Getting Your Cash: Enforcing Article 9 Remedies!

Don Petersen
donpetersenlaw.com
don@donpetersenlaw.com
(616) 389-4960

My Education

- Lansing Community College
- The University of Chicago
- Harvard Law School

Teaching Experience

- Professor at Cooley Law School
  - Professor of the Year (twice)
- Harvard Law School
- Harvard University
- Southern Methodist University
- Oakland University

Westlaw Treatise

Security Interests in Personal Property

Third Edition

Donald K.S. Petersen, Attorney, Detroit, MI

2025–2026

Issued in December 2025

Goals

- UCC – promote commercial transactions.
- Article 9 – protect potential lenders

Abbreviations

- AAP = After-Acquired Property
- FA = Future Advance
- FS = Financing Statement
- JLC = Judicial Lien Creditor
- PMSI = Purchase-Money Security Interest
- PSI = Perfected Security Interest
- PSP = Perfected Secured Party
- SA = Security Agreement
- SI = Security Interest
- SLC = Statutory-Lien Creditor
- USP = Unperfected Secured Party

Petersen's 9-Step Wonder Formula

Step 1 -- ID the parties and categorize them.
Step 2 -- Classify each creditor's collateral.
Step 3 -- Was creditors' SI attached to collateral?
Step 4 -- Did each creditor perfect its SI?
Step 5 -- Did a subsequent event impact a PSI?
Step 6 -- Did a creditor obtain proceeds?
Step 7 -- ID who's fighting over the collateral.
Step 8 -- Attach correct priority rules.
Step 9 -- Apply default/remedy provisions of Part 6

Confusing Words

- Debtor – party who puts up the collateral.
- Obligor – party who owes you money.
- Often the same person, but not always.
- I'll try to use them properly.

Why Did You Get Collateral?

- If the borrower doesn't pay, you still get some value.
- If the obligor defaults, you want to "monetize" the collateral.
- You apply the value of your collateral toward the debt that you're owed.

Rights upon Default (Part 1)

- Upon default, you may:
  - Follow Part 6 of **Article 9**; and
  - Use the remedies in the SA; and
  - Rely on other law to collect the debt.
- Your rights are cumulative – you can exercise some or all of the available options.

Rights upon Default (Part 2)

- Your choice of remedy depends on the debtor:
  - Will it resist paying you?
  - Does it have good defenses?
- It also depends on the collateral. How easy can you turn it into money (monetize it)?

Rights upon Default (Part 3)

- Think about the possibilities. A good, consignor-of-goods, a buyer-of-AR, chattel, payment intangibles, promissory notes, etc.
- A default may not even be necessary for you to exercise your enforcement rights.

Taking Possession (Part 1)

- Standard SA clause: SP can require the person who owns the collateral to assemble it for them.
- Or, the SP may (i) use the courts, or (ii) re-possess collateral it can find.

Taking Possession (Part 2)

- Judicial process -- suing for a “writ of replevin,” with a hearing or “ex parte.”
- It’s cheaper for SP to re-possess collateral without suing. But you can’t **breach the peace**.

*****Key Phrase: Breach the Peace!!*****

Breach of Peace (Part 1)

- It's like Justice Goldberg's definition of obscenity. I know it when I see it!
- **Article 9** doesn't define it, and there's no absolute standard.
- Courts consider all the circumstances surrounding the repossession.

Breach of Peace (Part 2)

- Courts consider, among other things:
  - The threat of violence – you don't need actual violence.
  - The degree of trespass.
  - Commercial or residential property.
  - Did SP use a uniformed, off-duty officer.

Breach of Peace (Part 3)

- Factors that courts consider:
  - Open/unlocked property or breaking open a locked structure?
  - Entering a detached garage is better than a house.
  - The timing of the repossession

Breach of Peace (Part 4)

- Factors that courts consider:
  - The reaction of those present
  - If the SP gained possession through deceit.
- To avoid trespassing, SA should authorize the SP to enter property (not homes/buildings!).

§9-602(3).
Waiver And Variance Of Rights And Duties

[T]he debtor or obligor may not waive or vary the rules stated in the following listed sections:

(3) **Section 9-607(c)**, which deals with collection and enforcement of collateral;

§9-602(4)-(5).
Waiver And Variance Of Rights And Duties

(4) **Sections 9-608(a)** and **9-615(c)** to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) **Sections 9-608(a)** and **9-615(d)** to the extent that they require accounting for or payment of surplus proceeds of collateral;

§9-602(6)-(8)
Waiver And Variance Of Rights And Duties

(6) **Section 9-609** to the extent that it imposes upon a SP that takes possession of collateral without judicial process the duty to do so without **breach of the peace**;

(7) **Sections 9-610(b)**, **9-611**, **9-613**, and **9-614**, which deal with disposition of collateral;

(8) **Section 9-615(f)**, which deals with calculation of a deficiency or surplus when a disposition is made to the SP, a person related to the SP, or a secondary obligor;

§9-602(9)-(13)
Waiver And Variance Of Rights And Duties

(9) **Section 9-616**, which deals with explanation of the calculation of a surplus or deficiency;

(10) **Sections 9-620**, **9-621**, and **9-622**, which deal with acceptance of collateral in satisfaction of obligation;

(11) **Section 9-623**, which deals with redemption of collateral;

(12) **Section 9-624**, which deals with permissible waivers; and

(13) **Sections 9-625** and **9-626**, which deal with the SP's liability for failure to comply with this article.

§9-624(a)-(b). Waiver

(a) A debtor or secondary obligor may waive the right to notification of disposition of collateral under **Section 9-611** only by an agreement to that effect entered into and authenticated **after** default.

(b) A debtor may waive the right to require disposition of collateral under **Section 9-620(e)** only by an agreement to that effect entered into and authenticated **after** default.

§9-624. Waiver

(c) Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under **Section 9-623** only by an agreement to that effect entered into and authenticated after default.

§9-603. Agreement On Standards Concerning Rights And Duties

(a) The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in **Section 9-602** if the standards are not manifestly unreasonable.

(b) Subsection (a) does not apply to the duty under **Section 9-609** to refrain from **breaching the peace**.

Redemption I

- Until foreclosure, the debtor, a secondary obligor, or a lienholder can pay the SP and redeem the collateral.
- The debtor can’t waive this right in the SA.
- Few debtors redeem.

Redemption II

- Foreclosure can be effected by:
  - selling the collateral;
  - accepting the collateral in partial or full satisfaction of the obligation; or
  - collecting on the collateral (this only applies to collateral that is itself a debt or other obligation owed **to** the debtor).

Selling Collateral (Part 1)

- Article 9 calls it “disposition” of collateral.
- I call it “selling” the collateral.
- 99% of the time the SP sells it.
- Notice of the Sale – specific information is required – different if the debtor is a consumer.

Selling Collateral (Part 2)

- Commercial Reasonableness – Key!
- Distributing Proceeds after selling the collateral.
- Rights of Secondary Obligors (guarantors)

Coxall v Clover Commercial, 781 N.Y.S.2d 567 (Kings Cty. Civ. Ct. 2004) (Part I)

Facts

- The Coxalls in default, and Clover repossessed Lexus.
- February 20, 2003, letters to Coxall.
- Redemption price of $5,970, plus redemption fee/costs.
- Private sale on March 3, 2003.
- Clover sold the car for $1,500.
- April 22 letter to Coxall demanding payment of the deficiency of nearly $5,000.

Coxall v Clover Commercial (Part 2)

Issue: *Was notice proper?*

Ruling

- After Clover took the car, it had to send reasonable notice to the debtor.
  - **Non-consumer** -- notice at least 10 days before sale.
  - **Consumer Transaction** – notice has to be earlier, and a notice lacking required information is insufficient as a matter-of-law.

Coxall v Clover Commercial (Part 3)

Issue: *Was notice proper?*

Ruling

- Notice is required so the debtor can
  - redeem or bid at the sale,
  - challenge the sale before it occurs, or
  - find a buyer.

– There is no evidence that Utho Coxall received notice, only Jason.

Coxall v Clover Commercial (Part 3)

Ruling (cont.)

- Neither notice stated:
  - that Coxall could get an accounting of the debt, or
  - the charge for an accounting.
- In a consumer transaction, unless a quick sale is needed to get the best price, 10 days isn't enough notice.

Commercial Reasonableness (Part 1)

A UCC sale is commercially reasonable if it:

- Is made in a recognized market, **or**
- Conforms to reasonable commercial practices among dealers, **or**
- Is otherwise objectively reasonable

Commercial Reasonableness (Part 2)

- Price doesn't always determine reasonableness
- But grossly-low prices make courts suspicious.
- Courts consider these (and other) factors:
  - was it a public or private sale;
  - when and where was it held;
  - was the collateral sold in bulk or divided;

Commercial Reasonableness (Part 3)

- Courts consider these (and other) factors:
  - how the SP should have prepared the collateral before selling it;
  - the advertising or other efforts to locate potential buyers; and
  - the sale terms.

Commercial Reasonableness (Part 4)

- If the sale price seems too low, it may cause the judge to examine more closely other aspects of the sale.

Public Sale

- Open Access -- anyone can attend/bid.
- Competitive Pricing -- market sets price.
- Debtor may attend/bid, and see if it's fair.
- Transparency -- presumed reasonable if proper notice was given.
- Easier for the SP to justify a deficiency.

Private Sale

- Public (and debtor) can’t attend.
- SP negotiates a price with a specific buyer/group.
- No public bidding.
- Must still be commercially reasonable in method, manner, time, place, and terms.

Coxall v Clover Commercial (Part 5)

Was the sale commercially reasonable?

- Clover sold the car to Coxall's dealer.
- "Reasonableness" is a fact-intensive inquiry. No magic step immunizes the creditor.
- Private sales tend to generate higher prices.
- ***It's commercially reasonable if it's consistent with how dealers practice.***

Coxall v Clover Commercial (Part 6)

- The SP must prove it acted in good faith and to its and the Debtor's best interests.
- A private auction is usually okay, but this was sold back to the selling dealer.
- The price was only 18.5% of the purchase price after 4 months.
- So the court carefully scrutinized it.

Distributing the Sale Proceeds

- Where do the sale proceeds go?
- What happens to the sold collateral?
- Debtor, obligor, and SP's status?

Disbursing Cash Proceeds

- **Article 9** tells us how to disburse cash proceeds.
  - **First** -- for SP's repossession and sale costs.
  - **Second** -- to pay off the foreclosing SP's debt.
  - **The balance** – to junior lienors who demand a share.
- **Deficiency** – obligor is liable.
- **Surplus** – the **debtor** gets this.

Strict Foreclosure Commercial Goods

- SP keeps collateral to fully/partially satisfy the debt.
- SP must send notice to the debtor, who must consent.
  - If SP forgives 100% of debt, the debtor can consent through silence.
  - If less than 100%, debtor must sign a consent.
- The debtor can't consent in advance, such as in a SA.

Strict Foreclosure Consumer Goods

- Only if SP writes-off entire debt.
- Strict foreclosure is prohibited if:
  - if the obligor has paid 60% of the purchase price of a PMSI, or
  - 60% of the secured loan for a non-PMSI.
    - The obligor probably has equity.

Enforcement Against Obligations that Others Owe the Debtor

- You have AR as collateral.
- How can you collect directly from these folks who owe the debtor money?
- SP can inform them to mail their payments directly to SP.

How to Apply Collection Proceeds

First -- to collection costs.

Next -- to the obligation owed the SP.

Finally -- to subordinate lienors who demanded a share.

How Does a SP Breach?

- If the debtor didn't really default.
- Breach-the-peace while repossessing.
- Don't give notice or give improper notice.
- Be commercially unreasonable when collecting or selling the collateral.
- Accept collateral in full/partial satisfaction when required to sell it.

Article 9 Remedies against SP

- actual damages caused by non-compliance (consequential damages?);
- penalties for not complying; and
- SP can’t collect a deficiency judgment.

Coxall v Clover Commercial (Part 7)

- Rebuttable-Presumption Rule.
- Breaching SP can recover a deficiency only by proving that complying with the rules would not have satisfied the debt.
- Difficult standard. How do you prove?

Non-Consumer Transaction (Part 1)

- The SP's right to a deficiency is subject to the rebuttable-presumption rule in **§9-626(a)(3)**, **(4)**.
- Deficiency = Secured Obligation minus the greater of:
  - sale proceeds under **§9-615**, or
  - proceeds from a "pretend" complying sale.

Non-Consumer Transaction (Part 2)

- The “pretend” sale proceeds are presumed to be the balance owed -- we start with no deficiency.
- But you can rebut the presumption.

Consumer Transaction (Part 1)

- **Article 9** is silent.
- Absolute-bar or rebuttable-presumption rule.
- Absolute bar = SP gets nothing.
- A consumer may get damages.
- It's also possible to get statutory damages if the collateral is consumer goods.

Consumer Transaction

- Can the debtor both void the deficiency and recover statutory damages?
- *Coxall* permitted both, but it's a statutory-interpretation question.

The End!

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