

SUBJECT: Disposition of Collateral After Default Under § 409.610, Wis. Stat.

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INTRODUCTION

This release applies to all credit unions, state and federal.

EXECUTIVE SUMMARY

This memorandum addresses the requirements a credit union must meet to dispose of repossessed collateral under § 409.610 of the Wisconsin Statutes (Exhibit A). Section 409.610 applies to consumer and non-consumer transactions.

There are a number of issues related to the disposition of collateral that are not covered in this memorandum. For example, application of the proceeds from sale (§ 409.615, § 422.413), the debtor's right to redeem (§ 409.623, § 425.208), the secured party's liability for failing to comply with the rules regarding disposition (§ 409.625) and restrictions on deficiency judgments (§ 425.209) will not be covered. For purposes of this memorandum, it is assumed that the credit union is a secured lender and the borrower is a member.

Section 409.610 gives credit unions a great deal of flexibility in disposing of collateral. The purpose of this flexibility is to give credit unions sufficient leeway to dispose efficiently of the repossessed collateral and maximize the net price received.¹ The statute's intention is to “put the secured party in a position akin to that of a merchant selling or otherwise disposing of his own goods with a view to making the best disposition possible and realizing the best possible return.” Thomas M. Quinn, *Uniform Commercial Code Commentary and Law Digest* § 9-504[A][1] (2d ed. 1991).

There is, however, a tradeoff that comes with this flexibility. Any disposition² is subject to the scrutiny of the courts. And every aspect of the sale must be “commercially reasonable.” This standard permits flexibility, but eliminates bright line rules that ensure compliance with the law.

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There is, however, a tradeoff that comes with this flexibility. Any disposition is subject to the scrutiny of the courts. And every aspect of the sale must be “commercially reasonable.” The principle of good faith is essential for interpreting what actions are commercially reasonable.

The primary focus of commercial reasonableness is not the proceeds received from the sale but rather the procedures employed for the sale. If the secured creditor makes certain that conditions of the sale, in terms of the aggregate effect of the manner, method, time, place and terms employed conform to commercially accepted standards, he should be shielded from the sanctions contained in the UCC.

A sale is commercially reasonable where it is done in public, during business hours, upon adequate notice within a reasonable time of repossession, and under conditions reasonably calculated to bring a fair market price.

¹ Net price is the amount of money received after deducting the expenses of preparing and selling the collateral.

² This memo will hereinafter substitute the term “sale” for “disposition” because a sale is the predominant method of disposing of collateral. The issues addressed in the memo in regard to sales apply equally to other dispositions, such as leasing, as well.

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.

Section 409.610(2), Wis. Stats., provides that the sale of collateral may be “by public or private proceedings.” The choice is given to the credit union, but the choice must be commercially reasonable.

Before deciding upon a public sale, a credit union should establish whether the collateral could be sold privately, and if so, the price that could be achieved. To accomplish this, credit unions should solicit bids and/or seek appraisals from parties that regularly deal in the type of collateral to be sold.

In certain circumstances, the credit union may purchase the collateral. In a public sale, the credit union's right to purchase is broad. However, the credit union's right to purchase is greatly circumscribed in a private sale. It is risky for a credit union to conduct a sale solely to its own members for a number of reasons.

For a private sale, a credit union is required to give the member “reasonable notification of the time after which any private sale or other intended disposition is to be made.” For a private sale it is generally sufficient for the notice to state: “We will sell [or lease or license, as applicable] the [describe collateral] privately sometime after [day and date]”.

For public sales, § 409.613 requires the time and place of any public sale.

Unless the member has signed, after default, a statement renouncing or modifying the right to notification of sale, the credit union must send such notice to the “debtor.” “Debtor” includes co-signers or guarantors of promissory notes as well as the member. Notification must also be given (except in the case of consumer goods) to every person who has filed a financing statement indexed in the name of the member.

A credit union should consider implementation of a policy asking a member in default to sign a statement waiving the right to notice of the sale.

Courts have found the following practices to be commercially unreasonable:

- Failing to select a proper time and place for a sale,
- Failing to sell the goods within a reasonable time,
- Failing to give sufficiently broad public notice of the sale,
- Failing to target notice to specialized dealers and buyers of the collateral,
- Failing to correctly state the planned date, time and location of the sale in a notice of public sale,
- Failing to provide sufficient lead time for buyers to bid or attend a sale,
- Failing to clean, paint, repair or otherwise prepare the goods for sale, and
- Failing to protect the collateral upon foreclosure.

Ultimately, the best way for a credit union to insulate itself from claims of commercial unreasonableness when disposing of collateral after default is to document all good faith efforts to protect the member’s interests and to achieve a fair market price. Credit unions must act cautiously, but can take comfort in knowing that non-material errors will not, ordinarily, result in financial consequences.

COMMERCIAL REASONABLENESS

A. General Principles—Good Faith and a Fair Process

The Uniform Commercial Code (“UCC”), as codified in the Wisconsin Statutes, requires that all parties act in good faith in the performance and enforcement of all agreements or duties. § 401.304, Wis. Stats. The principle of good faith is essential for interpreting what actions are commercially reasonable. The requirement of commercial reasonableness is specifically stated in § 409.610(2):

Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

The interplay of these two principles—good faith and commercial reasonableness—guides the courts' determinations of appropriate sales of collateral.

The Wisconsin Supreme Court has considered the meaning of “commercially reasonable” in two cases. In Vic Hansen and Sons, Inc. v. Crowley, 57 Wis. 2d 106 (1973), the court rejected the secured creditor's deficiency claim after the private sale of the debtor's repossessed auto failed to cover the entire debt. The court found the creditor's sale of the auto commercially unreasonable because the creditor simply transferred ownership of the auto to itself and unilaterally assigned it a “wholesale value.” The court found fault because the creditor failed to establish the auto's fair market value. The court stated that the secured party owed a duty to the debtor to use all fair and reasonable means in obtaining the best price. *Id.* at 111. The court also stated that the secured party does not have to use “extraordinary means” to accomplish this result, but must at least be able to prove that the price obtained was the fair market value.³ *Id.* at 112.

In Appleton State Bank v. Van Dyke Ford, Inc., 90 Wis. 2d 200 (1979), the Supreme Court emphasized the importance of proper procedures in conducting a commercially reasonable sale.

The primary focus of commercial reasonableness is not the proceeds received from the sale but rather the procedures employed for the sale. In re Zsa Zsa, Ltd., 352 F. Supp. 665, 671

(S.D. N.Y. 1972). If the secured creditor makes certain that conditions of the sale, in terms of the aggregate effect of the manner, method, time, place and terms employed conform to commercially accepted standards, he should be shielded from the sanctions contained in [the UCC]. *Id.*

Id. at 208. The court upheld the bank's decision to sell the entire inventory of a Ford dealer's repossessed autos as a package. It also accepted the creditor's decision to restrict the sale to other Ford dealers.⁴

The Court of Appeals for the Seventh Circuit has taken a similar position, emphasizing a fair process as the primary focus of a commercially reasonable sale:

In the end, the “principal limitation on the secured party's right to dispose of the collateral is the requirement that he proceed in good faith (§ 1-203) and in a commercially reasonable manner.” UCC § 9-507, Official Comment 1. Whether a sale was commercially unreasonable is, like other questions about “reasonableness,” a fact-intensive inquiry; no magic set of procedures will immunize a sale from scrutiny. (Citations omitted.) In re Excello Press, Inc., 890 F.2d 896, 905 (7th Cir. 1989).⁵

The Seventh Circuit also cited with approval a Fifth Circuit case that provided some of the essential factors of a commercially reasonable sale:

A sale is commercially reasonable where it is done in public, during business hours, upon adequate notice within a reasonable time of repossession, and under conditions reasonably calculated to bring a fair market price. (Citations omitted.)

Contrail Leasing Partners, Ltd. v. Consolidated Airways, Inc., 742 F.2d 1095, 1099 (7th Cir. 1984).

These Wisconsin Supreme Court and Seventh Circuit cases reflect the belief that a correct process provides the best chance for achieving the goal of a fair market price. This interpretation is supported by the language of § 409.627(1), which states:

The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

³ Wisconsin places the burden of proof on the creditor to show that a sale is commercially reasonable. See footnote 10, below. See also Vic Hansen and Sons, Inc. at 112-13.

⁴ The court noted that the bank's decision was based on the following factors: 1) it was late in the model year and dealers were experiencing inventory problems because it had been a poor year for auto sales; 2) the bank felt that if the cars were sold piecemeal, the buyers would pick out the better cars and leave the bank holding the less saleable ones; and 3) only Ford dealers were given notice because the cars would have been worthless to non-Ford dealers who would not be able to warrant the cars. Appleton State Bank, 90 Wis. 2d at 206-07.

⁵ Opinions of the federal Seventh Circuit Court of Appeals are binding on all persons and entities in its territory, which includes Wisconsin. Wisconsin credit unions are, therefore, bound by decisions of Wisconsin courts and the Seventh Circuit, as well as United States Supreme Court decisions.

B. Specific Issues

The following sections address some of the issues that arise in the process of disposing of collateral.

1. Public v. Private sales

Section 409.610(2), Wis. Stats., provides that the sale of collateral may be “by public or private proceedings.” The choice is given to the credit union, but the choice must be commercially reasonable. Appleton State Bank, 90 Wis. 2d at 207. Comment 1 to § 409.504(3) states: “Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties.”

a. *What is a “public” or “private” sale?*

The UCC does not define “public sale” or “private sale.” However, public sale is defined as an auction elsewhere in the Comments to the Code.⁶

Several courts have considered the issue of what constitutes a public sale. In Lloyd's Plan, Inc. v. Brown, 268 N.W.2d 192 (Iowa 1978), the Iowa Supreme Court noted: “The essence of a public sale is that the public is not only invited to attend and bid but is also informed when and where the sale is to be held.” In Morrell Employees CU v. Useton, 28 UCC Rep. 269, 273 (Tenn. Ct. App. 1979), the court held that a sale conducted by the president of the credit union, advertised solely by the posting of notices on company property, was not a public sale. The court turned to the Restatement of Security § 48, Comment C at 139-40 (1941), which states that a public sale is “one to which the public is invited by advertisement to appear and bid at auction for goods to be sold.” The sale was held to be private because, among other reasons, only members of the credit union were allowed to bid on the automobile.

The Seventh Circuit cited Useton favorably in Ford Motor Credit Co. v. Solway, 825 F.2d 1213, 1218 (7th Cir. 1987), and stated that although a public sale is a sale by auction, not every auction is a public sale. *Id.* at 1217. The court judged that the auction in that case, which was limited to retail auto dealers, was a private sale. *Id.*

From these cases, it appears that a sale will be deemed “public” if it is open to anyone who chooses to bid and if the advertisements and other recognized forms of notification are designed and placed to reach “the public.” A “private sale” is simply one that does not qualify as a “public sale.”

b. *Choosing between a public or private sale*

Good faith requires the credit union to make a reasoned and informed judgment as to which method will realize the best net price for the collateral. Good faith also proscribes a credit union from engaging in self-dealing. For instance, good faith would prohibit credit unions from first holding

... a procedurally proper public sale where they buy the goods themselves for rather less (perhaps much less) than a private sale would have brought, and thereafter resell[ing] at a higher price through their private outlet ...

James J. White and Robert S. Summers, Uniform Commercial Code § 27-10, at 595 (3d ed. 1988). Although the statute specifically permits a credit union to buy at public sale, it must ensure that the process is fair. Before deciding upon a public sale, a credit union should establish whether the collateral could be sold privately, and if so, the price that could be achieved. To accomplish this, credit unions should solicit bids and/or seek appraisals from parties that regularly deal in the type of collateral to be sold.⁷

c. *May the credit union buy the collateral?*

⁶ See Comment 4 of § 402.706, referenced in Comment 1 of § 409.504. Nothing in the UCC or the Comments, or the case law interpreting them, requires that an auction must be a live auction. However, along with the other attributes of a “public sale” discussed in this section, courts in some jurisdictions have concluded that an auction includes the basic concept that a bidder will have knowledge of the highest bid and an opportunity to bid higher. See, e.g., Boatmen's National Bank of Carthage v. Edison, 796 S. W.2d 920 (Mo. App. 1990). An auction with sealed bids therefore may not qualify as a “public sale.” However, the pertinent question is not whether the sale is “public” or “private,” but whether, under the facts and circumstances, it is commercially reasonable.

⁷ According to the court's decision in Vic Hansen and Sons, Inc., the secured creditor is obligated to establish the fair market value of the collateral (in that case an automobile) and cannot rely solely upon wholesale or retail price books. See Vic Hansen and Sons, Inc., 57 Wis. 2d at 114.

In certain circumstances, the credit union may purchase the collateral. Section 409.610(3) provides:

A secured party may purchase collateral:

- (a) At a public disposition; or
- (b) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

In a public sale, then, the credit union's right to purchase is broad. However, the credit union's right to purchase is greatly circumscribed in a private sale. Where a fair market price for the collateral is readily available (e.g., publicly-traded stocks and bonds), there is little danger of self-dealing. However, without such public price information, the private purchase of collateral by the credit union may be suspicious and readily challenged as commercially unreasonable. See Quinn, § 9-504[A][17].

d. *Member-only sale*

It is risky for a credit union to conduct a sale solely to its own members for a number of reasons. First, the sale would be a private one and would be subject to attack as failing to reflect fair market value. Second, a credit union might be hard-pressed to show that such a sale was commercially reasonable—merchants are normally willing to sell to any buyer, not just a select group. Finally, a credit union might have a conflict of interest in such a sale, and therefore fail to act in good faith.

2. Retail v. Wholesale price

The credit union must also decide whether to sell at wholesale or retail. Some factors that courts have deemed important to the reasonableness of that decision are

- a. Whether the expenses of selling at retail would offset any price advantages;
- b. Whether the secured party had the facilities for selling at retail; and
- c. The condition of the collateral. White and Summers, § 27-11, at 597. Again, the inquiry is fact specific. It should be sufficient if a credit union has good reasons for selling at wholesale. Comment 2 to § 409.507 states that [o]ne recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable. . . .

3. Notice

Section 409.611 requires a credit union to give a member reasonable notice before disposing of collateral. The only exceptions to this notice requirement are for collateral that is (1) perishable or rapidly depreciable (e.g., produce or 1994 Rose Bowl t-shirts), or (2) customarily sold on a recognized market (e.g., stocks and bonds). The content, nature, and timing of the notification is different for a public sale than for a private sale. For a private sale, a credit union is required to give the member “reasonable notification of the time after which any private sale or other intended disposition is to be made.” § 409.614(3), Wis. Stats. The purpose of giving notice of a private sale is to give the member the opportunity to discharge the debt and redeem the collateral, to find a substitute buyer, or to ascertain that the sale is conducted in a reasonable manner.

For a private sale it is generally sufficient for the notice to state: “The collateral will be sold at a private sale on or after (a particular date).” White and Summers, § 27-12, at 601. See *In re Excellor Press, Inc.*, 890 F.2d 896, 902 (7th Cir. 1989). Generally, courts have agreed that the sale date on the notice is the minimum time that the credit union will wait to sell, not the intended date of the private sale. *Id.*

For public sales, § 409.613(1)(e) requires different information:

“[t]he time and place of a public disposition”

This information permits the member (and any guarantor) the additional opportunity of being able to attend the sale and bid on the collateral.

a. *Written notice*

The safest course is always to send written notice of a sale. However, some courts are willing to accept oral notice when the circumstances show the debtor was aware of a sale and able to protect his interests. See, e.g., *Umbaugh Pole Bldg. Co. v. Scott*, 390 N.E.2d 320 (Ohio 1979). Such courts are willing to look behind the purpose of notice and reject rigid formalities. However, since not all courts take this view, a credit union should send written notice even when the member has actual knowledge of a sale.

b. *Sending the notice*

Section 401.201(38) requires the notice to be properly addressed. It does not, however, require that the member actually receive the notice. To keep within the general principle of good faith, a credit union should do all that is reasonable to ensure that the member receives the notice. This might include sending a second notice when a certified or registered letter is returned unclaimed. See *Mallicoat v. Volunteer Fin. and Loan Corp.*, 415 S.W.2d 347 (Tenn. App. 1966).

The UCC permits the parties to include in their security agreement a clause governing the definition of reasonable notice.⁸ But this can be a double-edged sword since failure to meet this standard could be held against the credit union. In most instances, maintaining effective internal controls and procedures is a better way to deal with reasonable notification issues.

c. *Who is entitled to notice?*

Unless the member has signed, after default, a statement renouncing or modifying the right to notification of sale, the credit union must send such notice to the “debtor.” § 409.611(1)(b), Wis. Stats. “Debtor” includes co-signers or guarantors of promissory notes as well as the member. *White & Summers*, § 27-12, at 604. In Wisconsin, notification must also be given (except in the case of consumer goods) to every person who has filed a financing statement indexed in the name of the member.

A credit union should consider implementation of a policy asking a member in default to sign a statement waiving the right to notice of the sale. This policy should include requesting such a statement from a member who has voluntarily surrendered collateral.

d. *Length of time notice must precede the sale*

The length of time the notice must provide the member is subject to the standard of commercial reasonableness. Two business days is almost certainly unreasonable, whereas ten days is likely sufficient in most circumstances. See *White and Summers*, § 27-12, at 605.

Staleness of notice—too long a period between notice and actual sale—is a concern for a public sale. A second notice should be sent where part or all of the collateral is not sold at the originally scheduled public sale.⁹

C. Procedural Pitfalls to a Commercially Reasonable Sale

Ensuring that a sale is commercially reasonable requires pro-active planning, both to avoid potential procedural pitfalls and to guarantee that appropriate steps are taken to protect the interest of the member. Although some transactions may be fairly routine, the facts and circumstances of each disposition must be considered. Courts have found the following practices to be commercially unreasonable.

1. *Failing to select a proper time and place for a sale*

A sale at an improper time or place may prevent the member or qualified buyers from attending a sale. Further, the buyers must be given the right to inspect the collateral in order to encourage informed, competitive bidding.

⁸ Section 409.501(3) permits parties to agree in advance to “the standards by which the fulfillment of these rights and duties is to be measured, if such standards are not manifestly unreasonable.”

⁹ One Illinois case held that notice could go stale in the context of a private sale, although this decision has been criticized by *White and Summers*. See *Spillers v. First National Bank*, 400 N.E. 2d 1057 (Ill. Ct. App. 1980); *White and Summers*, § 27-12 at 605.

2. *Failing to sell the goods within a reasonable time*

Many cases challenging the secured creditor's unreasonable delay in selling collateral arise in the context of deficiency actions against debtors,¹⁰ with the debtors claiming either that a delay resulted in depreciation of the collateral or that the creditor's election to keep the collateral resulted in full satisfaction of the debt. See Mack Fin. Corp. v. Scott, 606 P.2d 993 (Idaho 1980) (holding secured lender's unexcused two-year delay in sale of collateral commercially unreasonable so that lender was not entitled to deficiency judgment); Henderson Few & Co. v. Rollins Communications, Inc., 250 S.E.2d 830 (Ga. App. 1978) (finding that secured creditor holding collateral must either sell within a commercially reasonable time, apply collateral toward debt, or return collateral to the debtor). If there is a valid reason to delay a sale, a credit union might be able to protect itself by keeping the member informed of the circumstances of the pending sale.

3. *Failing to give sufficiently broad public notice of the sale*

If notice does not reach "the public," a court might deem the sale to be a private one. This in itself is not problematic, because the UCC seems to favor private sales that meet regular commercial standards. However, commercial standards generally require that a sufficient number of buyers participate to yield the highest net price for the collateral. The concern here is to prevent credit unions from self-dealing. Self-dealing could occur in a private sale where a credit union makes a sale to a favored customer or supplier for a lower price. Self-dealing could also occur in a public sale if the credit union "purchases" the collateral as a bidder and then resells it privately at a higher price.

The very nature of a private sale places the burden on the credit union to prove that this choice was reasonably calculated to ensure the fair market price. In both private and public sales, credit unions are well-advised to follow closely the practices of dealers of the type of collateral that is to be sold.

4. *Failing to target notice to specialized dealers and buyers of the collateral*

When the collateral is of a specialized nature, commercial reasonableness requires a credit union specifically to target the notice to those specialized buyers. Advertisements placed in specific trade magazines and direct contact with dealers are two means credit unions can use to ensure that qualified buyers will participate.

5. *Failing to correctly state the planned date, time and location of the sale in a notice of public sale*

Material defects in the notice will generally result in a determination that a sale is commercially unreasonable. However, a credit union might still be allowed to show that the price received did reflect the fair market value. See, e.g., Ford Motor Credit Co. v. Solway, 825 F.2d 1213, 1217 (7th Cir. 1987). Since not every court accepts this view, great care must be taken to ensure that the notice is proper.¹¹

6. *Failing to provide sufficient lead time for buyers to bid or attend a sale*

Again, the member's opportunity to inspect and bid on the collateral must be preserved.

7. *Failing to clean, paint, repair or otherwise prepare the goods for sale*

The appropriate manner and amount spent on preparing goods for resale is particular to each repossession and sale. The UCC requires a credit union to maximize the net amount received.¹² The credit union's actions should reflect reasonable measures directed toward this end. The cases generally require a credit union to repair the collateral where doing so would increase the price by more than the cost of repair. White and Summers, § 27-13, at 609. An exception has been made where the secured creditor is without the financial means to make repairs. In re Deephouse Equip. Co., 37 UCC Rep. 1810 (D.Conn. 1984). Where the credit union allows collateral to deteriorate, the credit union is held responsible for its decline in value. See, e.g., In re Severance Truck Line, Inc., 37 UCC Rep. 1021 (M.D. Fla. 1993).

8. *Failing to protect the collateral upon foreclosure*

¹⁰ In consumer transactions, a credit union's ability to obtain a deficiency judgment may be limited. See § 425.209, Wis. Stats.

¹¹ The courts take three approaches to defective sales. Some courts require the debtor to prove that any defect caused a loss. The majority of courts (including Wisconsin) place the burden of proof on the creditor to show that the defect did not result in an insufficient price. A third approach finds any defect to be an absolute bar to a creditor's attempt to recover in a deficiency action against the debtor. See Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales*, 40 UCLA L. Rev. 695, 723-24 (1993).

¹² For consumer credit transactions, credit unions may be limited in the amount they can charge back to a member for repairs made to collateral. See § 422.413, Wis. Stats.

A credit union must use reasonable care in preserving repossessed collateral. § 409.207, Wis. Stats. A credit union should take physical possession of the collateral where feasible, or see that the collateral is protected wherever located. The credit union might be unable to recover any lost value from the member if the collateral is damaged in the interim between repossession and sale. As an example, if repossessed vehicles are stripped after foreclosure, the credit union will suffer the loss in value. See Bank of Josephine v. Conn, 599 S.W.2d 773 (Ky. Ct. App. 1980).

CONCLUSION

Ultimately, the best way for a credit union to insulate itself from claims of commercial unreasonableness when disposing of collateral after default is to document all good faith efforts to protect the member's interests and to achieve a fair market price. The present statutory scheme holds creditors to a high standard, but focuses on the ultimate goal: higher net prices for collateral. Credit unions must act cautiously, but can take comfort in knowing that non-material errors will not, ordinarily, result in financial consequences.

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Legal Affairs Department

KH/jb

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EXHIBIT A: SECTION 409.610, WIS. STATS

§ 409.610 Disposition of collateral after default.

- (1) Disposition after default. After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
- (2) Commercially reasonable disposition. Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.
- (3) Purchase by secured party. A secured party may purchase collateral:
 - (a) At a public disposition; or
 - (b) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.
- (4) Warranties on disposition. A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.
- (5) Disclaimer of warranties. A secured party may disclaim or modify warranties under *sub. (4)*:
 - (a) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or
 - (b) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.
- (6) Record sufficient to disclaim warranties. A record is sufficient to disclaim warranties under *sub. (5)* if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

History: 2001 *a. 10*.

The burden of proving that a private sale was commercially reasonable is on the seller. Proof that the sale was made at the wholesale price does not establish reasonableness. *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728 (1973).

The primary focus of commercial reasonableness is not the proceeds from a sale, but procedures employed for the sale. *Appleton State Bank v. Van Dyke Ford, Inc.* 90 Wis. 2d 200, 279 N.W.2d 443 (1979).

The conduct of a debtor may be taken into account in determining the commercial reasonableness of a sale. *First National Bank of Kenosha v. Hinrichs*, 90 Wis. 2d 214, 279 N.W.2d 449 (1979).

A secured creditor can retain a debtor's collateral while seeking an independent action for a money judgment. *Dorman v. Morris*, 185 Wis. 2d 845, 519 N.W.2d 685 (Ct. App. 1994).

NOTE: The above annotated materials cite to the pre-2001 Wis. Act 10 version of ch. 409.