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Does Newspaper Notice Constitute “Commercially Reasonable Notice” in 2016?

Michael Brandess, Christopher Cahill and Jonathan Friedland¹

Abstract

This article discusses the evolution of the “commercially reasonable” standard applicable to foreclosure and similar sales. In particular, it examines whether the historic practice of satisfying the standard by publishing notice of such sales in a newspaper still suffices. It concludes in the negative; that newspaper notice alone, in light of the precipitous decline in newspaper readership together with technological advances that enable sellers to reach interested buyers far more efficiently, is increasingly insufficient (and perhaps not even necessary) to meet the standard.

Introduction

You represent a secured lender. You are called on to help your client exercise its rights under UCC § 9-610 to sell its collateral after it has foreclosed.

Or maybe you represent a chapter 11 debtor and are getting ready to file a motion to sell assets under Bankruptcy Code § 363.

Or perhaps you are a federal equity receiver selling under 28 U.S.C §§ 2001 et seq.

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Or you might be an assignee for the benefit of creditors or state court receiver who is selling a company's assets pursuant to state law.

Regardless of the hat you wear, you have business assets to sell: maybe an entire going concern. How will you fulfill your duty to market the sale in *at least* a commercially reasonable manner, to obtain the highest price you reasonably can?

You'll certainly reach out to folks you know who may have an interest. But that won't be enough to market most assets adequately, either from the perspective of actually getting the best price *or* making sure the sale withstands after-the-fact scrutiny.

Most people wearing these hats also run newspaper ads, on the assumption that doing so will, *de facto*, constitute commercially reasonable notice in the face of a challenge to the contrary. This is, however, no longer the case. Nor is it particularly likely to help bring about robust bidding.

Why You Need to Care?

What happens if a sale is found not to have been commercially reasonable? The answer is—it depends.

If a debtor challenges a secured creditor's post-sale pursuit of a deficiency claim, the secured creditor has the burden of establishing that the disposition of the collateral was commercially reasonable.² If the secured creditor fails to prove that the disposition was commercially reasonable, it may not pursue collection of any deficiency owed to it, and may even be liable for damages.³ For instance, in *Coxall v. Clover Commercial Corp.*, the court found that the seller of a debtors' collateral had failed to sell the collateral in a commercially reasonable manner⁴ and held that an aggrieved debtor was entitled to damages to be computed under a retail installment contract plus 10% of the cash price, even if debtor

²See U.C.C. § 9-626(a)(2).

³See U.C.C. § 9-626(a)(3) and U.C.C. § 9-625.

⁴*Coxall v. Clover Commercial Corp.*, 4 Misc. 3d 654, 667, 781 N.Y.S.2d 567, 579, 54 U.C.C. Rep. Serv. 2d 5 (N.Y. City Civ. Ct. 2004).

sustained no actual loss from secured party’s failure to comply with UCC requirements.⁵

A failure to provide proper notice could also subject a seller to potential malpractice or breach of fiduciary claims—especially where the seller is a receiver, assignee or trustee with well-defined fiduciary duties to a specific class of beneficiaries.

For the buyer, the dangers from a deficient sales process are also manifest. For example, if the sale of an asset to a buyer through a UCC foreclosure sale is later challenged successfully by an aggrieved party as not having been conducted in a commercially reasonable manner, the borrower may be subject to a fraudulent transfer action. This was the case in *In re Am. Bus. Fin. Servs., Inc.*, for example, where a trustee argued that an earlier auction of the debtor’s assets to an insider “was a sham and not commercially reasonable resulting in the receipt of less than reasonably equivalent value.”⁶

Suffice it to say, for both buyer and seller, it is better to be on the safe side in conducting a commercially reasonable notice and auction.

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⁵Clover Commercial Corp., 4 Misc. 3d 654, *citing* U.C.C. § 9-625 (remedies for secured party’s failure to comply with Article 9).

⁶*In re American Business Financial Services, Inc.*, 362 B.R. 149, 160 (Bankr. D. Del. 2007) (finding that the trustee’s claim sufficed to overcome a motion to dismiss).