TABLE OF CONTENTS

Advanced Creditors Rights: Deficiency Suits

I. REAL PROPERTY DEFICIENCY JUDGMENTS

A. The Big Picture of Mortgage Foreclosure.

This portion of the paper will address real property foreclosures and deficiencies under Texas law as compared to other states. Mention is made of the developing trends in this area as well as the current rules concerning non-judicial foreclosures and resulting deficiencies. Judicial foreclosures on real property are not discussed inasmuch as few lenders invoke the assistance of the Court when they can recover the property by trustee's sale on the courthouse steps without so much as filing a petition in court.

1. Historical Balance. Throughout its development, the law of mortgage foreclosure has sought a balance between the rights of mortgagors and those of mortgagees. See 4 American Law of Property: A Treatise on the Law of Property in the United States, 427-519 (1952). As the needs of one group were perceived to be more pressing than the needs of the other, the law of mortgage foreclosure shifted the balance in order to compensate and promote fundamental justice. See 9 G. Thompson, Commentaries on the Modern Law of Real Property, 693 (1958). As was noted by one scholar in 1940, [w]hereas economic conditions and the concomitant policy considerations may at one time require that the interest of one party be advanced, and this necessarily is to the detriment of the other, similar dictates at another period prompt the Court to swing the balance in the opposite direction.

Vaughan, "Reform of Mortgage Foreclosure Procedure--Possibilities Suggested by Honeyman v. Jacobs," 88 U. Pa. L. Rev. 957, 958 (1940). In Texas, the current balance is struck overwhelmingly in favor of the mortgagee. There are trends, however, suggesting that the Texas judiciary is willing to take steps to protect mortgagors from obvious and ruinous injustice.

2. The Model Foreclosure System. Ideally, a nonjudicial foreclosure system should permit a lender to execute on its security within a reasonable time and recover its investment, while protecting the defaulting borrower's equitable interests. G. Osborne, G. Nelson and D. Whitman, Real Estate Finance Law § 1.4 (1979); Washburn, "The Judicial Response to Price Inadequacy in Mortgage Foreclosure Sales," 53 Cal. L. Rev. 843, 844-47 (1980); Comment, "Mortgage Foreclosure as Fraudulent Conveyance: Is Judicial Foreclosure an Answer to the Durrett Problem?" 1984 Wis. L. Rev. 195 (1984). However, this objective can be accomplished without denigrating the mortgagor's equitable interest in his or her property. Indeed, many critics suggest that by preventing a mortgagee from collecting a deficiency judgment, a new equitable balance will be struck between the interests of mortgagor and mortgagee. The mortgagee would still have quick access to its security interest in the property--all the mortgagee will be denied is the windfall of a deficiency judgment. The mortgagor will be spared the onerous burden of a deficiency judgment and be protected from the arguably inequitable and commercially unreasonable manner in which nonjudicial foreclosure sales are conducted in Texas.

3. Comparison of Texas to Other States. An examination of the Texas nonjudicial foreclosure statute (Tex. Prop. Code § 51.002) evidences the ease with which lenders may obtain title to a borrower's property. The lender is required to provide only twenty-one (21) days notice to the borrower before conducting a "public" sale on the courthouse steps on the first Tuesday of the month in the county where the property is located. Aside from the notice requirement, the statute does nothing to protect equitable interests of the borrower. The statute does not require public advertising through newspaper or other media. Contrast Miss. Code Ann. § 89-1-55; Va. Code Ann. § 55-59.1, 55-59.2; N.Y. Real Prop. Acts § 231. The only period of redemption allowed by the statute is the twenty-one (21) days prior to the sale thus, the borrower is denied even that protection as to adequacy of price. Sparkman v. McWhirter, 263 S.W.2d 832 (Tex. Civ. App.--Dallas 1953, writ ref'd n.r.e.); Thornton v. Goodman, 216 S.W.2d 147, 148 (Tex. 1919); M. Baggett, Texas Mortgage Foreclosures § VIII.A, p. 161 (1987). Other states which allow nonjudicial foreclosure provide for a post-foreclosure period of redemption of approximately one (1) year. The spector of post-foreclosure redemption ensures that fair market value is obtained at the sale.

In a 1981 decision, the Texas Court of Appeals grappled with whether to apply a Louisiana anti-deficiency statute to a real estate foreclosure which occurred in Texas. First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806 (Tex. App.--Houston [14th Dist.] 1981). The Louisiana Deficiency Judgment Act provides that if a mortgagee allows a debtor to waive his statutory right to appraisement of his property,

and the proceeds of the judicial sale are insufficient to satisfy the debt, the debt is deemed to be discharged and the mortgagee does not have a right to proceed against the debtor for a deficiency. To obtain judgment in Louisiana against a debtor for any deficiency following judicial sale of the debtor's property, a mortgagee must institute court proceedings and serve notice on the debtor's property, a mortgagee must institute court proceedings and serve notice on the debtor, advertise the sale of the property by publication twice, and give the debtor notice for the appointment of an appraiser. The debtor, the mortgagee, and the sheriff may all appoint separate appraisers. After advertisement, appointment of appraisers, and filing of an oath by the appraisers, the sheriff conducts a public sale. If the highest bid is less than two-thirds (2/3rds) of the appraised value, the property may not be sold at the first sale. The sheriff must readvertise the sale of the property and at the second sale, the property may be sold to the highest bidder for cash except that the property may not then be sold if the price offered by the highest bidder is not sufficient to discharge the costs of sale and liens superior to those of the foreclosing creditor. Id. at 808. The court observed that such procedure is not necessary in Texas against Texas debtors on a deficiency arising out of the foreclosure of real property located in Texas. However, here, the parties clearly bargained in most specific terms for the application of Louisiana law and the court could find no reason to frustrate such intention. Thus, summary judgment against the lender in a suit for deficiency following the sale of property was affirmed. Both the procedure in Louisiana concerning deficiency suits and the policy considerations examined by the Court of Appeals merit attention.

While the Texas statute requires that the day, place and a four (4) hour block of time for the sale be specified in the notice, it does not require that the actual time at which the sale is to be conducted be disclosed. Thus, a potential buyer, other than the mortgagee, only knows that the sale will be conducted at a time usually between 10:00 a.m. and 1:00 p.m. or 1:00 p.m. and 4:00 p.m. Indeed, the fact that the property is posted for foreclosure does not mean that the sale will be conducted at all. Thus, a potential buyer must tolerate a great deal of uncertainty when considering a purchase at foreclosure sale. He or she can never be sure that there will be a "market" offering of the property he or she is interested in. This uncertainty arguably chills the entire public sale process.

4. Other States' Treatment of Deficiencies. Approximately twenty-six (26) states allow nonjudicial foreclosure. See Dunnaway, The Law of Distressed Real Estate, Appx. 13A (1986). However, in only eighteen (18) of those twenty-six (26) states is nonjudicial foreclosure the most common method. See "Oklahoma Banks Press for Law on Out-of-State Foreclosure," American Banker, January 29, 1986, Page 18. Twenty-one (21) states limit deficiency judgments in direct relation to the appraised fair market value of the subject property. It should be noted that some of those states do not allow nonjudicial foreclosure. Nonetheless, even with judicially supervised sales, they require that there be a substantial relationship between the fair market value of the property (usually as determined by appraisal or evidentiary hearing) and the value which may be claimed through a deficiency judgment. These states have adopted limitations on allowable deficiency judgments in order to protect the borrower's equitable interests and yet allow the lender to easily gain a saleable title to the property in default. After some two hundred years of shifting balance between lender and borrower, these states have reached an equilibrium between competing interests. The majority rule therefore is simple and easy to apply. A lender may sell a piece of property at a foreclosure sale at any price it wishes. However, it may collect a deficiency judgment only if the fair market value of the property (as determined by appraisal) is less than the debt owed. In effect, a commercially reasonable sale result is obtained indirectly. Thus, all that the rule requires is a comparison of the market value of the property with the debt owed to the lender. If the market value is equal to or exceeds the debt, the lender is not entitled to pursue a deficiency judgment but is allowed to keep any overage in value. If the market value is equal to or exceeds the debt, the lender is not entitled to pursue a deficiency judgment but is allowed to keep any overage in value.

This approach to foreclosure and deficiency judgments serves all of the interests of the lender while offering some degree of protection for the equitable interest of the borrower. The lender is still able to quickly foreclose on the property in default. The basic rule that inadequacy of price will not invalidate a foreclosure is preserved. Litigation, if any, would go only to the amount collectible as a deficiency judgment. The property title would not be an issue. The borrower's equitable interest is protected to some degree because he or she is assured of being credited with the fair market value of the property the

borrower is losing. Notwithstanding the efficacy and appropriateness of such system in other states, the Texas system of nonjudicial foreclosure is not borrower-minded.

5. Deficiencies in Texas. Not only does the borrower lose his or her real property and time and effort he or she has put into it through nonjudicial foreclosure, but the borrower is almost certainly faced with a deficiency judgment because the system is virtually designed to produce a sale price substantially below the market value. Indeed, it is hard to conceive of a nonjudicial foreclosure system which would offer a borrower less protection for his or her interests. Even the banking industry's proposals are more equitable than the Texas nonjudicial foreclosure procedure. In the proposal to the Oklahoma State Legislature several years ago, the Oklahoma League of Savings Institutions urged that the state adopt a nonjudicial foreclosure procedure. The procedure it proposed would not allow nonjudicial foreclosure of homesteads, would give the borrower the option of having a hearing on the matter despite the power of sale provision, and perhaps most important, would not allow for a deficiency judgment following a nonjudicial foreclosure. See "Oklahoma Banks Press for Law on Out-of-Court-Foreclosure," American Banker, January 29, 1986, p. 18. In Texas, however, the borrower is largely at the mercy of the lender as to the size of the deficiency judgment he or she will be subject because the foreclosure procedure does not have any built-in safeguards of commercial reasonability. The Texas legislature has not been effective in bringing about reform to the nonjudicial foreclosure process. Indeed, the only bill modifying the nonjudicial foreclosure procedure in recent years became effective January 1, 1988, and required that the notice of sale recite the earliest time that the sale will occur and directed that the sale must occur at that time or no later than three (3) hours thereafter. See Tex. Prop. Code § 51.002(c).

B. Texas Foreclosure and Deficiency Cases.

1. The Procedural Setting. The typical scenario from which these issues arise is one in which a bank has sued for a deficiency judgment on a promissory note that was secured by real property. When the note went into default, the bank would post the real property for nonjudicial foreclosure, usually be the only bidder at such foreclosure, establish the deficiency at that time and bring suit accordingly. Usually, the borrower will counterclaim for wrongful foreclosure and the issues are presented most regularly in the context of a motion for summary judgment on the deficiency. Because of the ease with which lenders get to that point in Texas, courts usually scrutinize the summary judgment evidence carefully, noting it is a harsh remedy that should be sparingly used. In addition, the Texas courts of civil appeals do not hesitate to reverse and remand for trial a summary judgment in favor of the lender if they find the bank failed to establish as a matter of law that there was no genuine issue of fact as to the validity of the trustee's sale.

Typically, issues raised by a debtor/borrower in a counterclaim for wrongful foreclosure include lack of notice or ineffective notice, see Ogden v. Gibraltar Sav. Ass'n, 620 S.W.2d 926 (Tex. Civ. App.--Corpus Christi 1981) reversed, 640 S.W.2d 232 (Tex. 1982), waiver of notice and/or acceptance of late payments Dhanani Inves., Inc. v. Second Master Bilt Homes, Inc., 650 S.W.2d 220, 223 (Tex. App.--Ft. Worth 1983, no writ) (en banc), fraud and duress, State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex, App.--El Paso 1984, writ dism'd by agr.), breach of a covenant of good faith and fair dealing, Arnold v. Nat'l Union County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987) and usury Huddleston v. Texas Commerce Bank, 756 S.W.2d 343 (Tex. App.--Dallas 1988 writ denied).

Recent Texas cases suggest that the Texas judiciary is becoming much more sensitive to the built-in inequities of the nonjudicial foreclosure system and resulting deficiencies and are imposing standards of fairness, good faith and reasonability in the process. To fully appreciate the trend in cases, it is necessary to briefly examine the historical rules they modify.

2. The Inadequate Price/Irregularity Rule. It has long been established in Texas that foreclosures must be conducted in strict compliance with the terms of the deed of trust. University Savings Ass'n v. Springwood Shopping Center, 644 S.W.2d 705 (Tex. 1982), Slaughter v. Qualls, 139 Tex. 340, 162 S.W.2d 671 (1942). The basis of the rule is the fact that nonjudicial foreclosures are a harsh remedy and that the trustee has no power to sell a borrower's property, except as may be found in the deed of trust. Id. The rule has developed, however, that foreclosure sales will not be set aside on the basis of a defect in the sale if a fair price is received for the property. Conversely, inadequacy of consideration alone will not support a borrower's suit for wrongful foreclosure (as a defense to a deficiency suit). As the Texas Supreme Court stated, "the rule is

well established that mere inadequacy of consideration is not grounds for setting aside a trustee's sale if the sale was legally and fairly made." Tarrant Savings Ass'n v. Lucky Homes, Inc. 390 S.W.2d 473 (Tex. 1965). The rule is that "there must be evidence of irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price." American Savings and Loan Ass'n v. Musick, 531 S.W.2d 581 (Tex. 1975). See also Jinkins v. Chambers, 622 S.W.2d 614, 615 (Tex. App. -- Tyler 1981, no writ) citing Sparkman v. McWhirter, 263 S.W.2d 832, 837 (Tex. Civ. App. -- Dallas, 1953, writ ref'd n.r.e.) and 39 Tex. Jur.2d Mortgages & Trust Deeds § 156, at 208 (there must be evidence of irregularity, though slight, that caused or contributed to a sale for an inadequate price).

The courts seem to imply an inverse relationship between inadequate sales price and the degree of irregularity. See Rio Delta Land Co. v. Johnson, 566 S.W.2d 710, 712 (Tex. Civ. App. -- Corpus Christi 1978, writ ref'd n.r.e.) ("the greater such inadequacy of price the slighter need be the circumstances of fraud, accident or mistake"). At the very least, the extent of any irregularity and the inadequacy of the consideration will usually create fact issues sufficient to defeat a summary judgment and compel a jury finding. See FLR Corp v. Blodgett, 541 S.W.2d 209, 215 (Tex. Civ. App.--El Paso 1976, writ ref'd n.r.e.) cert. denied 434 U.S. 915 (1977).

Usually the mortgagee who bids at a nonjudicial foreclosure sale is a successful bidder. Thereafter, the mortgagee may sell the foreclosed property without affecting the deficiency owed (if any) by the mortgagor because such deficiency is determined as of the date of the foreclosure sale. The foreclosure does not become wrongful if the mortgagee later sells the property for more than its foreclosure bid; however, as explained below, Courts are becoming increasingly sensitive to the post-foreclosure actions.

3. Fair Market Value Trend. Texas Courts have recently expressed a willingness to closely analyze and criticize a lender's action in purchasing the property at foreclosure, selling it days later for its fair market value yet still pursuing the debtor for an alleged deficiency. Olney Savings and Loan Ass'n v. Farmer's Market of Odessa, Inc., 764 S.W. 2d 869 (Tex.Civ.App.-El Paso 1989, no writ).

The El Paso Court of Appeals reversed a jury finding denying relief to the lender who sued to recover on a deficiency judgment. The case was remanded for a new trial because the trial court did not submit to the jury the bank's issues concerning reformation of the guaranty. Concerning the deficiency issue, however, the court suggested on retrial that the jury be asked to determine if the bid price at foreclosure was fair and reasonable. In the event of an answer of "yes," the Court suggested a follow-up issue would be asked to determine the amount of the deficiency. If the jury answers that the bid price was not fair and reasonable, the follow-up issue would ask the jury to determine what would be a fair and reasonable price. The amount of the deficiency, if any, then should be asked, says the Court.

The Olney decision is important for several reasons. First, it expressly states that the lender is under a trust arrangement with the borrower compelling it, therefore, in the event of foreclosure, to make an honest effort to reduce the loan as much as possible by securing a fair price for the collateral, citing Lee v. Sabine Bank, 708 S.W.2d 582 (Tex.App.--Beaumont 1986, writ ref'd n.r.e.) and Heller & Co. v. O/S Sonny V. 595 F. 2d 968 (5th Cir. 1979). Even though in the Olney case the lender had an appraisal of the property of $200,000.00, bid the property in at foreclosure for $150,000.00 and sold the property to a third party within eight (8) days thereafter for $200,000.00, a jury issue was created as to whether the foreclosure price of seventy-five percent (75%) of actual value was a fair and reasonable price.

The second import of the Olney decision is that it evidences another Texas Appellate Court citing Lee v. Sabine Bank with approval and shows a willingness to follow its precedent. The Court of Appeals in Lee v. Sabine Bank, 708 S.W.2d (Tex. App.-- Beaumont 1986, writ ref'd n.r.e.), stated that when a lender purchases collateral and there is a probable significant disparity between the sale's price and the property's fair market value, the borrower may contest the sale and present evidence contending such disparity at the time of the judicial sale. Id. at 585.

The Lee case is also noteworthy for its characterization of the lender/borrower relationship as being a trust arrangement which requires the lender, in the event of foreclosure, to make an honest effort to reduce the loan as much as possible by securing a fair market price for the collateral. Id. at 584. Such an obligation dovetails with the line of cases imposing a duty of good faith and fair dealing on a lender when attempting

to nonjudicially extract real property from the borrower (infra). On the facts of the Lee case, however, the judgment of the trial court was affirmed because

Lee had failed to present any evidence to the trial court of the fair market value of the property (which was personalty).

Often times, counsel for lenders attempt to distinguish the Lee case because the foreclosure was pursuant to the Federal Ship Mortgage Act and did not involve real property. Thus, lenders prefer to suggest that the Texas Rule remains that mere inadequacy of consideration alone will not invalidate an otherwise proper foreclosure. Not only does such a suggestion ignore the court's holding (that when a lender purchases collateral to secure a loan given it by a borrower and where there is a probable significant disparity between the sales price of the property and its fair market value that the borrower may contest the sale and prevent evidence contending such), but the Beaumont Court of Appeals has now adopted the Lee holding in a real property context. Halter v. Allied Merchants Bank, 751 S.W.2d 286 (Tex. App.--Beaumont 1988, writ denied).

Although the Court of Appeals in Halter upheld the trial court's summary judgment in favor of the bank in their suit for a deficiency following a real estate foreclosure, it cited Lee as the rule of the case. The Court agreed that the evidence presented was sufficient to show inadequacy of price but still refused to overturn summary judgment because the summary judgment record did not contain the fact that the bank/mortgagee was the purchaser of the collateral. It is clear in the opinion that the Beaumont Court of Appeals would have overturned the bank's summary judgment on the sole basis of inadequate price had the summary judgment proof contained evidence that the mortgagee was the purchaser of the property. Thus, the strength and importance of the Lee decision is confirmed.

The figure that constitutes a "significant disparity" between the sales price and the fair market value has not been definitively answered. The Texas Supreme Court in Musick, supra, observed that the bid was only 7.4% of the fair market value yet the record did not present another foreclosure irregularity sufficient to constitute a wrongful foreclosure. On the other hand, the Olney Court of Appeals observed that a bid value of 75% of appraised value still raised a fact question as to whether or not it was a fair and reasonable price.

A useful guideline has resulted from the Durrett v. Washington Nat'l Ins. Co. case, 621 F.2d 201 (5th Cir. 1980). The rule of Durrett is that property not bid in at a foreclosure sale at 70% of its fair market value may be set aside as a fraudulent transfer should the debtor file bankruptcy within one year of the foreclosure sale. In Durrett, the Court held that a bid of 57.7% of fair market value was not a fair equivalent for the transfer of the property. Moreover, the Court found no district court or appellate decision approving of a transfer of real estate for less than 70% of its fair market value. Id. at 203. It must be noted that the Texas Supreme Court's holding in Musick preceded both Durrett and Lee and it is questionable how the Supreme Court would rule on the inadequacy of consideration issue if presented today.

4. Good Faith and Fair Dealing Trend. Texas Courts are trending toward imposing a duty of good faith and fair dealing in circumstances where a relationship between the parties reveals an unequal bargaining power such that one party would be in a position to take advantage of the other party's inferior bargaining position. Arnold v. Nat'l County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987). Although the Arnold case arose out of the relationship between an insured an insurer, the imposition of a duty of good faith and fair dealing was found to be necessary because of the inadequacy of the remedy available to an aggrieved insured concerning the settlement or resolution of claims.

The relationship between an insured an insurer is analogous to the relationship between a borrower and lender. Both relationships begin as arms length commercial transactions. The insurer and the lender have superior bargaining power at this point, although competition acts as a limiting factor to some extent. Each party has an interest in the success of the other. The insurer is more successful if its insured does not make any claims or if it can avoid paying claims. A lender is more likely to receive prompt payment if the project it is underwriting is successful, but even if the project is not successful, the lender is secure because it may foreclose on the underlying collateral and seek a deficiency. Thus, the lender transaction has even less risk involved than the insurance transaction. Once the initial transaction is completed, the insurer and lender assume vastly superior positions in the relationship. As noted by the Texas Supreme Court, the insurer has

almost absolute control over the claims process. Likewise, the lender assumes near absolute control over the success or failure of the borrower. Often times, the loan documents allow the lender absolute discretion to approve or disapprove of changes in a project cost breakdown. This discretion, in view of the unpredictable nature of land development and construction, can virtually insure a technical default and ultimately, the failure of a project.

The unequal bargaining positions of the parties coupled with the inadequacy of remedies for bad faith breach by a lender to fully compensate the borrower support the imposition of good faith/fair dealing duty upon lenders. Even if the borrower can recover under a wrongful foreclosure theory, he or she is limited to the monetary damage for lost equity but still suffers irreparable injury having lost the unique property and attendant business opportunities and the investment of time and effort that has been put into the project. Unless lenders are held to a duty of good faith and fair dealing, borrowers will not have an adequate remedy and there will not be sufficient deterrent to wrongful acts on the part of lenders.

A recent Texas Court of Appeals decision has imposed such a duty upon the lender in a real estate foreclosure context. The Court in Coleman v. FDIC, No. 08-87-00235-CV (Tex. App. -- El Paso Mar. 9, 1989) (available on Lexis [copy attached as Appendix B]) held that the lender breached a duty of good faith in waiting twenty one (21) months from the time it obtained the right to foreclosure to the time the foreclosure sale was actually held. Thereafter, the lender sought summary judgment for its claimed deficiency which was granted by the trial court. The Court of Appeals reversed and remanded noting that "duty exists that the mortgagee conduct a foreclosure sale fairly so as to produce as good a price as possible...[and] that motive is immaterial, and that the mortgagee is judged by the results, although not the disparity in price alone...[copy attached] we believe the duty of good faith obtained in this case, and that whether or not appellee breached that duty by undue delay in foreclosing, is a material question of fact left to be determined." Clearly, the Court of appeals is willing to let a jury determine whether the actions of the lender speak of fairness and reasonability.

C. Conclusion

The apparent trend in recent Texas decisions is toward a stringent scrutiny of the lender's pre-and post-foreclosure actions and its attempts to seek a deficiency. Such scrutiny focuses on whether or not the lender attempted to obtain a fair market value for the collateral and acted in good faith and dealt fairly with the borrower when seeking such a deficiency. Such a trend will more closely align Texas jurisprudence with the majority of the courts in the country who look upon nonjudicial foreclosure remedies (coupled with the availability of deficiencies) as suspicious at best. The result will be to accomplish by implication what Article 9 of the UCC expressly provides in the personal property context: foreclosure sales conducted only in a commercially reasonable manner.

II. PERSONAL PROPERTY FORECLOSURE AND DISPOSITION

This portion of the paper will address personal property foreclosures and deficiencies under the Texas Uniform Commercial Code. Extraordinary remedies such as attachment, sequestration, or turnover orders will not be addressed herein as they deserve, and almost require, treatises of their own.

Article 9 of the Texas Uniform Commercial Code is perhaps the most significant piece of legislation governing the perfection of the security interest and foreclosure on personal property. Indeed, some have averred that Article 9 of the Uniform Commercial Code generally is one of the most significant pieces of legislation of the 20th Century. Cook, Editor Creditors Rights in Texas 1981 (2nd Ed.) at p. 238. Because of its preeminence in the personal property foreclosure and disposition field, Article 9 is the primary focus of this portion of the paper.

Seeking a deficiency judgment under the Texas Uniform Commercial Code is unlike seeking a deficiency judgment under Texas common law regarding real property. Instead of the common law, vagaries of the Texas Uniform Commercial Code must be traversed on the personal property side. In all fairness, it is not so much a matter of vagueness as it is a matter of procedural technicalities, options and choices. Because of the technicalities involved in personal property lien perfection and foreclosure, this portion of the paper will address the entire process from lien perfection to deficiency judgment.

A. Introduction to Article 9 - Scope and Terminology.

Generally speaking, Article 9 of the Texas Uniform Commercial Code applies to:

(1) Any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; (2) Any sale of accounts or chattel paper.

Tex. Bus. & Comm. Code § 9.102 (Tex. UCC). Article 9 does not apply to security interests subject to any statute of the United States, a landlord's lien, a lien given by statute or other rule of law for services or materials (i.e. mechanic's and materialman's liens) except as provided by § 9.03, to a transfer of an interest or claim or in or under any policy of insurance (except a provided by § 9.306), to a right represented by a judgment to the creation or transfer of an interest in or lien on real estate including a lease or rentals thereunder (except to the extent that provision was made for fixtures in § 9.313), to a transfer in whole or in part of any claim arising out of tort, to a transfer of an interest in any deposit account (except as provided with respect to proceeds § 9.306) and priorities and proceeds (§ 9.312). Thus, it is obvious when the broad scope of Article 9 is compared with the limited exceptions thereto, a vast array of personal property interests are subject to it.

The following terms and definitions will be useful in understanding Article 9 UCC liens and disposition of property pursuant to them.

TERM DEFINITION

Encumbrance Includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests. Tex. UCC § 9.105(7). Goods Includes all things which are movable at the time the security interest attaches or which are fixtures, but does not include money, documents, instruments, accounts, chattel paper, general intangibles or minerals or the like (including oil and gas) before extraction. "Goods" does include standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals and growing crops. Tex. UCC § 9.105(8). The general classification of "goods" is further broken down into consumer goods, equipment, farm products and inventory. Tex. UCC § 9.109. Security Agreement Any agreement which creates or provides for a security interest. Tex. UCC § 9.105(12). Secured Party Lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. Account Any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. Tex. UCC § 9.106.

General Intangibles Any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money.

Attachment Term used to described the creation of a security interest. Account Debtor The person who is obligated on an account, chattel paper or general intangible. Tex. UCC § 9.015(1).

Collateral Property subject to a security interest, including accounts and chattel paper which have been sold. Tex. UCC § 9.105(3).

Debtor The person who owes payment or other performance of the obligation(s) secured. Tex. UCC § 9.105(4).

Chattel Paper A writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods when a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments; the group of writings taken together constitutes chattel paper. (Tex. UCC § 9.105(2).

B. Step 1 -- Attachment of a Security Interest.

Establishing a security interest under Article 9 of the Texas UCC is relatively simple. There are three (3) formal requirements: (1) the collateral is in the possession of the secured party pursuant to an agreement or the debtor has signed a security agreement which contains a sufficient definite description of the collateral (where growing crops or crops to be grown or timber are concerned, a description of the land upon which said growth will occur is required; (2) value has been given; and (3) the debtor has rights in the collateral. Tex. UCC § 9.203(a). In most instances, a security interest will be evidenced by a written document--a security agreement.

A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachments occur as soon as all of the events specified above as requisites to the perfection of a security interest have taken place unless there is an explicit agreement between the parties postponing such attachment. Tex. UCC § 9.203(b). It should be noted that the security interest perfected in given goods as described in the security agreement can extend to proceeds from said goods. See Texas UCC § 9.306, et. seq. Similarly, a security agreement can be so structured that it will extend to after-acquired property. See Texas UCC § 9.204.

The concept of value as contained in the requirements for attachment of a security interest is generally analogous to the concept of consideration as part of a binding contract. Since a security interest is a special property interest, it is only natural that it is necessary that the debtor have some property rights in the collateral before the security interest may attach. However, this does not preclude a debtor from agreeing to give a security interest in collateral to be obtained in the future. Assuming all other conditions are met, and such an instance, the security interest would attach as soon as the debtor's interest in the property matures or vests.

C. Step 2 -- Perfecting the Security Interest.

It must be noted that in the context of Article 9 of the Texas UCC, the concepts of attachment and perfection of a security interest are distinct. "Perfection" is a term of art under Article 9. However, the method of perfecting a security interest varies depending upon the type of collateral pledged. Additionally, the term "perfection" is never defined in Article 9. A perfected security interest is not necessarily invulnerable or invincible when in competition with conflicting claims. Rather, "perfection merely means that the secured party has taken steps to qualify for protection against the conflicting claims of a certain class of parties, depending upon the nature of the collateral and the types of interests involved." Creditors Rights in Texas at 259.

Generally, there are two interrelated facets of perfection. The first facet is the methods available for perfection of the security interest. The second relates to lien priorities. This paper will address only the method of perfecting the security interest.

In practice, most security interests are perfected by the filing of a financing statement. However, Article 9 of the Texas UCC provides the following exceptions to the foregoing rule. The following security interests cannot or need not be perfected by filing a financing statement:

1. A security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

2. A purchase money security interest in consumer goods;

3. An assignment of accounts which does not alone, or in conjunction with other assignments to the same assignee, transfer a significant part of the outstanding accounts of the assignor;

4. A security interest in oil or gas production or their proceeds under § 9.319 of the Texas UCC.

There are several other exceptions to the general rule found in § 9.302 of the Texas UCC which should be consulted prior to making a determination as to whether or not to file a financing statement. When in doubt, file a financing statement.

In some instances, physical possession is necessary in order to perfect a security interest. For example, a security interest in money or instruments (other than certificated securities or instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession except as limited by subsections (d) and (e) of § 9.304 of the Texas UCC. In some instances, a security interest can be perfected either by filing or taking physical possession of the object of the security interest. See § 9.305 of the Texas UCC.

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1. Mechanics of Filing a UCC Financing Statement in Order to Perfect Article 9 Lien. Public notice by filing is the most widely used mode to perfecting a security interest. By perfecting a security interest, a security interest is given the maximum protection that Article 9 afford with respect to lien priorities. In some respects, filing of a UCC financing statement is analogous to the transaction filing that normally occurs with respect to a property conveyance or a deed of trust. However, it should be noted that a financing statement may be filed before the security interest actually attaches or even before a security agreement is executed. It is often advisable to make a UCC filing prior to the time the security interest attaches. This closes the window which might otherwise open between the time a security interest attaches and the potential attachment of intervening claims.

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It should be noted that where the debtor changes his name or in the case of an organization name, identity or corporate structure, a financing statement becomes seriously misleading; the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four (4) months after the change, unless a new appropriate financing statement is filed before the expiration of that time. Tex. UCC § 9.402(g). Generally, a financing statement is effective for five (5) years from the date it is filed. There is an exception when the financing statement is in the form of a mortgage which is effective as a filing under subsection (f) of § 9.402. In that case, the statement remains effective until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate. Tex. UCC 9.403(f).

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UCC filings should be in the office of the county clerk in the county of the debtor's residence or if the debtor is not a resident of Texas, then the UCC filings should be made in the office of the county clerk in the county where the goods are kept.

If the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (e) of § 9.104, or when the financing statement is filed as a fixture filing (§ 9.313) and the collateral is goods which are to become fixtures, then the UCC filing should be done in the office of the county clerk in the county where a mortgage on the real estate would be filed or recorded. In all other cases governed by Article 9 of the Texas UCC where filing is required in order to perfect a security interest and lien, the filing should be done in the office of the Secretary of State. If there is any doubt as to the proper classification of the collateral in issue, then it is best to make the filing in multiple counties and/or with the Secretary of State. This is a reasonable practice in view of the fact that fees are minimal. Also, a filing which may be appropriate when initially made, may become ineffective if the domicile of the debtor or the place of business or the location of the collateral changes. Thus, some vigilance is necessary in order to maintain the vitality of a given filing. See Tex. UCC § 9.401(d).

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D. Step 3 -- Repossession and Foreclosure on Article 9 Security Interests in the Event of Default.

"Default" is not defined in the Uniform Commercial Code. However, it has been accurately stated that "default is whatever the security agreement says it is." J. White and R. Summers, Uniform Commercial Code § 26–2 (West 1972). There are a number of standard events of default commonly identified in security agreements. Such events of default often include (1) failure to make any required payment when it becomes due; (2) removing the collateral from a specified location; (3) death or insolvency of the debtor; (4) failure to keep collateral insured against loss or theft; and (5) secured parties believe that the prospect of payment or performance has been impaired. Potential definitions of events of default are limited by the fact that the Texas UCC requires that secured a party act reasonably and in good faith in declaring a default. Tex. UCC § 1.203.

As with real property, acceleration of the entire balance of the obligation is a common practice following a default if the security agreement so provides. Acceleration clauses are specifically allowed under § 3.109 of the Texas UCC. The purpose of acceleration is to avoid the need for a multiplicity of actions by the secured party to collect each individual installment as it becomes due. Often acceleration clauses are drafted to allow acceleration whenever the secured party deems himself insecure. Naturally, such a deeming is limited by the duties of good faith applied to default by the UCC.

After default and potential acceleration has occurred, there are several options open to the secured party under Article 9 to recover the collateral or otherwise satisfy the amount due and owing. The secured party has the option to ignore the collateral and immediately seek a money judgment for the entire amount of the debt. There is no forced election of remedies under the UCC unless the agreement so provides. Generally, it is uncommon for a party to ignore the security which has been pledged in support of an obligation. However, if the collateral has been destroyed or has deteriorated greatly in value or if the cost of retaking is

prohibitive, the secured party may decide to seek an immediate money judgment and execute that judgment against the other available assets of the debtor. Tex. UCC § 9.501(a).

Article 9 provides for self help repossession of collection. "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." Tex. UCC § 9.503. In some instances, it may be preferable to seek judicial relief in pursuit of collection on a UCC lien than self help. This would be the preferable course of action if there is reason to believe that the debtor would object to the retaking and to avoid the possibility of breach of the peace. Under such circumstances, the secured party would prefer to resort to judicial means of repossession and send a state official to take possession of the property. In such a case remedies such as attachment, sequestration or garnishment may be available. If self help repossession is chosen, the secured party may send his own agent to effect repossession. In such a case, if the debtor strenuously objects to the retaking, it should not be carried out. This is to avoid possible breach of the peace liability. If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available at a place selected by the secured party which is reasonably convenient to both parties. Tex. UCC § 9.503. This is often done in the case of heavy or bulky equipment where repossession would be impractical.

Once the collateral is in the possession of the secured party, Article 9 imposes a duty that the secured party use reasonable care in the custody and preservation of the collateral. Tex. UCC § 9.207. In the case of instruments or chattel paper, reasonable care includes the taking of any steps necessary to preserve the rights against prior parties. The secured party is liable for any loss caused by failure to use reasonable care, but he does not lose his security interest. The secured party also assumes a number of other duties while he has possession of the collateral. The secured party must pay reasonable expenses arising from the custody, preservation or use of the collateral however, such charges are chargeable to the debtor and secured by the collateral. Tex. UCC § 9.207(b)(1). The secured party may hold as additional security any increase or profits (except money) received from the collateral. Any money received must be either remitted to the debtor or applied in reduction of the secured obligation. Tex. UCC § 9.207(b)(3). The secured party must keep the collateral identifiable, but fungible collateral may be commingled. Tex. UCC § 9.207(b)(4).

Also analogous to real property law is some states, pursuant to Article 9 of the Texas UCC, the debtor has a right to redeem his collateral prior to its disposal. Such redemption may occur at any time prior to the disposal of the collateral. In order to effectuate redemption, the debtor must tender fulfillment of all obligations secured by the collateral plus expenses incurred in the retaking and care of the collateral. Tex. UCC § 9.506. The comments to Article 9 indicate that if the balance of the obligation has been accelerated, the entire balance must be tendered. An argument can be made that this is an unconscionable course of conduct in consumer cases and redemption should be accomplished by bringing the obligation current. See Urdang v. Muse, 114 N.J. Super. 372, 276 A.2d 397 (1971).

After collateral has been retaken, and assuming no redemption has occurred, the secured party may be able to choose to keep the collateral in satisfaction of the debt. If the collateral is "consumer goods," and the debtor has paid sixty (60) percent or more of the cash price, the secured party cannot unilaterally choose to keep the goods in satisfaction of the debt unless he obtains a post default waiver of the debtor's Article 9 right to insist on a resale. Without such a waiver, the goods must be sold within ninety (90) days after retaking or the secured party will be liable of conversion under the Article 9.02 provisions. Tex. UCC § 9.505(1). In any other case, whether involving consumer goods or other collateral, the secured party may propose in writing to keep the goods in satisfaction of the debt. In the case of consumer goods, such a proposal must be directed to the debtor. In other cases, the proposal must also be directed to any other secured party who has filed a financing statement in the name of the same debtor or has given written notice of claim of interest in the collateral to the foreclosing secured party. Thus, prior to foreclosing on any collateral, the secured party should check the relevant records and filings to determine if any other UCC liens have been filed. If no objection to the proposal to retain the collateral in satisfaction of the debt is received from any party within twenty-one (21) days after the proposal was sent, the secured party may retain the collateral in satisfaction of the debt. Tex. UCC § 9.505(b).

After the collateral has been retaken, and assuming no redemption occurs, the secured party always has the option of reselling the collateral and applying the proceeds of resale to the debt and suing for a deficiency if

the proceeds are not sufficient to satisfy the debt. Disposition of the collateral may be accomplished either through public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in bulk at any time and place on any terms. However, every aspect to the disposition including the method, manner, time, place and terms must be commercially reasonable.

If the debtor has not signed a default statement or renounced or modified his rights to notification of sale, the secured party must provide reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made. An exception is made to this requirement if the collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market. In the case of consumer goods, the foregoing notification is all that is required. However, in all other cases, notification shall be sent to any other secured party who has a security interest in the same collateral and has duly filed in the office of the Secretary of State or in the county court in the proper county in this state, a financing statement indexed in the name of the debtor or from whom the secured party has received (before sending notification of the debtor or before the debtor's renunciation of his rights), written notice of a claim of an interest in the collateral. The secured party may buy at any public sale, and if the collateral is of a type customarily sold in a recognized market, or is a type which is the subject to widely distributed standard price quotations, the debtor may buy at private sale. Tex. UCC § 9.504(c).

Every aspect of the sale, whether public or private, must be commercially reasonable. The term, "commercially reasonable" is not defined in the UCC but is left to a case-by-case determination. Factors which should be considered in determining whether a sale is commercially reasonable include the method of advertising the sale, the time and manner of conducting the sale, and the place of the sale. In view of recent case law trends imposing more significant duties of good faith and fair dealing in certain commercial and/or noncommercial transactions, care should be taken in conducting such a sale.

Section 9.504(a) and (b) sets forth the manner of distribution proceeds after a sale. Proceeds of resale are to be applied in the following order: (1) the reasonable expenses of retaking or selling, including reasonable attorney's fees, unless otherwise agreed in the security agreement; (2) to the satisfaction of debt secured by the resold collateral; (3) to the satisfaction of any debt secured by subordinate security interest if the holder of these security interest have demanded such payment in writing before the distribution of proceeds is complete; and (4) any remaining proceeds are to be remitted to the debtor unless the security agreement otherwise specifies. Care should be taken to remit excess proceeds to the debtor in order to avoid usury.

The UCC does not necessarily mandate resale as a method of satisfying the secured debt. Specifically, § 9.504 of the Texas UCC provides that, "a secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing." Thus, there is greater flexibility in personal property foreclosures pursuant to Article 9 of the UCC than associated with real property foreclosures pursuant to a deed of trust or the like.

The foregoing discussion of obligations of good faith and fair dealing and notice is based on the presumption that the repossession of the collateral and its sale will be accomplished through nonjudicial means. However, if there is a judicial order of foreclosure entered, it may be possible to obviate the notice and good faith and fair dealing requirements as set forth in Article 9 of the UCC. See Tex. UCC § 9.507(b). Where there is an order of judicial foreclosure, there is a presumption that the sale will be connected in a commercially reasonable manner. However, pursuant to judicial foreclosure, sale will be accomplished through execution and levy or other extraordinary remedies. Thus, additional time and expense and lesser return on the sale may be a result. Thus, the tradeoff between potential irregularities in the sale and subsequent litigation and the certainty of judicial foreclosure and the probability of lesser proceeds must be evaluated on a case-by-case basis.

E. Conclusion.

Undoubtedly, the pursuit of deficiency judgments concerning personalty requires a creditor to comply with a series of procedural technicalities mandated by the UCC. Those requirements, however, balance the competing interests between lender and borrower to produce security for the lender and a commercially fair result for the borrower. It is that standard of fair dealing and reasonableness which the courts have most recently begun to apply in the real property context as well.

II. PERSONAL PROPERTY FORECLOSURE AND DISPOSITION

This portion of the paper will address personal property foreclosures and deficiencies under the Texas Uniform Commercial Code. Extraordinary remedies such as attachment, sequestration, or turnover orders will not be addressed herein as they deserve, and almost require, treatises of their own.

Article 9 of the Texas Uniform Commercial Code is perhaps the most significant piece of legislation governing the perfection of the security interest and foreclosure on personal property. Indeed, some have averred that Article 9 of the Uniform Commercial Code generally is one of the most significant pieces of legislation of the 20th Century. Cook, Editor Creditors Rights in Texas 1981 (2nd Ed.) at p. 238. Because of its preeminence in the personal property foreclosure and disposition field, Article 9 is the primary focus of this portion of the paper.

Seeking a deficiency judgment under the Texas Uniform Commercial Code is unlike seeking a deficiency judgment under Texas common law regarding real property. Instead of the common law, vagaries of the Texas Uniform Commercial Code must be traversed on the personal property side. In all fairness, it is not so much a matter of vagueness as it is a matter of procedural technicalities, options and choices. Because of the technicalities involved in personal property lien perfection and foreclosure, this portion of the paper will address the entire process from lien perfection to deficiency judgment.

A. Introduction to Article 9 - Scope and Terminology. Generally speaking, Article 9 of the Texas Uniform Commercial Code applies to:

(1) Any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts;

(2) Any sale of accounts or chattel paper.

Tex. Bus. & Comm. Code § 9.102 (Tex. UCC). Article 9 does not apply to security interests subject to any statute of the United States, a landlord's lien, a lien given by statute or other rule of law for services or materials (i.e. mechanic's and materialman's liens) except as provided by § 9.03, to a transfer of an interest or claim or in or under any policy of insurance (except a provided by § 9.306), to a right represented by a judgment to the creation or transfer of an interest in or lien on real estate including a lease or rentals thereunder (except to the extent that provision was made for fixtures in § 9.313), to a transfer in whole or in part of any claim arising out of tort, to a transfer of an interest in any deposit account (except as provided with respect to proceeds § 9.306) and priorities and proceeds (§ 9.312). Thus, it is obvious when the broad scope of Article 9 is compared with the limited exceptions thereto, a vast array of personal property interests are subject to it.

The following terms and definitions will be useful in understanding Article 9 UCC liens and disposition of property pursuant to them.

TERM

Attachment Term used to described the creation of a security interest. Account Debtor The person who is obligated on an account, chattel paper or general intangible. Tex. UCC § 9.015(1). Chattel Paper A writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods when a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments; the group of writings taken together constitutes chattel paper. (Tex. UCC § 9.105(2). Collateral Property subject to a security interest, including accounts and chattel paper which have been sold. Tex. UCC § 9.105(3). Debtor The person who owes payment or other performance of the obligation(s) secured. Tex. UCC § 9.105(4). Encumbrance Includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests. Tex. UCC § 9.105(7). Goods Includes all things which are movable at the time the security interest attaches or which are fixtures, but does not include money, documents, instruments, accounts, chattel paper, general intangibles or minerals or the like (including oil and gas) before extraction. "Goods" does include standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals and growing crops. Tex. UCC § 9.105(8). The general classification of "goods" is further broken down into consumer goods, equipment, farm products and inventory. Tex. UCC § 9.109. Security Agreement Any agreement which creates or provides for a security interest. Tex. UCC § 9.105(12). Secured Party Lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. Account Any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. Tex. UCC § 9.106. General Intangibles Any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money.

B. Step 1 -- Attachment of a Security Interest

Establishing a security interest under Article 9 of the Texas UCC is relatively simple. There are three (3) formal requirements: (1) the collateral is in the possession of the secured party pursuant to an agreement or the debtor has signed a security agreement which contains a sufficient definite description of the collateral (where growing crops or crops to be grown or timber are concerned, a description of the land upon which said growth will occur is required or the debtor has signed a security agreement); (2) value has been given; and (3) the debtor has rights in the collateral. Tex. UCC § 9.203(a). In most instances, a security interest will be evidenced by a written document--a security agreement.

A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachments occur as soon as all of the events specified above as requisites to the perfection of a security interest have taken place unless there is an explicit agreement between the parties postponing such attachment. Tex. UCC § 9.203(b). It should be noted that the security interest perfected in given goods as described in the security agreement can extend to proceeds from said goods. See Texas UCC § 9.306, et. seq. Similarly, a security agreement can be so structured that it will extend to after-acquired property. See Texas UCC § 9.204.

The concept of value as contained in the requirements for attachment of a security interest is generally analogous to the concept of consideration as part of a binding contract. Since a security interest is a special property interest, it is only natural that it is necessary that the debtor have some property rights in the collateral before the security interest may attach. However, this does not preclude a debtor from agreeing to give a security interest in collateral to be obtained in the future. Assuming all other conditions are met, and such an instance, the security interest would attach as soon as the debtor's interest in the property matures or vests.

C. Step 2 -- Perfecting the Security Interest

It must be noted that in the context of Article 9 of the Texas UCC, the concepts of attachment and perfection of a security interest are distinct. "Perfection" is a term of art under Article 9. However, the method of perfecting a security interest varies depending upon the type of collateral pledged. Additionally, the term "perfection" is never defined in Article 9. A perfected security interest is not necessarily invulnerable or invincible when in competition with conflicting claims. Rather, "perfection merely means that the secured party has taken steps to qualify for protection against the conflicting claims of a certain

class of parties, depending upon the nature of the collateral and the types of interests involved." Creditors Rights in Texas at 259.

Generally, there are two interrelated facets of perfection. The first facet is the methods available for perfection of the security interest. The second relates to lien priorities. This paper will address only the method of perfecting the security interest.

In practice, most security interests are perfected by the filing of a financing statement. However, Article 9 of the Texas UCC provides the following exceptions to the foregoing rule. The following security interests cannot or need not be perfected by filing a financing statement:

1. A security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

2. A purchase money security interest in consumer goods;

3. An assignment of accounts which does not alone, or in conjunction with other assignments to the same assignee, transfer a significant part of the outstanding accounts of the assignor;

4. A security interest in oil or gas production or their proceeds under § 9.319 of the Texas UCC.

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As with real property, acceleration of the entire balance of the obligation is a common practice following a default if the security agreement so provides. Acceleration clauses are specifically allowed under § 3.109 of the Texas UCC. The purpose of acceleration is to avoid the need for a multiplicity of actions by the secured party to collect each individual installment as it becomes due. Often acceleration clauses are drafted to allow acceleration whenever the secured party deems himself insecure. Naturally, such a deeming is limited by the duties of good faith applied to default by the UCC.

After default and potential acceleration has occurred, there are several options open to the secured party under Article 9 to recover the collateral or otherwise satisfy the amount due and owing. The secured party has the option to ignore the collateral and immediately seek a money judgment for the entire amount of the debt. There is no forced election of remedies under the UCC unless the agreement so provides. Generally, it is uncommon for a party to ignore the security which has been pledged in support of an obligation. However, if the collateral has been destroyed or has deteriorated greatly in value or if the cost of retaking is prohibitive, the secured party may decide to seek an immediate money judgment and execute that judgment against the other available assets of the debtor. Tex. UCC § 9.501(a).

Article 9 provides for self help repossession of collection. "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." Tex. UCC § 9.503. In some instances, it may be preferable to seek judicial relief in pursuit of collection on a UCC lien than self help. This would be the preferable course of action if there is reason to believe that the debtor would object to the retaking and to avoid the possibility of breach of the peace. Under such circumstances, the secured party would prefer to resort to judicial means of repossession and send a state official to take possession of the property. In such a case remedies such as attachment, sequestration or garnishment may be available. If self help repossession is chosen, the secured party may send his own agent to effect repossession. In such a case, if the debtor strenuously objects to the retaking, it should not be carried out. This is to avoid possible breach of the peace liability. If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available at a place selected by the secured party which is reasonably convenient to both parties. Tex. UCC § 9.503. This is often done in the case of heavy or bulky equipment where repossession would be impractical.

Once the collateral is in the possession of the secured party, Article 9 imposes a duty that the secured party use reasonable care in the custody and preservation of the collateral. Tex. UCC § 9.207. In the case of instruments or chattel paper, reasonable care includes the taking of any steps necessary to preserve the rights against prior parties. The secured party is liable for any loss caused by failure to use reasonable care, but he does not lose his security interest. The secured party also assumes a number of other duties while he has possession of the collateral. The secured party must pay reasonable expenses arising from the custody, preservation or use of the collateral however, such charges are chargeable to the debtor and secured by the collateral. Tex. UCC § 9.207(b)(1). The secured party may hold as additional security any increase or profits (except money) received from the collateral. Any money received must be either remitted to the debtor or applied in reduction of the secured obligation. Tex. UCC § 9.207(b)(3). The secured party must keep the collateral identifiable, but fungible collateral may be commingled. Tex. UCC § 9.207(b)(4).

Also analogous to real property law is some states, pursuant to Article 9 of the Texas UCC, the debtor has a right to redeem his collateral prior to its disposal. Such redemption may occur at any time prior to the disposal of the collateral. In order to effectuate redemption, the debtor must tender fulfillment of all obligations secured by the collateral plus expenses incurred in the retaking and care of the collateral. Tex. UCC § 9.506. The comments to Article 9 indicate that if the balance of the obligation has been accelerated, the entire balance must be tendered. An argument can be made that this is an unconscionable course of conduct in consumer cases and redemption should be accomplished by bringing the obligation current. See Urdang v. Muse, 114 N.J. Super. 372, 276 A.2d 397 (1971).

After collateral has been retaken, and assuming no redemption has occurred, the secured party may be able to choose to keep the collateral in satisfaction of the debt. If the collateral is "consumer goods," and the debtor has paid sixty (60) percent or more of the cash price, the secured party cannot unilaterally choose to keep the goods in satisfaction of the debt unless he obtains a post default waiver of the debtor's Article 9 right to insist on a resale. Without such a waiver, the goods must be sold within ninety (90) days after

retaking or the secured party will be liable of conversion under the Article 9.02 provisions. Tex. UCC § 9.505(1). In any other case, whether involving consumer goods or other collateral, the secured party may propose in writing to keep the goods in satisfaction of the debt. In the case of consumer goods, such a proposal must be directed to the debtor. In other cases, the proposal must also be directed to any other secured party who has filed a financing statement in the name of the same debtor or has given written notice of claim of interest in the collateral to the foreclosing secured party. Thus, prior to foreclosing on any collateral, the secured party should check the relevant records and filings to determine if any other UCC liens have been filed. If no objection to the proposal to retain the collateral in satisfaction of the debt is received from any party within twenty-one (21) days after the proposal was sent, the secured party may retain the collateral in satisfaction of the debt. Tex. UCC § 9.505(b).

After the collateral has been retaken, and assuming no redemption occurs, the secured party always has the option of reselling the collateral and applying the proceeds of resale to the debt and suing for a deficiency if the proceeds are not sufficient to satisfy the debt. Disposition of the collateral may be accomplished either through public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in bulk at any time and place on any terms. However, every aspect to the disposition including the method, manner, time, place and terms must be commercially reasonable.

If the debtor has not signed a default statement or renounced or modified his rights to notification of sale, the secured party must provide reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made. An exception is made to this requirement if the collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market. In the case of consumer goods, the foregoing notification is all that is required. However, in all other cases, notification shall be sent to any other secured party who has a security interest in the same collateral and has duly filed in the office of the Secretary of State or in the county court in the proper county in this state, a financing statement indexed in the name of the debtor or from whom the secured party has received (before sending notification of the debtor or before the debtor's renunciation of his rights), written notice of a claim of an interest in the collateral. The secured party may buy at any public sale, and if the collateral is of a type customarily sold in a recognized market, or is a type which is the subject to widely distributed standard price quotations, the debtor may buy at private sale. Tex. UCC § 9.504(c).

Every aspect of the sale, whether public or private, must be commercially reasonable. The term, "commercially reasonable" is not defined in the UCC but is left to a case-by-case determination. Factors which should be considered in determining whether a sale is commercially reasonable include the method of advertising the sale, the time and manner of conducting the sale, and the place of the sale. In view of recent case law trends imposing more significant duties of good faith and fair dealing in certain commercial and/or noncommercial transactions, care should be taken in conducting such a sale.

Section 9.504(a) and (b) sets forth the manner of distribution proceeds after a sale. Proceeds of resale are to be applied in the following order: (1) the reasonable expenses of retaking or selling, including reasonable attorney's fees, unless otherwise agreed in the security agreement; (2) to the satisfaction of debt secured by the resold collateral; (3) to the satisfaction of any debt secured by subordinate security interest if the holder of these security interest have demanded such payment in writing before the distribution of proceeds is complete; and (4) any remaining proceeds are to be remitted to the debtor unless the security agreement otherwise specifies. Care should be taken to remit excess proceeds to the debtor in order to avoid usury.

The UCC does not necessarily mandate resale as a method of satisfying the secured debt. Specifically, § 9.504 of the Texas UCC provides that, "a secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing." Thus, there is greater flexibility in personal property foreclosures pursuant to Article 9 of the UCC than associated with real property foreclosures pursuant to a deed of trust or the like.

The foregoing discussion of obligations of good faith and fair dealing and notice is based on the presumption that the repossession of the collateral and its sale will be accomplished through nonjudicial means. However, if there is a judicial order of foreclosure entered, it may be possible to obviate the notice and good faith and fair dealing requirements as set forth in Article 9 of the UCC. See Tex. UCC § 9.507(b).

Where there is an order of judicial foreclosure, there is a presumption that the sale will be connected in a commercially reasonable manner. However, pursuant to judicial foreclosure, sale will be accomplished through execution and levy or other extraordinary remedies. Thus, additional time and expense and lesser return on the sale may be a result. Thus, the tradeoff between potential irregularities in the sale and subsequent litigation and the certainty of judicial foreclosure and the probability of lesser proceeds must be evaluated on a case-by-case basis.

E. Conclusion. Undoubtedly, the pursuit of deficiency judgments concerning personalty requires a creditor to comply with a series of procedural technicalities mandated by the UCC. Those requirements, however, balance the competing interests between lender and borrower to produce security for the lender and a commercially fair result for the borrower. It is that standard of fair dealing and resonableness which the courts have most recently begun to apply in the real property context as well.