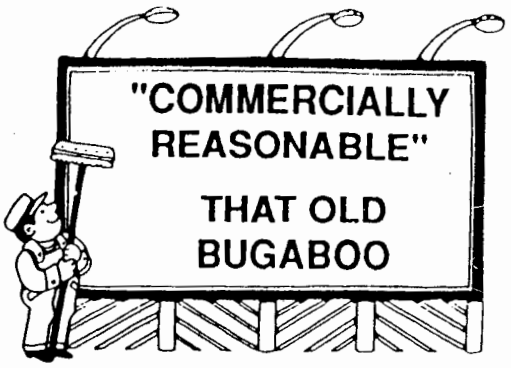

The Uniform Commercial Code, Section 9-504, provides that a repossessing creditor may sell its collateral and apply the net proceeds to the debtor's balance. Key language in the statute reads as follows:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be in 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. [Emphasis added.]

The statute goes on to state that unless the collateral in question is perishable or threatens to decline speedily in value or is a type customarily sold in a recognized market, the debtor must be sent reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made.

The key term "commercially reasonable" is not, however, defined anywhere in the Uniform Commercial Code. Thus, what is or is not commercially reasonable about some given aspect of the sale -- method, manner, time, place or terms -- is an issue to be determined under the facts of each case. In short, there is no magic formula creditors can use to assure themselves that a sale cannot later be challenged by the debtor.

This is not to say that the U.C.C. is not without some guidelines for the creditor. For example, the sale may be either private or public and still, depending on the circumstances, meet the test. If it is public, then the sale notice must give reasonable notice of the time and place of the sale. If it is private, then the sale notice must give reasonable notice of the time after which the sale will take place.

Furthermore, U.C.C. 9-507 states another important proposition: "The fact that a better price could have been obtained by 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. If the secured party either sells the collateral in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold it in a commercially reasonable manner." Obviously, there is some comfort here for the knowledgeable creditor.

There is also one way contained in this statute to render a sale bullet-proof: "A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable. . . ." As a practical matter, judges in Indiana and Kentucky state courts are frequently reluctant to give creditors an order setting forth the terms of a repossession sale. Based upon our experience, however, bankruptcy court judges have been more disposed to sign such orders.

Although creditors frequently bemoan the lack of clear cut guidelines as to what the court will later view as "commercially reasonable," the creditor is probably better off for having some flexibility in most cases. The repossessing creditor, with knowledge of the condition of the collateral, the local and/or national market for such goods, and the expenses involved in a public versus a private sale, should be best placed to defend its method of liquidation later. ❑