. General Motors Acceptance Corp., 363 S.E.2d 813 (Ga. App. 1987).

F. Standard of Conduct Under Article 9

The parties may, in the security agreement or by other agreement, define the standards by which their compliance with Part F of Article 9 will be measured. The standards must not be "manifestly unreasonable." Tex. Bus. & Com. Code Ann. § 9.603(a) (Vernon 2002). That continues a rule from Article 9 before the 2001 revisions.

In any event the parties may not define "breach of the peace," a rule that had developed in case law under previous Article 9 and is explicit in the Code with revised Article 9. *Id.* As with "breach of the peace" and what is not "commercially reasonable," the Code does not define "manifestly unreasonable" but allows the courts to know it when they see it.

G. Secured Party's Failure To Comply with Article 9

1. Types of Available Relief

What can happen if the secured party fails to act in accordance with applicable provisions of Article 9? Depending on the circumstances, the failure may result in one or more of—

- Injunctive relief;
- Actual damages;
- Recovery of interest or finance charges plus a portion of the principal amount of the debt; and
- A $500 penalty. Tex. Bus. & Com. Code Ann. § 9.625 (Vernon 2002).

2. Injunctive Relief

A court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. *Id.* § 9.625(a).

3. Damages

A person can be liable for damages in the amount of any loss caused by the failure to comply, and that may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing. *Id.* § 9.625(b).

A person who was a debtor or an obligor, or held a security interest or other lien in the collateral, at the time of the failure may recover damages for its loss. *Id.* § 9.625(c)(1).

A debtor may recover damages for the loss of any surplus. *Id.* § 9.625(d). But a debtor or secondary obligor whose deficiency is eliminated or reduced, although allowed to recover for the loss of a surplus, may not recover for any other loss caused by the secured party's failure to comply with Article 9 with regard to collection, enforcement, disposition, or acceptance. *Id.*

Failure to act in a commercially reasonable manner gives rise to a cause of action sounding in contract, and thus exemplary damages may not be awarded absent a finding of an independent tort with accompanying actual damages. International Bank v. Morales, 736 S.W.2d 622 (Tex. 1987) (although failure to dispose of collateral in a commercially reasonable manner violates an "implied covenant" under the UCC, exemplary damages may not be imposed absent a finding of actual damages resulting from an independent tort); Texas Nat'l Bank v. Karnes, 717 S.W.2d 901 (Tex. 1986) (secured party's obligation to dispose of repossessed collateral in a commercially reasonable manner is an implied covenant in all contracts governed by Article 9 and thus a cause of action for its breach sounds in contract; consequently punitive damages may not be imposed for the breach absent the award of actual damages).

4. Penalty

In addition to damages under Section 9.625(b) (see II.G.3. above, a debtor, consumer obligor, or person named as a debtor in a filed record may recover $500 in each case from a person who—

- Fails to comply with Section 9.208 (relating to the secured party's control of collateral);
- Fails to comply with Section 9.209 (requiring the secured party to respond to a debtor's request to release an account debtor if no secured debt remains unpaid);
- Fails to comply with a request under Section 9.210 (relating to an accounting of unpaid obligations);
- Files a record that the person is not entitled to file under Section 9.509(a) (generally relating to initial financing statements and certain amendments);
- Fails to cause the secured party of record to file or send a termination statement as required by Section 9.513(a) or (c);
- Fails to comply with Section 9.616(b)(1) (relating to an explanation of a deficiency or surplus in a consumer-goods transaction) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or
- Fails to comply with Section 9.616(b)(2) (relating to a waiver of a consumer obligor's deficiency). *Id.* § 9.625(e), (f), (g).

5. Recovery of Interest and Portion of Principal

If the collateral is consumer goods, a person who was a debtor or an obligor at the time of the failure may recover not less than the credit service charge plus ten percent of the principal amount of the obligation or

the time-price differential plus ten percent of the cash price. *Id.* § 9.625(c)(2).

6. Action by Unsecured or Unperfected Party

An unsecured party does not have standing to assert that a disposition of collateral was not commercially reasonable, because Section 9.625(c)(1) limits that right to a person who, at the time of the disposition, "was a debtor, was an obligor, or held a security interest or other lien on the collateral." iFlex, Inc. v. Electrophy, Inc., 2004 WL 502179 (D. Minn. 2004) (mem. Op.). A party holding a security interest in the collateral that had attached but was not perfected has standing to contest the commercial reasonableness of the disposition. AmSouth Bank v. Trailer Source, Inc., 2006 WL 1724627 (Tenn. App. 2006).

7. Prohibition of Waiver

Neither the debtor nor any obligor may waive or modify the requirements of Section 9.625. *Id.* § 9.602(13).

H. Limits on Secured Party's Liability

As discussed in III.G. above, the secured party can incur liability to others for failing to comply with Article 9. Section 9.628 provides some limits on this liability, however.

The thrust of Section 9.628 is to protect a secured party from liability arising out failure to comply with Article 9 if the failure was a result of its not knowing that a person was a debtor or obligor, the person's identity, and how to communicate with him. It also addresses the problem that arises when a debtor's or obligor's representations cause the secured party to believe that a transaction is not a consumer-goods transaction or a consumer transaction, thus causing it not to comply with Article 9 requirements imposed on those kinds of transactions, and protects the secured party when the transaction is recharacterized as a consumer-goods transaction or a consumer transaction. The criteria for exculpation vary depending on the nature of the claim.

I. Action in Which Deficiency or Surplus Is an Issue

1. Burden of Proving Compliance

The secured party does not have to prove compliance with rules of Subchapter 6 relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the compliance in issue; if that happens, the secured party has the burden of establishing compliance. Tex. Bus. & Com. Code Ann. § 9.626(a)(1), (2) (Vernon 2002).

If the secured party fails to meet its burden, the debtor's or secondary obligor's liability for a deficiency is limited to an amount by which the sum of the secured obligation (plus expenses and attorney's fees) exceeds the greater of—

- The proceeds of the collection, enforcement, disposition, or acceptance; or
- The amount of proceeds that would have been realized had the noncomplying secured party complied with its obligations. *Id.* § 9.626(a)(3).

There are some exceptions to this rule in Section 9.628 (see III.H. above).

If disposition of collateral is to the secured party, a person related to the secured party, or a secondary obligor (such as a guarantor), calculation of the surplus or deficiency is subject to attack on the grounds that disposition was for an amount that is significantly below to range of proceeds that would have resulted if some other person had purchased the collateral *Id.* § 9.615(f). In that case the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is substantially below the range of prices that a complying disposition to another person would have brought. *Id.* § 9.626(a)(5). That is not the same question of what price (and thus what surplus or deficiency) actually would have resulted if the debtor or obligor meets its burden of establishing that the actual proceeds was substantially below an appropriate range of prices, and Article 9 does not appear to address that issue.

2. Rules for Consumer Transactions

The rules in Section 9.626(a) explicitly apply only in actions arising from transactions other than consumer transactions. *Id.* § 9.626(a). In consumer transactions, the Code lets the courts set the rules and states that "the court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches. *Id.* § 9.626(b).

Section 9.626(a) establishes the "rebuttable presumption" rule in determining the secured party's ability to recover a deficiency (in a transaction other than a consumer transaction) if its conduct has violated Article 9. Article 9 was silent on this point before revised Article 9 became effective in 2001, and under former Article 9 courts had developed at least three approaches—the absolute bar rule, the rebuttable presumption rule, and the offset rule, as discussed in Official Comment 4 to revised Article 9. In *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982), Texas had adopted the absolute bar rule. *Tanenbaum* arose out of a commercial transaction and presumably applied to

consumer transactions as well. Revised Article 9 applies the rebuttable presumption rule to transactions other than consumer transactions, thus changing Texas law, but under Section 9.626(b) refrains from prescribing a rule for consumer transactions and leaves that decision to the courts. Presumably the *Tanenbaum* absolute bar rule remains effective for consumer transactions under revised Article 9.

3. Prohibition of Waiver

Neither the debtor nor any obligor may waive or modify the requirements of Section 9.626. *Id.* § 9.602(13).

III. THE FORECLOSURE

A. Repossession of Collateral

1. Repossession

The right to repossess collateral is one of the bedrock provisions of Article 9. After default, the secured party may repossess collateral and, without removal, may render equipment unusable. Tex. Bus. & Com. Code Ann. § 9.609(a) (Vernon 2002). The secured party may do so pursuant to judicial process or, if it proceeds without breach of the peace, without judicial process. Id. § 9.609(b).

Self-help repossession does not violate the Fourteenth Amendment of the U.S. Constitution. James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974) (per curiam), cert. den., 419 U.S. 1034 (1974).

2. Mandatory Assembly of Collateral

If the security agreement or some other agreement so provides, or in any case after default, the secured party "may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that is reasonably convenient to both parties." Tex. Bus. & Com. Code Ann. § 9.609(c) (Vernon 2002).

If the debtor fails to assemble collateral when required by the secured party under Section 9.609(c), the secured party may be able to obtain a mandatory injunction ordering compliance. Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54 (5th Cir. 1970), cert. Den., 402 U.S. 909 (1971).

3. Breach of the Peace

a. Prohibition of Breach of the Peace

The secured party must avoid committing a breach of the peace when repossessing collateral. Tex. Bus. & Com. Code Ann. § 9.609(b) (Vernon 2002).

b. Prohibition of Waiver

Neither the debtor nor any obligor may waive or modify the secured party's obligations to avoid breach of the peace. Tex. Bus. & Com. Code Ann. § 9.602(6).

c. Definition of Breach of the Peace

The UCC does not define "breach of the peace" but leaves it to the courts. The Code explicitly prohibits the parties' defining "breach of the peace." Tex. Bus. & Com. Code Ann. § 9.603(b) (Vernon 2002).

d. Examples of Breach of the Peace

Based on pre-Code chattel-mortgage cases, the **use of force or violence** will almost certainly be a breach of the peace, Watson v. Hernandez, 374 S.W.2d 326 (Tex. Civ. App.—Amarillo 1964, writ dism'd), as will the **use of force, threats, and fear**, Pryor v. Universal C.I.T. Credit Corp., 253 S.W.2d 493 (Tex. Civ. App.—San Antonio 1952, no writ). **Picking a lock to enter a building** to seize collateral has been held to be a taking of the collateral by force and violence, probably the functional equivalent of a breach of the peace. Gulf Oil Corp. v. Smithey, 426 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1968, writ dism'd).

In another pre-Code case, a repossession of a car by **breaking into the debtor's garage**, apparently when the debtor was not present, was found not to be a peaceable repossession. A. B. Lewis Co. v. Robinson, 339 S.W.2d 731, 735 (Tex. Civ. App.—Houston 1960, no writ). A California court has held, under the Code and the California Penal Code, in a case in which a **lock on the debtor's garage door was broken** to gain access to the car, that "such an entry by force, if made, was of course unlawful." Henderson v. Security Nat'l Bank, 140 Cal. Rptr. 388 (Cal. Ct. App. 1977).

In a repossession of a mobile home, **breaking a lock on the front door of the home** (to release a household pet) and **destroying the cinder block foundation** in removing the home, which occurred without the debtor's presence and without any confrontation, the appellate court held that the trial court erred in finding no breach of the peace. General Electric Credit Corp. v. Timbrook, 291 S.E.2d 383 (W.Va. 1982).

Using a locksmith to open locked doors to the debtor's unoccupied coin and gun shop, **removing and replacing the locks**, and **deactivating the shop's burglar alarm** have been held to be a breach of the peace. Riley State Bank v. Spillman, 750 P.2d 1024 (Kans. 1988) ("[We] view breaking and entering either the residence or business of a person a serious act detrimental to any concept of orderly conduct of human affairs and a breach of the peaceful solution to a

dispute. We hold the Bank breached the peace by breaking the locks to the [debtors'] place of business.")

The mere **presence of a law officer** observing (but not actively participating in) the repossession, when the debtor also has been present, has been found to be a breach of the peace. Walker v. Walthall, 588 P.2d 863 (Ariz. Ct. App. 1978); Waisner v. Jones, 755 P.2d 598 (1988) ("mere presence of the [law enforcement] official, without more, is sufficient to chill the legitimate exercise of the defaulting party's rights"); First & Farmers Bank v. Henderson, 763 S.W.2d 137 (Ky. 1988) ("the deputy sheriff acting under color of office, without any legal process, enabled the Bank to repossess over 'the debtor's] objection. There was, thus, an actual breach of the peace").

e. Examples of No Breach of the Peace

Making noise, without more, does not breach the peace. In a case in which two cars were towed from the debtor's driveway at about 5:00 a.m. with no confrontation or verbal exchange (although one of the tow truck operators noticed a man watching from the debtor's front door as the tow trucks drove off), the fact that the repossession created what the debtor called a "tremendous ruckus" (a statement that the court called conclusory) during what the debtor called a "night raid," the appellate court affirmed summary judgments favoring the secured party and the tow truck operator. Ragde v. Peoples Bank, 767 P.2d 949 (Wash. App. 1989).

In the debtor's suit for conversion in a pre-Code chattel mortgage case in which his car was repossessed from an **on-street parking space**, the appellate court upheld a directed verdict for the repossessor, remarking that the car was **not taken by stealth or force**. Haydon v. Newman, 162 S.W.2d 1041 (Tex. Civ. App.—Amarillo 1942, no writ).

In a case in which the jury found that a trespass occurred when the secured party repossessed a car **from the debtor's driveway without confrontation**, the appellate court held that, because the chattel mortgage authorized entry on the debtor's property, there was no "unauthorized trespass." Pioneer Fin. & Thrift Corp. v. Adams, 426 S.W.2d 317 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.). Although the opinion did not discuss breach of the peace, it would seem to be some authority for the proposition that such a repossession would not offend Section 9.609.

Towing an **unlocked truck** from an **open driveway** in front of the debtors' residence at 2:00 a.m. when **no one confronted**, or even saw, the repossessor has been held not to breach the peace. Butter v. Ford Motor Credit Co., 829 F.2d 568 (5th Cir. 1987).

Nor did a breach of the peace occur in a repossession from the **debtor's residential driveway** during the night when **neither force nor fraud was used** and the **debtor was unaware of the activity**. Robertson v. Union Planters Nat'l Bank, 561 S.W.2d 901 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

A more recent case in which repossession from the **debtor's driveway without his knowledge** was not a breach of the peace is Schachtner v. Crosby State Bank, No. 14-03-00424-CV, 2004 WL 78202 (Tex. App.—Houston[14 th Dist.] Jan. 20, 2004, no pet. h.) (mem. op.).

In an opinion that does not fully describe the act of repossession (stating only that the debtor "discovered that her front gate was open, her cattle were gone and her automobile was missing") but suggests that the car was repossessed, **without confrontation and from within a fenced yard**, the appellate court reversed the trial court's award of damages to the debtor for conversion, stating that "the record in the present case reveals that the repossession was completely peaceful and lacking in any wrongful character." River Oaks Chrysler-Plymouth, Inc. v. Barfield, 482 S.W.2d 925, 928 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ dism'd).

Other cases in which a breach of the peace was held not to have occurred include:

- Ford Motor Credit Co. v. Cole, 503 S.W.2d 853 (Tex. Civ. App.—Fort Worth 1974, writ dism'd) (repossessor began repossession during day, l**eft when told by the debtor to do so**, and **returned during the early morning hours and towed away the car with a wrecker, apparently without the debtor's knowledge**)
- Collins v. Ford Motor Credit Co., 454 S.W.2d 469 (Tex. Civ. App.—Beaumont 1970, no writ) (repossession from a **parking lot** without the debtor's presence and without breaking and entering or the use of force, threats, or violence)
- In re Hamby, 19 Bankr. 776 (Bankr. N.D. Ala. 1982) (repossession at night from a **parking lot** near the debtor's place of employment while she was at work, the court observing that the repossession was not through "improper trickery, fraud, artifice, or stealth" but taking note of the creditor's "insensitivity" in not informing the debtor of what had happened to her car and leaving her stranded at night more than twenty-five miles from her residence)
- Marine Midland Bank-Central v. Cote, 351 So.2d 750 (Fla. Dist. Ct. App. 1977)

(repossession from the debtor's **unenclosed carport** without threat or use of force is not trespass and thus by itself is not a breach of the peace; "the right of repossession stated by [Section 9.609] implies, just as it did at common law, a limited privilege to enter on the debtor's land," which may be exercised only without breach of the peace)

- Pierce v. Leasing Internat'l, Inc., 235 S.E.2d 752 (Ga. Ct. App. 1977) (repossession from an **open garage**, attached to the debtor's home, in which there was no indication that the creditor opened the garage door, that the debtor protested, that any property was damaged, or that anyone entered the debtor's home).

4. Secured Party's Liability for Repossessor's Acts

Typically the secured party hires an independent party to effect the repossession. In such a case the secured party is liable for breach of the peace committed by its independent contractor. MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151 (Tex. 1992) (here a wrecker driver who repossessed a vehicle with the debtor in it); Osborne v. Minnesota Recovery Bureau, Inc., 2006 WL 1314420 (D. Minn. 2006).

5. Seizure of Property Not Subject to Security Interest

If the collateral is a vehicle (or a boat, an aircraft, or similar property), it is not unlikely that it will contain personal property not subject to the security interest, such as clothing in the back seat, a cellular phone, or items in the glove box. Failure to immediately return these items to the debtor can result in liability for conversion. Ford Motor Credit Co. v. Cole, 503 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1974, writ dism'd); River Oaks Chrysler-Plymouth, Inc. v. Barfield, 482 S.W.2d 925, 928 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ dism'd). However, Texas law permits a motor vehicle contract to authorize the secured party to retain or dispose of such property after giving notice as prescribed in the statute. Tex. Fin. Code Ann. § 348.407 (Vernon 1998).

6. Effect of Bankruptcy

Title to repossessed collateral sometimes becomes an issue in bankruptcy cases. In a typical scenario, the secured party rightfully repossesses collateral and the debtor commences bankruptcy before the secured party disposes of the collateral, leading to dispute between the parties about whether the collateral is property of the estate and consequently the automatic stay stops the secured party's efforts to dispose of the collateral. The courts almost uniformly rule that the collateral remains property of the debtor until the secured party disposes of it (by foreclosure sale or by electing to retain the collateral in satisfaction of the debt) and so is part of the debtor's estate in bankruptcy. Estis v. Credit Union of Johnson County (In re Estis), 311 B.R. 592 (Bankr. D. Kan. 2004) (repossessed collateral was property of debtor, despite fact that "repossession title" had already been issued to secured party); Motors Acceptance Corp. v. Rozier, 597 S.E.2d 367 (Ga. 2004).

Bankruptcy courts in two districts in Texas have required the party that took possession of collateral before commencement of the debtor's bankruptcy to return the property to the debtor on the ground that the party's continued possession violates the Bankruptcy Code's prohibition (in 11 U.S.C.A. § 362(a)(3)) against taking "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," holding that the phrase "exercise control" includes the party's retaining possession of the property and denying the debtor use of the property after the debtor has requested its return. In re Zaber, 223 B.R. 102 (Bankr. N.D. Tex. 1998) (chapter 13 proceeding in which secured party refused to return repossessed collateral); In re Coats, 168 B.R. 159 (Bankr. S.D. Tex. 1993) (chapter 13 proceeding in which constable refused to return property seized under writ of execution).

A bankruptcy court in a third district has held to the contrary, on the ground that postpetition retention of property seized before commencement of bankruptcy is merely maintenance of the status quo and that exercise of control over the property will subject the secured party to sanctions only if it involved an affirmative act of the secured party that occurred after commencement of the bankruptcy. In re Richardson, 135 B.R. 256 (Bankr. E.D. Tex. 1992) (chapter 13 proceeding in which secured party placed repossessed collateral in storage on learning of the bankruptcy but refused to return it to debtor).

B. Disposition of Collateral

1. Secured Party's Right To Dispose of Collateral

The secured party may dispose of collateral after taking control or possession of it. Tex. Bus. & Com. Code Ann. § 9.610(a) (Vernon 2002).

2. Method of Disposition

Usually disposition is by sale, but Article 9 permits leasing, licensing, or other dispositions. Tex. Bus. & Com. Code Ann. § 9.610(a) (Vernon 2002).

Section 9.610(b) allows flexibility in the disposition—permitting public sale or private sale, piecemeal or as one unit, at any time, at any place, on any terms—so long as the disposition is "commercially

reasonable" as to method, manner, time, place, and all other aspects.

3. Prohibition of Waiver

Neither the debtor nor any obligor may waive or modify the secured party's obligations under Section 9.610(b) with regard to disposition of collateral. Tex. Bus. & Com. Code Ann. § 9.602(7) (Vernon 2002).

4. Commercial Reasonableness

The Code does not define commercial reasonableness, but Section 9.627, discussed in the following paragraphs, provides some guidance.

Whether the disposition of collateral was commercially reasonable is generally a question of fact. Al Gailani v. Riyad Bank, Houston Agency, 144 S.W.3d 1 (Tex. App.—El Paso, pet. denied); Gordon & Assoc. v. Cullen Bank Citywest, N.A., 880 S.W.2d 93 (Tex. App.—Corpus Christi 1994, no writ).

For a good discussion of commercial reasonableness, see Havins v. First Nat'l Bank, 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ).

a. Safe Harbors

Article 9 provides that certain kinds of dispositions are deemed to be commercially reasonable:

- Disposition in the usual manner on any recognized market;
- Disposition at the price that is current in any recognized market at the time of disposition; or
- Disposition that is otherwise in conformity with reasonable commercial practices among dealers in the type of the property that was the subject of the disposition. Tex. Bus. & Com. Code Ann. § 9.627(b) (Vernon 2002).

Similarly, a disposition is commercially reasonable if it has been—

- Approved in a judicial proceeding;
- Approved by a bona fide creditors' committee;
- Approved by a representative of creditors; or
- Approved by an assignee for the benefit of creditors. *Id.* § 9.627(c).

Just because a disposition occurs in the context of a proceeding in which approval *could* be obtained does not mean that approval *must* be obtained, and lack of approval does not necessarily mean that the disposition is not commercially unreasonable. *Id.* § 9.627(c).

b. Sale Price

The fact that a greater amount could have been obtained by a disposition at a different time or in a different method from that selected by the secured party does not by itself preclude the secured party from establishing that the disposition was made in a commercially reasonable manner. *Id.* § 9.627(a).

Courts have considered that a secured party has a fiduciary relationship with the debtor in meeting the duty to dispose of collateral in a commercially reasonable manner and that this duty requires the secured party to make a "sincere effort to obtain a full market value upon the sale of the mortgaged property." Christian v. First Nat'l Bank, 531 S.W.2d 832 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

If a court is convinced that collateral sold for accepted market value, questions of method, manner, time, place, and terms probably will be considered irrelevant and the sale will be held to have been commercially reasonable. See, e.g., Pruske v. National Bank of Commerce, 533 S.W.2d 931 (Tex. Civ. App.—San Antonio 1976, no writ). A low price, however, may not render a sale unreasonable. *Id.*; Siboney Corp. v. Chicago Pneumatic Tool Co., 572 S.W.2d 4 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) ("the fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner"). See also F.D.I.C. v. Lanier, 926 F.2d 462 (5th Cir. 1991) (fact that disposition produced an amount that was substantially lower than original cost or what one witness testified he would have paid was not ground for holding that disposition was commercially unreasonable when there was no evidence of irregularity, bad faith, or other commercially unreasonable actions).

A grossly inadequate sale price must be coupled with "the slightest circumstance resulting in unfairness to the debtor" before the sale will be set aside as being commercially unreasonable. American Sav. & Loan Ass'n v. Musick, 531 S.W.2d 581 (Tex. 1975). The commercial reasonableness standard was not met in a case in which the sale was inadequately advertised and organized and the sale price was substantially below the purchase price one year earlier. In re Frazier, 93 B.R. 366 (Bankr. M.D. Tenn. 1988).

c. Unique Collateral

If collateral is unique, "the failure to publicize the foreclosure sale to those likely to be interested in the type of collateral involved constitutes evidence that the sale was not commercially reasonable." Al Gailani v. Riyad Bank, Houston Agency, 144 S.W.3d 1 (Tex. App.—El Paso, pet. denied).

5. Warranties on Transfer of Collateral

A disposition of collateral will include "warranties relating to title, possession, quiet enjoyment, and the like that by operation of law accompany a voluntary disposition of property of the kind subject to the contract." Tex. Bus. & Com. Code Ann. § 9.610(d) (Vernon 2002). The secured party may disclaim or modify these warranties. *Id.* § 9.610(e). "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" (or "words of similar import") is sufficient to disclaim warranties under Section 9.610(e). *Id.* § 9.610(f).

C. Notice of Intended Disposition of Collateral

1. Requirement of Notice

One of the secured party's duties if it intends to dispose of collateral is to provide certain parties with notice of the intended disposition in all cases. Tex. Bus. & Com. Code Ann. § 9.611(b) (Vernon 2002).

In Morgan Buildings and Spas, Inc. v. Turn-Key Leasing, Ltd., 97 S.W.3d 871 (Tex. App.—Dallas 2003, pet. denied), the secured party failed to provide the required notice of its intended disposition or retention of the collateral and could not rely on the offset mechanism to which parties agreed before default because it was unreasonable.

2. Parties to Whom Notice Must Be Given

The notice of the secured party's intended disposition must be given to-

- The debtor (see III.C.2.a. below);
- Any secondary obligor (see III.C.2.b. below); and
- Certain other persons with an interest in the collateral, but only if the collateral is other than consumer goods (see III.C.2.c. below).

a. Notice to the Debtor

Notice of intended disposition must be given to the debtor in all cases. Tex. Bus. & Com. Code Ann. § 9.611(c)(1) (Vernon 2002).

Revised Article 9 defines "debtor" as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is [obligated on the debt]." *Id.* § 9.102(28).

Because the definition of "debtor" in Section 9.102(a)(28) includes the owner of the collateral but not the person obligated to pay the secured debt—the "obligor" (see Section 9.102(a)(60))—notice need not be sent to the obligor if it is not also the owner of the collateral. This rule is the obverse of its counterpart in real-property foreclosures, in which notice of a nonjudicial sale must be given to the person obligated to pay the secured debt but not to the owner of the real property subject to the sale. Tex. Prop. Code § 51.002(b)(3) (Supp. 2005).

b. Notice to Secondary Obligors

Notice of intended disposition must be given to "any secondary obligor" in all cases. Tex. Bus. & Com. Code Ann. § 9.611(c)(2) (Vernon 2002).

Under revised Article 9, an "obligor" is "a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment of other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment of other performance of the obligation." *Id.* § 9.102(60).

Revised Article 9 defines "secondary obligor as "an obligor to the extent that: (A) the obligor's obligation is secondary; or (B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either." *Id.* § 9.102(72).

c. Notice to Other Persons with Interest in the Collateral

In cases in which the collateral is other than consumer goods, notice of intended disposition must be given to—

- Any other person from whom the secured party has received, before the notification date (see III.C.2.d. below), an authenticated notification of a claim of an interest in the collateral (Tex. Bus. & Com. Code Ann. § 9.611(c)(3)(A) (Vernon 2002);
- Any other secured party or lien holder that, ten days before the notification date (see III.C.2.d. below), held a security interest in or other lien on the collateral perfected by the filing of a financing statement that (i) identified the collateral, (ii) was indexed under the debtor's name as of that date, and (iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date (*id.* § 9.611(c)(3)(B); and
- Any other secured party that, ten days before the notification date (see III.C.2.d. below), held a security interest in the collateral perfected by compliance with a statute, regulation or treaty described in Section 9.311(a) (*id.* § 9.611(c)(3)(C).

d. Notification Date

The "notification date" is the earlier of the date when—

- A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition (Tex. Bus. & Com. Code Ann. § 9.611(a)(1) (Vernon 2002)); or
- The debtor and any secondary obligor waive the right to notification (§ 9.611(a)(2)).

3. When Notice Must Be Given

The timing of the notice of intended disposition must be reasonable. Tex. Bus. & Com. Code Ann. § 9.611(b) (Vernon 2002).

In a transaction *other than a consumer transaction*, the reasonableness requirement is met by sending the notice after default and ten days or more before the earliest time of disposition as stated in the notice. *Id.* § 9.612(b). In all other cases whether a notification is sent within a reasonable time is a question of fact. *Id.* § 9.612(a).

Prior to the revisions effective July 1, 2001, Article 9 did not prescribe a minimum period between sending notification of intended disposition of collateral and the disposition itself. Consequently secured parties had to choose a notification period that was long enough to comply with Article 9's requirement of commercial reasonableness while minimizing the deterioration in value of the collateral resulting from delays in disposing of it. Because Article 9 has always allowed the parties to contract as to terms such as notification period, most security agreements included such a provision, commonly ten days. With the revision to Article 9 came a safe-harbor provision for consumer transactions. *Id.* § 9.612(b). Section 9.612(b) draws a distinction between consumer transactions and all other transactions: in the latter, notification of intended disposition of collateral sent at least ten days before the earliest time of disposition is deemed to have been sent within a reasonable time; no time period is prescribed in the former but whether the timing is reasonable is a question of fact. The parties are still allowed to agree in advance, such as in the security agreement, as to what will be a reasonable notification period in consumer transactions so long as the time period is not manifestly unreasonable. *Id.* § 9.603(a). The fact that Article 9 now permits a ten-day notification period for other-than-consumer transactions while omitting to provide any safe-harbor period for consumer transactions might be seen as a rejection of a ten-day period for consumer transactions and a requirement that the period be longer than ten days.

Sections 9.613 and 9.614 provide the content of notifications, but in them the distinction shifts from the consumer transaction/other transaction distinction in Section 9.612 for purposes of timing of the notice to a consumer-goods transaction/other transaction in Sections 9.614 and 9.613 respectively for the for... the notice.

4. Prohibition of Waiver

This notice requirement may be waived only after default. Tex. Bus. & Com. Code Ann. § 9.624(a) (Vernon 2002). An attempted waiver of this notice requirement in the security agreement or at any time before default is ineffective. *Id.* § 9.602(7).

5. Exception for Collateral That Is Perishable, Threatens To Decline Speedily in Value, or Is Sold on a Recognized Market

Notice is excused only if the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Tex. Bus. & Com. Code Ann. § 9.611(d) (Vernon 2002).

6. Requirement That Notice Be Authenticated

The notice of intended disposition must be authenticated. Tex. Bus. & Com. Code Ann. § 9.611(b) (Vernon 2002). Consequently it must be signed or it must be produced in a way that, under the definition of "authenticate" in Section 9.102(a)(7), precludes oral notification. As pointed out in the State Bar Committee Comment for this section, that is a change in Texas law, which had permitted oral notification under Beltran v. Groos Bank, N.A., 755 S.W.2d 944 (Tex. App.—San Antonio 1988, no writ) and MBank Dallas, N.A. v. Sunbelt Mfg., Inc., 710 S.W.2d 633 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

7. Form of Notice

Prior to revised Article 9, effective July 1, 2001, the secured party was left to its own lights in trying to draft a notice that would satisfy Article 9's requirements. Revised Article 9 provides safe-harbor notice forms in Sections 9.614 (for consumer-goods transactions) and 9.613 (for all other transactions). These forms are reproduced in Appendix A and Appendix B below respectively.

Note that in Sections 9.613 and 9.614 the distinction shifts from the consumer transaction/other transaction distinction in Section 9.612 for purposes of timing of the notice to a consumer-goods transaction/other transaction in Sections 9.614 and 9.613 respectively for the form of the notice.

8. Notice to Internal Revenue Service

The Internal Revenue Service must be notified of an intended disposition of collateral if is has filed a notice of a lien with the secretary of state or county clerk, as appropriate, that affects any of the collateral subject to disposition. Although Section 9.611(c)

requires notification to other lien holders who held a perfected security interest in the collateral as of ten days before the notification date, notification to the IRS is required if its notice of lien was of record in the appropriate location as of thirty days before the intended date of sale. 26 U.S.C. § 7425(c)(1).

The general rule is that a filing is effective against other secured parties only if it will be returned in a search using the debtor's name as determined under the rules of Section 9.503. One federal circuit court has held that a filing by the IRS of a notice of federal tax lien is effective if a "reasonable and diligent search would have revealed the existence of the notices of the federal tax liens under those names," even though the name on the tax lien notice was not the debtor/taxpayer's exact name. U.S. v. Crestmark Bank (In re Spearing Tool & Mfg. Co., Inc.), 412 F.3d 653 (6th Cir. 2005), cert. denied, 127 S.Ct. 41 (2006). In *Spearing Tool* a bank had filed a financing statement with the Michigan Secretary of State that identified the debtor as "Spearing Tool and Manufacturing Co.," which was the precise name under which the debtor was registered with the Michigan Secretary of State, which apparently was the jurisdiction in which the debtor was organized. The IRS filed a notice of federal tax lien with the Michigan Secretary of State that identified the debtor as "Spearing Tool & Mfg. Company Inc.," which was not the precise name of the debtor although it was the name the debtor used on at least one of its quarterly tax payments. The bank had obtained search reports of UCC filings using the correct name, but, because the Michigan Secretary of State used a search logic that required an exact match, the IRS filings did not appear on the report and the bank advanced additional funds after the IRS had filed but in ignorance of the IRS filings. The Sixth Circuit held that the Internal Revenue Code and implementing regulations do not require an exact identification of the taxpayer on a notice of tax lien and these federal rules override any inconsistent state law, and these filings were effective. The court commented that the bank should have known to search for common abbreviations, such as "Mfg." for "Manufacturing."

A federal tax lien does not have super priority; its priority is determined by time of filing, as with contractual security interests. Unlike other security interests, it will not be terminated by the foreclosure of a superior lien unless the notice described above is timely received. *Id.* § 7425(b)(1). If the tax lien is inferior to the security interest being foreclosed and the IRS receives the notice, the IRS may redeem the property during the 120-day period immediately following disposition of the collateral and the collateral will be free of the right of redemption and the lien only after the 120-day period expires without redemption by the IRS. *Id.* § 7425(d)(1).

The notice of intended disposition prescribe... Sections 9.613 and 9.614 will not satisfy the IRS notice requirements. *See* Treas. Reg. § 301.7425–3(d) (1976).

9. Notice to Others To Publicize Sale

Depending on the circumstances of the intended disposition, additional notices may be appropriate to conduct a commercially reasonable disposition. For example, the sale should be publicized among those who might be interested in the collateral and should include information about the collateral, and terms of the sale, that would not be included in the notice required by this section.

D. Application of Proceeds of Disposition

1. General Scheme of Distribution

The secured party must distribute cash proceeds of disposition of the collateral in this order:

- First, to the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing and (to the extent provided for by agreement and not prohibited by law) reasonable attorney's fees and legal expenses incurred by the secured party (Tex. Bus. & Com. Code Ann. § 9.615(a)(1) (Vernon 2002));
- Second, to satisfaction of obligations secured by the security interest under which the disposition was made (Id. § 9.615(a)(2));
- Third, to the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if (i) the secured party received from the subordinate lien holder an authenticated demand for proceeds before distribution of the proceeds was completed and (ii) in the case of a consignor's having an interest in the collateral, the subordinate security interest is senior to the interest of the consignor (§ 9.615(a)(3));
- Fourth, to a secured party that is a consignor of the collateral if the secured party received from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed (§ 9.615(a)(4)); and
- Last, any surplus to the debtor (§ 9.615(d)).

2. Payment to Subordinate Secured Parties

Holders of subordinate security interests may get their share of proceeds only if the disposing secured party has received an authenticated demand from them before distribution of the proceeds is complete. Tex. Bus. & Com. Code Ann. § 9.615(a)(3) (Vernon 2002). The disposing secured party may require "reasonable

proof of the interest or lien within a reasonable time." *Id*. § 9.615(b).

3. Surplus or Deficiency

After all others entitled to a share of the proceeds of disposition of the collateral have been paid, the debtor is to be paid any surplus (and the obligor is liable for any deficiency) if the security interest secures payment or performance of an obligation. Tex. Bus. & Com. Code Ann. § 9.615(d) (Vernon 2002). That rule does not apply if the underlying transaction was a sale of accounts, chattel paper, payment intangibles, or promissory notes. *Id*. § 9.615(e).

Section 9.626 is a long section governing a secured party's explanation of how it calculated the surplus or deficiency after disposition of the collateral.

The requirements of section 9.626 apply only to a consumer-goods transaction; if that criterion is met, the explanation goes to the *debtor* if there is a surplus and to the *consumer obligor* if there is a deficiency, and they may not be the same person. Section (b) imposes deadlines by which explanations may be given; as the period in which an explanation of the deficiency must be given begins when the secured party "first makes written demand on the consumer obligor [for payment of the deficiency] after the disposition," no explanation need be provided if the secured party decides not to pursue collection of the deficiency and accordingly does not make such a demand for payment.

Prior to the revisions effective July 1, 2001, Article 9 did not require the secured party to account to anyone with regard to the result of collateral disposition, except that the debtor could provide the secured party with a statement of the what the debtor believed to be the aggregate amount of unpaid debt and require to secured party to approve or correct it. That procedure was in Section 9.208 before the 2001 revisions and now is in Section 9.210; it was and is available at any time, whether before default or afterward. But now revised Article 9 provides an additional accounting procedure for situations in which the secured party has disposed of collateral.

In a consumer-goods transaction in which the debtor is entitled to a surplus, the secured party must tell the debtor the amount of the surplus, explain how it was calculated, and provide certain other information. The secured party must do so by the deadlines stated in Section (b).

In a consumer-goods transaction in which a consumer obligor is liable for a deficiency, the secured party must provide the same information as in the case of a debtor's entitlement to a surplus and must do so by the deadlines stated in Section (b).

In a consumer-goods transaction in which the collateral was sold for the amount of the debt, so that no surplus or deficiency exists, the secured party is not obligated to provide information under this section.

In a consumer-goods transaction in which a consumer obligor is liable for a deficiency but the secured party is not attempting to collect it, the secured party is not obligated to provide information under Section (b)(1), but Section (b)(2) requires the secured party to provide a waiver of the deficiency within fourteen days after receipt of a request therefor.

In a transaction other than a consumer-goods transaction, regardless of whether a surplus or deficiency exists and regardless of whether the secured party is attempting to collect a deficiency, the secured party is not obligated to provide information under Section 9.626.

Care must be given in providing the information required by Section (b)(1), as Section (c) requires that it be presented in a specified order. In addition, Section 9.625(e) provides that the debtor, consumer obligor, or person named as a debtor in a filed record may recover $500 in each case from one who (1) fails to comply with Section 9.616(b)(1) and whose failure is part of a pattern of noncompliance or consistent with a practice of noncompliance or (2) fails to comply with Section 9.616(b)(2). However, Section 9.616(d) provides some relief by excusing minor errors that are not seriously misleading.

Section 9.602 prohibits waiver or modification by the debtor or any obligor of the secured party's obligations under Section 9.626.

4. Superior Security Interests

the disposing secured party need not apply cash proceeds of the disposition to obligations secured by a security interest or lien that is superior to the disposing secured party's security interest—and takes the cash proceeds free of the superior security interest or lien—if the disposing secured party receives the cash proceeds "in good faith and without knowledge that the receipt violates the rights of the holder of" the superior security interest or lien. Tex. Bus. & Com. Code Ann. § 9.615(g) (Vernon 2002).

The disposing secured party probably will have knowledge of prior filed financing statements, but such a filing does not necessarily mean that a security interest exists or has attached, and presumably the disposing secured party is not required to investigate whether by its retention of cash proceeds the prior filer's rights are being violated.

In a case in which disposition of collateral is to the secured party, a person related to the secured party, or a secondary obligor (such as a guarantor), calculation of the surplus or deficiency is subject to attack on the grounds that disposition was for an amount that is significantly below to range of proceeds

that would have resulted if some other person had purchased the collateral *Id.* § 9.615(f). Another section of Article 9 places on the debtor or obligor the burden of establishing that the amount of proceeds of the disposition is substantially below the range of prices that a complying disposition to another person would have brought. *Id.* § 9.626(a)(5). That is not the same question of what price (and thus what surplus or deficiency) actually would have resulted if the debtor or obligor meets its burden of establishing that the actual proceeds was substantially below an appropriate range of prices, and Article 9 does not appear to address that issue.

5. Prohibition of Waiver

Section 9.602 prohibits waiver or modification by the debtor or any obligor of the secured party's obligations under Section 9.615(c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition, Section 9.615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral, or Section 9.615(f) with regard to calculation of a deficiency or surplus when disposition of the collateral is to the secured party, one related to the secured party, or a secondary obligor. *Id.* § 9.602(4), (5), and (8).

E. Rights of Transferee of Collateral

The party who takes the collateral pursuant to the secured party's disposition gets all of the debtor's right in the collateral, free of the security interest under which disposition is made and free of any security interests or liens that are *subordinate* to the security interest under which disposition is made but not free of any security interests or liens that are *superior* to the security interest under which disposition is made. Tex. Bus. & Com. Code Ann. § 9.617(a) (Vernon 2002).

That rule applies only if the transferee acted in good faith and (if the transferee acted in good faith) applies even if the disposing secured party did not comply with Article 9 or the requirements of any judicial proceeding, in which case the debtor or other aggrieved party may look only to the disposing secured party and not to the transferee. *Id.* § 9.617(b)

F. Acceptance of Collateral in Satisfaction of Debt

1. Permitted Acceptances

The secured party may accept collateral in full satisfaction of the secured obligation if it complies with Section 9.620. Tex. Bus. & Com. Code Ann. § 9.620(a) (Vernon 2002). In a transaction other than a consumer transaction, it also may accept collateral in *partial* satisfaction. *Id.* § 9.615(g). These acceptances of collateral are known as strict foreclosure. Partial strict foreclosure was new with the revision to Article 9 effective July 1, 2001. Article 9 encourages strict foreclosure as they "often will produce better results than a disposition for all concerned." *Id.* § 9.620 comment 2.

2. Debtor's Consent

The debtor must consent to the proposal, and, in the case of partial satisfaction, the consent must be by a record that is authenticated after default (*Id.* § 9.620(a)(1)), certain other parties that may have an interest in the collateral must be notified and may object (*Id.* §§ 9.620(a)(2), 9.621), and the collateral must not be in the debtor's possession if it is consumer goods (*Id.* § 9.620(a)(3)).

3. Required Disposition

The secured party having possession of the collateral will be required to dispose of it within certain deadlines if the collateral is consumer goods and (1) in the case of a purchase-money security interest, 60 percent of the cash price has been paid or (2) in cases other than a purchase-money security interest, 60 percent of the principal amount of the secured obligation has been paid. *Id.* § 9.620(e). If the secured party is required to dispose of the collateral within the applicable deadline under this rule, strict foreclosure is not available unless the debtor has waived the sale requirement under Section 9.624 by an agreement entered into and authenticated after default.

4. Notice of Intended Acceptance

A secured party proposing to accept collateral in full or partial satisfaction of the secured obligation under Section 9.620 must, among other things, send its proposal to these persons:

- Any person from whom the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral (Tex. Bus. & Com. Code Ann. § 9.621(a)(1) (Vernon 2002));
- Any other secured party or lien holder that, ten days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that (i) identified the collateral, (ii) was indexed under the debtor's name as of that date, and (iii) was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date (*id.* § 9.621(a)(2));
- Any other secured party that, ten days before the debtor consented to the acceptance, held a

security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 9.311(a); and

- *Only in the case of a partial satisfaction*, any secondary obligor (*id.* § 9.621(b)).

Suggested forms for these notices are in Appendix C and Appendix D below.

5. Effect of Acceptance

The effect of the secured party's acceptance of collateral in full or partial satisfaction of debt is to—

- Discharge the obligation to the extent consented to by the debtor;
- Transfer all of the debtor's rights in the collateral to the secured party;
- Discharge the security interest that is the subject of the debtor's consent;
- Discharge any subordinate security interest; and
- Terminate any other subordinate interest. Tex. Bus. & Com. Code Ann. § 9.622(a) (Vernon 2002).

A subordinate interest is discharged or terminated under Section 9.622(a) even if the secured party fails to comply with Article 9. *Id.* § 9.622(b).

6. Prohibition of Waiver

Section 9.602 prohibits waiver or modification by the debtor or any obligor of the secured party's obligations under Sections 9.620 and 9.621, although Section 9.624(b) allows a debtor to waive the right under Section 9.620(e) to require disposition of collateral if the waiver occurs after default. In In re Cadiz Properties, Inc., 278 B.R. 744, 48 UCC Rep.Serv.2d 440 (Bankr. N.D. Tex. 2002), for example, delivery of pledged stock after default pursuant to an escrow agreement executed before default nonetheless required compliance with § 9.620, which could not be waived.

G. Collection of Accounts

1. Direct Collection from Account Debtor

In a case in which collateral is a payment obligation or a performance obligation, the secured party may after default (or before default if so agreed) notify the person obligated on the collateral to make payment or performance directly to the secured party. Tex. Bus. & Com. Code Ann. § 9.607(a) (Vernon 2002).

A common example is the debtor who is a retailer and who has put up its accounts receivable as collateral for the loan; the secured party may direct the account debtor to make payment on the account directly to the secured party, and such payments will be applied to reduce the secured debt as well as the account debtor's obligation to the retailer-debtor, or the secured party may take control of the proceeds of the accounts, such as by directing the debtor to collect them and deliver the proceeds to the secured party.

Another common example is the debtor who has put up a certificate of deposit as collateral; the secured party may direct the issuer of the certificate of deposit to liquidate the CD and pay it to the secured party.

If the secured party elects to collect from a third party and if the secured party is entitled to charge back uncollected collateral to full or limited recourse against the debtor or a secondary obligor, the secured party must proceed in a commercially reasonable manner. *Id.* § 9.607(c). Neither the debtor nor any obligor may waive or modify the secured party's obligations of commercial reasonableness under Section 9.607(c) with regard to the secured party's collecting or enforcing an account debtor's obligations, charging back uncollected collateral, or exercising recourse rights against the debtor or secondary obligor. *Id.* § 9.602(3).

2. Repossession and Foreclosure Not Required

For collateral within the scope of Section 9.607, the secured party need not go through repossession and foreclosure proceedings against the debtor, as would be the case, for example, were the collateral equipment. In a case in which the secured party directed the debtor to deposit all receipts of collected accounts into a bank account under the secured party's control, the Texas Supreme Court held that the Code does not require notice prior to such a directive and that requirements of notice and commercial reasonableness apply only when the secured party attempts to collect directly from the account debtor or the obligor of an instrument. Cullen Frost Bank v. Dallas Sportswear Co., 730 S.W.2d 668 (Tex. 1987). The Code does not define commercial reasonableness, but Section 9.627 provides some guidance. Also see III.B.4. above.

3. Real Estate Note As Collateral

Revised Article 9, effective July 1, 2001, has added provisions enabling simplified enforcement of a lien in real property securing a promissory note that in turn is collateral for obligations owed to a secured party by the owner and holder of the collateral note. The secured party may enforce the debtor's lien in the real property without first foreclosing its security interest in the collateral note but instead may file with the county clerk (of the county where the deed of trust on the real property is filed) a copy of the security agreement creating the security interest in the collateral note and an affidavit that default has occurred under

the collateral note and the secured party is entitled to enforce the deed of trust nonjudicially. Tex. Bus. & Com. Code Ann. § 9.607(b) (Vernon 2002).

4. Application of Proceeds of Collection

The secured party who has received proceeds of collection or enforcement under Section 9.607 turns to Section 9.608 to determine how to apply the proceeds. Proceeds (defined in § 9.102(a)(65)) may be either cash proceeds (defined in § 9.102(a)(9)) or noncash proceeds (defined in § 9.102(a)(58)).

a. Order of Distribution

The secured party must distribute proceeds of collection or enforcement under Section 9.607 in this order to the extent proceeds are available:

- First, to reasonable expenses of collection and enforcement (*id*. §§ 9.608(d), 9.608(a)(1)(A));
- Second, to payment of the obligations secured by the security interest under which the collection or enforcement was made (*id*. § 9.608(a)(1)(B));
- Third, to satisfaction of obligations secured by any subordinate security interest in the collateral if the secured party has received an authenticated demand for proceeds before distribution of the proceeds is completed (*id*. § 9.608(a)(1)(C)); and
- Last, any surplus to the debtor (*id*. § 9.608(a)(4)).

b. Costs of Collection

Proceeds may be applied to reasonable attorney's fees and legal expenses incurred by the secured party only to the extent provided by the security agreement or other agreement but may be applied to reasonable expenses of collection and enforcement in the absence of an agreement. *Id*. § 9.608(a)(1)(A).

c. Inferior Security Interests

If the collateral is subject to a security interest that is subordinate to the security interest being enforced, the enforcing secured party need not pay any excess proceeds to the subordinate secured party unless the enforcing secured party has received an authenticated demand for proceeds before completing distribution of the proceeds (*id*. § 9.608(a)(1)(C)). The enforcing secured party may require the subordinate secured party to provide reasonable proof of the subordinate security interest and need not comply with the subordinate secured party's demand for distribution if it does not receive the proof within a reasonable time (*id*. § 9.608(a)(2)). To avoid incorrect distribution of proceeds, the enforcing secured party should always require evidence that the subordinate security int... is still in force and of the amount outstanding on the subordinate debt.

d. Superior Security Interests

If the collateral is subject to a security interest that is superior to the security interest being enforced, the enforcing secured party need not pay any proceeds to the superior secured party. Tex. Bus. & Com. Code Ann. § 9.607 comment 5 (Vernon 2002); *id*. § 9.608 comment 5.

e. Noncash Proceeds

The secured party who obtains noncash proceeds obtained under Section 9.607 need not apply or pay over for application noncash proceeds unless the failure to do so would be commercially unreasonable. Tex. Bus. & Com. Code Ann. § 9.608(a)(3) (Vernon 2002). If the secured party does so, it must be in a commercially reasonable manner. *Id.* Section 9.207 imposes the duty to use reasonable care in the custody and preservation of collateral in the secured party's possession.

f. Waiver of Duties

Neither the debtor nor any obligor may waive or modify the secured party's obligations under Section 9.608(a) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition or require accounting for or payment of surplus proceeds of collateral. Tex. Bus. & Com. Code Ann. § 9.602(4) (Vernon 2002).

IV. TRANSFER WITHOUT FORECLOSURE

What might seem to be a disposition of collateral that is subject to Article 9 rules (for example, the section 9.611 requirement of giving the debtor notice of intended disposition) may be exempt from those rules. Tex. Bus. & Com. Code Ann. § 9.618 (Vernon 2002).

Under Section 9.618, a section 9.610 disposition does not occur when a secondary party receives an assignment of the secured transaction from the secured party, receives a transfer of the collateral from the secured party and agrees to accept the secured party's rights and assume the secured party's duties, or is subrogated to the secured party's rights with respect to the collateral.

Article 9 has always contained provisions of this nature, but prior to revised Article 9, effective July 1, 2001, confusion had existed as to some transactions in which secured parties and secondary parties commonly engaged—for example, if the secured party forecloses its security interest in goods and a secondary party purchases the goods at the foreclosure, was that a disposition subject to the normal rules of Article 9?

Section 9.618's language, new with revised Article 9, is intended to make it clear that such a transfer is a disposition subject to Section 9.610 because the secondary party has not taken on the role of secured party by assignment or subrogation.

Thus a secured party who transfers its security interest—rather than the collateral—to a secondary party is not liable for violations of Article 9 by the secondary party once it becomes the secured party, and the transfer to the secondary party is not a Section 9.610 disposition that thus is burdened by, for example, the requirement of notice of disposition. But the language of Section 9.618(b)(2) that the secured party is relieved of *further* duties under Article 9 indicates that the original secured party still remains liable for violations of Article 9 that occurred before the transfer.

In a case in which the secured party repossessed collateral, delivered the collateral to A, a guarantor (who repaired and sold the collateral and delivered sale proceeds to the secured party), and sued B, another guarantor, for the deficiency, the delivery of collateral to A was not a disposition requiring notice to B but A's sale of collateral to third parties was a disposition requiring notice to B. Bexar County Nat'l Bank v. Hernandez, 716 S.W.2d 938 (Tex. 1986) (per curiam).

V. ADDITIONAL MATERIAL

ANDERSON, BARTLETT & EAST'S TEXAS UNIFORM COMMERCIAL CODE ANNOTATED (2006) (updated annually). Portions of these course materials have appeared in this publication and are used here by permission of Thomson West. Further reproduction is prohibited.

Annot., *Validity, Under State Law, of Self-Help Repossession of Goods Pursuant to UCC § 9-503*, 75 A.L.R.3RD 1061.

Annot., *Loss or Modification of Right to Notification of Sale of Repossessed Collateral Under UCC § 9-504*, 9 A.L.R.4TH 552.

Annot., *Nature of Collateral Which Secured Party May Sell or Otherwise Dispose of Without Giving Notice to Defaulting Debtor Under UCC § 9-504(3)*, 11 A.L.R.4TH 1060.

Annot., *Improper Sale, Removal, Concealment, or Disposal of Property Subject to Security Interest Under UCC*, 48 A.L.R.4TH 819.

Annot., *What Constitutes Public or Private Sale Under § 9-504(3)*, 60 A.L.R.4TH 1012.

Annot., *Right of Secured Party To Take Possession of Collateral on Default under UCC § 9-503*, 25 A.L.R.5TH 696.

Annot., *Validity, Under Federal Constitution and Laws, of Self-Help Repossession of Goods Pursuant to UCC § 9-503*, 29 A.L.R.FED 418.

Bates, *Certificates of Title in Texas Under Revised Article 9*, 53 BAYLOR L. REV. 735 (2001).

Benfield, *Consumer Provisions in Revised Article 9*, 74 CHICAGO-KENT L. REV. 1255, 1272-74 (1999).

Coles-Bierre, *Trusting the Process and Mistrusting the Results: A Structural Perspective on Article 9's Low-Price Foreclosure Rule*, 9 AMER. BANKR. INST. L. REV. 351 (2001).

Derber, *Enforcement of Security Interests Under Texas UCC Revised Article 9*, 30TH ANNUAL CONVENTION, TEXAS ASS'N OF BANK COUNSEL (2006).

Dunagan, *Vehicle Repossessions and Resales Under Revised UCC Article 9: The Requirements and the Consequences of Non-Compliance*, 54 CONSUMER FIN. L.Q. REP. 192 (2000).

Kelley, Ropiequet & Maldonado, *Secured Party Liability for the Acts of Repossessors: Exposure, Protective Steps and Ethical Responsibilities*, 55 CONSUMER FIN. L.Q. REP. 158 (2001).

Krahmer, *Some Notes on Avoiding Pitfalls and Penalties Under the New UCC Article 9*, 25TH ANNUAL CONVENTION, TEXAS ASS'N OF BANK COUNSEL (2001).

Nicewander, *Procedures for Repossession and Resale of Consumer Goods in Texas Under Revised Article 9 of the UCC*, 25TH ANNUAL CONVENTION, TEXAS ASS'N OF BANK COUNSEL (2001).

Rapson, *Repurchase Agreements and the Larger Issue of Deficiency Actions: What does Section 9-504(5) Mean?* 29 IDAHO L. REV. 649 (1992).

Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code, Part II*, 54 BUS. LAWYER 1113 (1999).

Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code, Part II*, 54 BUS. LAWYER 1737 (1999).

Zinnecker, *The Default Provisions of Revised Article 9*, 25TH ANNUAL CONVENTION, TEXAS ASS'N OF BANK COUNSEL (2001).

APPENDIX A

Form for
Notification of Disposition of Collateral Under Section 9.613
(Other Than Consumer-Goods Transactions)

[*See III.C. above.*]

To: _____ [*Name of debtor, obligor, or other person to which the notification is sent*]

NOTIFICATION OF DISPOSITION OF COLLATERAL

From: _____ [*Name, address, and telephone number of secured party*]

Name of Debtor(s): _____ [*Include only if debtor(s) are not an addressee*]

[*For a public disposition:*]

We will sell [or lease or license, *as applicable*] the [*describe collateral*] [to the highest qualified bidder] in public as follows:

Day and Date: _____

Time: _____

Place: _____

[*For a private disposition:*]

We will sell [or lease or license, *as applicable*] the _____ [*describe collateral*] privately sometime after _____ [*day and date*].

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, *as applicable*] [for a charge of $_____]. You may request an accounting by calling us at _____ [*telephone number*].

APPENDIX B

Form for
Notification of Disposition of Collateral Under Section 9.614
(Consumer-Goods Transactions)

[*See III.C. above.*]

_____ [Name and address of secured party]

_____ [Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

_____ [Name and address of any obligor who is also a debtor]

Subject: _____ [Identification of Transaction]

We have your _____ [describe collateral] , because you broke promises in our agreement.

[For a public disposition:]

We will sell _____ [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____

Time: _____

Place: _____

You may attend this sale and bring bidders if you want.

[*For a private disposition:*]

We will sell _____ [describe collateral] at private sale sometime after _____ [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you _____ [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying to us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at _____ [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at _____ [telephone number] [or write us at _____ [secured party's address] _____] and request a written explanation. [We will charge you $_____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at _____ [telephone number] [or write us at _____ [secured party's address] _____].

We are sending this notice to the following other people who have an interest in _____ [describe collateral] or who owe money under your agreement:

_____ [Names of all other debtors and obligors, if any]

APPENDIX C

Form for
Notification of Proposal To Accept Collateral in Full Satisfaction of Debt Under Section 9.620
(Other Than Consumer Transactions)

[*See III.F. above.*]

_____ [Name and address of secured party]

_____ [Date]

_____ [Name and address of each person entitled to notice under Section 9.621(a)]

Re: Notification of proposal to accept collateral in full satisfaction of debt
Debtor: _____
Collateral: _____

Dear _____:

The Debtor is in default under a security agreement dated _____ entered by and between the Debtor and us as the secured party. The security interest grants us a security interest in the Collateral. As of _____ the Debtor owes us $_____, and that amount is secured by our security interest in the Collateral.

We intend to accept the Collateral in full satisfaction of such amount. Doing so will fully discharge the amount due.

If you have any objection to our proposal to accept the Collateral in full satisfaction of such debt, you must send us a signed, written statement of your objection within twenty calendar days from the date this notice was sent. If we have not received a signed, written objection by the expiration of that time, you will be deemed to have consented to this proposal and will have no further right to object, and we will retain the Collateral in full satisfaction of the Debtor's obligations described above.

APPENDIX D

Form for
Notification of Proposal To Accept Collateral in Partial Satisfaction of Debt Under Section 9.620
(Other Than Consumer Transactions)

[*See III.F. above.*]

_____ [Name and address of secured party]

_____ [Date]

_____ [Name and address of each person entitled to notice under Section 9.621(a)]

Re: Notification of proposal to accept collateral in full satisfaction of debt
Debtor: _____
Collateral: _____

Dear _____:

The Debtor is in default under a security agreement dated _____ entered by and between the Debtor and us as the secured party. The security interest grants us a security interest in the Collateral. As of _____ the Debtor owes us $_____, and that amount is secured by our security interest in the Collateral.

We intend to accept the Collateral in satisfaction of $_____ of the total debt due us from the Debtor.

If you have any objection to our proposal to accept the Collateral in satisfaction of $_____ of the total debt due us from the Debtor, you must send us a signed, written statement of your objection within twenty calendar days from the date this notice was sent. If we have not received a signed, written objection by the expiration of that time, you will be deemed to have consented to this proposal and will have no further right to object, and we will retain the Collateral in partial satisfaction of the Debtor's obligations described above.