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Secured Transactions: Remedies on Default

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CONCLUSION

Article 6 goes far toward setting up a uniform bulk sales law and should be acceptable to Wyoming. Bulk sales laws are primarily designed to prevent a transferor from putting assets beyond the reach of his bona fide creditors and also to protect the buyer who substantially complies with the law. The advantage of uniform legislation in this matter is very evident when one considers a creditor who extends credit to various debtors in a number of different states. With uniform laws in effect, the creditor would not be required to know the various bulk sales laws. Instead, he would have to be aware of only one set of laws and could act with more certainty and safety in extending credit. Many of the disputes that have arisen in other states have not been before the Wyoming courts. The acceptance of this Article by Wyoming would reduce the amount of litigation since its great asset is the clarification of many already litigated problems that have been troublesome to other states.

DEAN CLARK

SECURED TRANSACTIONS: REMEDIES ON DEFAULT

Article 9 of the Uniform Commercial Code seeks to unify the rules applicable to all secured transactions.¹ It applies to any transaction, regardless of its form, which is intended to create a security interest in personal property. Chattel mortgages, conditional sale contracts, trust receipts, and other security devices are included under this heading.² A lender, seller, or other person in whose favor there is a security interest is defined as a "secured party." The person who owes payment or other performance of the obligation secured is referred to as the "debtor." The property subject to a security interest is termed the "collateral."³ The Code further classifies the term "goods" into "consumer goods," "equipment," "farm products," and "inventory." "Consumer goods" are goods used or bought for use primarily for personal, family, or household purposes.⁴

The Code provisions with respect to the rights and liabilities of the debtor and the secured party in a default situation would introduce several changes in the existing Wyoming law. These changes would not substantially affect current commercial practices, but would give statutory recognition and approval to them.

A change appears under the Code by allowing the secured party to take possession of the collateral on default without resorting to judicial process.⁵ Wyoming provides for statutory foreclosure only;⁶ however, our

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1. Hereafter referred to as the Code.
 2. Uniform Commercial Code § 9-102.
 3. Uniform Commercial Code § 9-105. See generally for definitions.
 4. Uniform Commercial Code § 9-109 (1).
 5. Uniform Commercial Code § 9-503.
 6. Wyo. Comp. Stat. §§ 59-115 through 59-118 (1945).

present law of chattel mortgages⁷ has been construed to allow a mortgagee to take the collateral, on default, if the mortgage expressly provides this right.⁸ The Wyoming statutes on conditional sales do not provide for a default situation.⁹ With respect to trust receipt financing, Wyoming has adopted the Uniform Trust Receipts Act which allows the taking of the security upon default by peaceable means without resort to judicial process.¹⁰

Under the Code the secured party, after default, may sell, lease, or otherwise dispose of the collateral.¹¹ The disposition of the collateral may be by public or private proceedings¹² and a private sale is encouraged.¹³ Wyoming has no express provisions for private sale, but here again, Wyoming Compiled Statutes § 59-115 (1945), has been interpreted to allow a private sale if the mortgage expressly provided this right.¹⁴

At the present time, a Wyoming statute permits a mortgagee to purchase the mortgaged property at public sale.¹⁵ The Code, on the other hand, expressly permits the secured party to purchase the collateral at public or private sale.¹⁶

Under both the Code¹⁷ and our present chattel mortgage statute the secured party has a right to a deficiency from the debtor should the proceeds of the sale of the collateral be less than the balance due on the contract.¹⁸ Another provision of the Code permits the secured party to retain the goods in lieu of sale, in satisfaction of the obligation.¹⁹ The remedies of the secured party as provided by the Code are cumulative²⁰ and are in addition to the existing statutory remedies.²¹

The secured party's rights on default, mentioned above, offer "great scope for overreaching."²² The Code, therefore, has wisely provided that the rights of the debtor and the duties imposed upon the secured party may not be waived by agreement unless such a waiver is found to be manifestly reasonable.²³

7. Wyo. Comp. Stat. § 59-115 (1945).

8. *McInerney & Conway Finance Corp. v. Smith*, 42 Wyo. 380, 295 Pac. 273, 73 A.L.R. 851 (1931).

9. Wyo. Comp. Stat. §§ 41-801 through 41-804 (1945).

10. Wyo. Comp. Stat. § 59-406(2) (Supp. 1955).

11. Uniform Commercial Code § 9-504(1).

12. Uniform Commercial Code § 9-504(3).

13. Uniform Commercial Code § 9-504. Comment 1.

14. *Supra* note 7.

15. Wyo. Comp. Stat. § 59-122 (1945).

16. Uniform Commercial Code §§ 9-501(5) and 9-504(3).

17. Uniform Commercial Code § 9-504(2).

18. Wyo. Comp. Stat. § 59-123 (1945).

19. Uniform Commercial Code § 9-505(2).

20. Uniform Commercial Code § 9-501(1).

21. *Cooper, The Effect of Article Nine of the Uniform Code Upon Chattel Mortgages in Kentucky*, 47 Ky. L.J. 94 (1958). "In the event the secured party cannot get possession, he may use the judicial procedures available in order to foreclose."

22. Uniform Commercial Code § 9-501. Comment 4.

23. Uniform Commercial Code 9-501(3) and see Symposium, *Amending the Uniform Code—A Report on Valid Criticism and Suggested Change*. In re Article 9, 28 Temple L.Q. 511 (1955). "For the most part, the remedies provided for in the Code upon default by the debtor cannot be varied in the agreement."

If the secured party is not proceeding in conformity with Part 5, Article 9 of the Code, the debtor has a right to restrain him and to recover from the secured party any loss caused by a failure to comply with these provisions. In the case of consumer goods, the debtor has a minimum recovery of an amount not less than the credit service charge plus ten per cent of the principal amount of the debt, or the time price differential plus ten per cent of the cash price.²⁴

The Code provides that the secured party must not breach the peace in obtaining possession of the collateral, on default,²⁵ and that the debtor is entitled to reasonable notice of sale.²⁶ The Wyoming statutory requirements for notification of sale under a chattel mortgage are more exacting and technical. An entruster must give notice "not less than five days"²⁷ before sale of the goods and a sale by a mortgagee under Wyoming Compiled Statutes § 59-117 (1945), requires publication for four successive weeks.

The debtor has an absolute right to insist upon the sale of the collateral within ninety days where the collateral has been taken upon default and the debtor has paid sixty per cent of the contract price. If the collateral is not sold within that time, the debtor can recover in conversion or avail himself of the remedies provided in § 9-507 (1) of the Code.²⁸ The debtor can insist upon the sale of the collateral in the situation where the secured party has proposed to retain the collateral in satisfaction of the obligation. The right is available to any debtor regardless of the amount paid by him on the contract.²⁹

The debtor has a right to any surplus arising from the sale of the collateral³⁰ and he has a right of redemption at any time before the secured party has disposed of the goods.³¹ The mortgagor has a similar right of redemption in Wyoming.³²

The debtor has the right to see that the secured party uses reasonable care in the custody and preservation of the collateral in his possession,³³ but when default occurs, the secured party must act in a "commercially reasonable manner" in the exercise of his rights to dispose of the collateral.³⁴ The Wyoming Supreme Court has held that a mortgagee

24. Uniform Commercial Code § 9-507 (1).

25. Uniform Commercial Code § 9-503.

26. Uniform Commercial Code § 9-504 (3).

27. Wyo. Comp. Stat. § 59-406 (3) (b) (Supp. 1955).

28. Uniform Commercial Code § 9-505 (1).

29. Uniform Commercial Code § 9-505 (2).

30. Uniform Commercial Code § 9-504 (2).

31. Uniform Commercial Code § 9-506.

32. Wyo. Comp. Stat. § 59-123 (1945).

33. Uniform Commercial Code § 9-207 (1).

34. Uniform Commercial Code §§ 9-507 (2), 9-207, Comment 4. "This Section applies when the secured party has possession of the collateral before default . . . as a pledgee, and also when he has taken possession of the collateral after default. . . . When default has occurred the rights and duties stated in this Section yield to the provisions of Part 5 in so far as there is any conflict."

making a sale under a power of sale in the mortgage must act in good faith.³⁵ In another case the court said that a mortgagee, in a similar situation, must act "as trustee or agent" for the mortgagor.³⁶

The commercially reasonable standard imposed upon the secured party by the Code has been criticized by debtor and secured creditor alike. The controversy has been summarized as follows:

. . . the imposition on the lender of a duty to dispose of collateral in a "commercially reasonable manner" has also been attacked as altogether too flimsy a protection, in view of the removal of common law safeguards, for the interests of the debtor, and his other creditors. The attack from the lender's point of view is that altogether too high a standard of duty is imposed and that the lender is exposed, despite the presence of language designed to clarify certain types of permissible behavior, to an uncertain liability of indefinite scope.³⁷

The better view of the commercially reasonable standard would seem to be: "commercially reasonable" is used repeatedly in other Articles of the Code, as well as in Part 5 of Article 9. It constitutes a flexible standard which is certainly the most appropriate to the nature of the transaction, although it is indefinite; flexibility is preferable to rigidity.³⁸

The secured party's rights on default are flexible, and he is allowed a great deal of freedom in exercising those rights. This is what one authority has to say on the matter:

The restrictive rules, common law and statutory, abandoned or abolished by Article 9, have long since ceased to serve any useful purpose. Their vestigial survival works only to trap the unwary and the ill-informed and to penalize legitimate financing operations.³⁹

Another writer on the Code expressed it this way:

Article 9 does not surround enforcement of a security interest with the technicalities which are present in many state statutes.⁴⁰

Does the removal of statutory and common law restrictions on the secured party's operations work to the public interest or is Article 9 a "sell-out to the vested interests"⁴¹ of the secured party? The question has been answered:

35. *Wettlin v. Jones*, 32 Wyo. 446, 234 Pac. 515, rehearing denied, 236 Pac. 247 (1925).

36. *McInerney & Conway Finance Corp. v. Smith*, 42 Wyo. 380, 295 Pac. 273, 73 A.L.R. 851 (1931).

37. Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 *Law & Contemp. Prob.* 27 (1951).

38. Birnbaum, *Article 9—A Restatement and Revision of Chattel Security*, 1952 *Wis. L. Rev.* 348 (1952).

39. *Supra* note 35.

40. *Supra* note 36.

41. *Supra* note 35. "From the left we hear that Article 9 is a sell-out to the vested interests at the expense of the public interest. It is pointed out that Article 9 with a liberal hand removes most of the restrictions and limitations on lender's operation which have grown up over a century at common law and under statute. . . . Most serious of all is the abandonment of the restrictions which have hemmed in the lender's freedom of action in dealing with the collateral after default. . . ."

It is my firmly-held belief that the requirements of public sale, specified holding periods, a terminal selling date, and so on not only do not accomplish the end; they make it impossible to dispose of the collateral at a decent price.⁴²

Similar reasoning by another authority on the Code has been expressed in these words:

The rigid formality of old-fashioned foreclosure has often resulted in loss to all except those who purchased at foreclosure sales.⁴³

Chief Justice Blume in a dicta from the *McInerney and Conway Finance Corporation v. Smith* case lends persuasive force to these observations:

The provisions of the statute for public sale, made for the advantage of the mortgagor, on the whole doubtless subserve a good purpose. Still we know that sales of mortgaged property are frequently purely formal, at which the mortgagee usually bids in the property, and at his own price, so that a private sale might often be more advantageous to mortgagors than a public one.⁴⁴

We conclude that the more flexible provisions of the Code allow simple remedies for the secured party for realization upon the collateral in the event of default. The secured party can take possession of the collateral without costly delays and the security can be sold privately in a market that is commercially suited to such sales. The less restricted disposition of the security would generally result in a greater realization of value of the collateral which would benefit all parties concerned.

The debtor, under the Code, would not only benefit from greater realization upon the collateral, but would be entitled to a high standard of conduct on the part of the secured party, would have specific remedies not presently available to him, and would acquire greater rights than the existing statutes provide.

DONALD P. WHITE

CERTIFIED CHECKS

Certified checks, as negotiable instruments, are substitutes for money,¹ and their utility lies in the fact that a holder, on sight, can determine their value without investigating the solvency of the maker or the validity of third party claims. The practice of certification is entirely one of convenience and is not a legal obligation of the bank to its customers.² As a

42. *Supra* note 35.

43. *Supra* note 36.

44. 42 Wyo. 380, 295 Pac. 273, 73 A.L.R. 851 (1931).

1. *Smith v. Field*, 19 Idaho 558, 114 Pac. 668 (1911). Held, under a statute authorizing a money deposit in lieu of an undertaking, that the deposit of a certified check is a sufficient compliance with the statute.
2. Uniform Commercial Code § 3-411 (2).