

THE ARROW

A Publication of
Greene & Cooper Attorneys At Law

RESPONSE TO READERS' REQUESTS:

The "Notice of Sale"

Various questions from our readers and clients suggest that we should address a few words to the notice of sale required when a secured creditor liquidates its collateral under UCC 9-504.

First of all, it is important to note that a creditor's sale of its collateral may be either a public or a private one, that the sale can take place by way of one or more contracts, and in units or in parcels, and at any time or at any place or under any terms so long as *every* aspect of the disposition including the *method, manner, time, place and terms* is "commercially reasonable." This concept of "commercial reasonableness" is, of course, a real bugaboo for the reposessing creditor who is preparing to liquidate its collateral.

No notice of sale is necessary if the collateral is of the type that is perishable or which threatens to decline speedily in value, or is a type customarily sold on a recognized market. One example of perishable collateral is the inventory of a produce stand. The liquidating creditor in such an instance is not obligated to provide its debtor with notice prior to the sale of his inventory of fruits and vegetables. An example of a type of collateral

customarily sold on a recognized market is common shares listed on the New York Stock Exchange.

In other cases, the notice of sale is required and must go to everyone obligated on the debt, including guarantors, and, of course, co-makers. If a husband and wife are both obligated, for example, each should receive a *separate* notice of sale in a *separate* envelope. The notice given must take different forms depending upon whether the intended sale is going to be a public or private sale.

For example, if the sale is to be public, then the creditor must provide "reasonable notification" of the time and place of the sale, whereas if the sale is to be a private one, the creditor need only give "reasonable notification" of the time after which it intends to dispose of its collateral.

Depending upon the form of UCC 9-507 in use in your jurisdiction, notice is required only to those other lienholders from whom the secured party has received written notice of a claim or interest prior to sending notification. As always, however, the reposessing creditor is cautioned that the Internal Revenue Service has its own laws and rules, and requires special notice to it in the event of a tax lien upon your collateral.

Finally, the secured party should be careful to avoid using only one notice of sale form for public and one notice of sale form for private sale in the event, as is common, that the notice of sale used spells out that the creditor intends to hold the debtor liable for any deficiency.

To send such a notice is a mistake in those cases where the debtor is in bankruptcy and the stay has been terminated so as to allow for the sale. In such cases, the reposessing creditor should obtain a written waiver of sale notice from the debtor or delete any language regarding its deficiency claim from the sale notice used.

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