Fall 2022

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Recommended Citation
David G. Carlson, *Article 9 Foreclosures: When Is a Sale Not a Sale?*, 84 U. Pitt. L. Rev. 67 (2022).
https://doi.org/10.5195/lawreview.2022.912

ARTICLE 9 FORECLOSURES: WHEN IS A SALE NOT A SALE?

David Gray Carlson*

Article 9 of the Uniform Commercial Code empowers a secured creditor to sell collateral. This power is circumscribed. A secured party may not sell *before* default. A secured party cannot self-deal in a private sale. A pledgee of securities can sell to itself in a private sale if the securities are of a kind that is customarily sold on a recognized market, but the law is unclear what formalities the pledgee must meet to memorialize the sale. A secured party may not sell in a commercially reasonable manner to a buyer with notice of the commercial unreason. This article explores these and other limits on a secured creditor's power to sell. Sometimes a sale is not a sale.

What does it mean to *foreclose* an Article 9 security interest on personal property? We may infer a definition from Uniform Commercial Code ("U.C.C.") § 9-617(a):

> A secured party's disposition of collateral after default:
>
> (a) transfers to a transferee for value all of the debtor's rights in the collateral;
>
> (b) discharges the security interest under which the disposition is made;
>
> (c) discharges any subordinate security interest or other subordinate lien. . . .

These words imply that foreclosure *creates* a title in a buyer and *terminates* any title or interest of the debtor (*D*), of the enforcing secured party (*SP*), and of any junior lien creditor. But § 9-617(b) throws cold water on our deduction. According to § 9-617(b):

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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.912
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> A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

From these two provisions, we learn that, where *SP* sells to a buyer (*B*) in a commercially unreasonable manner and *B* is in *good* faith, *D* is foreclosed.[1] Isn't this subsection telling us something about a *bad* faith purchaser? The "negative pregnant" of § 9-617(b) is that, if *SP* holds a commercially *unreasonable* foreclosure sale and *B* *knows* of the commercial unreason, *B* does not buy *D*'s interest in the collateral.[2] The sale is not a sale after all.

A New York court has recently disagreed. In *Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC*,[3] the court held that a commercially unreasonable sale is still a sale, even where *B* is in bad faith. *D* loses her property in a commercially unreasonable sale to a bad faith transferee. To be sure, *D* has a cause of action against *SP* for money damages.[4] If *B* is *D*'s co-conspirator, *B* is jointly and severally liable along with *SP*. But there are circumstances (*SP* and *B* are insolvent) where it very much matters that *D* has no *in rem* rights—only *in personam* rights against *B* and *SP*. In any case, there is the matter of *D*'s liberty interest in being secure in her property rights. Why should *SP* and *B*, in admitted violation of the law, have power to deprive *D* of her property?

The *Atlas MF* holding, in conflict with the negative pregnant principle of § 9-617(b), fails to appreciate the limits of *SP*'s power of disposition under Article 9. This Article investigates those limits. I conclude that *SP*'s power to sell is limited to (i) commercially reasonable sales after default, (ii) bid-ins[5] by *SP* at public sales (and some private sales), and (iii) commercially unreasonable sales where *B* is a good faith transferee. Beyond that? No sale!

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[1] Lichty v. Fed. Land Bank, 467 N.W.2d 657 (Neb. 1991).

[2] If, on the other hand, the foreclosure sale entirely complies with Article 9, even a bad faith *B* takes free and clear. Thomas v. Price, 975 F.2d 231 (5th Cir. 1992).

[3] 105 N.Y.S.3d 59 (App. Div. 1st Dept. 2019).

[4] U.C.C. § 9-625(b) (AM. L. INST. & UNIF. L. COMM'N 2010) ([A] person is liable for damages in the amount of any loss caused by a failure to comply with this article").

[5] A "bid-in" signifies that *SP* as seller sells to *SP* as buyer, where payment consists of cancellation of *D*'s obligation to pay *SP* as creditor.

I. HOHFELDIAN POWERS

A security interest in collateral is a power of sale. But any power has a limit. The transferring act of the empowered agent must fall within the scope of the power.

Wesley Newton Hohfeld, over a century ago, profoundly theorized legal power.[6] In Hohfeld's classic analysis, where two persons (*X* and *Y*) are chosen at random, the legal present between them[7] consists of *X*'s right against *Y* and *Y*'s correlative duty to *X*. Or, oppositely, *X* has no right against *Y* and *Y* is privileged against any legal remedy that *X* importunes. Power is an element in the legal present between *X* and *Y*. Power is the ability to *change* the legal present and *make it into something else*.[8] Suppose *X* vests *Z* with a power to sell *X*'s property. *Z* has a power over *X* and *X* has a liability to *Z*'s power. For the moment, *X* has a right to her property, but *Z*'s power casts an ominous shadow over *X*'s present property right. The power is "present" alongside *X*'s right against *Y* to possess (*i.e.*, exclude others), consume and alienate the property. "Power" should be conceived as an interest in *X*'s property. If *X* is liable to *Z*'s power and *X* conveys the property to *W*, one should expect that *Z*'s power over the thing continues.[9] *Z* now has power over *W*'s property.

If *Z* exercises her power, the legal present is changed. Suppose *Z* causes the transfer from *W* to *Y*. A new legal present has dawned. *W* previously had a right. Now *W* has no right. Previously, *Y* had a duty to respect *W*'s property right. Now, *Y*

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[6] *See* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1923); Peter Maus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557, 579–81 (1998); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982). According to Hohfeld's famous system of opposites and correlatives, all law can be described by eight terms. Arranged by correlatives, any legal relationship between *A* and *B* can be described as follows:

> If *A* has a: right | privilege | power | immunity
> then *B* has a: duty | no-right | liability | disability.

[7] We may call this a "correlative jurisprudence," where all law is present and transparent and there is no uncertainty. Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 877 (1989). In psychoanalytic terms, Hohfeld describes the realm of "the imaginary." Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 328–29 (2002).

[8] Singer, *supra* note 6, at 986 ("'Powers' are state-enforced abilities to change legal entitlements held by oneself or others. . . .").

[9] U.C.C. § 9-315(a)(1) ("[A] security interest continues in collateral notwithstanding sale. . . .").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2022.912
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is privileged against any legal remedy that *W* might importune. *Y* has a right against *W*, and *W* owes *Y* a duty with respect to *Y*'s newly-acquired property. In the newly constituted legal present, *Z*'s power disappears, since *Z* has used it.[10] Power, an insatient cormorant, consumes itself.

Power is always circumscribed. For example, *Z*'s power may be the power to alienate *X*'s property (a gold brick, say) if *Z* can obtain a price of $100 or better. It follows that *Z* has no power to sell to *Y* for $90. Suppose *Z* agrees to sell *X*'s gold brick to *Y* for $90. *Z* had no power to do this. Therefore, *Y* owns nothing and *X* continues to have rights to the brick. The power was not used.[11] The legal present is unchanged. These are thoughts that underlie Part 6 of the U.C.C.

II. POWER OF SALE BEFORE DEFAULT

Suppose *D* owns a gold brick and conveys a security interest in it to *SP*. A security interest represents a power (upon *D*'s default) to sell this brick to a transferee for value *B*.[12] What is *SP* selling and what is *B* buying? Whatever *D* could have conveyed at the time *SP*'s security interest attached—provided *SP*'s lien was in no way defeased or subordinated.[13] This is expressed in U.C.C. § 9-617(a):

> A secured party's disposition of collateral after default:
> (a) transfers to a transferee for value all of the debtor's rights in the collateral;[14]

[10] *See id.* § 9-617(a)(3) (A foreclosure "discharges the security interest under which the disposition is made . . . .").

[11] If *Z* is a merchant dealing in gold bricks, *Z* has the inherent power to sell a brick for $90, provided *Y* is a buyer in the ordinary course of business. *Id.* § 2-403(2). Also, if *X* is at fault for giving the world the false impression that *Y* is an agent, *X* can be held estopped to deny *Z*'s title under the doctrine of apparent authority.

[12] *Id.* § 9-610(a).

[13] Article 9 is pockmarked with exceptions. For example, if SP_1 obtained a perfected security interest at t_1 and SP_2 obtained a perfected security interest at t_2 but SP_2 was the first to file a financing statement, SP_1 can sell *less* than that which *D* had at t_1 under Article 9's famous first-to-perfect-or-files rule. *Id.* § 9-322(a).

[14] *Id.* § 9-617(a). Linguistically, this formulation is imprecise. Subparagraph (1) describes *sales*. But *SP* is invited to "sell, lease, license or otherwise dispose of . . . the collateral." *Id.* § 9-610(a). For a case in which *SP* was treated as repossessor and lessor of cooperative shares in a residence, see Cantrade Private Bank Lausanne v. Torresy, 876 F. Supp. 564, 570–71 (S.D.N.Y. 1995). For cases where *SP* leased collateral for a time, see Contrail Leasing Partners. Ltd. v. Consol. Airways, Inc., 742 F.2d 1095 (7th Cir. 1984); RSB Ent., LLC v. Heritage Bank, N.A. 942 N.W.2d 3 (Iowa Ct. App. 2020).

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.912
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> (b) discharges the security interest under which the disposition is made;
>
> (c) discharges any subordinate security interest or other subordinate lien . . . .

On occasion, however, Article 9 clearly indicates that *SP* has *no power of sale*. On these occasions, Hohfeld would say that *SP* is *disabled* from disentitling *D* and *D* is *immune* from this power.[15]

An uncontroversial example of a limitation on *SP*'s power of sale is *SP*'s power to sell to *SP* in exchange for a total or partial satisfaction of *D*'s obligation to pay. This is what real estate lawyers would call a strict foreclosure.[16] The text of Article 9, however, awkwardly refers to this as "acceptance of collateral."[17] A Comment

Obviously, Subparagraph (1) cannot be true if *SP* leases to *B*. Given disposition by lease *D* would still retain the reversionary right, as encumbered by *SP*'s security interest. In this case, it is false that "[a] secured party's disposition of collateral after default . . . transfers to a transferee for value *all* of the debtor's rights in the collateral." (Emphasis added.) This question has never arisen, and courts will surely recognize *B*'s lease is a legitimate disposition, in spite of § 9-617. But see Schmode's Inc. v. Wilkinson, 361 N.W.2d 557 (Neb. 1985), where *D* bought a truck on secured credit and could not sustain the payments. *SP* repossessed and leased the truck. Properly, *SP* could use the rent payments to reduce the secured claim, and *D* would continue to own a reversionary interest in the truck. Before *SP* had been paid in full, *SP* sued *D* for the deficiency. The case was dismissed because leasing the collateral (instead of selling it) was held to be a *de facto* strict foreclosure. In ruling that some foreclosures convey less than all *D*'s interest, courts will have to set aside the plain text of Article 9, which implies that *SP* always conveys *all* of *D*'s rights.

An example of a disposition in which not all of *D*'s rights are conveyed to the transferee in a disposition is given in Comment 3 to U.C.C. § 9-615. According to this example, *SP* finances automobile acquisitions. *D* borrows from *SP* to buy a car and grants *SP* a purchase money security interest in it. *D* defaults and *SP* repossesses. *SP* could sell outright to a buyer (*B*), in which case *B* obtains "all of the debtor's rights" in the car. U.C.C. § 9-671(a). In the example, *SP* transfers less than this. *SP* sells to *B* on secured credit, retaining a security interest on *B*'s purchase. Here *D* does not convey *all* that *D* owns. *SP* conveys *D*'s right of possession, but *D* still retains a security interest in *B*'s car. Thus, after sale to *B*, if *D* were to redeem by paying off *SP*, *D* would end up with a security interest in *B*'s car, and *B* therefore does *not* take *all* of *D*'s rights to the car.

[15] According to Hohfeld, if *Z* is powerful, *X* is liable to that power. But if *Z* is not powerful, *Z* is disabled and *X* is immune from *Z*'s exercise of power. *See* HOHFELD, *supra* note 6.

[16] *See* U.C.C. § 9-620 cmt. 2 ("This section and the two sections that follow the deal with strict foreclosure, a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposition under Section 9-610.").

[17] *Id.* § 9-620 (Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral).

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.912
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from the U.C.C. denies "acceptance of collateral" is a sale,[18] but I beg to differ. "A 'sale' consists in passing of title from the seller to the buyer for a price."[19] *D* has title, *SP* has power to transfer that title, and, utilizing that power, *SP* transfers title to *SP* for a price.

Suppose after *D* defaults, *SP* simply announces that she owns *D*'s title and that *D* has not consented. Who now has title? *D* still does. According to § 9-620(a), "a secured party may accept collateral [*i.e.*, take over title] in full or partial satisfaction of the obligation it secures only if (1) the debtor consents . . . ." Absent this consent, *D* still has title. The strict foreclosure is a nullity. *SP* has transgressed her power of sale under Article 9. No one doubts this.

A purported sale to a third party, *B*, under U.C.C. § 9-610(a) might likewise be a nullity. Most saliently, *SP* probably has no power of sale before default. According to U.C.C. § 9-610(a), a secured party may sell "after default." This implies that any attempt to sell *without* default is not a sale at all.[20]

Suppose *D* grants a security interest in her gold brick to *SP*. Default is not a defined term. Article 9 relies on the security agreement to define a default.[21] Suppose the security agreement defines default as missing an installment payment. Suppose, at a time when *D* was current on all installment payments, *SP* repossesses in violation of U.C.C. § 9-609(a), which states that *SP* may take possession "[a]fter default." Finally, suppose that *SP* sells to *B* in violation of § 9-610, which authorizes a disposition (in the foreclosure sense) only "[a]fter default."

Under these circumstances, there has been no foreclosure sale. If there had been a "disposition of collateral after default," within the meaning of U.C.C. § 9-617(a),

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[18] *Id.* § 9-610 cmt. 2.

[19] *Id.* § 2-401(1) ("Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.").

[20] Fletcher v. Cobuzzi, 499 F. Supp. 694 (W.D. Pa. 1980). In *Fletcher*, *SP* waived a default and sold pledged shares anyway. The sale was said to be "invalid," and *SP* had to account for subsequent appreciation value in the shares. The observation, however, is questionable. An invalid foreclosure sale implies that the buyer (*B*) of the collateral has failed to buy *D*'s equity. But since *B* was an anonymous buyer on the New York Stock Exchange, the buyer was a "protected purchaser" under Article 8 who bought free and clear of any adverse claim by *D*. In fact, *D*'s proper remedy was either a money judgment for conversion (with valuation as of the moment of conversion) or constructive trust in the traceable proceeds received by *SP*. Basically, the court valued the shares at the time of lawsuit, not the time of the conversion.

[21] U.C.C. § 9-601 cmt. 3.

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B would own (1) *D*'s interest, (2) the "security interest under which the disposition is made," and (3) junior liens. These are "the rights and interests described in subsection (a)."[22] But a disposition *before* default is not within the scope of § 9-617(a). *B* does not own (1) *D*'s interest. Nor does *B* own (3) the junior liens. *SP* lacked power over these things. But *B does* own (2) the "security interest under which the disposition is made." *SP*'s security interest was *SP*'s property, and this part of the transaction was completely valid. If *B* wants to avail herself of items (1) and (3), *B* is invited to reforeclose—presuming that *D* has since defaulted.

Documented attempts by *SP* to sell before default are scarce. The leading example (supposedly) is *Kinzel v. Bank of America*,[23] where *SP* was a stockbroker and *D* a customer. The collateral, ostensibly, was shares of *X Corp.*, which *D* owned indirectly through *SP*.[24]

In *Kinzel*, the security agreement with *D* included a "remedy-events clause," which set forth "twelve conditions, the occurrence of *any* of which was independently sufficient to permit [*SP*], 'in its sole discretion and without prior notice,'" to "liquidate the Securities Account and apply the proceeds to" *SP*'s secured claim.[25]

[22] *Id.* § 9-617(b).

[23] 850 F.3d 275 (6th Cir. 2017).

[24] The exact property at stake in *Kinzel* is surprisingly complex. *X Corp.* will have issued certificated securities to the Deposit Trust & Clearing Corp., a securities intermediary. U.C.C. § 8-102(a)(14)(i) (defining a securities intermediary as "a clearing corporation"). *SP* has bought a pro rata share of those securities. *SP* therefore is an "entitlement holder"—"a person identified in the records of a securities intermediary [*i.e.*, the DTCC] as the person having a security entitlement against a securities intermediary." *Id.* § 8-102(a)(7). *SP* owns a "financial asset"—"property that is held by a securities intermediary [*i.e.*, the DTCC] for another person in a securities account." *Id.* § 8-102(a)(9)(iii). *SP* has sold to *D* a pro rata share of its financial asset—its claim against the DTCC—to *D*. *D*'s claim against *SP* for *X Corp.* shares was the collateral *D* offered to *SP* in a security agreement. The value of *D*'s property was measured by the market value of the *X Corp.* shares as reported by the New York Stock Exchange. If *D* were to default on the margin loan, *SP* would cancel *D*'s claim against *SP*, thereby enhancing *SP*'s beneficial ownership of its preexisting claim against the DTCC. The foreclosure "sale" is more in the nature of a setoff of the loan against *D*'s claim against *SP* for a share of *SP*'s claim against the DTCC. On the peculiarity of property claims to securities owned indirectly through intermediaries, see Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305 (1990).

[25] *Kinzel*, 850 F.3d at 279.

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Properly speaking, *SP*'s feeling of insecurity *was* an event of default, and the case does not validate foreclosures in the *absence* of default. This was not how the Sixth Circuit panel viewed the matter:

> Here there was no default; no one has argued that [*D*] had in any way breached their loan obligations or defaulted on a loan payment. [I]n liquidating the shares . . . [*SP*] was exercising control over the collateral as the contract directed that [*SP*] could do even when there was no breach or default by the borrower.[26]

In Sixth Circuit usage, "default" means "not paying." In fact, default is whatever the contract says it is. According to U.C.C. § 9-601, "this Article leaves to the agreement of the parties the circumstances giving rise to a default." Therefore, properly analyzed, *Kinzel* is simply a routine case where *SP* liquidated collateral after an event of default.

I am inspired by *Kinzel* to observe that, if the contract allows the sale and the sale occurs, there has been an event of default. It is not exactly the case that *SP* can only sell after default. The sale, consistent with the contract, proves that a default has occurred. Can a security agreement provide that *SP* may repossess and sell for no reason at all? I do not see any reason why not. U.C.C. § 9-602 governs impermissible contract terms. For example, the security agreement may not vary the rule stated in § 9-610(b) (sale must be commercially reasonable).[27] Nor may the security agreement vary the rule in U.C.C. § 9-611 (*SP*'s duty to notify *D* in advance of sale, in certain cases).[28] The rule in § 9-609 (repossessions) may not be varied, but only "to the extent that [§ 9-609] imposes upon a secured party that take possession of the collateral without judicial process the duty to do so without breach of the peace."[29] Otherwise, freedom of contract breathes and reigns.

A statutory point may be made. Compare the remedy of collecting an account or a payment intangible. According to U.C.C. § 9-607(a), *SP* may collect from an account debtor "[i]f so agreed, and in any event after default." The reference to "if so agreed" was asserted to acknowledge and accommodate notification receivables

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[26] *Id.* at 282.

[27] U.C.C. § 9-602(7).

[28] *Id.* In *Kinzel*, *SP* had no duty to notify *D* in advance of liquidation because the collateral was "of a type customarily sold on a recognizable market." 850 F.3d at 282 (citing U.C.C. § 9-611(d)).

[29] U.C.C. § 9-601(6).

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financing.[30] In contrast, when it comes to liquidating collateral by sale, U.C.C. § 9-610(a) omits any reference to "agreement"; rather, disposition can occur only "after default."

It is a common canon of interpretation that, if the drafters knew how to make collections before default possible, they must have intended to make dispositions before default impossible.[31] But since default can be reduced (per *Kinzel*) to "I feel like foreclosing," it is best to dismiss this point and proclaim that, if the contract authorizes the sale, the sale is valid.[32]

One of the few cases of a sale without default is *Barnette v. Brook Road, Inc.*[33] The case upholds a foreclosure sale of a car. Properly, this was not an Article 9 case at all. Rather, it was a bailment case in which a consumer *D* was allowed to have possession of a car prior to a sale. The dealer and *D* were involved in something resembling an Article 2 "sale on approval,"[34] which is, confusingly, not a sale.[35] A sale is defined as passage of title for a price.[36] Sale on approval creates a *bailment* in *D*, not a transfer of title. When the dealer "repossessed" the bailed car, the dealer was terminating a bailment, and Part 6 of Article 9 did not apply.[37] The *Barnette* court,

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[30] *See id.* § 9-607 cmt. 3 ("It is not unusual for debtors to agree that secured parties are entitled to collect and enforce rights against account debtors prior to default.").

[31] *See id.* § 9-609(a) (conditioning disposal of collateral on default already occurring).

[32] A provision that does not quite apply is U.C.C. § 1-309, governing options to accelerate at will:

> A term providing that one party . . . may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure," or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired.

This provision does not ostensibly foreclosure sales at will, but it surely encourages a court to impose upon *SP* a duty not to foreclose unless *SP* in good faith doubts *D*'s ability or willingness to repay.

[33] 457 F. Supp. 2d 647 (E.D. Va. 2006).

[34] U.C.C. § 2-326(1)(a).

[35] We are expected to figure out that a sale on approval is not a sale from U.C.C. § 2-326(2): "Goods held on approval are not subject to the claims of the buyer's creditors until acceptance . . . ."

[36] *Id.* § 2-106(1) ("A 'sale' consists in the passing of title from the seller to the buyer for a price (Section 2-401).").

[37] Drewry v. Starr Motors, Inc., No. 3:07CV624, 2008 U.S. Dist. LEXIS 38534 (E.D. Va. May 12, 2008) (similar facts, but Article 9 held not to apply).

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however, treated the dealer as a secured party and sanctified a repossession and sale in the absence of default.[38]

In *Barnette*, the dealer was not in the habit of extending secured credit to its customers, as many car dealers do, but it undertook, as agent of its customers, to shop for financing from some third-party lender. Wishing to buy a car, *D* filled out a request for credit, which the dealer then undertook to shop. If this shopping expedition had been successful, the lender (not the dealer) would become *SP*. The lender would advance cash to the dealer in payment of the purchase price, and *D* would own the car, encumbered by *SP*'s purchase money security interest.

In *Barnette*, the dealer, unwisely, let *D* have possession of the car pending lender approval. To govern this relationship, the dealer and *D* entered into a sales contract conditional on lender approval. A separate "delivery agreement" governed the bailment prior to the sale. The delivery agreement was a masterpiece of ambiguity:

> Buyer understands that all financing decisions are made by a financial source not affiliated with Dealer and that financing source is the credit-reporting agency in accordance with the Fair Credit Reporting Act. Seller will attempt to sell the contract on terms satisfactory to the Seller. If the Seller is successful in doing so, the contract (and all other documents executed by Buyer) shall be deemed delivered and fully binding.
>
> If seller does not receive approval from a lending source for the Contract on terms acceptable to Dealer, Dealer may rescind the sales transaction and the Contract. Buyer agrees that upon notice from Seller, Buyer shall return the vehicle. . . . Seller retains a *priority security interest* in the vehicle and upon Buyer's failure to return the vehicle, Seller shall be entitled to all remedies . . . including . . . repossession . . . .[39]

Thus, the dealer self-identified as a secured party, as if Article 9 applied to the transaction. But just because the dealer called itself a "secured party" did not make it one. Article 9 applies to "a transaction, regardless of its form, that creates a security interest in personal property . . . by contract . . . ."[40] The converse is not true. Article

[38] *Barnette*, 457 F. Supp. 2d at 648 (The parties "agree that no default occurred."); *cf.* Padin v. Oyster Point Dodge, 397 F. Supp. 2d 712 (E.D. Va. 2005) (repossession in the absence of default violates Article 9, where sale of car was conditional on financing, sale was canceled but the dealer accepted one installment payment on the would-be sales contract).

[39] *Barnette*, 457 F. Supp. 2d at 652 (emphasis added).

[40] U.C.C. § 9-109(a).

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9 presumably does *not* apply when a contract *calls* a property interest a security interest, when substantively the transaction is no such thing. One cannot contract out of Article 9, but neither can one contract *into* Article 9 when there never was a security interest in the first place.

A "security interest" draws a lengthy definition in U.C.C. § 1-201(b)(45). According to this definition, "security interest"

> means an interest in personal property or fixtures which secures payment or performance of an obligation.[41]

Do we have a security interest in *Barnette*? *D* was obliged to return the vehicle. The dealer had an interest in the car to secure the obligation to return it. So conceived, if the third-party lender did not agree to advance the loan, the dealer had an Article 9 right to repossess the car. Following repossession, the intent was that the dealer had the right to *keep* the car—a strict foreclosure. But, unless *D* consents to the strict foreclosure,[42] Article 9 obliges the dealer to *sell* the car and return the surplus to *D*.[43] The trouble is that *there was no monetary obligation* to pay the price of the car. Rather, the sales contract was simply canceled if no lender agreed to lend. Therefore, application of Article 9 to the case is ultimately disastrous for the dealer, if logic prevails.

The *Barnette* court was convinced that *D* had never defaulted on *any* agreement. But this can be disputed. *D* was obliged to return the car. *D* refused. Why is this refusal not a default? Be that as it may, after repossession, the dealer resold the car on the retail market—a sale in the absence of default. If Article 9 really did apply, the dealer owed the surplus to *D*. In *Barnette*, the dealer claimed the expense of repossession ($250). Why was it not obliged to return the $12,000 proceeds (minus

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[41] The definition goes on at great length to include sales and bailments that are covered by Article 9 but which are not liens. The definition "includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9." *Id.* § 1-201(b)(35). A series of exclusions are mentioned. The penultimate sentence in the definition provides, "The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a 'security interest.'" *Id.*

[42] *D*'s pre-default consent to strict foreclosure is void. *Id.* § 9-602(10). *D*'s consent to a partial satisfaction counts "only if the debtor agrees to the terms of the acceptance in a record authenticated *after default*." *Id.* § 9-6(c)(1) (emphasis added). *D*'s acquiescence to an acceptance of collateral in full satisfaction counts only if *SP* "sends to the debtor after default a proposal . . . ."). *Id.* § 9-620(c)(2)(A).

[43] *Id.* § 9-615(d)(1).

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$250) of "the collateral" to *D*? Yet that is the implication if Article 9 really does apply.

All of this nonsense disappears if we agree that Article 9 does not apply to the case. *D* was bailee of the car and the delivery agreement simply repeated what is true of bailments: when the bailment is over, the dealer can take back the car and keep it. There is no obligation to sell the car and return a surplus.[44]

In any case, the *Barnette* court ruled that the dealer could sell the car in the absence of default by *D*. "[T]he parties are free to agree that the secured creditor may repossess the collateral after the occurrence of something other than default."[45] In short, *Barnette purports* to permit pre-default foreclosures, but in truth, the case was not properly within the jurisdiction of Article 9.

Another case involving foreclosure sale without a default is *Mojica v. Automatic Employees Credit Union*,[46] where a class of consumer debtors constitutionally challenged Article 9 itself, insofar as it permits repossessions and sales with no judicial declaration of default. The class action was thrown out of court. A three-judge panel concluded that the sales, allegedly in the absence of default, were nevertheless final. Therefore, injunctive relief would be to lock the barn door after the horses were gone; the cars "were repossessed and resold, with titles transferred."[47] In denying this relief, the court assumed that foreclosure sales in the absence of default were valid sales.

The security agreement may define default down to zero, but assuming default has positive content, a sale in the absence of default as no sale at all. Title does not pass to a buyer. But the buyer nevertheless takes *SP*'s security interest by assignment.

The collateral, however, may be negotiable instruments or securities. If that is the case, prior to *D*'s default *SP* has no power of disposition under Article 9 but has such a power under Article 3 or 8 of the U.C.C.

[44] Under new Article 9, certain consignments (*i.e.*, bailments coupled with authority to sell the bailor's interest) are made into Article 9 transactions. *Id.* § 9-209(a)(4). But § 9-615(a)(4) absolves the repossessing consignor from returning any surplus to the dispossessed consignee. A consignment is defined as delivery of goods to a merchant. *Id.* § 9-102(a)(20).

[45] Barnette v. Brook Rd., Inc., 457 F. Supp. 2d 647, 658 (E.D. Va. 2006).

[46] Mojica v. Automatic Emps. Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973).

[47] *Id.* at 146.

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In *Segovia v. Equities First Holdings, LLC*,[48] the collateral was certificated securities. *SP* sold the pledged certificates before default. *D* complained that, as a result of the sale, she was deprived of her right to vote the shares. This is false under Article 9. A purported sale in the absence of default is no sale. *D* still owns the shares. According to Delaware law, *D* has the right to vote unless the pledge agreement says otherwise.[49] But Article 8 deprives *D* of the right to vote. If *SP* sold the pledged stock to *B*, if *B* has given value, if *B* has no notice of *D*'s adverse claim of equity ownership, and if *B* "obtains control" of the certificate,[50] *B* is a "protected purchaser"[51] who "acquires its interest in the security free of any adverse claim."[52] *B* has the right to vote and *D* does not. Meanwhile, *SP*'s pre-default sale of the collateral to a protected purchaser is a conversion, entitling *D* to a money judgment for the fair market value (FMV) of the certificates, minus the amount of *SP*'s unsecured claim.[53]

III. BIDDING IN

In many lien enforcement regimes, a lien creditor, exercising the power of sale, may also be the buyer in the sale. When this self-dealing occurs, the creditor is said to "bid-in."[54] Although the bidder must go out of pocket to cover the costs of the auctioneer, the remainder of the price is paid by setoff, not by the tender of cash.[55]

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[48] Segovia v. Equities First Holdings, LLC, C.A. No. 06C-09-149-JRS, 2008 Del. Super. LEXIS 197 (May 30, 2008).

[49] *See* DEL. CODE ANN. tit. 8, § 217(a) (2022) ("Persons whose stock is pledged shall be entitled to vote, unless in the transfer by the pledgor on the books of the corporation such person has expressly empowered the pledgee to vote thereon, in which case only the pledgee . . . may represent such stock and vote thereon.").

[50] "A purchaser has 'control' of a certificated security in registered form if the certificated security is delivered to the purchaser, and: (1) the certificate is indorsed to the purchaser or in blank by and effective indorsement; or (2) the certificate is registered in the name of the purchaser, upon . . . registration of transfer by the issuer." U.C.C § 8-106(a).

[51] *Id.* § 8-303(a).

[52] *Id.* § 8-303(b).

[53] *See also* Fletcher v. Cobuzzi, 499 F. Supp. 694 (W.D. Pa. 1980) (sale of stock in the absence of a default).

[54] Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491, 497 n.22 (1997); Wilkerson Motor Co. v. Johnson, 580 P.2d 505, 506 (Okla. 1978) ("bought in").

[55] *See* 11 U.S.C. § 363(k) ("At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim

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Article 9 generally restricts *SP*'s right to bid-in. It permits a bid-in when the sale is a "public disposition."[56] Bidding in is permitted in cases of private sale "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"[57]—*e.g.*, the stock market[58] or commodities.[59]

Bidding in may be compared to strict foreclosure[60]—forfeiture by *D* of all rights to *SP*. In a strict foreclosure, the junior liens all disappear.[61] Strict foreclosure is thus more than a "deed in lieu of foreclosure," which cannot destroy junior liens.[62] *D*, however, must consent to strict foreclosure.[63] If *D* so agrees, *SP* forgives all or part of the secured claim against *D*. Absent consent, *SP* must sell or otherwise dispose of the collateral. In contrast, a bid-in occurs of *D*'s opposition to the sale.

may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.").

[56] U.C.C. § 9-610(c)(1). Public sales are also mentioned in U.C.C. § 2-706(1), referring to a seller's option of reselling goods identified to the contract in case of a buyer's breach of contract. *See* Old Colony Tr. Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 706, 712 (E.D. Pa. 1968).

[57] U.C.C. § 9-610(c)(2). "Fairness is assured by the operation of the market." William E. Hogan, *The Secured Party in Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 234 (1962).

[58] Layne v. Bank One, 395 F.3d 271, 279–80 (6th Cir. 2005); Ross v. Rothstein, 92 F. Supp. 3d 1041 (D. Kans. 2014) (the over-the-counter market for shares is a recognized market); Barkley Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey into the Underworld and a Proposed Salvation*, 51 OR. L. REV. 302, 314 (1973) ("[T]he courts seem to be saying that only stocks and bonds satisfy the 'recognized market' test."). For criticism of the position that over-the-counter is a recognized market, see Carl S. Bjerre, *Investment Securities*, 71 BUS. LAW. 1311, 1316–17 (2016). As part of proposed Article 12 governing virtual currencies, the American Law Institute has redrafted existing Comment 9 to § 9-610 ("Recognized Market") to adopt this view. AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE AND EMERGING TECHNOLOGIES 133–34 (2022) (TENTATIVE DRAFT NO. 1).

[59] Cattle auctions have qualified as a recognized market. Havins v. First National Bank, 919 S.W.2d 177 (Tex. App. 1996) (but requiring evidence that cattle auctions are recognized as a market). In *Dischner v. United Bank Alaska*, 631 P.2d 107 (Alaska 1981), *SP* sold a car to *SP* in a private sale at the Blue Book wholesale market. This was held to be *per se* commercially reasonable because the Blue Book was a "widely distributed standard price quotation."

[60] U.C.C. § 9-610 cmt. 8. The new proposed comment to § 9-610, *supra* note 57, pours cold water on this interpretation of the Bluebook.

[61] *Id.* § 9-622(a)(2).

[62] R. Wilson Freyermuth & Dale A. Whitman, *Residential Mortgage Default and the Constraints of Junior Liens*, 57 U. LOUISVILLE L. REV. 207, 241–43 (2019).

[63] U.C.C. § 9-620(a)(1).

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If *SP* bids in, the deficit is calculated according to the nominal amount that *SP* bids—unless "the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than [*SP*] . . . would have bought."[64] *D*, however, has the burden of showing that the amount of the bid-in was "significantly below the range of prices" that a third party would have paid.[65] If *D* meets this burden (by, for example, introducing into evidence a "Blue Book" of retail and wholesale values), *SP* must prove the FMV.[66] If *SP* carries that burden, the deficit is the secured claim minus FMV. If not, *SP* may not have a deficiency judgment.[67]

Bid-ins are permitted in a "public disposition"[68] but not in most private dispositions. A public disposition is not defined,[69] but, according to case law, a public sale is one in which the public is invited by efficacious advertisements to attend and bid.[70] But if advertisement is held inadequate, the courts may hold that the public sale is actually a private sale. In that case, the sale to *SP* is void.[71] Suppose *SP* attempts to bid-in at a private sale and then resells to *B*. Article 9 implies that *SP*'s bid is a nullity—there has been no foreclosure sale.[72] Nevertheless, *SP* has

[64] *Id.* § 9-615(f)(2).

[65] *Id.* § 9-626(a)(5).

[66] *But see* DeGiacomo v. Raymond C. Green, Inc. (*In re* Inofin Inc.), 512 B.R. 19, 91 (Bankr. D. Mass. 2014) (allocating this burden to *D*'s bankruptcy trustee).

[67] Com. Credit Group. Inc. v. Barber, 682 S.E.2d 760, 768 (N.C. Ct. App. 2009).

[68] U.C.C. § 9-610(c)(1).

[69] Georgia and North Carolina seem to have had a non-uniform definition. *See* Colonial Pac. Leasing Corp. v. N & N Partners v. N & N Partners, LLC, 981 F. Supp. 2d 1345, 1350 (N.D. Ga. 2013); Aviation Fin. Group LLC v. Duc Hous. Partners, Inc., No. CV 08-535-LMB, 2010 U.S. Dist. LEXIS 39007 (D. Ida. Apr. 20, 2010). These, however, have been repealed. 2015 Ga. Laws 6; 2000 N.C. Sess. Laws 80.

[70] According to comment 7 to U.C.C. § 9-610:

> [A] "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

[71] S.M. Flickinger Co. v. 18 Genesee Corp., 423 N.Y.S.2d 73, 77 (App. Div. 4th Dep't 1979) (Moule, J., dissenting).

[72] Robyn L. Meadows, *A Potential Pitfall for the Unsuspecting Purchaser of Repossessed Collateral: The Overlooked Interaction Between Sections 9-504(4) and 2-312(2) of the Uniform Commercial Code*, 44 AM. U. L. REV. 167, 191–92 (1994); *see* Paco Corp. v. Vigliarola, 611 F. Supp. 923 (E.D.N.Y. 1985) (implying that *SP* had no right to bid on equipment at a private sale).

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conveyed *something* to *B*. If Article 2 applies, we learn from § 2-402(a) that a purchaser of goods (here, *B*) "acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchase." Although this sentence presupposes that we know what "title" is—a profound metaphysical challenge far beyond our present meager agenda[73]—we can for the moment affirm that, just prior to the purported foreclosure sale, *SP* had no "title" in *D*'s personal property.[74] Therefore, after the purported sale, *B* has no title. Nevertheless, *B* is the purchaser of a "limited interest"—*SP*'s security interest. The bid-in was incompetent to foreclose *D*. At the end of the private sale, *D* had a nonpossessory interest in the goods sold. The *SP-B* transfer, however, effectively assigned *SP*'s security interest over to *B*. *B* is now the secured creditor. Furthermore, since *D* is in default, *B* is entitled to possess the collateral against *D*,[75] but only for the purpose of Part 6 enforcement of *SP*'s security interest.

Since *SP* has no power of sale when *SP* bids in at a non-qualifying private sale, courts occasionally stretch to find that a sale was public after all, thereby upholding the bid-in. In *Shields v. Bobby Murray Chevrolet, Inc.*,[76] *SP* put the repossessed car on a dealer's lot where the public was invited in to inspect and bid. This certainly resembled an ordinary course *private* sale of a car, unless we are willing to confirm that *all* retail sales are public. Be that as it may, the court held that *SP* bought at a public sale, and so the bid-in was permitted. Otherwise, *SP* would have been obliged to foreclose all over again.

In *Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*,[77] *SP* advertised a public sale of equity shares in a corporation. Investment bankers shopped the deal to various investors. *Wall Street Journal* ads shouted the news that the shares were up for auction. When buyers failed to materialize, *SP* negotiated with *D* for the sale of the shares to a corporate entity related to *SP*. A surety, *S*, claimed

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[73] On title, see Jeanne L. Schroeder, *Death and Transfiguration: The Myth that the U.C.C. Killed "Property,"* 69 TEMP. L. REV. 1281 (1996); William L. Tabac, *The Unbearable Lightness of Title Under the Uniform Commercial Code*, 50 MD. L. REV. 408 (1991).

[74] *See* U.C.C. § 9-202 ("Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.").

[75] *Id.* § 9-609(a)(1) authorizes a secured party to "take possession of the collateral . . . ." Where *SP* purports to sell but only assigns the security interest to *B*, *B* may "take possession" from *SP*.

[76] Shields v. Bobby Murray Chevrolet, Inc., 261 S.E.2d 238 (N.C. Ct. App. 1980).

[77] 68 A.3d 197, 202 (Del. Ch. 2013) (applying Illinois law).

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the sale was private. *S* seemed to concede that there was indeed a sale, but *S* alleged the sale to be commercially unreasonable because *SP* had bought in a private sale.

Properly, a sale to a corporation affiliated with *SP* is not a bid-in under § 9-610(c)(1). *SP* is capable of selling to a separate corporate entity owned by *SP*. When that occurs, U.C.C. § 9-615(f) has a different rule for calculating the deficit because the buyer is "a person related to the secured party." In ordinary cases, *B*'s historic bid is the subtrahend when calculating the deficiency, but FMV must be the subtrahend where *B* is a "person related" to *SP*, whenever "the amount of proceeds of the disposition is significantly below the range that a complying disposition to a person other than . . . a person related to the secured party . . . would have bought."[78] The fact that § 9-615(f) exists at all implies that *SP* has power to sell to a "person related" to *SP*.

The chancellor in *Edgewater*, however, ruled that a private sale to a subsidiary of *SP* was impossible. In effect, the chancellor implied that the *SP*-*B* corporate veil is to be ignored in all cases[79]—an assumption that undercuts U.C.C. § 9-615(f). Given this assumption, if the sale by *SP* to *SP*'s affiliate was to be valid, it became necessary for the court to find that the privately negotiated contract between *D* and *SP*'s subsidiary was in fact a *public* sale. The court did indeed find the sale to be public, and so *SP* was capable of selling to its own subsidiary.

One positive aspect of the attitude in *Edgewater* is that it is too easy for *SP* to evade the disability to self-deal in a private sale. *SP* can always evade the rule by selling to a captured subsidiary, which then flips the property back to *SP*—all in the course of a few minutes of time. If this is possible, the disability of *SP* to sell privately to *SP* is unimpressive. A *per se* veil piercing rule forces *SP* to adhere to the strictures of a public sale.

An issue for bid-ins is whether there is such a thing as a commercially unreasonable public sale, where *SP* as seller is empowered to sell to *SP* as buyer. If this concept is allowed, *D* obtains her revenge for commercial unreason in *SP*'s suit for a deficiency.[80] That is, *D* may force *SP* to prove the FMV. In commercially

[78] In effect, U.C.C. § 9-615(f) proclaims a sale to a related person to indeed be a sale. Folks v. Tuscaloosa Co. Credit Union, 989 So. 2d 531 (Ala. Civ. App. 2007).

[79] *Id.* at 211 n.70.

[80] U.C.C. § 9-626; *see* Contrail Leasing Partners Ltd. v. Consol. Airways, Inc., 742 F.2d 1095 (7th Cir. 1984) (*SP* bid in at an unreasonable public sale); Com. Credit Group, Inc. v. Barber, 682 S.E.2d 760 (N.C. Ct. App. 2009) (flaw in advertisements made a public sale unreasonable).

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unreasonable cases, the deficit is defined as the secured claim minus the FMV that would have been produced if the sale had been reasonable.

Alternatively, a commercially unreasonable public sale is arguably a *private* sale, which is to say that it is no sale at all. In that case, *SP* must re-foreclose, until which time *D*'s power to redeem[81] lives on.

What if *SP* purports to bid-in at a private sale? Properly, there is no sale. But in *Munao v. Lagattuta*,[82] the court disagreed. There was a sale, but it was a commercially unreasonable one. Therefore, *SP* could sue *D* for the secured claim minus the appraised value of the retained collateral.[83]

We may ask how the sale in *Munao* differs from a strict foreclosure. In a strict foreclosure, *D* must consent. In a *Munao* sale, *SP* can ride roughshod over *D*'s preferences. In a strict foreclosure, *SP*'s proposal to accept is binding on *D* where *D* fails to respond, but a proposal to accept in exchange for a *partial* discharge cannot be imposed on *D* based on apathy alone. *D* must affirmatively accept.[84] In a *Munao* sale, however, *SP* can impose a partial discharge on *D* over *D*'s active opposition. That is to say, a commercially unreasonable sale in the bid-in context closely resembles a strict foreclosure over the opposition of *D*.

To be sure, *D* may obtain a § 9-625(a) injunction preventing *SP* from proceeding with a commercially unreasonable sale,[85] but in a *Munao* sale, all that *SP* need disclose in a notice is that a private sale will occur after a stated date.[86] *SP* need not disclose that she intends to confiscate the collateral in exchange for an appraised value. *SP* is thus invited to confiscate the collateral in exchange for the appraised value of the collateral, contrary to the rule in U.C.C. § 9-620(a)(1).

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[81] U.C.C. § 9-623.

[82] 691 N.E.2d 818 (Ill. App. Ct. 1998).

[83] In *In re* Saddlepoint Cattle Co. LLC, No. 8:14-cv-00174-MJM 2014 U.S. Dist. LEXIS 83780, at *31–32 (D. Neb. June 10, 2014), *SP* confiscated some of the collateral without selling it. The court seemed to accept that *SP* owned the collateral but declared the expropriation to be a commercially unreasonable practice. But because *SP*'s appraisal was held to be the FMV of the collateral, *SP* suffered no ill consequences.

[84] U.C.C. § 9-620(c)(1).

[85] *See* Patriarch Partners XV, LLC v. U.S. Bank Nat'l Ass'n, 93 U.C.C. Rep. Serv. 2d (West) 718 (S.D.N.Y. 2017) (but denying the injunction on the merits).

[86] U.C.C. § 9-613(1)(E).

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Therefore, to protect the integrity of *D*'s right to object to a strict foreclosure, *Munao* should be considered wrongly decided. A bid-in at a nonqualifying private sale is no sale at all!

IV. BIDDING IN AT A PRIVATE SALE

Bidding in by *SP* at a "public disposition" is permitted.[87] Competition at an auction protects *D* from the abuses of self-dealing. Bidding in at a *private* sale is *sometimes* permitted—when the collateral is "of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations."[88] Significantly, bidding in at a private sale is permitted when the collateral is certificated securities traded in the stock market. In the case of such a sale, *SP* is not even required to notify *D* or *S* of it.[89] *SP* has a *secret* power to sell to *SP* at will.

Though well-written in most respects, Part 6 of Article 9 lapses into gibbering incoherence when *SP* is the pledgee of certificated securities sold on a recognized market. In general, a pledgee of certificated securities may self-deal. This is so even if the certificated security may not trade very frequently (or at all) on a recognized market. It is enough that, in general, certificated securities are of a *kind* that trades in such a market. So, we are dealing with certificated securities in general—not just certificated securities the price of which one can look up in the *Wall Street Journal*.[90]

This is a disturbing thought. One cannot readily ascertain a current market price in a closely held corporation.[91] Yet there is strong evidence that *SP* can self-deal when *SP* is the pledgee of certificated shares issued by a closely-held corporation. Prior to the revision of Article 8 in 1992, old U.C.C. § 8-102 Comment 2 said:

> Interests such as the stock of closely-held corporations, although they are not actually traded upon securities exchanges, are intended to be included within the

[87] *Id.* § 9-610(c)(1).

[88] *Id.* § 9-610(c)(2).

[89] *Id.* § 9-611(d) ("Subsection (b) does not apply if the collateral . . . is of a type customarily sold on a recognized market."); *see generally* Kinzel v. Bank of Am., 850 F.3d 275 (6th Cir. 2017).

[90] *But see* Mercantile Bank & Tr. v. Cunov, 749 S.W.2d 545 (Tex. App. 1988) (stock not customarily sold in a recognized market).

[91] *See generally* Wendy Gerwick Couture, *The Collision Between the UCC and the Securities Act: Foreclosure Sales of Unregistered Securities*, 50 SEC. REGUL. L.J. 287 (2022).

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> definitions of both certificated and uncertificated securities by the inclusion of interests "of a type" commonly traded in those markets.

In *Stancil v. Stancil*,[92] the court remarked:

> It is inconsequential whether the shares of stock in question are in fact suitable for trading or have ever been traded on an exchange or market. The statutory definition only requires . . . that instruments by "of a type" that is dealt in on securities exchanges or markets in order to be deemed investment securities. Since stock exchanges and markets generally facilitate the trading of shares of corporate stock . . . , [I]t is our conclusion that the shares of a corporation—whether publicly or closely held—are instruments "of a type" commonly dealt in on securities exchanges or markets.[93]

Granted, these sources are interpreting whether Article 8 generally applies to securities issued by closely held corporations. They do not address the precise "of a kind" language that appears in U.C.C. § 9-610(c)(2). But since § 9-610(c)(2) uses the *exact* language from Article 8,[94] coverage of Article 8 and the meaning of U.C.C. § 9-610(c)(2) would appear to bear the same interpretation—*any* certificated security is available for *SP* to bid-in at a private sale.[95]

A sale under U.C.C. § 9-610(a) by *SP* to *SP* for an appraised price bears a very close resemblance to strict foreclosure.[96] Nevertheless, if we put these forms under the jurisprudential microscope, there are differences—absurd differences! In the case of a strict foreclosure, *SP* must propose one,[97] or consent, in an authenticated record,

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[92] 392 S.E.2d 373 (N.C. 1990).

[93] *Id.* at 374; *see also* Bahre v. Pearl, 595 A.2d 1027 (Me. 1991). The *Stancil* case involved whether an oral contract for the sale of securities issued by a closely-held corporation was valid. Modern Article 8 upholds oral contracts. U.C.C. § 8-113. Old Article 8 required a writing. Old U.C.C. § 8-319(a) (AM. L. INST. & UNIF. L. COMM'N 1978).

[94] U.C.C. § 8-102(a)(15)(iii) defines "security" as a certificate "which (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets."

[95] "[I]dentical words used in different parts of the same act are intended to have the same meaning." Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934).

[96] *See* U.C.C. § 9-610 cmt. 7 ("A secured party's purchase of collateral at its own private disposition is equivalent to a 'strict foreclosure' and is governed by Sections 9-620, 9-621, and 9-622.").

[97] *Id.* § 9-620(b)(1).

to a strict foreclosure proposed by *D*.[98] The strict foreclosure can be in exchange for a partial satisfaction of *D*'s debt, but only if *D* affirmatively consents.[99] A strict foreclosure can be in exchange for a *full* satisfaction if *SP* proposes one and *D* apathetically fails to respond within twenty days.[100] If *D* casts off his slough and actually objects, *SP* must sell.[101] But *SP* can sell to herself—for an amount less than *D*'s debt. Therefore, *D* is *worse off* by objecting to a strict foreclosure when *SP*'s secured claim is clearly under water. If *D* keeps mum, the deficit disappears. If *D* insists on a sale, the deficiency comes roaring back because *SP* is invited to self-deal without notice. Why, then, would a pledgee *ever* propose a strict foreclosure instead of a foreclosure by sale, where the collateral is "of a kind that is customarily sold on a recognized market"?[102]

Profoundly exacerbating the problem is that the U.C.C. never defines when a sale occurs, where a pledgee bids in at a private sale. Outside the context of Article 9 foreclosures, it is easy to tell when a seller sells a certificated security to a buyer. The point of sale turns on *delivery*. According to U.C.C. § 8-301 Comment 1: "Delivery is used in Article 8 to describe the formal steps necessary for a purchaser to acquire a direct interest in a security under this Article." Section 8-301 defines delivery:

> Delivery of a certificated security to a purchaser occurs when:
>
> (a) the purchaser acquires possession of the security certificate . . . .

This test, based upon the true avouch of eyes and ears, does not function where *SP* is a pledgee. In such a case, *SP* is the seller, empowered to convey *SP*'s security interest and *D*'s equity. *SP* is also the buyer. There is no disruption of possession to signal the sale, as is the case when the seller and the buyer are different persons. In a pledge, *SP* possesses throughout.

This leaves open the possibility that, after default, a pledgee can simply *think* a sale, and it automatically happens. Sale becomes what Immanuel Kant called an

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[98] *Id.* § 9-620(b)(1). Presumably it is *D* who makes the proposal, since strict foreclosure also requires *D*'s consent. *Id.* § 9-620(b)(2).

[99] *Id.* § 9-620(c)(1).

[100] *Id.* § 9-620(c)(2)(C).

[101] *Id.* § 9-620(a) ("A secured party may accept collateral in full or partial satisfaction of the obligation it secures only if: (1) the debtor consent(s) to the acceptance under subsection (c) . . . .").

[102] *Id.* § 9-611(d).

"intellectual intuition,"[103] an attribute of God alone.[104] This is rather unsatisfactory and perhaps blasphemous. Surely the thought of sale must be manifested or rendered visible to the world by *SP*.[105] As Macbeth puts it:

> Strange things I have in head, that will to hand;
> Which must be acted ere they may be scann'd.[106]

If things in head will to hand, then for *SP* to sell pledged certificates to *SP*, *SP* must speak the words or do the act in the earshot or eyeshot of someone who can testify in court. Or *SP* can do an act that is permissible only to a beneficial owner. That would constitute evidence that the sale has indeed occurred. If *SP* (with this strange power) acts like the owner, *SP* is the owner.

In *Cole v. Manufacturers Trust Co.*,[107] a pre-U.C.C. court hooted at the idea that *SP* could sell to *SP* by self-serving declaration. The case involved the pledge of regularly-traded negotiable securities. In the pledge agreement, *SP* reserved for itself the right to sell the securities at a public *or private* sale, and, at such a sale, *SP* reserved the right to be the buyer. *D* defaulted, and, by book entries with no advance notice, *SP* privately pronounced itself the beneficial owner of the securities. Thereafter, *D* tendered the redemption price and demanded return of the securities. *SP* refused. Claiming the refusal to be a conversion, *D* demanded a money judgment for the value of the securities as of the time of *SP*'s refusal—an amount considerably to the north of the book entries only a few months prior to the refusal.

If *SP* had validly foreclosed, its refusal to return the securities upon tender of the redemption price was rightful. The securities would then have belonged entirely to *SP*, and *D* could claim no right to possess them. But if there had been no sale, *SP*, by refusing to surrender, wrongfully interfered with *D*'s right of possession.[108] In the

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[103] An intellectual intuition is thinking and doing simultaneously. HENRY E. ALLISON, KANT'S TRANSCENDENTAL IDEALISM 13–14 (2d ed. 2004) (an intellectual intuition creates the object thought by the mere means of thought); SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 39 (1993).

[104] "This archetypical intellect Kant attributed to God." CHARLES TAYLOR, HEGEL 301 (1975); *cf. Genesis* 1:3 ("Let there be light, and then there was light.").

[105] *In re* Copeland, 531 F.2d 1195, 1207 (3d Cir. 1976) ("[A] disposition of the collateral requires some sort of affirmative action or conduct on the part of the secured party.").

[106] WILLIAM SHAKESPEARE, MACBETH act 3, sc. 4.

[107] 299 N.Y.S. 418 (Sup. Ct. 1937).

[108] Telemark Dev. Grp. v. Mengelt, 313 F.3d 972 (7th Cir. 2002).

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days before Article 9, the issue was one of contractual interpretation. By contract, *SP* had the right to sell to *SP* in a private sale. But did the book entries constitute a sale?

The *Cole* court remarked:

> But can it be said that the trust company by making entries upon its books showing a transfer of this collateral and a credit upon the notes of $870,569.37, without notice to [*D*] conducted a private sale at which it was the purchaser? I think not. In doing this the trust company was merely retaining or taking over the collateral at a certain price. Whether this price was fair or unfair, or whether it was the highest price obtainable under all the circumstances, it would obviously be impossible to determine from book entries which reflect the transaction. It may be true that "in most banking loans on collateral the bank reserves the right to sell the collateral on default or to retain it itself at a fair value and apply the proceeds of the loan." But the point is that the contract here, neither expressly nor by implication, gave the trust company any right to retain or take over the collateral, either at fair value, the market value, or at any other valuation. It could obtain the collateral only by purchasing it at a *sale*. It seems far fetched [sic] and almost absurd to argue that the book entries constituted a sale.[109]

Now the contract clearly said that the sale could be a private one, and at that sale *SP* could buy. What did the court think such a sale would look like?

> When the contract here speaks of a sale it means a sale as commonly understood, that is, a sale where third parties either bid or are given an opportunity to bid and become purchasers. At a sale so conducted the contract gives the trust company the option to become the purchaser. The obvious purpose of such a stipulation in the contract is to stimulate competition and to permit the highest bidder, whether he be the pledgee or a stranger, to buy in and thus to obtain for the benefit of the pledgor as well as for the benefit of the pledgee as much as possible upon the collateral.[110]

[109] *Cole*, 299 N.Y.S. at 425–26 (citation omitted).

[110] *Id.* at 426.

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In other words, a private sale where *SP* was the buyer would involve shopping to buyers and *SP* outbidding those potential buyers.[111] Where these potential buyers are lurking round and about the private sale, *SP*, having fulfilled its fiduciary duty,[112] could sell to *SP*. But then, having outbid some buyers, how should *SP* memorialize the fact that *D*'s beneficial ownership of the securities has ended and *SP*'s ownership has commenced? The answer must be that *SP* must take some observable action to signal that *SP* has exercised its power to sell. Book entries should do the job quite nicely.

In *Cole*, *SP* credited *D* with the value of the securities as reported by the stock market. Therefore, it is hard to argue that *D* was harmed by not shopping the deal to buyers, who would presumably bid the market price. The court denied that, at a private sale, the market price was the criterion of true value:

> It may well be that at a private sale one interested in the securities might pay considerably more than the market price, either because he desired to keep them out of the open market or because the immediate acquisition by him of large blocks of the securities would enable him to gain control of certain corporations. As a trustee the pledgee is duty bound to make every reasonable endeavor to obtain the highest price possible, not merely the market price. In any event, the price paid by the trust company, whether it be the market price or any other price, is immaterial; nor does [*D*] complain of inadequacy of the price paid. The sole determining factor here is whether or not the trust company actually conducted a

[111] The court paraphrases *SP* as arguing: what more could *D* want than a credit for the reported current value of the securities? Said the court: "[T]he answer is simple: he would want such a private sale." *Id.* at 428—that is, a sale "at which the securities will be exposed for sale, at which there shall be competitive bidding, and at which the highest bidder, whether he be the pledgee or a stranger, shall become the purchaser—all with the view of realizing as much as possible on the collateral." *Id.*

[112] The court took *SP* to be a fiduciary of *D*. *Id.* at 425. This is sometimes asserted. Solfanelli v. CoreStates Bank, N.A., 203 F.3d 197, 201 (3d Cir. 2000); United States v. Terrey, 554 F.2d 685, 693 (5th Cir. 1977); *In re* Estate of Kiamie, 130 N.E.2d 745, 747 (N.Y. 1954); *see* Chittenden Tr. Co. v. Maryanski, 415 A.2d 206, 208–09 (Vt. 1980) (best efforts); 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965) (*SP* must "use his best efforts to see that the highest possible price is received for the collateral."). For the view that *SP* either is or ought to be a fiduciary, see Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. REV. 445 (1994). The concept has been rejected in new Article 9. Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH U. L.Q. 491, 516–17 (1997).

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> private sale. If it did, its purchase was authorized. If it did not, its purchaser was unauthorized regardless of the price it paid.[113]

It is apparent in these passages that the court confounds whether the sale by *SP* to *SP* was "commercially reasonable" and whether there was a sale at all.[114] The court took the position that a commercially reasonable sale is no sale.[115] The modern U.C.C. says otherwise—at least when the buyer is a good faith purchaser.[116] In the case of publicly traded securities, the modern U.C.C. declares: "A disposition of collateral is made in a commercially reasonable manner if the disposition is made . . . (2) at the price current in any recognized market at the time of the disposition . . . ." The U.C.C., then, clearly indicates that an *SP*-to-*SP* sale is possible—without any advance notice to *D*. And the practice is *per se* reasonable, so long as *SP* deducts the current market price.

But *when* does the sale occur? Suppose on Tuesday *SP* announces to some witness or signs an affidavit saying. "On Monday I bought the pledged certificates."[117] Is the sale Monday or Tuesday? The question makes a big difference if a tender offer was announced Monday evening, causing a dramatic increase in value on Tuesday morning. The U.C.C. never addresses the question.[118]

Furthermore, *SP*'s power to will a sale collides with the rules on strict foreclosure. Ordinarily, *SP* cannot unilaterally confiscate *D*'s collateral in exchange for an appraised value. *D* must consent to this. If *D* protests, *SP* must sell or return the collateral.[119] As pledgee of a certificate, however, *SP* can simply *decree* that *SP* owns the collateral, in exchange for a credit equating to the market value of the

[113] *Cole*, 299 N.Y.S. at 426–27.

[114] For similar confusions, see Union & Mercantile Tr. Co. v. Harnwell, 250 N.W. 321 (Ark. 1933); Lowe v. Ozmun, 86 P. 729 (Cal. Ct. App. 1906). Elsewhere, the *Cole* court conceded that, if *SP* had notified *D* in advance that *SP* would make book entries qualifying *SP* as owner, the sale could proceed by book entry. 299 N.Y.S. at 438–39.

[115] *Cole*, 299 N.Y.S. at 439 ("[W]hen a pledgee undertakes to conduct a private sale without notice to the pledgor of the time and place of sale, he must conduct a private sale as a private sale is ordinarily conducted, that is, be endeavoring to obtain bids and selling to the highest bidder.").

[116] U.C.C. § 9-617(b) ("A transferee that acts in good faith takes free of the rights and interest of [the debtor's rights in the collateral], even if the secured party fails to comply with this article . . . .").

[117] This occurred in *Burns v. Anderson*, 123 Fed. App'x 543 (4th Cir. 2004).

[118] *See Cole*, 299 N.Y.S. at 430.

[119] U.C.C. § 9-625(a) ("[A] court may order . . . disposition of collateral . . . .").

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shares.[120] In short, sale over the opposition of *D* and strict foreclosure (*i.e.*, acceptance of the collateral) amount to the same manifested act, except that the secret sale does not require *D*'s consent.

These issues arose under old Article 9 in *In re Copeland*,[121] a case celebrated for its rulings on other important issues.[122] In *Copeland*, *D* pledged certificated securities as collateral. *D* delivered the shares to an escrow agent, thereby perfecting *SP*'s security interest. When *D* defaulted and filed for bankruptcy under old Chapter XI, the escrow agent delivered the shares, duly indorsed, to *SP*. *SP* then had the issuer of the shares register *SP* as the owner.[123]

At the time, *SP* was under water with respect to its claim against *D*. *SP* filed a proof of claim for the deficiency. After a time, the shares substantially increased in value. *D*, as debtor-in-possession, sought a large surplus from *SP*, claiming that *SP*

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[120] Could *SP* decree that the credit is *less* than the market value of the shares? In such a case, when *SP* sues for a deficiency judgment, and *D* puts commercial reasonableness in issue, *SP* has the burden to prove that the price "received" was reasonable. *Id.* § 9-626.

[121] *In re* Copeland, 531 F.2d 1195 (3d Cir. 1976).

[122] *Copeland* is a leading case for the assertion that certificates held by an escrow agent bound jointly to *SP* and *D* is a mode of perfection under Article 9. Claire Moore Dickerson, *New Article 8 of the Uniform Commercial Code: Are Certificated Shares Subject to a Perfected Security Interest if Held in Escrow?*, 17 HOFSTRA L. REV. 407 (1989). It also rules that a pledge agreement providing that *SP* upon default is to have the rights of an Article 9 secured party does not intend to defer attachment within the meaning of U.C.C. § 9-203(a) ("unless an agreement expressly postpones the time of attachment."). *In re* Copeland, 531 F.2d at 1201.

[123] It might profit our thinking to retrace every step of the *Copeland* case.

First, *D* and *SP* entered into a security agreement and *SP* gave value. At that point, *SP* had an unperfected security interest in the certificates still held by *D*, even though the certificates were not "delivered." Although *SP* did not become a purchaser under Article 8, Comment 2 to § 8-302 indicates that transfers of certificated securities can occur under the rules of Article 9.

Second, *D* "delivered" the certificates to an escrow agent. Since the escrow agent stands for creditor possession of the collateral, this act "perfected" *SP*'s security interest, and it made *SP* an Article 8 purchaser. But *SP* was *already* a purchaser under Article 9.

Third, the escrow agent delivered the certificates to *SP* because *D* defaulted. This was no delivery (in the sense of creating *SP* as a purchaser) because the escrow agent had no equitable interest in the certificates. Delivery in *that* sense had occurred at an earlier point of time.

Fourth, *SP* instructed the corporate registrar to list *SP* as owner, entitled to vote and receive dividends. This act had nothing to do with the certificates. *SP* possessed the certificates from the time *D* "delivered" the certificates to the escrow agent.

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had never bought the shares. *SP* claimed it did indeed buy the shares and was therefore the owner of the surplus.

We have said that the indicium of sale must be some sort of overt assertion of ownership. We have also said that backdating the sale past the time of the assertion should not be permitted. On these criteria, the proof of claim should have consummated the sale. On that reasoning, *SP* (not *D*) was the owner of the surplus, and also the owner of a bifurcated unsecured claim[124] against *D* in the Chapter XI proceeding.

This seems to be an argument that *SP* never considered. Instead, *SP* plausibly argued that registration of the certificates under *SP*'s name was an act of dominion over the collateral that signaled a "disposition" under Article 9 had occurred.

This should have been a meritorious claim. Perfection of the pledge of certificated securities in no way depends on *SP* appearing on the corporate books as the owner of the shares. All *SP* need do to perfect is to possess the certificates.[125] If the certificates are indorsed to *SP* or indorsed in blank, *SP* is empowered to make an effective sale upon default. But even if the certificates are not so indorsed, the pledge is still perfected. Registration plays no role in the concept of perfecting the security interest.

Registration with the issuer permits *SP* to vote, however, and to receive dividends.[126] These are the indicia of use and enjoyment of the shares. So, when *SP* is the registered owner, *SP* is showing dominion and control at the expense of *D*.[127]

A pledge agreement often permits *SP* to vote the shares during the life of the pledge. To achieve this, *SP* will have to register to vote. When the pledge agreement permits this, registration is consistent with *D*'s continued ownership of the equity in the shares. But where the pledge agreement is silent, *SP* trespasses on *D*'s rights by registering to vote. Registration over the opposition of *D* coheres with *SP*'s absolute

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[124] In bankruptcy, undersecured creditors are "bifurcated." They have one perfectly secured claim and one perfectly unsecured claim. *See* 11 U.S.C. § 506(a)(1).

[125] U.C.C. § 9-313(a).

[126] Actually, *SP* owns dividends whether *SP* is registered or not. Dividends are "proceeds" of the stock. *Id.* § 9-102(a)(64) (proceeds include "(B) whatever is . . . distributed on account of, collateral . . . ."); *id.* § 9-102 cmt. 13a ("broad enough to cover cash or stock dividends distributed on accounts of securities . . . .").

[127] Relevant here is, in Article 2 cases, when a seller tenders goods to the buyer and the buyer "does any act inconsistent with the seller's ownership," the buyer has accepted the goods and owes the price. U.C.C. § 2-606(1)(c).

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ownership and would constitute a conversion, if Article 9 did not authorize the sale.[128]

The *Copeland* court ultimately ruled that *SP* never bought the shares. Being registered as the owner did not establish the sale.[129] After the registration, *SP* remained a secured party who had not foreclosed. Therefore, *SP* owed the surplus to *D*.[130]

According to the case law, registration does not unambiguously announce that the pledgee has bought the shares.[131] But it is hard to figure out what *SP* could have done to accomplish the foreclosure sale.[132] Presumably, a *declaration* of *SP*

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[128] *See* N.Y. BUS. CORP. LAW § 612(e) (McKinney 2022) ("A shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, or nominee of the pledgee.").

[129] Similarly, the court in *Fletcher v. Cobuzzi*, 499 F. Supp. 694 (W.D. Pa. 1980), held that registration of the stock to *SP*'s name is not an indicium of sale:

> The transfer of stock titles is not technically a sale . . . . Rather it is more akin to repossession, a perfection of the creditor's rights to the collateral. [*SP*'s] transfer was merely a means of eliminating [*D*'s] legal title to the collateral, and vesting such title in himself. A parallel may be seen in the repossession of tangible property, vesting ownership in the creditor prior to disposition. Thus, such a transfer of title by the creditor to himself will not operate as a foreclosure under the Code.

Id. at 698–99. Complicating matters was the fact that, at the time of registration, *D* was not even in default. So, the foreclosure sale was invalid, even if we say registration is ordinarily an indicium of sale from *SP* to *SP*. *SP* cannot sell in the absence of a default. *See supra* text accompanying notes 14–53.

[130] The *Copeland* court worried that if *SP*'s doing nothing was a disposition, a distinction between accepting the collateral (in which case there was no deficiency) and selling the collateral (in which case there could be a deficiency) would be obliterated. 531 F.2d at 1207. The court took *SP* to be arguing that perhaps there was no sale, but silent retention fell under the language "or otherwise dispose of." *See* GILMORE, *supra* note 112, at 1238 ("Why then does § 9-504 authorize disposition not only by sale, but by lease or 'otherwise' (although exactly what 'otherwise' includes in addition to sales and leases defeats the imagination)?").

[131] *See In re* LaRoche, 969 F.2d 1299 (1st Cir. 1991). In *LaRoche*, a pledgee after default re-registered stock in his own name. He then purported to join in an involuntary bankruptcy petition against *D* as an undersecured creditor. *D* protested that registration constituted a *de facto* strict foreclosure of the pledge, implying that *SP* was not an unsecured creditor of *D*. The court rejected this notion and held that *SP* had not strictly foreclosed. Therefore, *SP* was in part an unsecured creditor who could petition *D* into bankruptcy. In *Sports Court v. Brower*, 534 N.W.2d 317 (Neb. 1975) (a legal malpractice case), voting shares was held not to be indicium of a sale, and so there was no disposition that could have been commercially unreasonable, such that the absolute bar rule was triggered.

[132] Weinstein v. Schwartz, 422 F.3d 476, 479 (7th Cir. 2005) (*SP* "has not sold or otherwise disposed of the shares. Simply taking the shares and keeping them (retention) is not a permissible means of disposing

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ownership should suffice to accomplish the sale. If so, one may ask why the proof of claim filed by *SP* in *Copeland* did not qualify as such a declaration.

A case arguably holding that registration is an indicium of sale is *Burns v. Anderson*.[133] Here the parties agreed in advance that thinly traded stock certificates were of a kind customarily sold on a recognized market and that, after default, *SP* could buy at a discount according to an appraisal. Default occurred, and *SP* submitted the certificates for registration on August 12, 2002. Later, *SP* reported to the SEC that the sale of *D*'s shares had occurred on September 6. What precisely occurred on September 6 was not revealed, but the *Burns* court agreed that a sale had occurred, On the basis of the appraisal, *D*'s obligation was reduced and *SP* successfully recovered the deficiency. The court emphasized that the parties had agreed that *SP* could buy at a private sale, whereas in *Copeland*, there was no such agreement. But the agreement in *Burns* simply repeats what Article 9 says anyway. Therefore, the case can be read in support of the idea that registration in the name of *SP* is an indicium that a sale has occurred.

In *Banker v. Upper Valley Refrigeration Co.*,[134] *D* pledged stock to *SP* and then defaulted. *SP* registered stock in his own name and, as controlling shareholder, fired the board of directors. The new directors appointed *SP* as president. Whereas in *Copeland SP* claimed ownership of the surplus, this time *SP* sought to recover a deficiency. That is, *SP* asserted that a sale had occurred and a deficiency was now due and owing. The *Banker* court held that *SP* could not sue for the deficit because it had retained the collateral.

The case does not quite hold that *SP* had bought the shares by asserting dominion over them via registration. In fact, what the case means is subject to an inscrutable ambiguity. The case is a straightforward application of *Lamp Fair Inc. v. Perez-Ortiz*.[135] *Lamp Fair* involved the sale of a Connecticut lamp store on purchase money credit—inventory, fixtures and equipment, to be exact. *D* defaulted and tendered the collateral back to *SP*. *SP* then opened up shop. While peddling lamps, *SP* sued *D* for the amount of the secured claim minus the appraised value of the

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of collateral under [the UCC]. A secured party does not acquire ownership of pledged collateral simply because the debtor defaults on a loan. There is a process for transferring ownership that must be followed. That process has not been completed in this case.").

[133] Burns v. Anderson, 123 F. App'x 543 (4th Cir. 2004).

[134] Banker v. Upper Valley Refrigeration Co., 771 F. Supp. 6 (D.N.H. 1991).

[135] Lamp Fair Inc. v. Perez-Ortiz, 888 F.2d 173 (1st Cir. 1989).

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collateral. Then-Judge Stephen Breyer affirmed dismissal of *SP*'s suit. There was no such remedy under Article 9, Judge Breyer thought.

As he read Article 9, *SP*, as a creditor-in-possession, had three options. First, *SP* could sue on the debt, but only if the repossession was in anticipation of a sheriff's levy. "A secured party choosing this option may take possession of the collateral prior to obtaining judgment, but only to preserve it as security for the debt."[136] This is a rather unique reading of § 9-601.[137] It implies that if *SP* obtains the money judgment, *SP* loses the right to foreclose by means of private sale.[138] Rather, *SP* holds the collateral for the sheriff only. This reading is a challenge to the idea that, under Article 9, *SP* is invited to accumulate remedies.[139]

The second option was that *SP* could propose a strict foreclosure. In the ordinary case, this extinguishes the secured claim and makes *SP* the beneficial owner of the collateral.

The third option was to sell the collateral. *SP*, however, cannot, under Article 9, sell to itself in a private sale (where the collateral was inventory, equipment and fixtures).[140]

Judge Breyer upheld dismissal of *SP*'s *in personam* suit on one of two theories, though he declined to say which was determinant. Either *SP* had accomplished a *de facto* strict foreclosure, or *SP* had simply not chosen one of the three permitted enforcement options and so was not entitled to a money judgment against *D*.

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[136] *Id.* at 175.

[137] At the time of the opinion, old Article 9 numbered this provision as § 9-501.

[138] Judge Breyer cited *Kimura v. Wauford*, 715 P.2d 451 (N.M. 1986), for the proposition. *Lamp Fair Inc.*, 888 F.2d at 175. In *Kimura*, *SP* repossessed for the purpose of preserving the collateral from depredation, as *D* was not taking care of it. The implication in *Kimura* was that if repossession had been for the purpose of disposition, it would have affected *SP*'s right to a money judgment. Thus, the court remarks, "it would be equally unfair to [*D*] to allow [*SP*] to take possession at all, if [*SP*] never intended to dispose of the security." *Kimura*, 715 P.2d at 454. The court accepted the assurance of *SP* (in its brief) that *SP* "will make some disposition of the subject collateral." *Id.* The main thrust of *Kimura* was that repossession did not constitute *SP*'s acceptance of the collateral, in the sense of erasing *D*'s *in personam* liability on the debt.

[139] U.C.C. § 9-601(c).

[140] *Id.* § 9-610(c)(1). Public sales are also mentioned in U.C.C. § 2-706(1), referring to a seller's option of reselling goods identified to the contract in case of a buyer's breach of contract. *See* Old Colony Tr. Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 706, 712 (E.D. Pa. 1968).

Lamp Fair was decided under old Article 9, where many courts asserted that a *de facto* strict foreclosure was possible. New Article 9 expressly opposes *de facto* strict foreclosure. Rather, *SP* must *consent* to a strict foreclosure in an authenticated record. According to U.C.C. § 9-620(b):

> A purported or apparent acceptance of collateral under this section is ineffective unless:
>
> (1) [*SP*] consents to the acceptance in an authenticated record or sends a proposal to [*D*]; and
>
> (2) the conditions of subsection (a) are met.[141]

Retrospectively, *Lamp Fair* (and therefore *Banker*) cannot pass as *de facto* strict foreclosure cases. Rather, if they are still valid, they stand for the proposition that *SP* cannot bring an action for money judgment while in possession of collateral—a challenge to the assumption that Article 9 abolishes the doctrine of election of remedies.[142]

In *Banker*, *SP* may have achieved an Article 9 sale by virtue of voting the shares. If not, *SP* was out of court because *SP* could not get a money judgment for the debt while *SP* remained in possession of unforeclosed collateral. But *SP* retained

[141] Comment 5 explains this provision:

> To ensure that the debtor cannot unilaterally cause an acceptance of collateral, subsection (b) provides that compliance with these conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under subsection (b), acceptance does not occur unless, in addition the secured party consents to the acceptance in an authenticated record or sends to the debtor a proposal. For this reason, a mere delay in collection or disposition of collateral does not constitute a "constructive strict foreclosure." Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner for purposes of Section . . . 9-610. A debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation under this section.

U.C.C. § 9-620 cmt. 5. Thus, it is the fond hope of new Article 9 that repossessions are never *de facto* strict foreclosures.

[142] "The cumulative nature of Uniform Commercial Code remedies is in derogation of the old rule that election of one remedy precludes pursuit of another." Warnaco, Inc. v. Farkas, 664 F. Supp. 738, 742 (S.D.N.Y. 1987), *aff'd*, 872 F.2d 539 (2d Cir. 1989); *see also* Citicorp Homeowners v. W. Sur., 641 P.2d 248, 250 (Ariz. Ct. App. 1981) ("A secured creditor is not required to elect a remedy. He can take any permitted action or combination of actions.").

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the unilateral right to *declare* a sale. So, the day after *SP* was out of court for failing to sell, *SP* could get back *into* court by publicly declaring, "I hereby sell the certificates to myself for their appraised value." Such a declaration is a commercially reasonable sale entitling *SP* to a deficiency judgment, where the shares are of the kind customarily sold on a recognized market.

Relevant to the issue of what evidences sale of certificated securities by *SP* to *SP* is *Cohen v. Rains*,[143] but it is challenging to determine what the case stands for.[144] In *Cohen*, *SP* claimed a security interest in certificated securities of *D Corp.* Obscuring matters is that the securities were issued by a subchapter *S* corporation. Such a corporation is not a taxable entity. The Internal Revenue Code, however, requires that the corporation be closely held.[145] Therefore, although certificated securities are involved, perhaps they are not of a kind customarily sold in a recognized market (even though certificated securities in general are thusly sold). If so, *SP* had no power to sell to *SP* (except at a public disposition).

In *Cohen*, *D* defaulted and delivered the certificates to *SP*, thereby perfecting *SP*'s security interest.[146] The certificates, however, were never indorsed. *SP* nevertheless voted the shares to install directors who appointed *SP* president of *D Corp. SP* then sued *D* for a money judgment on the debt and for a judicial foreclosure of the certificates.[147]

D denied that *SP* was entitled to a money judgment on the debt. *D* seems to have been claiming that, by voting the shares,[148] *SP* had achieved a *de facto* strict foreclosure, which implied that *SP* had no right to recover a deficiency judgment

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[143] 769 S.W.2d 380 (Tex. App. 1989).

[144] The case represents a substituted opinion "in order to clarify our prior holding in this case . . . ." 769 S.W.2d at 381. One shudders to contemplate what the *unclarified* opinion held.

[145] A corporation is eligible for Subchapter S if it has no more than 100 shareholders. 26 U.S.C. § 1361(b)(1)(A)-(D).

[146] Under old Article 9, possession was the exclusive means for perfecting a security interest in certificated shares. Old U.C.C. §§ 8-304(1); 9-105(1)(i) (AM. L. INST. & UNIF. L. COMM'N 1978).

[147] *SP* expected the court to declare that *SP* was the buyer of the certificated securities. *Cohen*, 769 S.W.2d at 382–83 ("[*SP*] also sought judicial foreclosure of the security interest held by him in the . . . common stock. In this regard, [*SP*] requested that the judgment entered provide for the transfer of ownership of the stock . . . .").

[148] *SP* claimed that the security agreement gave *SP* the right to vote the shares after default and that *SP* therefore deserved a judgment notwithstanding the jury verdict. *Id.* at 384, 388. The court found the security agreement ambiguous on this score. *Id.* at 390.

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against *D*.[149] Or perhaps *D* was claiming there was a sale by *SP* to *SP*, but the sale was unreasonable and therefore, under the absolute bar rule, *SP* was precluded from recovering the deficit.[150] It was surely the case that the certificated securities *SP* held had little or no value since the business was failing. Either theory would have allowed *D* to walk away from the debt and impose the loss entirely on *SP*.

The trial court asked the jury whether *SP* exercised the rights to the collateral that a third party, *B*, would have exercised if *B* had become the owner via sale.[151] The jury answered that *SP* had indeed behaved as an owner of the shares. The court gave judgment against *SP*.[152] *SP* had bought the shares.

The appellate panel reversed.[153] The appellate court denied that a sale by *SP* to *SP* had occurred. It left open the possibility that *SP* had achieved a *de facto* strict foreclosure,[154] and on this question the court remanded for further trial

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[149] *D* contended that *SP*'s "action in notifying them that he had voted such stock and removed Allied's officers and directors was, in effect, a foreclosure, and [*SP*] thereby accepted such stock in full satisfaction of [*D*'s] obligations." *Id.* at 383; *see also id.* at 386.

[150] *D* claimed *SP*'s letter announcing stock voting, removal of corporate officers and installation of *SP* as president "constituted a foreclosure and disposition of the collateral (presumably from [*SP*] as pledgee-creditor to [*SP*] as owner)." *Id.* at 384.

[151] According to the jury question:

> Did [*SP*] on or before June 29, 1983, intend to, and did he, exercise the same or similar rights of ownership with regard to the . . . common stock . . . which a third party would have usually exercised if the stock had been owned by such a third party, other than [*SP*] or [*D*]?

Id. at 383–84. *SP* claimed that this question "was not a controlling question" and should never have been submitted to the jury. *Id.* at 385–86.

[152] *Id.* at 381 ("Based upon a jury verdict that [*SP*] exercised ownership rights in the stock shares, the trial judge ruled in favor of appellees on their affirmative defense that [*SP*] was precluded from suing for the balance due on the note because his action in notifying [*D*] that he had voted the shares of stock amounted to a foreclosure of his security interest in full satisfaction of the debt under article nine of the Uniform Commercial Code.").

[153] *SP* had argued that the trial court should have issued a judgment notwithstanding verdict because the letter about voting did not constitute a disposition of collateral under what is now codified as U.C.C. § 9-610(a). *Id.* at 384.

[154] New Article 9 tries to overrule the *de facto* strict foreclosure. U.C.C. § 9-620(b). In 1989, strict foreclosure was governed by *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982). In *Tanenbaum*, *D* bought equipment on secured credit from *SP*. The equipment was defective, suggesting that *D* could offset a breach of warranty claim against *SP*, so that *SP*'s right to recover on the debt was questionable. In the case, *D* voluntarily tendered the equipment to *SP*. *SP* found the equipment unusable and so, without notice to *D*, *SP* "scrapped" it. Presumably this meant selling the equipment to a junk

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proceedings.[155] Confusingly the court ruled that "exercise of ownership rights is not necessarily synonymous with 'retention' in satisfaction of debt under section [9-620]."[156] Instead, the test should be whether *SP intended* a strict foreclosure. Thus, the jury on remand could consider whether voting the shares

> manifested an intention by him to retain the collateral in complete satisfaction of the debt [in a strict foreclosure]. The right to vote stock may be *one* incident of ownership; for a pledgee to exercise such voting right would not necessarily constitute a disposition or retention of the collateral itself, but may be *one* fact issue to be evaluated by the jury in arriving at its determination of the controlling issue, *i.e.*, disposition [by sale] or retention."[157]

SP claimed he had no power of sale at all because the certificates were not indorsed and therefore were nonnegotiable.[158] This is palpably incorrect; *SP* could sell to a buyer *B* who would then be entitled to *D*'s indorsement of the shares.[159] Be that as it may, *SP* argued that, given his inability to sell, voting could not constitute a

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dealer, or perhaps it meant *SP* deposited the equipment in a junkyard without selling at all. *Tanenbaum*, 628 S.W.2d at 770; *Cohen*, 769 S.W.2d at 384 (assuming that *SP* in *Tanenbaum* destroyed the collateral).

The trial court ruled that *SP* could obtain a money judgment while retaining possession of the collateral. So the trial court thought there had been no disposition. Nevertheless, it appears *SP* credited *D* with "$2,100 as value for the equipment." *Tanenbaum*, 628 S.W.2d at 772.

The Texas Supreme Court ruled that, given *SP*'s repossession, *SP* had to elect either sale under § 9-610(a) or strict foreclosure under § 9-620(a). The court assumed *SP* had elected sale. Given failure to give notice of disposition, the sale was unreasonable and, under the absolute bar rule, *SP* was not entitled to a money judgment. *But see Cohen*, 769 S.W.2d at 384 (*Tanenbaum* holds "that non-compliance with the notice requirement . . . prior to disposition by destruction results in an implied retention of the collateral in full satisfaction of the indebtedness . . . .").

[155] *Cohen*, 769 S.W.2d at 386 ("The issue confronting us is: if a secured creditor never proposes in writing to retain the collateral pursuant to section 9.505, can the creditor nevertheless be held to have retained the collateral in full satisfaction of the debtor's obligation?"); *see also id.* at 385 ("Therefore, if [*SP*] was found to have retained the collateral under [S]ec[.] 9.505 he is precluded from recovering a deficiency judgment.").

[156] *Id.* at 388.

[157] *Id.*

[158] *Id.* at 386.

[159] U.C.C. § 8-304(d).

disposition of the shares.[160] But (assuming Subchapter S certificated securities are of a kind that is customarily sold on a recognized market), *SP* had the power to sell to *SP* and in fact had done so when *SP* exercised dominion and control by voting. If, however, *SP* had no power to self-deal, *SP* converted the shares by voting. Curiously, in the case of conversion, *SP* could deduct the FMV of the securities from *SP*'s claim against *D*, the same as if *SP* actually did foreclose.[161]

The tort of conversion (*i.e.*, theft) and *SP*'s unreasonable sale-to-self bear a close affinity. Whether *SP* acted lawfully under Article 9 or whether *SP* was a thief does not seem to make any difference. Suppose *SP* claimed $100 and the securities expropriated were worth $60. If the sale were a commercially reasonable foreclosure, *SP* would have a deficit claim for $40. If *SP* simply stole the shares, and if *D* chose to treat *SP*'s actions as a conversion, *SP* could set off the $60 conversion claim against *SP*'s $100 loan. Either way, *SP* is entitled to a $40 judgment against *D*.[162]

We have one last item of business before we can move on. Ordinarily, *SP* cannot sell to *SP* in a private sale, unless the collateral is "of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations."[163] Suppose the collateral is not of such a kind. Suppose, for example, that the collateral is a trademark.

Now, according to U.C.C. § 9-610(c):

> A secured party may purchase collateral:
> (1) at a public disposition; or

[160] "Mere assumption of ownership ('exercise of ownership rights that a third party would have usually exercised') does *not* constitute a sale or disposition under [U.C.C § 9-610(a)] . . . ." *Cohen*, 769 S.W.2d at 390.

[161] Where *D* wishes to sue for damages instead of a declaration that the bid-in at a private sale was a non-event, *D* is effectively exercising her option to declare *SP*'s act of dominion a conversion. N. Com. Co. v. Cobb, 778 P.2d 205 (Ala. 1989); Cooper Inv. v. Conger, 775 P.2d 76 (Colo. App. 1989); Mercantile Bank & Tr. v. Cunov, 749 S.W.2d 545 (Tex. App. 1988) (stock not customarily sold in a recognized market).

[162] For a case in which *extended* retention of shares, coupled with voting, was thought to constitute a strict foreclosure, see *Wisconics Engineering, Inc. v. Fisher*, 466 N.E.2d 745, 763 (Ind. Ct. App. 1984) ("A secured party should not be permitted to profit by his retention of collateral for an indefinite or unreasonable period of time by asserting his right to a deficiency amount on the debt, claiming that he had no intent to retain the collateral is satisfied thereof as evidenced by the absence of written notice to retain. Therefore, there may be circumstances in which strict compliance with written notice provisions of § 9-505(2) are not essential to a claim that the secured party, by his unreasonable conduct, retained the collateral in satisfaction of the debt.").

[163] U.C.C. § 9-610(c)(2).

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> (2) at a private disposition only if the collateral is of a kind that is customarily sold in a recognized market or subject of widely distributed standard price quotations.

A trademark (*i.e.*, a general intangible) is not customarily sold in a recognized market, nor are there widely distributed trademark price quotations. Evidently, a private sale of a trademark by *SP* to *SP* is not permitted.

But what if the security agreement specifically authorizes self-dealing by *SP*? May the security agreement override the prohibition in U.C.C. § 9-610(c)? One would intuit that such a pre-default agreement would violate public policy. But this is far from clear on the face of Article 9.

Section 9-602 provides a host of anti-waiver rules. According to the preamble: "except as otherwise provided in Section 9-624 . . . , the debtor or obligor may not waive or vary the rules stated in the following sections . . . ." There follows a long list of unwaivable rights, mostly plucked from the vineyard of Part 6. For example, the rule of § 9-610(b) (all aspects of a foreclosure sale must be reasonable) may not be waived. But the rule of § 9-610(c) (no self-dealing in a private sale) is nowhere mentioned. The implication is that *D* may, in the original security agreement, authorize *SP* to self-deal for some (presumably reasonable) price.

In *Fodale v. Waste Management of Michigan, Inc.*,[164] a security agreement purported to authorize a bid-in (at a specified price)—in short, an option to buy upon *D*'s default on a loan obligation. Though decided in 2006, the court determined that old Article 9 applied. Old § 9-501(3)(b) prevented pre-default waivers of the rights specified in old § 9-504(3). Old § 9-504(3) required commercially reasonable sales, and it also prohibited self-dealing at (most) private sales. To the extent the security agreement authorized a sale by *SP* to *SP*, the agreement was incompetent to authorize *SP*'s exercise of the option. The court noted in passing that the result would be different under the 2000 amendments.[165]

There is something wrong with the conclusion that a security agreement can authorize a bid-in at a private sale. The ability to self-deal at a private sale seems identical to a strict foreclosure under U.C.C. § 9-620(a). Per § 9-602(10), the protections in § 9-620 (*D* must consent) are not waivable. Authorization of bidding in at a private sale is just strict foreclosure by another name. If so, § 9-610(c) rights are unwaivable, even though § 9-610(c) is not specifically listed in § 9-602.

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[164] 718 N.W.2d 827 (Mich. Ct. App. 2006).

[165] *Id.* at 837–38.

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In *Fodale*, the security agreement unlawfully authorized a bid-in at a private sale. *SP* announced it was exercising this supposed bid-in right, and *D* did not respond, except by suing *SP* for damages four years later. Incredibly, the court ruled that *SP*'s illegal announcement of the bid-in (without any advance notice of the private "sale") also constituted a proposal for strict foreclosure—which *D* accepted by doing nothing for twenty-one days. According to U.C.C. § 9-620(a):

> a secured party may accept collateral in full . . . satisfaction of the obligation it secures only if
>
> (1) the debtor consents to the acceptance under subsection (c) . . .

According to subsection (c)(2) of § 9-620:

> A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures . . . if the secured party:
>
> (A) sends to the debtor after default a proposal that is unconditional or subject to a condition that collateral not in the possession of the secured party be preserved or maintained;
>
> (B) in the proposal, proposes to accept collateral to full satisfaction of the obligation it secures; and
>
> (C) does not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent.

Thus, on the theory that "acceptance of collateral" under § 9-620 is not a "disposition" under § 9-610(a), triggering the duty of *SP* to act reasonably, *D* was effectively out of court. What was an illegal bid-in with none of the notice required by § 9-611(b) became a valid proposal for strict foreclosure, where twenty days of debtor apathy constitutes consent.

V. COMMERCIALLY UNREASONABLE SALES

We have argued that *SP* lacks all power to sell before default or to self-deal unless the sale is public or is privately sold in a recognized market. Where *SP* proposes to sell to a third party, *B*, *SP* has absolute power to sell after default in a commercially reasonable sale. *SP* still has *some* power to sell in a commercially *unreasonable* sale, but the power is circumscribed. According to U.C.C. § 9-617(b), "A transferee that acts in good faith takes free of the rights and interests described in subsection (a)." The negative pregnant proposition that follows from this is that *SP*

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may sell unreasonably *only* to a good faith transferee.[166] A commercially unreasonable sale to a bad faith purchaser is no sale.

One would expect that not only must the transferee be in good faith, but the transferee must be *for value*. This requirement, missing from § 9-617(b), is in fact supplied in U.C.C. § 9-617(a)(1), which states that only transferees *for value* obtain all of "the debtor's rights in collateral."

This raises a conundrum. Suppose *D* grants a security interest in a gold brick to SP_1 in exchange for a $100 loan. Suppose the brick is worth $90. *D* then grants a security interest to SP_2 in exchange for a $75 dollar loan. *D* defaults and SP_2 schedules a public sale where SP_2 bids in zero—the exact value of the brick as encumbered by SP_1's surviving security interest. Is SP_2 a transferee for value? If not, SP_2 has bought nothing at all. If SP_2 wishes to buy the brick, SP_2 had better bid a dollar, a dime, or a penny. But then SP_2 runs the risk that some court will claim the consideration nominal and therefore to be disregarded. SP_2 will then have bought nothing—a contradiction in terms.

Linguistically, U.C.C. § 9-617(a)(1) is implicated in a contradiction. If SP_2 is a transferee for no value, SP_2 takes nothing. And if SP_2 takes nothing SP_2 is not a transferee. Yet § 9-617(a) assumes SP_2 *is* a transferee—of nothing![167] There is a self-defeating and recursive quality to the implied definitions of "transfer" and "transferee."

Admittedly our critique of subparagraph (1) is a quibble. Subparagraph (2), however, deserves a more substantive criticism. The subsection "discharges the security interest under which the disposition is made."[168] This language invokes disappearance, avoidance, and obliteration. Thus, *SP*'s security interest simply evaporates into the void like MacBeth's witches: "what seem'd corporeal melted As breath into the wind."[169] In fact, what really happens is that *SP transfers* its security interest to *B*. Where there are no junior liens, *B* takes *D*'s equity and *SP*'s security

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[166] Bank of Am., N.A. v. Illumination Station, Inc., No. 10-CV-3061, 2011 U.S. Dist. LEXIS 46734 (N.D. Ill. May 2, 2011).

[167] This proves the Hegelian dictum that *nothing* is, after all, *something*. G.W.F. HEGEL, SCIENCE OF LOGIC 82 (A.V. Miller trans., 1967) (1812) ("To intuit or think nothing has, therefore, a meaning; both [being and nothing] are distinguished and thus nothing *is* (exists) in our intuiting or thinking.").

[168] U.C.C. § 9-617(a)(2).

[169] WILLIAM SHAKESPEARE, MACBETH, act 1, sc. 3.

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interest. These two interests merge and become *B*'s absolute interest in the collateral. *SP*'s security interest is *transferred* and is definitely not *discharged*.

This is not just an airy point of vocabulary. Suppose *SP* purports to sell *D*'s gold brick to *B* in a commercially unreasonable sale. Suppose *B* knows of the unreason—say a defective notice of the foreclosure sale by *SP* to *D*. *B* buys anyway. There has been no foreclosure because, when the sale is commercially unreasonable, *SP* has power only if *B* is a good faith transferee for value. *B* does not own *D*'s right to the brick, but *B* nevertheless has *some* rights to the brick. One would expect that *B* buys *SP*'s security interest. Therefore, *B* can use this security interest to re-foreclose and obtain *D*'s "rights in the collateral."[170]

In *Hamilton v. Moore Flying, Inc. (In re Hamilton)*,[171] *D* granted a security interest in an airplane to *SP*. *D* defaulted and failed to notify *D* of a foreclosure sale, which tainted the sale with unreason. *D* sold the plane to *B*, who (the court found) had knowledge of the notification defect. *D* then filed for Chapter 13 bankruptcy and sought turnover of the plane.[172] Had there been a foreclosure sale, *B* would own the plane and would be immune from turnover. The bankruptcy court, however, found that the foreclosure sale never occurred. The bankruptcy estate was therefore entitled to possess the plane and *D*, a Chapter 13 debtor, was free to joy-ride the Arkansas skies.[173] Nevertheless, *B* took *SP*'s security interest in an assignment and so *B* was a secured creditor in *D*'s bankruptcy. *D*'s aviary adventures would require adequate protection of *B*'s security interest in the plane.[174]

U.C.C. § 9-617(a), on its plain meaning, reverses this good result. Section 9-617(a) posits the *evaporation* of *B*'s security interest. The security interest does not exist, and therefore, *B* takes no security interest from *B*. If *B* had a security interest, *B* would have a post-default right of possession good against *D* (at least outside bankruptcy).[175] But *B* *has* no security interest. *D* can therefore take back the airplane, and *B* has no remedy. Meanwhile, *B*'s money ends up reducing *D*'s liability to *SP* for the loan. *B* is out the money and does not get *any* part of the plane.

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[170] This is certainly true in real estate foreclosure law, where a mortgage has neglected to serve the mortgagor with process.

[171] Hamilton v. Moore Flying (*In re* Hamilton), 197 B.R. 305 (Bankr. E.D. Ark. 1996).

[172] 11 U.S.C. § 542(a).

[173] *See id.* § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.").

[174] *Id.* § 1325(a)(5)(B)(iii)(II) ("[P]ayments shall not be less than an amount sufficient to provide the holder of such claim adequate protection during the period of the plan.").

[175] United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).

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To make matters worse, U.C.C. § 9-617(c) states that if bad faith *B:*

> does not take free of the rights and interest described in subsection (a), the transferee takes the collateral subject to:
> (1) the debtor's rights in the collateral;
> (2) the security interest . . . under which the disposition is made; and
> (3) any other security interest or other lien.

Under (c)(2), it would appear that commercially unreasonable *SP* gets the security interest that bad faith *B* should have taken. *SP* (who has *B*'s money) can re-foreclose and sell to B_2 and get *double* the money. Or, if *D* is bankrupt, *SP* is a secured creditor in *D*'s bankruptcy and *B* is not even an unsecured creditor.

In physics, Lavoisier used to claim that matter can neither be created nor destroyed. In commercial law, a similar law should be applied to the concept of property. Property can neither be created nor destroyed. It can only be transferred. Bankruptcy Code § 547(b), for example, proclaims that a bankruptcy trustee may *avoid* a transfer. Avoidance suggests disappearance, obliteration and (borrowing from Article 9) discharge.[176] But avoidance is not the whole story. Section 551 assures us that what is destroyed is preserved. Properly conceived, commercial law recognizes *eine Ohnmacht des Negativen*—a weakness of the negative.[177] What is negated is preserved. The security interest is not discharged; it is *transferred*. What is consciously suppressed survives in the subconscious.

Accordingly, when *SP* transfers to a bad faith *B*, *something* is transferred—*SP*'s security interest, which allows *B* to re-foreclose on *D*. But U.C.C. § 9-617(c) says otherwise. *B* takes nothing from *SP* in a commercially unreasonable sale.

Similar points can be made about liens junior to *SP*. Suppose *D* conveys a security interest in her gold brick to *SP* and *SP* perfects. *JC* then obtains a money judgment, pursuant to which *JC* serves a writ of execution on the sheriff. The sheriff then levies the brick. When *D* defaults, *SP* can repossess the brick from the sheriff, foreclose and sell to *B*, a good faith transferee for value. The sale "discharges" *JC*'s judicial lien—if the sale is commercially reasonable or if *B* is a good faith transferee

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176 Picard v. Citibank, N.A. (*In re* Bernard L. Madoff Inv. Secs. LLC), 12 F.4th 171, 181 (2d Cir. 2021) ("avoid" means "cancel").

177 ERROL E. HARRIS, AN INTERPRETATION OF THE LOGIC OF HEGEL 136 (1983) ("This inability to reach its bourne Hegel describes as *Eine Ohnmacht des Negativen*—a weakness of the negative—in that what it abolishes by its own canceling immediately reassert itself.").

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for value in a commercially unreasonable sale. But what if *B* is a bad faith transferee and the sale is unreasonable? In such a case, *B* takes subject to *JC*'s judicial lien.[178]

Suppose the commercial unreason is lack of notice to *D*. Under U.C.C. § 9-611(c), *SP* has no duty to notify *JC*.[179] Therefore, we face this situation: the sale is commercially unreasonable as to *D*, but it is commercially reasonable as to *JC*. Therefore, properly, *JC* should be foreclosed. *JC*'s lien should be deemed transferred to *B*, along with *SP*'s security interest. Thus, when *B* re-forecloses against *D*, *B* is entitled to *SP*'s secured claim (to the extent of the amount *B* paid *SP*) plus the amount of *JC*'s lien, before *D* is entitled to any surplus. This replicates the real property result when a mortgagee forecloses and omits to join the mortgagor in a foreclosure action.[180] U.C.C. § 9-617(c), on its face, dictates a different rule.

We have argued that, by the negative pregnant to U.C.C. § 9-617(b), *SP* may not sell unreasonably to a bad faith *B*. In a recent case, however, a New York court has ruled that *SP* has power to convey good title to *B* in a commercially unreasonable sale, even if *B* is a bad faith transferee. In other words, the court denied the negative pregnant implication of § 9-617(b).

Atlas MF Mezzanine Borrower LLC v. Macquaries Tex. Loan Holder LLC,[181] is a mezzanine financing case. Mezzanine financing is a real estate deal where *D*, owner of real property, grants a mortgage to a lender *A* and thereafter conveys the real property equity to a limited liability corporation (LLC). *D* then pledges the LLC interests to *SP*. The loan from *SP* is called "mezzanine financing." Basically, it assures that *SP*, claiming LLC interests, remains deeply subordinated to *A*, who claims a mortgage on real property.[182]

D acquired eleven Texas properties on credit from the Department of Housing and Urban Development, which took a mortgage on these properties. *D* then

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[178] U.C.C. § 9-617(c)(3).

[179] According to U.C.C. § 9-611(c)(3)(B), *SP* owes notice to a "lienholder that, 10 days before the notification date, held a . . . lien on the collateral perfected by the filing of a financing statement . . . ." Since *JC* has probably not filed a financing statement, *JC* deserves no notice.

[180] Polish Nat'l Alliance of Brooklyn, USA v. White Eagle Hall Co., 470 N.Y.S.2d 642, 648 (N.Y. App. 1983) ("While the foreclosure sale may be considered void as to an omitted party . . . , it is nonetheless effective to vest the purchaser with the interests of the mortgagee, the named defendants and persons acquiring interests from the defendant after the notice of pendency . . . .") (citations omitted).

[181] 105 N.Y.S.3d 59 (App. Div. 1st Dep't 2019).

[182] *See* Andrew R. Berman, *"Once Mortgage, Always a Mortgage"—The Use (and Misuse) of Mezzanine Loans and Preferred Equity Investments*, 11 STAN. J.L. BUS & FIN. 76 (2005).

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.912
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conveyed the eleven properties to eleven "special purpose entities"[183]—LLCs, to be precise.

SP proclaimed a default and noticed a nonjudicial public sale of the LLC interests. In the auction, *SP* set bidding rules, involving proof of a bidder's ability to pay and a cashier's check to cover an $8.25 million deposit. *D*'s corporate parent (*P*) qualified at the last minute to bid. *P* did not have time to procure the cashier's check, but it presented a "term sheet" from a third-party lender suggesting that *P* had access to funds to cover any bid.

At the auction, four bidders appeared, including *SP*, *P* and *B*. *B* (who would eventually win the auction) opened the bidding at $50.25 million. *P* attempted to bid but was silenced by *SP* (for want of a deposit check). *SP* then credit-bid for $73.5 million. *P* attempted a second bid (claiming that under the rules fabricated by *SP* it could produce the cashier's check by the end of the day). *SP* accepted that bid. *B*, however, topped it, bidding $76.75 million. *P* attempted to bid $77 million, but *SP* rejected the bid and accepted *B*'s lower bid for $76.75 million. This produced for *D* a surplus of over $836,000. This *SP* proposed not to return to *D* because *SP* had incurred $1.3 million in legal fees connected with the auction.

D then sought a declaration that no sale had occurred because *SP* unreasonably rejected *P*'s high bid and because *B* (a witness to the debacle) had knowledge of the commercial unreason.[184]

The court denied *D* this relief. If the sale had *not* occurred, *D* could have this relief. But, according to the court, a sale *had* occurred which could not be unwound. That is, *SP* had "sold" to *B*, a bad faith transferee. The sale was final and irreversible.

D had brought to the attention of the *Atlas* court the case of *Hamilton v. Moore Flying, Inc. (In re Hamilton)*,[185] the Chapter 13 airplane case we visited earlier. The case is right on point and contrary to the *Atlas* ruling. It is illuminating how the *Atlas* court misinterprets it. Recall that, in *Hamilton*, *SP* sold to *B* in a commercially unreasonable sale, where *B* was a bad faith transferee. The court held that the sale never occurred, but *B* did take an assignment of *SP*'s security interest. According to the *Atlas* court, the case does not "actually stand for the proposition that, pursuant to U.C.C. § 9-617, a U.C.C. sale can be unwound."[186] In fact, the issue is not whether

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[183] *Atlas MF Mezzanine Borrower*, 105 N.Y.S.3d at 61.

[184] *D* also inconsistently asked that the sale be set aside. *Id.* at 64. Thus, *D* alleged there was a sale and that there was no sale.

[185] 197 B.R. 305 (Bankr. E.D. Ark. 1996).

[186] *Atlas MF Mezzanine Borrower*, 105 N.Y.S.3d at 66.

a sale can be *unwound*. That confesses that a sale has indeed occurred, which sale must be rescinded. Rather, the issue is whether a sale ever occurred in the first place. *Hamilton* properly concluded that the answer is no sale—only an assignment of the security interest. Said the *Atlas* court:

> After the plaintiff [*i.e.*, *D*] had defaulted on his payment to [*SP*], which held a security interest in the airplane], the defendants [*B*] paid the loan, obtained a bill of sale from the bank, and took possession of the airplane, [*B*] had actually purchased a security interest in the airplane and not the airplane itself.[187]

In other words, the *Atlas* court assumed that *SP*'s intent in *Hamilton* was not to foreclose on the airplane—only to assign the security interest. This is inaccurate. What occurred in *Hamilton* was a busted foreclosure sale.[188] Nevertheless, the "sale" still achieved an assignment of the security interest from *SP* to *B*.

In reading Article 9, the *Atlas* court denied the negative pregnant of § 9-617(b). That is, if the positive aspect is that bona fide transferees take title in a commercially unreasonable sale, the negative aspect is that, where *B* is in bad faith, there is no sale. Thus, the court found that U.C.C. § 9-617(b) "does not touch on the remedies available to the debtor in the case of a 'bad faith' transferee."[189] Inconsistently, the court opined that the meaning of a bad faith purchase is that *D* "may still exercise some rights in the collateral, such as the redemption right."[190] But this is to say there was no sale! The right of redemption ends when the sale was final.[191] Therefore, if *D* may redeem, it must mean that the sale never occurred. Thus, the *Atlas* court contradicts itself. On the one hand, there was a sale, and so *D* was limited to a

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[187] *Id.*

[188] Another case distinguished in *Atlas* was *In re* Four Star Music Co., 2 B.R. 454 (Bankr. M.D. Tenn. 1979). In this case, *SP* ineffectively sold to *B*. *B*'s promise to pay was illusory. The *Four Star* court also held that, if *B*'s promise was consideration sufficient to find a sale, the foreclosure sale was commercially unreasonable and *B* was in bad faith. Therefore, *B* failed to buy *D*'s interest in the underlying collateral. The *Atlas* court dismissed the second alternative holding as *dicta*, which is fair enough. 405 N.Y.S.3d at 67.

[189] *Atlas*, 405 N.Y.S.3d at 67.

[190] *Id.* at 66.

[191] U.C.C. § 9-623 ("A redemption may occur at any time before a secured party . . . (2) has disposed of the collateral or entered into a contract for its disposition under Section 9-610[.]").

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damages remedy. On the other hand, there was no sale, so that *D* could still redeem from *B*.[192]

The *Atlas* court was able to cite a precedent for its reading of Article 9, and it is worth our while to look in on this precedent. In *In re Enron*,[193] an unsecured claim had been filed against Enron (the celebrated mega-bankrupt). Two parties disputed ownership of this claim. Originally, *D* had the claim and *D* filed a proof of claim for it. But *D* granted *SP* a nonrecourse security interest on assets generally (including the disputed claim). *D* was in default on this security agreement. *D* then assigned the encumbered Enron claim to D_2. *SP* foreclosed and sold many assets to *B*. Originally, the bill of sale did not include the Enron claim, but the bill of sale was later amended to include it. D_2 was thereby foreclosed. D_2, however, claimed that it had never received notice of the foreclosure sale. It further claimed that *B* was a bad faith transferee. By this argument D_2 hoped to establish that D_2 had the right to the proof of claim in the Enron bankruptcy and *B* (or *SP*) did not. But this overlooks the fact that, if there was no sale because of *B*'s bad faith, *B* nevertheless took *SP*'s lien on the Enron claim. D_2 owned the equity only. As account debtor, Enron, had the duty to pay *B*.[194] D_2's argument was therefore self-defeating. Whether or not *B* was in bad faith, *B* had the right to collect the Enron claim.

Missing this point, the *Enron* court concluded unnecessarily that a sale to a bad faith transferee is still a sale. *B* owned the Enron claim outright. D_2 did not. *B* was not merely a secured party but was an outright owner. D_2 had no right in the Enron bankruptcy, and D_2's remaining remedy was to sue *SP* and *B* (its co-conspirator) for damages.

The case was correctly decided for the wrong reason. It may be observed that the case can be solved consistently with the idea that *SP* lacks power to give good title to a bad faith transfer.

DeGiacomo v. Raymond C. Green, Inc. (In re Inofin Inc.)[195] also stands for the proposition that commercially unreasonable *SP* can covey good title to a bad faith *B*. In *Inofin*, *D*'s bankruptcy trustee (*T*) asserted that a commercially unreasonable bid-

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[192] Though, absurdly, U.C.C. § 9-617(c) implies *B* did not take an assignment from *SP*. So, on the plain language of Article 9, *D* had the right to redeem from *SP* (not from *B*).

[193] *In re* Enron, No. 01-16034 (AJG), 2005 Bank. LEXIS 3469 (Bankr. S.D.N.Y. June 16, 2005).

[194] U.C.C. § 9-607(a) ("[A]fter default, a secured party: (1) may notify an account debtor . . . to make payment . . . to or for the benefit of the secured party[.] ").

[195] 512 B.R. 19 (Bankr. D. Mass. 2014).

in at a public sale was void. That is to say, unreasonable *SP*-as-seller could not sell to bad-faith *SP*-as-buyer. Therefore, the collateral (chattel paper) was property of the bankruptcy estate—albeit encumbered by *SP*'s perfected security interest.

The bankruptcy court thought that *T* wanted to avoid a sale that was actually valid. But avoidance, the court observed, was not an Article 9 remedy within the meaning of U.C.C. § 9-625, which provides for damages[196] and whatever relief is comprehended in U.C.C. § 9-625(a):

> If it is established that a secured party is not proceeding in accordance with this Article, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions.

This provision, said the court, does not contemplate the avoidance of a valid-but-voidable title:

> Its provisions are cast in the present tense and are intended to curtail violations of UCC provisions while they are occurring. This Court does not interpret § 9-625(a) to authorize voiding the foreclosure sale even if [*SP*] did not act in a commercially reasonable manner. . . . Accordingly, the foreclosure sale is not void because of a violation of the provisions of UCC § 9-625.[197]

By putting the matter that way, the court assumed that a commercially unreasonable *sale* to a bad faith transferee is indeed a *sale*, which needs to be *avoided*. But this is not the case. The sale was a non-event. *SP* was in possession of collateral, which was part of the bankruptcy estate. Properly, the trustee (*T*) had the right under Bankruptcy Code § 542(a)[198] to recover the collateral without any reference to U.C.C. § 9-625(a).

Hedging its bets, the court also concluded that, even though *SP*-the-seller was guilty of commercial unreason, *SP*-the-buyer was supposedly a good faith transferee

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[196] U.C.C. § 9-625(a).

[197] *In re* Inofin Inc., 512 B.R. at 89–90.

[198] 11 U.S.C. § 542(a) provides:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

protected under U.C.C. § 9-617(b). This is completely unbelievable. *SP* behaved in a commercially unreasonable manner because pre-sale notices had erroneous sales dates in them.[199] *SP*'s lawyer lacked experience in foreclosures and failed to instruct the auctioneer to drum up business by contacting *D*'s chattel-paper competitors.[200] *SP* "made no reasonable efforts to market its loan portfolio and limited notice of the foreclosure sales."[201] *SP* was guilty of dodgy behavior in light of a cease-and-desist order (aimed at *D*) issued by the Massachusetts Division of Banks. Advertising was insufficient. The foreclosure sale "was perfunctory and intended to give [*SP*] control over its portfolio before [an anticipated] bankruptcy proceeding . . . ."[202] Yet *SP*-the-buyer was still considered a good faith transferee, which transcends the bounds of plausibility. *Knowledge* of irregularity is enough to taint a buyer with bad faith. The court would have us believe that *SP*-the-buyer had imbibed Lethean waters and had forgotten all that *SP*-the-seller knew.

In *Opacmare USA, LLC v. Lazzara Custom Yachts, LLC*,[203] the court considered a private bid-in—specifically prohibited by U.C.C. § 9-610(c). In *Opacmare*, D_1 owned a trademark and granted a security interest in it to *SP*. In a private sale, *SP* sold to *SP*[204]—a non-event according to § 9-610(c). *SP* flipped the trademark to *B*, who began doing business under the trademark.[205] Thereafter, D_1

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199 *In re* Inofin Inc., 512 B.R. at 85 ("Although the Security Agreement provided ten days notice would be sufficient and reasonable . . . , the first notice, which was sent to approximately 30 creditors as well as [*D*], contained the wrong date; the second notice was sent only to [*D*] two days before the date of sale, and the third notice provided notice of a sale to be conducted on January 26, 2011, although [*SP*] already had conducted a foreclosure sale as to [*D*] on January 18, 2011.").

200 *Id.*

201 *Id.*

202 *Id.*

203 314 F. Supp. 3d 1276 (M.D. Fla. 2018).

204 "Subsequently [*SP*] sent an undated 'Notice of Disposition of assets,' stating that it was 'exercising its right to foreclose upon and transfer right, title, and interest in the Assets,' including the LAZARRA mark, 'to itself.' It further stated that it foreclosed 'through a private sale under Uniform Commercial Code § 9-610 . . . .'" *Id.* at 1280.

205 "[T]he actual purchase agreement states that [*SP*] privately sold the trademark to themselves and were now selling the trademark to [*B*]. . . . While acknowledging that [*SP*] foreclosed upon and took ownership of the LAZZARA Mark through a UCC private sale, [D_2] argues that [*SP*] improperly purchased the collateral at a private disposition in violation of [U.C.C. § 9-610(c)(2)]." *Id.* at 1282.

transferred the trademark to D_2.[206] D_2 sued *B* for trademark infringement. *B* denied that D_2 owned the trademark.

Although the sale by *SP* to *SP* was a nullity, the sale from *SP* to *B* could pass as a foreclosure sale by *SP* of *D_2's* equity interest—a commercially unreasonable sale, to be sure, as *SP* did not notify either D_1 or D_2 of the sale. But commercially unreasonable sales to third parties are at least *sales*. The lack of notice put in jeopardy *SP*'s right to collect a deficiency from D_1, but it does not threaten *B*'s title, provided *B* was a good faith purchaser without knowledge of the lack of notice.[207] Therefore, D_2 lost the trademark when *B* bought from *SP*.

In short, the text of Article 9 supports the idea that *SP*'s power of sale fails when *SP* behaved in a commercially unreasonable manner and the buyer knows it. Some of the opinions we have reviewed, however, hold otherwise.

According to these opinions, the U.C.C. wishes to steer *D* away from property theories toward less disruptive money damage theories. There is a piece of evidence in Article 9 that vindicates this intuition. We have seen that U.C.C. § 9-620(a) invites strict foreclosure if *SP* proposes such to *D* (in exchange for total discharge of the debt) and *D* simply fails to object. Alternatively, *SP* may swap a *partial* discharge for a strict foreclosure only if *D* affirmatively accepts.

Under either concept, *SP* is required to send notice of strict foreclosure to certain enumerated foreclosed third parties.[208] If she does so, and these third parties fail to object,[209] the third parties are foreclosed.[210] What if *SP* never notifies these third parties? Section 9-622(b) provides, "[a] subordinate interest is discharged or terminated under subsection (a), even if the secured party fails to comply with this article." Says Comment 2 to this section:

> [S]ubordinate interests are discharged regardless of whether a proposal was required to be sent, or if required, was sent. However, a secured party's failure to

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[206] The transfer to D_2 occurred in a consent judgment by a Florida court, accomplishing an "asset payment" (the mark) in satisfaction of D_2's money judgment against D_1. *Id.* at 1281.

[207] D_2 did not claim otherwise. *Id.* at 1282–83.

[208] U.C.C. § 9-621(a).

[209] *Id.* § 9-620(a)(2).

[210] *Id.* § 9-622(a) ("A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures . . . (2) transfers to the secured party all of a debtor's rights in the collateral secured.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2022.912
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> send a proposal or otherwise to comply with this Article may subject the secured party to liability under Section 9-625 [*i.e.*, damages].

Thus, *SP* can run roughshod over third-party property rights, and such third parties are steered toward damages as their only remedy. But having *specifically* negated property rights here, we have reason to believe Article 9 *preserves* property rights when commercially unreasonable *SP* sells to bad faith *B*. Otherwise, the drafters would have *expressly* denigrated *D*'s property rights, as they knew how to do with respect to third parties in strict foreclosures.

VI. SALES TO A SURETY

Article 9 has tricky rules when *SP* sells to the guarantor of *D*'s obligation to *SP*. But before we explore them, we must attend to Article 9's unsatisfactory definition of "secondary obligor."

An obligor is "a person that, with respect to an obligation secured by a security interest in . . . the collateral, (i) owes payment . . . ; (ii) has provided property other than the collateral to secure payment . . . , or (iii) is otherwise accountable . . . for payment . . . ."[211] Presumably, the payment is owed *to SP*. A "secondary obligor" is "an obligor to the extent that: the obligor's obligation is secondary."[212] "Not the drafters' best work," observes the leading treatise.[213] A second alternative definition

[211] *Id.* § 9-102(a)(59). The definition goes on to exclude issuers of letters of credit, as they are not supposed to be guarantors, endowed with suretyship defenses. The definition also excludes "nominated persons"—persons authorized to pay a letter of credit upon promise of reimbursement by the issuer of the letter of credit. *Id.* § 5-102(a)(11).

[212] *Id.* § 9-102(a)(72). The drafters apologize: "One must consult the law of suretyship to determine whether an obligation is secondary." *Id.* § 9-102 cmt. 2a.

[213] 4 JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE § 34:25 (6th ed. 2015). For a mistaken application of this definition, see *King v. 2003 Silverado 1500*, No. A17-0385, 2017 WL 5560062 (Minn. Ct. App. Nov. 20, 2017). In this case, *D* and his mother signed a security agreement making a car collateral for *SP*. *D* was arrested for driving while intoxicated. The state sought forfeiture of the car under Minnesota law. The mother objected that forfeiture was subject to her right as surety to *SP*. The court ruled that mother signed as principal obligor and therefore could not resist forfeiture, but this seems wrong, if the car belonged to *D*. According to Rest 3d Suretyship & Guaranty, § 3:

> O offers to paint P's house for $5,000, payable upon completion of the painting if S will also agree to be liable for the $5,000. Accordingly, P, S, and O enter into contract pursuant to which O agrees to paint P's house and P and S are jointly and severally liable to pay $5,000 to O upon completion of the painting. P and S agree that, as between them, P is responsible for the payment. P is the principal obligor, and S is the secondary obligor. The obligation of P on the

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is offered, but it too is rather confusing: an obligor is secondary to the extent that "the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor or property of either."[214]

Let's test out this definition. Suppose *SP* advances funds to *D*, but *D* has no collateral to offer. As to *D*, *SP* is an unsecured creditor. *S*, however, guarantees *D*'s obligation and pledges some stock to secure *S*'s guaranty. Is *S* a secondary obligor? The answer appears to be no, because *D* is not a debtor! Doesn't *D* owe *SP* money? Yes, but in one of the slyer moments of new Article 9, a debtor is defined as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor."[215] A debtor *owns* but need not *owe*.[216]

S has recourse against *D*, but *D*, it appears, is no debtor. *D*, however, is "another obligor." But *S*'s recourse is *not* with respect to "an obligation secured by collateral." *D*'s obligation is *not* "secured by collateral." Ergo, *S* is an obligor (she owes *SP* money) *and* a debtor (she owns collateral). But *S* is not a *secondary* obligor, because *D* (though another obligor) has not secured its obligation to *SP* with collateral owned by *D*.

At least we know, however, that where *D* pledges collateral to *D* and *S* guarantees it, *S* is a secondary obligor. Our discussion proceeds on *that* assumption.

Section 9-618(b) informs us that "[a]n assignment, transfer, or subrogation described in subsection (a): (1) is not a disposition of collateral under Section 9-610." Is this telling us that a sale by *SP* to *S* is no sale?

Not quite. Another provision in Article 9 anticipates that *S* can buy at a foreclosure sale. U.C.C. § 9-615 in general governs the calculation of a surplus or deficiency when *SP* successfully sells under § 9-610(a). According to § 9-615(f):

> contract is the underlying obligation, while the obligation of S on that contract is the secondary obligation.

Thus, if *D* and his mother agreed that *D* would pay the loan, mother was a surety. In any case, forfeiture was not good against *SP* and mother could still save the car by paying and subrogating to *SP*.

214 U.C.C. § 9-102(a)(72)(B).

215 *Id.* § 9-102(a)(28). A debtor is further defined to include a seller of accounts, chattel paper, payment intangibles, or promissory note, and a consignee.

216 Compare the definition of "account debtor," who *owes* but does not *own*. *Id.* § 9-102(a)(3); Jeanne L. Schroeder & David Gray Carlson, *Three Against Two: On the Difference Between Property and Contract*, 35 EMORY BANKR. DEV. J. 417, 427–28 (2019).

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> The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor, if
>
> (1) the transferee in the disposition is . . . a secondary obligor . . . .

This says that, when *S* buys, we throw out the historic bid that *S* has made and we calculate *SP*'s deficit according to the FMV of the collateral. So, it cannot be the case that *S* is disqualified from buying at a foreclosure sale.[217]

Back to U.C.C. § 9-618(b)(1), this subsection cannot mean that *S* is excluded from the foreclosure sale. Rather, the section tries to distinguish between *foreclosure* by *SP* and *assignment* of the security interest (by subrogation) over to *S*. If the security interest is assigned, it is not foreclosed. Basically, the section is saying that subrogation of *S* to *SP*'s rights is an assignment of a security interest, not a foreclosure of it. In the case of subrogation, § 9-618(a) specifies that *S* only inherits *SP*'s *rights* against *D* (*i.e.*, *SP*'s security interest on *D* assets) but also *SP*'s *duties* to *D*—the duty to conduct a commercially reasonable sale.[218] In addition, *SP* is off the hook to *D* if *S* behaves unreasonably with respect to the collateral.[219]

Suppose *SP* lends $100 to *D* and *D* pledges his gold brick with a FMV of $80. In addition, *S* guarantees payment. *D* defaults and *SP* schedules a public sale of the brick. *S* shows up at the auction and buys for $60. In addition to paying $60, *S* tenders a check for $40 to *SP*, thereby satisfying *S*'s suretyship obligation. Is this a foreclosure or a subrogation? If a foreclosure, *S* owns the brick and has a deficiency claim against *D* for at least $20, since U.C.C. § 9-615(f) calculates the deficiency as total claim minus FMV of the collateral. To this *S* may add reasonable expenses (plus attorneys' fees, per *SP*'s security agreement) incurred by *SP*. Since *SP* is entitled the *SP*'s foreclosure expenses and *S* is subrogated to *SP*, *S* may collect *SP*'s expenses from *D*.[220]

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[217] *See* U.C.C. § 9-618 cmt. 3.

[218] *Id.* § 9-610(b).

[219] *Id.* § 9-618(b)(2). Suppose *SP* is an efficient liquidator of collateral and *S* is inefficient. *D* has no ground to complain that *SP* should have foreclosure rather than letting *S* do it.

[220] Comment 2 to § 9-618 upholds the possibility that *S* takes the brick in foreclosure and does not take an assignment of the security interest in the brick. The Comment concerns § 9-601(a)(1): A secondary obligor has the duties of a secured party (*i.e.*, there has been no foreclosure) if *S* "receives an assignment of a secured obligation from the secured party . . . ." According to the comment:

On the other hand, if it is a subrogation, the security interest on the brick is not foreclosed. *S* must conduct a sale in order to foreclose. Suppose *S* conducts a reasonable public sale and bids in for $60. *S*'s deficiency claim against *SP* is at least $40.[221] To this *S* can add *SP*'s attorneys' fees incurred in enforcing *SP*'s claim against *D*, since *S* paid those fees to *SP* and is subrogated to *SP v. D*. In addition, *S* is entitled to expenses of selling the brick. *S*, however, is not entitled to *S*'s attorneys' fees since *D* never promised *S* that *D* would pay them. Thus, *D* must pay more expenses if the *S*-*SP* transaction was a subrogation.[222]

It should not be hard to determine whether *SP* means to sell or assign. The sale involves notice to *D*.[223] Where these notices are sent—even if defective—*SP* intends to foreclose. Where the notice is not sent, we should suspect assignment. Where *SP* intends to foreclose, notice is defective and *S* knows it, we are back to assignment—if the negative to U.C.C. § 9-617(b) is indeed pregnant.

VII. SALES BY A DEFAULTING DEBTOR: A FORECLOSURE?

U.C.C. § 9-610(b) commands that "[e]very aspect of a disposition of collateral . . . be commercially reasonable." This is the sentence that charges *SP* to foreclose reasonably. When *D* defaults and *SP* forecloses, *SP* obviously owes to *D* a duty to conduct a commercially reasonable sale. Less obviously, *SP* owes this duty to the surety *S*. Article 9 nowhere says this very clearly. But U.C.C. § 9-625(c)(1)

> Subsection (a)(1) applies when there has been an assignment of an obligation that is secured at the time it is assigned. Thus if a secondary obligor acquires the collateral at a disposition under Section 9-610 and simultaneously or subsequently discharges the unsecured deficiency claim, subsection (a)(1) is not implicated.

[221] If *S* bids in $60 but the FMV is $80, the deficit is calculated according to the nominal amount that *SP* bids. But not if "the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than [*SP*] . . . would have bought." U.C.C. § 9-615(f)(2). *D*, however, has the burden of showing that the amount of the bid-in was "significantly below the range of prices" that a third party would have paid. U.C.C. § 9-626(a)(5). If *D* meets this burden, *SP* must prove FMV.

[222] Says comment 2 to U.C.C. § 9-618, "In some situations the capacity in which the payment is made may be unclear. Accordingly, the parties should in their relationship provide clear evidence of the nature and circumstances of the payment by the secondary obligor." For comment on this issue under old Article 9, see Donald J. Rapson, *Repurchase (of Collateral?) Agreements and the Larger Issue of Deficiency Actions: What Does Section 9-504(3) Mean?*, 29 IDAHO L. REV. 649 (1992).

[223] U.C.C. § 9-611.

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affirms that "a person that, at the time of the failure[[224]], was . . . an obligor . . . may recover damages under subsection (b) for its loss."

If *SP* forecloses poorly and thereafter sues *S* for the deficiency, *S* can provisionally avoid liability simply by putting commercial reasonableness in issue.[225] If *S* does this, *SP* has the burden to prove the commercial reasonableness of the disposition. If *SP* does not carry this burden, *SP* might still recover a little something from *S*. *SP* may recover the secured claim minus the FMV of the collateral unreasonably sold.[226] If *SP* cannot prove that FMV was less than *SP*'s secured claim, *S* is off the hook.[227]

But what if *SP* engages *D* as an agent in liquidating the collateral? Is this *SP*'s foreclosure on *D*'s equity (in which case *SP* owes the duty of reason to *S*), or is *D* privately selling (in which case, *SP* owes no duty to *S*)?

A foreclosure sale does two things. First, the sale conveys to the buyer (*B*) *D*'s equity in the collateral—*D*'s right to use the property beneficially.[228] Second, the sale also transfers *SP*'s security interest. As to this second transfer, U.C.C. § 9-617(a)(2) indicates that the sale "discharges the security interest under which the disposition is made." Invoking Lavoisier, we have re-characterized the discharge as a transfer from *SP*'s security interest to *B*.[229]

May we define foreclosure as the combination of these two transfers? Not exactly. Foreclosure also terminates redemption rights. According to U.C.C. § 9-623(a), "any secondary obligor, or any other [junior] secured party or lienholder may redeem collateral." And according to § 9-623(c):

> A redemption may occur at any time before a secured party:
>
> . . .

[224] What failure? Apparently, the failure referred to in U.C.C. § 9-615(b): "a failure to comply with this article."

[225] *Id.* § 9-626(a)(1), (2).

[226] *Id.* § 9-626(a)(3).

[227] *Id.* § 9-626(4) ("For purposes of paragraph (3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.").

[228] U.C.C. § 9-617(a)(1).

[229] *See supra* text accompanying notes 175–77.

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(2) has disposed of collateral or entered into a contract for its disposition under Section 9-610,

If *D* conveys her equity to *B* and then, separately, *SP* conveys (*i.e.*, "releases") her security interest to *B*, we have two separate transactions. *D*'s sale, considered separately, is no foreclosure. *SP*'s assignment/release, considered separately, is no foreclosure. Suppose *S* has guaranteed *D*'s payment to *SP*. *S* has a right of redemption and there has been no foreclosure. *S* is entitled to receive notification of a foreclosure.[230] Therefore, *S* is entitled to receive *from B* a notice of a *future* foreclosure so that *S* can decide whether to redeem. Until *B* forecloses *S*, *S* can take the collateral away from *B* (for a price).

But what if *D*, *SP*, and *B* as a threesome agree upon a sale to *B* free and clear of *SP*'s security interest? Is *S*'s right of redemption foreclosed? According to the court in *Fodale v. Waste Management of Michigan, Inc.*,[231] a disposition requires "a transfer of some portion of the *creditor*'s interest in the collateral *and* a transfer of the debtor's interest."[232] Where all three are in on the deal, we would seem to have a foreclosure.

The court in *Bremer Bank National Ass'n v. Matejcek*[233] said otherwise. *D* and *S* (wife and husband) had bought an expensive motorhome and co-signed a security agreement granting a purchase money security interest to *SP*. *S* commenced divorce proceedings. *D* wished to sell the motorhome and located a buyer. *SP* (seriously under water on the loan) agreed with this plan and agreed to "release" its security interest to *B*. *D* asked the divorce court to compel *S* to convey his 50% cotenancy to *D* to facilitate the sale. She asked the court to "order" the sale of the motorhome with proceeds to be paid to *SP*. The court obliged. The original buyer backed out of the deal, but *D* found a second buyer *B* who went through with the purchase. *SP* subsequently "released" its security interest when *SP* received cash proceeds from *B*. All along, *S* was protesting that the price *D* was negotiating was too low.

Upon consummation of the sale, *SP* sued *S* to recover the deficiency. *S* responded that the sale had been commercially unreasonable, hoping to trigger *SP*'s burden to show that the sale was reasonable. For one thing, *SP* had not sent *S* an authenticated notification of disposition, as U.C.C. § 9-611(a)(1) requires in cases of

[230] U.C.C. § 9-611(c)(2).

[231] Fodale v. Waste Mgmt. of Mich., Inc., 718 N.W.2d 827 (Mich. Ct. App. 2006).

[232] *Id.* at 834–35 (*quoting* Silverberg v. Colantuno, 991 P.2d 280, 289 (Colo. App. 1998)).

[233] Bremer Bank Nat'l Ass'n v. Matejcek, 916 N.W.2d 688 (Minn. Ct. App. 2018).

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foreclosure. But the court ruled no foreclosure had taken place and so *SP* owed *S* no duty of commercial reasonability. In this case, *D* sold her equity to *B*. *SP* "released" (*i.e.*, assigned) the security interest to *B*. These two acts were separate transactions. Neither was a foreclosure. Part 6 of Article 9 did not apply.[234]

But wasn't *D SP*'s agent, promising *B* on *SP*'s behalf title free and clear of *SP*'s security interest? *S* suggested this, but the court would not entertain the notion. *S* only mentioned the word "agent" in the reply brief, not in the principal brief, and the court was not bound to consider "new" ideas, however meritorious and obvious, raised for the first time in a reply brief.[235] Nevertheless, the court noted that *D* had approached *SP* with the idea of sale, *D* had procured a court order "directing" her to sell, and *D* did the work of closing the sale. "There is no record evidence that [*SP*] exercised any control over [*D*], which is necessary to prove a principal-agent relationship."[236]

None of these factors, however, rules out *D*'s agency. According to the *Restatement (3d) of Agency*:

> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act.[237]

This definition is consistent with agent *D* foreclosing on behalf of the principal *SP*.

Agency would clinch the matter for *S*. Properly, when *D* in tandem with *SP* offers *B* a free-and-clear title, we have a foreclosure. If there is an *S* out there, *S* is

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[234] *Id.* at 695 ("[*SP*] did not enter into a transaction to transfer ownership of possession of the motorhome. [*D*] transferred her ownership interest to the buyers of the motorhome. [*SP*] released its lien on the motorhome after [*D*] transferred title and to the buyers and after [*SP*] received the sales proceeds . . . ."). *D* had argued that *SP*'s consent to *D*'s sale was an "other disposition" within the meaning of U.C.C. § 9-610(a), and that this triggered *SP*'s duty to oversee the reasonableness of *D*'s sale. The court rightfully rejected this argument. *Id.* at 695 ("Section [9-610(a)] imposes duties on a secured party that enters into a transaction to 'sell, lease, license or otherwise dispose' of collateral. The statute does not impose duties based on a secured party's consent to a joint debtor's sale and we decline to add words that the legislature has omitted."). *SP*'s consent to *D*'s sale subject to the lien is irrelevant; *D* can sell her equity *without SP*'s consent. *SP*'s consent is therefore not an "other disposition."

[235] *Matejcek*, 916 N.W.2d at 695.

[236] *Id.*

[237] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

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entitled to an authenticated notification stating the date after which a private sale might occur.[238] This notice is for the purpose of alerting *S* that the clock is ticking on *S*'s redemption right.[239] Failure to send notice makes the "foreclosure" unreasonable.

If indeed *SP* had not foreclosed, then it was still open for *S* to redeem the collateral from *B* and realize the higher price that *S* alleged the collateral to have merited.

VIII. PRESUMPTIONS AND BURDENS OF PROOF

Usually, when commercially unreasonable sales rear their heads, the litigation posture is in the guise of *SP*'s suit for the deficit, because *SP* came up short in the unreasonable foreclosure. In the context of suits for the deficiency, new Article 9 carefully regulates burdens of proof and presumptions between *SP*, *D* and *D*'s surety (*S*). Initially, commercial reasonableness is presumed. If *D* or *S* puts *SP*s commercial reason "in issue,"[240] the burden to show commercial reasonableness shifts to *SP*. If *SP* cannot show commercial reason, *SP* is still entitled to a deficiency if she can prove a FMV that is less than *SP*'s secured claim.

Outside this specific context, the allocation of proof burdens and the applicability of presumptions is unclear. In the context under examination here, *D* is making a *property* claim against *B*. The initial presumption of commercial reason only applies "[i]n an action arising from a transaction . . . in which the amount of a deficiency or surplus is in issue."[241] In our present context, there cannot be a surplus or a deficit because there has been no sale in the first place. Therefore, we can assume that *D* has the burden to show that the sale was commercially unreasonable[242] and, if that burden is carried, *D* must show that *B* bought in bad faith.[243]

A magistrate judge under old Article 9 disagreed. In *Fink v. DeClassis*,[244] *D* granted a security interest to *SP* on *D*'s general intangibles. An account debtor (*AD*)

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[238] U.C.C. § 9-613(1)(E).

[239] Morgantown Excavators Inc. v. Huntington Nat'l Bank (*In re* Godfrey), 537 B.R. 271, 281–82 (Bankr. N.D. W. Va. 2015).

[240] U.C.C. § 9-626(a)(1).

[241] *Id.* § 9-626(a).

[242] Thomas v. Price, 975 F.2d 231, 239–40 (5th Cir. 1992).

[243] In *Lichty v. Federal Land Bank*, 467 N.W.2d 657 (Neb. 1991), *D* in a replevy suit was assigned the duty to prove *B*'s bad faith.

[244] No. 90 C 401, 1991 U.S. Dist. LEXIS 13567 (N.D. Ill. Sept. 30, 1991).

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agreed to pay a disputed debt into escrow. Pending a decision as to whether *AD* really owed the debt, *SP* sold its right against *AD* to *B*. *B* intervened and claimed that the escrow agent should pay *B*, not *D*. The magistrate, however, awarded the escrow payment to *D*. The magistrate imposed on *B* the burden of proving *B*'s good faith. Furthermore, since good faith only matters if *SP* has been commercially unreasonable in selling, the magistrate presumed the sale was *not* reasonable. Thus, *D* walked away with the escrow payment because *B* could not prove the sale was commercially reasonable.

The assignment of the burden of proof seems incorrect, but, putting that aside, the court overlooked the point that, in a commercially unreasonable sale, *SP* does not convey *D*'s interest in the escrow payment to a bad faith *B*, but *SP* succeeds in *assigning SP*'s perfect security interest. *B* therefore was a perfected secured party with collection rights that trumped *D*'s right to collect. In short, the commercial reasonableness of the *SP-B* sale was irrelevant; *B still* had a better right than *D* to collect the payment intangible from *AD*.

A better allocation of proof burdens was made in *DeGiacomo v. Raymond C. Green, Inc. (In re Inofin Inc.)*,[245] a case we visited earlier as wrongly according to *SP* the power to sell to bad faith transferees.[246] There, a bankruptcy trustee (*T*) failed to establish the voidness of such a sale. *T* was limited to recovery of damages. In this action for damages, *T* was assigned the burden of showing that *SP* behaved in a commercially unreasonable manner, which *T* sustained. *T* was also assigned the burden of proving that the FMV of the collateral exceeded what the buyer (also *SP*) actually bid. *T* failed to prove a higher FMV and so was out of court.[247]

Similarly, in *Regions Bank v. Trailer Source*,[248] SP_1 sold the collateral (trailers) without ever having repossessed. SP_2 had a junior security interest. SP_2 sued SP_1 for damages, claiming that SP_1 was injured because the sale was unreasonable. The court held that because SP_1 had *sold* under U.C.C. § 9-610(a), SP_1 owed SP_2 a commercially reasonable sale under § 9-610(b). But SP_2 had the burden of proving SP_1's commercial unreasonableness.

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[245] 512 B.R. 19 (Bankr. D. Mass. 2014).

[246] *See supra* text accompanying notes 195–202.

[247] 512 B.R. at 90.

[248] Regions Bank v. Trailer Source, No. M2008-01167-COA-R3-CV, 2010 WL 2074590 (Tenn. Ct. App. May 21, 2010).

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IX. THE EFFECT OF BANKRUPTCY ON AN ARTICLE 9 FORECLOSURE SALE

In the ordinary case, if *SP* forecloses and sells to *B* just prior to *D*'s bankruptcy petition, the bankruptcy has no effect on *B*'s title. For example, suppose *D* has granted a secured security on a gold brick. *SP* has perfected long ago and forecloses a week before *D*'s bankruptcy. U.C.C. § 9-617(a)(1) indicates that the foreclosure sale "transfers to [*B*] all of the debtor's rights in the collateral . . . ." On the day of bankruptcy, *D* has no rights in the brick and so *D*'s bankruptcy trustee (*T*) has none. *B* takes title from the foreclosure sale, free and clear of any right *T* might have.

Does it make any difference *SP* was unperfected at the time of the foreclosure sale?

Before answering, in the typical foreclosure sale, where collateral is tangible property, *SP* will have repossessed before the sale. Creditor possession *is* perfection, and so we have a case where a *perfected* secured party has foreclosed.

It is possible that the collateral is *not* tangible and so *SP* is *not* perfected at the time of the foreclosure. This occurred in *CERx Pharmacy Partners, LP v. Provider Meds, LP (In re ProvideRx of Grapevine, LLC)*,[249] where the collateral was patents. *SP* filed a defective financing statement, and *SP* obviously could not go into possession, since the patent is intangible. *SP* was therefore unperfected at the time *SP* sold to *SP* in a public sale.

T[250] challenged the title of *SP*-as-buyer under the strong arm provision of the Bankruptcy Code.[251] That is, *T* claimed to have a judicial lien on the patents as of the day of the bankruptcy petition, which adversely affected *SP*'s title. The court properly held that *D*'s title to the patent ended when *SP*-as-seller foreclosed. A judicial lien creditor of *D* could no longer reach the patents.[252]

This was perfectly correct as far as it goes, but it overlooks the fact that *SP*'s foreclosure sale occurred within ninety days of bankruptcy.[253] *SP*'s security interest

[249] 507 B.R. 132 (N.D. Tex. 2014).

[250] *T* was a debtor-in-possession in a Chapter 11 case. *Id.* at 167.

[251] *See* 11 U.S.C. § 544(a).

[252] *In re* ProvideRX, 507 B.R. at 168.

[253] *D* filed for bankruptcy on February 6, 2012. Tech Pharm. Servs. v. RPD Holdings, LLC (*In re* Provider Meds, LLC), No. 13-30678, 2017 Bankr. LEXIS 166, at *6 (N.D. Tex. Jan. 28, 2017). The foreclosure sale was on December 13, 2012. Timing of the transfer from *D* to *SP* is not actually covered by the timing rules in Bankruptcy Code § 547(e), but a sensible *ad hoc* solution is to say that at the time of the

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.912
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was a therefore voidable preference. *T* could recover this security interest from *SP*-as-seller, the initial transferee, and *T* could recover the security interest from *SP*-as-buyer. *SP*-as-buyer was a transferee of a transferee within the meaning of § 550(a)(1). Such transfers once removed are given a bona fide transfer defense under § 550(b), but *SP*-as-buyer probably could not claim to be in good faith, since *SP* should have known its financing statement was insufficient to perfect.

Interesting though the issue is, the ability of an avoidance power to upset a settled foreclosure sale is beyond the scope of this Article—which focuses on when Article 9 (standing alone) absolutely settles the sale. For the record, if *T* has an avoidance theory against *SP* and if *SP* has sold to a buyer with knowledge of the avoidance theory, *T* can snatch back the collateral. This was settled in the classic 1906 case of *First National Bank v. Staake*.[254] In *Staake*, *JC* obtained a voidable judicial lien on *D*'s property. *D* then sold the equity in the property to *B*. *D* then became bankrupt. T was able to avoid *and preserve* the suspect judicial lien and use it to bring *B*'s equity interest within the purview of *D*'s bankruptcy estate. Similarly, in *Grapevine*, *SP* the bad-faith buyer bought *D*'s equity and *SP*'s avoidable lien. T should be able to avoid and *preserve*[255] the voidable security interest and bring the patents into the bankruptcy estate (reserving for *SP* the value of any equity *SP* bought at the foreclosure sale).

Another example shows that foreclosure sales are likewise vulnerable under fraudulent transfer law in nonbankruptcy cases. In *United States v. Tabor Court Realty Corp.*,[256] *D* granted a mortgage to *SP*, and the mortgage was a fraudulent transfer. *SP* foreclosed and sold to *B*, a bad faith purchaser. An unsecured creditor was able to snatch back the fraudulent mortgage from *B*, even though the mortgage and *D*'s equity had merged into a fee simple absolute estate in *B*.

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foreclosure sale, *D* is deemed to have transferred the security interest to *SP* on antecedent debt. David Gray Carlson, *Security Interests in the Crucible of Voidable Preference Law*, 1995 U. ILL. L. REV. 211, 224–25 (1995).

[254] First Nat'l Bank v. Staake, 202 U.S. 141 (1906).

[255] *See* 11 U.S.C. § 551 ("Any transfer avoided under section . . . 547 . . . is preserved for the benefit of the estate but only with respect to property of the estate.").

[256] United States v. Tabor Ct. Realty Corp., 803 F.2d 1288 (3d Cir. 1986). This case is the premier example of a leveraged buyout that was a fraud on creditors. *See* Emily L. Sherwin, *Creditors' Rights Against Participants in a Leveraged Buyout*, 72 MINN. L. REV. 449, 480–88 (1988).

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We have said enough to justify a warning: outside Article 9, federal bankruptcy law and state fraudulent transfer law can undo a sale that is otherwise final under Article 9.[257]

CONCLUSION

A secured party under Article 9 has the power to sell the debtor's collateral. But this power of sale is circumscribed. What appears to be a sale is not a sale when the secured party lacks the power to make the transfer.

In particular, a secured party may not sell prior to default. A secured party cannot self-deal and "bid-in" at a private sale, unless the collateral is "of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations."[258] A secured party may not sell unreasonably to a bad faith purchaser for value.

The courts, however, often disagree. They have on occasion honored the sale when the secured party acted beyond the scope of its power, limiting the wronged party to money damages in lieu of the property right. On these occasions, the courts have not adhered to the property principles inherent in the Article 9 foreclosure system.

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[257] I say much more in a forthcoming article. David Gray Carlson, *Foreclosure Sales as Fraudulent Transfers*.

[258] U.C.C. § 9-610(c)(2). "Fairness is assured by the operation of the market." William E. Hogan, *The Secured Party in Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 234 (1962).

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