

Information & Instructions: How to handle personal property foreclosure proceedings

PREVIEW

1. Foreclosures on personal property are governed by the Security Agreement, if any, and by the Uniform Commercial Code, found in the Texas Business and Commerce Code.
2. The practitioner should check the Security Agreement to ascertain if it provides for a waiver of demand and waiver of notices, such as notice of intent to accelerate the debt or notice of acceleration of the debt, so that the creditor can proceed immediately upon default.
3. Note, however, that many practitioners send out notices such as the ones contained in the following forms even where notice has been waived.
4. The following procedure may be used to give notice of default, acceleration, foreclosure and deficiency and suits, where:

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- a. Send the debtor a demand letter for payment of amounts due and owing that states a clear and unequivocal notice of intent to accelerate the remainder of the debt if the amount currently due and owing is not paid on or before a certain date.
- b. If the debtor does not then make the payments due within the prescribed time period, send the debtor a letter stating that acceleration has occurred.
- c. With the letter, send a notice that the holder will foreclose on the property. The letter should state the date, time, and manner of any planned sale of the collateral. The notice should advise the debtor that he or she will be liable for any deficiency after the property has been sold at either private or public sale.
- d. A UCC lien search should be conducted as soon as possible to ascertain the identity of other lien holders, if any.
- e. The creditor may then peacefully take possession of the collateral. Judicial process is not required if possession can be obtained without a breach of the peace.
- f. If the creditor is unable to obtain the collateral, he or she should file suit on the debt and consider joining the suit with an Application for Writ of Sequestration, Attachment or Injunction.

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- g. Once the collateral has been obtained, the creditor may elect to sell the collateral or keep it in full satisfaction of the debt under Uniform Commercial Code Section 9-505 [Tex Bus & Com C § 9.505]. The creditor may desire to retain the collateral if its value exceeds or equals the secured debt or if the problems of a sale are such that a commercially reasonable sale will not be achieved.

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- h. Once an election is made, it is final. Thus, if the creditor accepts the collateral in full satisfaction of the debt, he or she may not file suit against a debtor for any deficiency.
- i. Retention of the collateral is not a viable alternative under Section 9.505 in a transaction involving consumer goods where the debtor has paid sixty percent (60%) of the cash price, unless the debtor signs a statement renouncing his or her rights under UCC 9-501 through 9-502 [Tex Bus & Com C _§5.01, 5.02].
- j. If the debtor has renounced those rights, the creditor may retain the collateral in full satisfaction of the debt. The practitioner is advised to review UCC Section 9-505 [Tex Bus & Com C §9.505] for the consumer requirements contained therein.

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A creditor who wishes to retain the collateral in full satisfaction of the debt should give the debtor written notice of that intent. See Form 19:10 for an example of such a notice.

- l. If the creditor wishes to sell the collateral rather than retain it, the sale must comply with Article 9 of the Uniform Commercial Code [Tex Bus & Com C §9.101 et seq.].
- m. The creditor must sell the collateral within ninety (90) days after taking possession of it or the debtor may file a conversion suit against the creditor.
- n. The creditor is required to exercise reasonable care and custody to preserve the collateral pending sale.
- o. The code requires the disposition to be made in a commercially reasonable manner.
- p. A commercially reasonable sale is a question of fact; the burden of proof is on the debtor to show that the sale was not commercially reasonable.
- q. Emphasis is on the use of the correct procedure, rather than the amount of proceeds received; if the correct procedure is followed, the presumption arises that the sale was commercially reasonable.
- r. Failure to notify the debtor of the sale may give rise to an action to overturn the sale.
- s. The fact that a better price could have been obtained does not ordinarily render the sale commercially unreasonable, as long as the creditor gave proper notice and acted in good faith. See Uniform Commercial Code Section 9-507 [Tex Bus & Com C §9.507].

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5. Consider the following in order to determine if the foreclosure sale is commercially reasonable:

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- a. Determine whether the sale should be private or public. Note that a private sale usually results in a higher price, since it avoids a fire sale or auction and/or lack of bidders on the day of sale.
- b. In a private sale, the creditor should solicit at least three bids and hold the collateral until a satisfactory bid is obtained.
- c. It is advisable to advertise the sale in a newspaper or trade journal in order to obtain bids from interested, qualified buyers.

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The creditor should serve notice of the sale on the debtor and on any guarantor and secured lienholder. Many practitioners prefer to give ten days' notice before the sale occurs.

6. Notice should state whether the sale is public or private, the time, date, and location of the sale, and description of the property to be sold.

7. It is advisable to send the notice by certified mail, return receipt requested, as well as by regular mail.

8. Notice requirements can be modified if the collateral is perishable or threatens to decline in value rapidly.

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9. Notice of public sale is used when the sale will occur at an auction and notice should set forth the date, time, place, and collateral to be sold at the public sale.

10. The following steps may be followed in preparing the collateral and conducting the sale:

11. The creditor should only make minor improvements to the property to enhance its value if the improvements would reasonably increase the value.

12. The creditor must give potential buyers the right to inspect the property prior to the sale.

13. Under Uniform Commercial Code 9-504 [Tex Bus. & Com. C. §9.504], the collateral may be sold as a unit or in parcels.

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14. The sale should be conducted within 90 days from the date of repossession if the collateral is a consumer item and 60 percent of the loan price has been paid.

15. Permissible bidders include the debtor, unrelated third parties, and secured parties.

16. In conducting the sale, it is advisable to

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- a. read the Notice of Sale;
- b. point out the items to be sold;
- c. solicit bids;
- d. state the terms, whether cash or other;
- e. open the bidding;
- f. accept the highest bid.

g. Execute a Bill of Sale after the auction process is complete.

17. To avoid possible litigation and the overturning of the sale in Bankruptcy Court, the property should be sold for at least 70 percent of its fair market value at the time of the foreclosure.

18. The proceeds may be allocated in the following order, assuming this allocation is consistent with the security instrument:

- a. expenses of retaking repossession;
- b. expenses of storage;
- c. expenses of preparing the property for sale;
- d. expenses of selling the collateral;
- f. attorney fees;
- g. interest; and,
- h. principal.

19. Post-sale considerations:

- a. Under Uniform Commercial Code § 9-504(2) [Tex Bus & Com C §9.504(b)], the debtor is liable for any deficiency in the sale where the proceeds are less than the monies owed, including expenses. It is advisable to send a Notice of Deficiency to the debtor after the sale.
- b. As a consequences of the sale, junior or inferior lien holders, with the exception of property tax liens, will generally be cut off.

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c. If an IRS tax lien is on record, the practitioner should give the IRS notice of the sale 25 days in advance. Notice should be sent to the Secretary of the Treasury. The government has the right to redeem the property from the purchaser within 120 days after the sale. The option expires if not exercised within this time period.

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