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Article 9's Incorporation Strategy and Novel, New Markets for Collateral: A Theory of Non-Adoption

MICHAEL KORYBUT†

INTRODUCTION

Here is a puzzle: online auctions like eBay widely are heralded as efficient, robust markets through which millions of businesses and people have sold billions of dollars of all types of property. Why then are Article 9 secured parties apparently only slowly and anemically adopting eBay or other online auctions to sell repossessed property (collateral) and sticking instead to conventional, traditional sale methods? The puzzle is worth solving because one of Article 9's central policies is for a secured creditor to realize the highest price possible for her collateral to pay off her debtor's obligation, and thereby reduce any deficiency the debtor would have to pay. To affect its price-maximization policy, Article 9 directs the secured party to sell her collateral in a "commercially reasonable" manner, largely by incorporating well-recognized or commonly-accepted market-based sale methods for the particular type of collateral. Thus, the apparent slow and anemic adoption of eBay and other online auctions by Article 9 secured creditors is troubling because it suggests a failure of the commercial reasonableness standard's incorporation strategy and its price-maximization goal. Understanding the causes of this failure and correcting them is important not just with respect to secured party adoption of online auctions, but

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any new, novel efficient sale method that develops in the future.

The Article proposes a non-adoption theory for novel, new markets to explain the apparent failure of the commercial reasonableness standard's incorporation strategy. The non-adoption theory holds that for any given new market, a wealth-maximizing secured party will suffer varying degrees of imperfect information due to legal, business, or empirical data uncertainties with respect to identifying, assessing, and using that new market. Such a secured party may fail to adopt a relatively more efficient new market and continue instead to use the conventional, traditional market due to the aggregate amount of this legal, businesses, and empirical data uncertainty. For the "riskiest" of new markets, those with the highest aggregate degree of such uncertainty, theoretically it is possible that no or very few secured parties would ever adopt it. For a less risky market, one with a wider range of perceived riskiness among secured creditors, it is theoretically possible that a larger number of Article 9 secured creditors would adopt it, although others would not.

The non or slow adoption of new markets which are relatively more efficient than the conventional, traditional market(s) for the secured party's collateral does great normative damage to Article 9's incorporation strategy for two reasons. First, non or slow adoption of a relatively more efficient new market is completely at odds with a central, stated purpose of the commercial reasonableness standard and its incorporation strategy: to allow *ex ante* secured creditors and *ex post* reviewing courts to adopt more efficient markets to sell repossessed collateral as they develop over time with the aspiration of maximizing the collateral's price at the foreclosure sale. This undermining of the incorporation strategy and its price-maximization goal harms both secured parties and debtors alike. Second, foreclosure sales of personal property have a sad history of realizing low prices for collateral. Not surprisingly, foreclosure sales are said to be one of the most litigated areas of Article 9, and a central motivating factor of such litigation has been an alleged low price. The secured creditor community's non-adoption or too slow adoption of relatively more efficient markets undermines the potential

to reduce the number of low price foreclosure sales and thus the incidence of litigation.

Given these adverse consequences, analyzing and correcting the salient and common causes of legal, empirical, and business uncertainty that likely will obtain to any novel, new market is exceedingly important. The Article performs this analytical and corrective task in the context of the online auction channel. To be sure, there are idiosyncratic reasons why a secured party may suffer legal, empirical, or business uncertainty in using a new market, including the online auction channel. The Article does not attempt to identify and discuss these reasons because, given their idiosyncratic nature, their explication would not have broad application in the Article 9 community.

The online auction channel is “new” because it is the latest significant method to become available to secured parties to sell their repossessed collateral. What makes the online auction channel so perplexing is that this method of sale is over ten years old and individual online auction sites like eBay are now ubiquitous, and yet few Article 9 secured parties appear to be using this method of sale. The online auction channel is “novel” because, as a method of sale, it differs in form and function in significant legal and business ways from conventional, traditional methods of selling collateral. Consequently, the non-adoption theory holds that the ensuing legal, empirical, and business uncertainty renders the online auction channel a “risky” market, which explains its apparent slow and anemic adoption by secured creditors. This is a shame since, as a market channel, online auctions may be able to sell certain types of repossessed collateral more efficiently than any existing, conventional, traditional market.

The Article’s development of the non-adoption theory for novel, new markets and its application to explain slow and anemic use of online auctions is a unique contribution to the Article 9 literature critiquing the commercial reasonableness standard. Further, as a theoretical enterprise, by exploring the possible reasons why a secured party may suffer legal empirical, and/or business uncertainty about using a novel, new market like the online auction channel, the Article sets the stage for much needed, and largely lacking, empirical work about what motivates

secured parties to choose conventional, traditional markets versus new markets for their collateral sales.

Part I of the Article discusses Article 9's commercial reasonableness standard, its incorporation strategy, and Article 9's price maximization goal for repossession sales. Part II briefly discusses the myriad heralded efficiency benefits of online auctions like eBay. Part II also provides anecdotal evidence that while some Article 9 secured creditors are using online auctions, their numbers appear to be relatively few. Part III unpacks the non-adoption theory. To apply the non-adoption theory broadly across the secured lending community, Part III frames the theory as three secured party/collateral neutral hypotheses. These hypotheses are animated by seven salient and common theoretical progenitors of legal, empirical, and/or business uncertainty. Part IV develops each of these progenitors of uncertainty. It also proposes corrective measures to mitigate each progenitor's adverse effects. Part V posits theoretical circumstances where non or slow adoption may occur even where, in fact, the novel, new market is more efficient relative to the conventional, traditional market(s) for the collateral. Part VI briefly discusses alternative reasons why a secured party may not use a relatively more efficient market: 1) he is not a wealth-maximizer, and/or 2) he lacks legal, business, and/or empirical data information about continuing to use the conventional, traditional market. Part VI's brevity is not meant to suggest these are not credible or important issues; they are. Rather, one has to pick one's battles given time and space constraints and keep to the worthy goal of a focused analysis.

I. A PRIMER ON ARTICLE 9'S INCORPORATION STRATEGY

An incorporation strategy that looks to merchant reality and evolving commercial behavior is a common jurisprudential tool employed throughout the Uniform Commercial Code (UCC).¹ Article 1 of the UCC, which sets

1. See, e.g., Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 626 (1975) (stating that "Article II frequently speaks as though courts should discover the law merchant from a careful, disinterested examination of custom and fact situations. Article

forth general definitions and policies governing the remaining UCC articles including Articles 2 and 9, states that the UCC “shall be liberally construed and applied to promote its underlying purposes and policies[, including]. . . . to permit the continued expansion of commercial practices through custom, usage and agreement of the parties”² With respect to Article 2, “the overall tone . . . suggests a clear respect for, if not deference to, commercial practices. Its rules speak in terms of commercial reasonableness, commercial standards, trade customs, and commercial understanding, all of which require courts to refer to actual commercial practice and understanding to resolve legal disputes.”³ Indeed, “the UCC was written largely to supplant the common law by clearing ‘statute and case law

It is not, in the main, an example of legislative lawmaking, it is a guide to law-finding. It does not tell judges the law; it tells them how to find the law. The law is not found in doctrine, not in policy, but in directed exploration of the ‘fact-pattern of common life’); Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 170-71 (1989) (stating, about the Legal Realist movement, that “[t]he realists focused on what they perceived to be the most serious shortcoming of the classical model—its failure to acknowledge the actual practices of business persons. . . . Llewellyn saw no point in legal doctrine that failed to take account of the nuances and vicissitudes of everyday commercial practices, which were themselves always in the process of evolution and change. Fundamentally a pragmatist, Llewellyn thought that contract doctrine should respond to commercial reality and not, as the classical theorists imagined, the other way around”); Joseph W. Singer, *Review Essay: Legal Realism Now*, 76 CAL. L. REV. 465, 501 (1988) (book review) (stating that “in drafting the Uniform Commercial Code, Llewellyn hoped to formulate legal rules that would take into account the social context in which commercial transactions took place”); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 494 (1987) (discussing Llewellyn’s desire to incorporate merchant reality in the law); see also Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, in THE JURISPRUDENTIAL FOUNDATION OF CORPORATE AND COMMERCIAL LAW 193 (Jody S. Kraus & Steven D. Walt eds., 2000); Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

2. Pre-revised U.C.C. § 1-102(2)(b). Article 1 was revised in 2001. Hereafter, the Article cites only pre-revised Article 1 sections, published in COMMERCIAL AND DEBTOR-CREDITOR LAW, SELECTED STATUTES (Foundation Press, 2004).

3. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1149 (1985) (citations omitted).

debris from the field so that commercial law could follow the natural flow of commerce.”⁴

A. *Commercial Reasonableness, Market-Based Sale Procedures, and the Price-Maximization Goal*

In Article 9 the commercial reasonableness standard exemplifies the UCC's policy of incorporating commercial practices.⁵ Rather than legislatively mandated, detailed sale procedures, Professor Grant Gilmore and the other original Article 9 drafters deliberately used the largely undefined commercial reasonableness standard to provide the secured party maximum flexibility to identify and use the most efficient market-based sale procedures possible to sell repossessed collateral.⁶ The repossession sale must be “commercially reasonable” in “[e]very aspect . . . including the method, manner, time, place, and other terms.”⁷ Additionally, section 9-627(b)(3) provides a safe harbor for secured parties, stating that a sale is commercially

4. Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 334 (1995) (citation omitted).

5. See Michael Korybut, *Searching For Commercial Reasonableness Under Revised Article 9*, 87 IOWA L. REV. 1385, 1450-55 (2002).

6. Grant Gilmore, *Article 9 of the Uniform Commercial Code—Part V: Default*, 7 PERS. FIN. L.Q. REP. 4, 7 (1952) [hereinafter Gilmore, *Article 9*] (stating that “[t]he basic policy of Article 9 is to allow disposition of the collateral without hampering restrictions, in the hope that, as to many types of goods, there will develop a pattern of using commercial outlets to sell goods for the going price at the least possible cost”). Professor Gilmore and the other original Article 9 drafters understood that earlier legislatively proscribed foreclosure sale procedures, such as those under the Uniform Conditional Sale Act, were terribly inefficient, yielded low sale prices, and frequently resulted in deficiency judgments. See *id.* at 5-6; 2 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 44.4 (1965) [hereinafter 2 GILMORE]; see also Korybut, *supra* note 5, at 1392-93.

7. Revised U.C.C. § 9-610(b). Article 9 was revised in 1999 and became effective in 2001. Hereafter, citations to Article 9 sections shall refer in the footnotes either to the “Revised” Article 9 or the “Pre-revised” Article 9, published in *COMMERCIAL AND DEBTOR-CREDITOR LAW, SELECTED STATUTES* (Foundation Press, 2004). Beyond this mandate, “commercial reasonableness” is not defined in the Code, although some instruction is provided in revised section 9-627(a) and 9-627(b)’s three safe harbors. Otherwise, “[t]he duty is a vague and fluctuating one, which cannot be meaningfully described except in terms of particular fact situations.” 2 GILMORE, *supra* note 6, § 44.5, at 1234-35.

reasonable if the secured party uses the “reasonable commercial practices among dealers in the type of property [sold].”⁸ Further, some Article 9 courts⁹ have looked to Comment 4 to Article 2 of the UCC, section 2-706,¹⁰ which states:

Subsection (2) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances In choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed.¹¹

The thrust of these limited statutory prescriptions is the basis for Article 9’s incorporation strategy to allow the secured party to adopt existing markets and their attendant sale procedures to sell repossessed collateral. A secured party is expected to act in good faith and with due diligence to identify and use the market and attendant sale procedures best calculated to realize the highest price

8. Revised U.C.C. § 9-627(b) (1997). Comment 2 to pre-revised section 9-507 stated that “[o]ne recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales.” Pre-revised U.C.C. § 9-507 cmt. 2.

9. See, e.g., *United States v. Terrey*, 554 F.2d 685, 694 (5th Cir. 1977); *Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698, 712 (E.D. Pa. 1968), *aff’d*, 398 F.2d 310 (3d Cir. 1968); *Beard v. Ford Motor Credit Co.*, 850 S.W.2d 23, 28 (Ark. Ct. App. 1993); *Deutz-Allis Credit Corp. v. Bakie Logging*, 824 P.2d 178, 185 (Idaho Ct. App. 1992); *Boatmen’s Nat’l Bank of Carthage v. Eidson*, 796 S.W.2d 920, 923 (Mo. Ct. App. 1990).

10. Article 2 was revised in 2003. Hereafter, the Article cites only pre-revised Article 2 sections, published in *COMMERCIAL AND DEBTOR-CREDITOR LAW, SELECTED STATUTES* (Foundation Press, 2004). Pre-revised section 2-706(1) states in part that “[w]here the [seller’s] resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price” Subsection two states in part that the sale may be “at public or private sale” and that it may be “at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable.” Pre-revised U.C.C. § 2-706.

11. Pre-revised U.C.C. § 2-706 cmt. 4. The Official Comment to pre-revised section 9-504 cross-refers to pre-revised section 2-706. Pre-revised U.C.C. § 9-504 cmt. 1.

possible for the collateral.¹² By allowing secured parties to access market-based sale procedures Professor Gilmore hoped that foreclosure sales would realize the highest prices possible for the collateral, thereby reducing the incidence of low price deficiency sales where the collateral's sale price did not cover the debtor's outstanding loan.¹³

12. See 2 GILMORE, *supra* note 6, § 44.5 (stating that that the secured party must "act with due diligence . . . use his best efforts . . . [and have a] 'reasonable regard for the debtor's interest'" in obtaining the highest possible price for the collateral). For cases, see, for example, *Commercial Credit Equip. Corp. v. Parsons*, 820 S.W.2d 315, 323 (Mo. Ct. App. 1991) (stating that in the face of a low price sale, the court needed to determine that the secured party had not neglected "the obligations of good faith, diligence, reasonableness and care. In the context of disposition of collateral, the duty to act in good faith is shown by evidence that the secured party was punctilious as to every procedure imposed by § 400.9-504(3) and was free of self-dealing. The diligent attention to the rights of the creditor at every stage of the disposition of the collateral, from declaration of default, through the notice of sale, the advertisements, the numbers of dealers invited to bid, the encouragement and responses to informal inquiries, all attest to a purpose to gain the best resale price and reduce any deficiency"); *Terrey*, 554 F.2d at 695 (stating that "the creditor . . . has the fiduciary duty to make a sincere effort to obtain the full market value for the assets"); *Eagle Bank & Trust Co. v. Dixon*, 15 S.W.3d 695, 695 (Ark. Ct. App. 2000) (stating that "[u]ltimately, commercial reasonableness requires that the secured party act in good faith to maximize returns on collateral"); see also *Old Colony Trust Co.*, 280 F. Supp. at 714-15 (noting that the "policy of Article 9 is to provide a simple, efficient, and flexible tool to produce the maximum amount from the disposition of the collateral"); *Id.* at 712 (stating that "Section 2-706, dealing with a seller's rights and duties to resell, has requirements of commercial reasonableness exactly parallel to those of § 9-504(3)," and that Official Comment 4 to Section 2-706 states "that the option between the two [a public or private sale] was given to enable 'the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances'" (quoting U.C.C. § 2-706)).

13. Gilmore, *Article 9*, *supra* note 6, at 7 (arguing that Article 9's foreclosure rules should be rules "which would promote the highest possible yield on disposition of the collateral"); see also William E. Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 207 (1962) (stating that "[t]he Code sets out to accomplish two goals. First, to assure the highest possible realization price, a considerable discretion is conferred upon the secured party seeking to realize upon his collateral"); Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491, 501-02 (1997) (stating that "Gilmore was convinced 'the price-determining function of the market' could be relied upon 'to establish the fair value of the collateral'" (quoting 2 GILMORE, *supra* note 6, § 44.6)); Korybut, *supra* note 5, at 1392-93. To be sure, commentators also have questioned whether the commercial reasonableness standard has failed to achieve this price-maximization goal on a variety of grounds. See *id.*

Article 9's price maximization goal, however, is tempered by other competing policies, such as the secured party's absolution from unforeseeable or uncontrollable events adversely affecting the sale;¹⁴ the secured party's interest in conducting a quick and inexpensive sale;¹⁵ the

14. Professor Gilmore maintained that the good faith, diligent secured party should not be second-guessed where, in hindsight, he failed to realize the highest price for the collateral due to unforeseeable or uncontrollable events. See 2 GILMORE, *supra* note 6, § 44.5; ROBERT BRAUCHER & ROBERT A. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 501-02 (1977) (stating that "[i]n essence it [Section 9-507(2)] provides that the secured party should not be liable merely because he failed to take advantage of an opportunity of which he had no reason to know, or which was, as a practical matter, not available to him. If, however, a substantially better price was obtainable by another disposition of which the secured party should have known, Section 9-507(2) does not exculpate him"). In explaining the reason for the former Section 9-507(2)'s admonition that "[t]he fact a better price could have been obtained by a sale at a different time or in a different method . . . is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner," Pre-revised U.C.C. § 9-507(2), Professor Gilmore said that "[t]he secured party is not required to be a seer or a prophet. He is not required to anticipate the course of the market." 2 GILMORE, *supra* note 6, § 44.6; see also Korybut, *supra* note 5, at 1421-22.

15. See Edward J. Heiser Jr. & Robert J. Flemma, Jr., *Consumer Issues in the Article 9 Revision Project: The Perspective of Consumer Lenders*, 48 CONSUMER FIN. L.Q. REP. 488, 499 (1994); Homer Kriptke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 946 (1985); Maury B. Poscover, *A Commercially Reasonable Sale Under Article 9: Commercial, Reasonable, and Fair to All Involved*, 28 LOY. L.A. L. REV. 235, 244 (1994) (stating that "[b]ecause a secured lender does not want to purchase the collateral at the sale or to store it for any longer than is necessary, the economic pressures on the lender encourage an expedited sale and, again, the optimum price. In general, with mercantile items and disposable goods, the maintenance and storage costs, plus the tendency for the value of the goods to decrease over time, makes expedited sales attractive to secured lenders"); Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. REV. 445, 513 (1994) (arguing that "the foreclosing creditor has a legitimate interest in obtaining repayment of the antecedent obligation expeditiously; accordingly, it should not be required to 'hold out' for the very best price"). In striking a fair balance between this interest and the debtor's concern with obtaining the highest price, courts and commentators recognize (and debate the extent of) legitimate limits to the foreclosure sale efforts the secured party must make to achieve such a price. See ROBERT L. JORDAN & WILLIAM D. WARREN, COMMERCIAL LAW 267-68 (4th ed. 1997) (observing that "[t]he law has long struggled with the problem of how to strike a fair balance between the interest of the foreclosing creditor in being able to realize on collateral quickly and cheaply and the rights of the defaulting debtor in having a fair disposition of the property").

secured party's lack of sophistication and resources;¹⁶ constraints imposed by relatively inexpensive collateral;¹⁷ and cases of few or no available markets for the particular type of collateral.¹⁸

Balancing the tension between the incorporation strategy's price maximization goal and these tempering policies, one arrives at an uneasy and imprecise compromise: Article 9, (1) directs the secured party in good faith and with due diligence to identify, assess, and use the market sale practices that she believes are best suited to maximize the collateral's price, but (2) holds the secured party only to those markets and attendant sale practices that are reasonably identifiable, accessible and usable under the circumstances.¹⁹ In economic terms, the secured

16. See Korybut, *supra* note 5, at 1423.

17. See *infra* note 267 and accompanying text.

18. See Korybut, *supra* note 5, at 1423.

19. See *id.* at 1422-23 (stating that "[v]arying with the secured party's sophistication and resources, the value of the collateral, and the available markets for the collateral, even a good faith, diligent secured party intent on maximizing the collateral's price may be unable to realize a price reflecting the collateral's true value"); Robyn L. Meadows, *Warranties of Title, Foreclosure Sales, and the Proposed Revision of U.C.C. § 9-504: Has the Pendulum Swung Too Far?*, 65 *FORDHAM L. REV.* 2419, 2446-47 (1997) (stating that "[w]hile the Code does not require the price to be maximized, the creditor is expected to make choices regarding the conduct of the sale with the expectation that they will result in a fair price" (footnotes omitted)); see also *Clark Equip. Co. v. Mastelotto, Inc.*, 150 Cal. Rptr. 797, 802 (Ct. App. 1978) (holding the sale commercially reasonable, and stating that "[w]hether a sale is conducted in a commercially reasonable manner is a question of fact and the answer depends on all of the circumstances existing at the time of the sale. Neither the most advantageous method of sale nor the highest possible price is demanded. This is made clear by [Section 9-507(2)]"); *Chrysler Dodge Country, U.S.A., Inc. v. Curley*, 782 P.2d 536 (Utah Ct. App. 1989) (holding the sale commercially reasonable, and stating that "[i]t is the duty of the secured party to obtain the best possible price for the benefit of the debtor. However, the secured party does not have to use extraordinary means"); *Appelton State Bank v. Van Dyke Ford, Inc.*, 279 N.W.2d 443, 445 (Wis. 1979) (holding the sale commercially reasonable and stating that "the secured party owed a duty to the debtor to use all fair and reasonable means in obtaining the best price for the property on sale. The secured party need not use 'extraordinary means' to accomplish this result"); 9C WILLIAM D. HAWKLAND, *HAWKLAND UNIFORM COMMERCIAL CODE SERIES* § 9-627:4 (2001); *JORDAN & WARREN, supra* note 15, at 288. *Cf.* *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l. Bank*, 570 P.2d 702, 711 (Wash. App. 1977) (holding the sale commercially unreasonable, although stating that "[t]he duty of the secured party in this instance was to obtain the best possible price it could

party is asked to identify, assess, and use the most efficient market reasonably available under the circumstances. Further, once the secured party has fulfilled this task and conducted a procedurally regular sale free from collusion, fraud or self-dealing,²⁰ if in fact the collateral's price is not maximized, that fact alone will not render the sale commercially unreasonable.²¹ As this primary Article 9 directive has been and will continue to be referred to throughout the Article, let us call it the "General Directive" for ease of later reference.

B. *Ex Post Judicial Oversight and Case Law Guidance*

Ex ante, the secured party enjoys a great deal of discretion under the commercial reasonableness standard, which relies upon her to choose the reasonably available market most suited to obtain a high price. Recognizing that such discretion might be abused, Professor Gilmore and the other drafters intended that ex post courts would review whether the challenged sale's time, place, manner, and other aspects were in fact commercially reasonable.²² Thus courts too must determine which market-based sale practices were reasonably available to the secured party and whether the secured party used the ones best calculated to realize the highest price possible for the collateral.²³ Doctrinally, under Article 9 and the incorporation strategy, a sale's commercial reasonableness is measured by its procedural regularity and reasonableness as compared against actual market

obtain for the collateral for the benefit of the debtor. The secured party does not have to use 'extraordinary means' to accomplish this result"); Korybut, *supra* note 5, at 1422-23.

20. See Korybut, *supra* note 5, at 1450-51, 1465-74.

21. See Revised U.C.C. § 9-627(a); see also Korybut, *supra* note 5, at 1432, 1434.

22. See Gilmore, *Article 9*, *supra* note 6, at 4, 7; see also 2 GILMORE, *supra* note 6, § 44.4; JORDAN & WARREN, *supra* note 15, at 288 ("[A]s a balance to this freedom of action the creditor is held to an ex post standard of 'commercial reasonableness' in all aspects of the realization process with strict accountability for failure to meet this flexible standard.").

23. See Korybut, *supra* note 5, at 1432, 1435, 1451.

practices.²⁴ Price is not considered a term of commercial reasonableness,²⁵ and a low price alone will not render an otherwise complying sale unreasonable.²⁶ A low price, however, will trigger the court's careful scrutiny of the sale process.²⁷

Where a sale is found to be commercially reasonable, the secured party may sue the debtor for any deficiency between the proceeds of the sale and the outstanding debt plus reasonable expenses.²⁸ Thus, the sale price is used to calculate the deficiency. Where, however, the sale is commercially *unreasonable*, the proceeds received for collateral are not used to establish the debtor's deficiency. Section 9-626 uses a rebuttable presumption rule for non-consumer transactions that may limit (perhaps severely) the secured party's right to collect a deficiency from the debtor.²⁹ For consumer transactions, Article 9 leaves to the courts the decision whether to use the rebuttable presumption rule or other rule such as the absolute bar rule that would eliminate any deficiency.³⁰

Further, Article 9 states that where the sale is found commercially *unreasonable*, the secured creditor also may be liable for certain damages.³¹ Under Section 9-625(b)-(f), the secured party is liable "for damages in the amount of any loss" caused by the secured party's noncompliance with the default provisions of Article 9.³² In particular, where the collateral is consumer goods, under Section 9-625(c)(2) the

24. *See id.*

25. *See id.* at 1432, 1435-49.

26. *See* Revised U.C.C. § 9-627(a); Korybut, *supra* note 5, at 1432, 1436.

27. *See* Korybut, *supra* note 5, at 1499.

28. *See* Revised U.C.C. § 9-615(a).

29. Revised U.C.C. § 9-626(a)(2). To calculate the deficiency under Section 9-626(a)(3), the debtor is credited with the greater of the actual proceeds of the sale or the proceeds that would have been realized had the secured party conducted a commercially reasonable sale. If a deficiency remains, the secured party may collect it.

30. *See* Revised U.C.C. § 9-626(b); TIMOTHY R. ZINNECKER, *THE DEFAULT PROVISIONS OF ARTICLE 9*, at 185-86 (1999).

31. Revised U.C.C. § 9-625(b).

32. Revised U.C.C. § 9-625(b)-(f).

debtor may recover a potentially significant amount where the loan amount and interest rate (credit service charge) are large.³³

Given the negative consequences associated with a commercially unreasonable sale, it seems sensible to say that most secured parties would be interested in conducting commercially reasonable sales.³⁴ To this end, from each state's published opinions over the last forty years, collectively there have emerged recognized sale factors that may help guide secured parties planning foreclosure sales. Summarizing case law, one court found seventeen sale factors relevant to determining a sale's commercial reasonableness, including publicity (advertising) of the sale; the place of sale; the solicitation and receipt of bids; the secured party's familiarity with type of property; the price realized for the collateral; and whether the sale was in accordance with reasonable commercial practices.³⁵

Particularly resonant of the incorporation strategy, some courts have declared that secured parties should sell their repossessed collateral in conformity with "prevailing trade practices,"³⁶ "accepted commercial practices,"³⁷ "well-

33. Revised U.C.C. § 9-625(f); *see also* Heiser & Flemma, *supra* note 15, at 500 (arguing that the consumer goods penalty is too onerous and should be abolished). *But see* Captain Darryll K. Jones, *Common Sense and Article 9: A Uniform Approach to Automobile Repossessions*, 8 ARMY LAW., Dec. 1988, at 12 (arguing under former Article 9 that such penalty amount may be small).

34. *But see infra* notes 311-12 and accompanying text.

35. *See In re Crosby*, 176 B.R. 189, 195-96 (B.A.P. 9th Cir. 1994); *see also* Marks v. Powell, 162 B.R. 820, 829 (Bankr. E.D. Ark. 1993) (identifying five factors); Conn. Bank & Trust Co. v. Incendy, 540 A.2d 32, 39 (Conn. 1988) (identifying seven factors); Westgate State Bank v. Clark, 642 P.2d 961, 970-71 (Kan. 1982) (identifying nine factors); Union Nat'l Bank v. Schmitz, 853 P.2d 1180, 1186 (Kan. Ct. App. 1993) (identifying nine factors). Note that *In re Crosby* was decided before the 2001 revisions to Article 9 under which price is more clearly removed as a term of commercial reasonableness.

36. *See, e.g.,* Investors Acceptance Co. v. James Talcott, Inc., 454 S.W.2d 130, 137-38 (Tenn. Ct. App. 1969) (stating that "[t]he requirement that the property be disposed of in a 'commercially reasonable' manner seems to us to signify that the disposition shall be made in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business" (quoting Mallicoat v. Volunteer Fin. & Loan Corp., 415 S.W.2d 347, 350 (Tenn. Ct. App. 1966))); *see also* Jackson County Bank v. Ford Motor Credit Co., 488 F. Supp. 1001, 1011 (M.D. Tenn.

recognized" customs and usages,³⁸ or "commonly accepted commercial practices."³⁹ Said one court, for example, "[t]he requirement that the property be disposed of in a 'commercially reasonable' manner seems to us to signify that the disposition shall be made in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business."⁴⁰ Commentators too have similarly pronounced that under Article 9's commercial reasonableness standard secured parties should follow widely accepted business practices.⁴¹

1980), *vacated*, 698 F.2d 1220 (6th Cir. 1982); *In re Four Star Music Co.*, 2 B.R. 454, 461 (Bankr. M.D. Tenn. 1979).

37. *Bankers Trust Co. v. J. V. Dowler & Co., Inc.*, 390 N.E.2d 766, 769 (N.Y. 1979) (observing that "[t]he virtue of [the commercial reasonableness standard's] lack of further particularization is that it invites consideration of accepted business practices as a guide to what is most likely to protect both debtor and creditor"). Official Comment 6 to section 1-205 suggests that commercial acceptance makes out a *prima facie* case that the usage is reasonable. U.C.C. § 1-205 cmt. 6 (1995).

38. *In re Excella Press, Inc.*, 890 F.2d 896, 905-06 (7th Cir. 1989).

39. *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505, 509 (Okla. 1978) (stating that "[g]enerally, the secured party acts in a 'commercially reasonable' manner when, in the process of disposing of repossessed security, he acts in good faith and in accordance with commonly accepted commercial practices which afford all parties fair treatment").

40. *Jackson County Bank*, 488 F. Supp. at 1011; *see also In re Four Star Music Co.*, 2 B.R. at 461; *Investors Acceptance Co.*, 454 S.W.2d at 137-38.

41. *See, e.g., Patterson, supra* note 1.

Even though there are numerous problems arising from the use of the term 'reasonable commercial standards,' the application of such standards may be feasible. Evidence of commercial standards and business practices may be obtained through the testimony of those engaged in a particular business. Thus, if a practice is widely accepted, a failure to follow it may indicate a failure to meet 'reasonable business standards.'

Id. at 169 n.192; *see also* CHRISTINE A. FERRIS & BENNETT H. GOLDSTEIN, DISPOSITION OF REPOSSESSED COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE § 1.2, at 3 (1990); Robert M. Lloyd, *The New Article 9: Its Impact on Tennessee Law (Part II)*, 67 TENN. L. REV. 329, 363 (2000).

II. APPARENT SLOW AND ANEMIC ARTICLE 9 SECURED PARTY ADOPTION OF ONLINE AUCTIONS

Part I established that Article 9's commercial reasonableness standard asks secured parties *ex ante*, and courts *ex post*, to identify and incorporate (use) the prevailing market(s) and attendant sale practices that are best calculated and reasonably available under the circumstances to maximize the collateral's price. Part I also described the negative consequences of a commercially unreasonable sale. Given these drivers, why then does it appear that Article 9 secured creditors only slowly and anemically are adopting generalist online auction sites like eBay.com⁴² and specialized online auction sites like Bid4Assets.com⁴³ to sell repossessed collateral?

Part II briefly discusses the robust nature of Internet commerce, with a particular focus on online auctions. Part II then provides anecdotal evidence suggesting that Article 9 secured parties only slowly and anemically are using online auctions to sell repossessed collateral.

A. A Robust Internet Market Place

Internet commerce is bustling. According to the U.S. Census Bureau's Quarterly Retail E-commerce Sales figures, e-commerce sales for the second quarter of 2006 were \$26.3 billion and \$86.3 billion for 2005.⁴⁴ In particular, online auctions have emerged as a central market channel through which to conduct e-commerce. Indeed, online auctions are plentiful; the Internet Auction List, for example, lists under the category "Online Auctions" hypertext links to 85 online auctions.⁴⁵ It is estimated that by 2007, online auction sales will exceed \$100 billion

42. Ebay, <http://www.ebay.com/> (last visited Mar. 3, 2007).

43. Bid4Assets, <http://www.bid4assets.com/> (last visited Mar. 3, 2007).

44. U.S. CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES 2ND QUARTER 2006 (2006), <http://www.census.gov/mrts/www/data/html/06Q2.html> (last visited Mar. 3, 2007).

45. Internet Auction List, <http://www.internetauctionlist.com/Results.asp?CategoryID=13&LocationID=0> (last visited Mar. 3, 2007).

annually.⁴⁶ Not surprisingly then, one commentator has said that “[e]lectronic markets based on the Internet—in particular, online auctions—have become popular venues for conducting business transactions In fact, it can be argued that the auction-based electronic markets best represent the changes to business inherent in e-commerce.”⁴⁷

Perhaps the best known online auction is eBay, which opened its cyberspace doors for business over ten years ago. There are over 100 million members of the eBay community worldwide who buy and sell in its market place.⁴⁸ eBay has both a general trading platform, eBay.com,⁴⁹ through which dozens of categories of property are sold, and specialized trading platforms, like eBayMotors.com⁵⁰ where automobiles, trucks, and parts are sold. In its 2005 financial report, eBay stated that the total value of all successfully closed listings on its trading platforms was \$44.3 billion.⁵¹

B. *Heralded Benefits of Online Auctions for Selling Distressed Property*

Perhaps Article 9 secured parties are not using online auctions because online auctions are not an efficient, maximizing way to sell distressed property? What then does one make of two inconvenient facts.

First, there is an abundant literature heralding the benefits of online auctions. For example, Professor David

46. See DAVID C. WYLD, GOVERNMENT GARAGE SALES: ONLINE AUCTIONS AS TOOLS FOR ASSET MANAGEMENT 33 (2004), <http://www.businessofgovernment.org/pdfs/WyldReport3.pdf> (last visited Mar. 3, 2007). This report is a research monograph published by the IBM center for the Business of Government.

47. Edieal J. Pinker et al., *Managing Online Auctions: Current Business and Research Issues*, MGMT. SCI., Nov. 2003, at 1457, 1457.

48. Ebay Community, <http://pages.ebay.com/aboutebay/community.html> (last visited Mar. 3, 2007).

49. Ebay, <http://www.ebay.com/> (last visited Mar. 3, 2007).

50. Ebay Motors, <http://www.motors.ebay.com/> (last visited Mar. 3, 2007).

51. Ebay Investor Relations, <http://investor.ebay.com/downloads/2005Annual/AnnualReport2005.pdf> (last visited Mar. 3, 2007).

Wyld, in 2004, published a comprehensive study on online auction use and concluded that "online auctioning is proving to be *the* most effective method for disposing of surplus, seized, used, and lost items held by public sector" actors such as the federal and state governments.⁵² From five case studies of the use of online auctions, including eBay and Bid4Assets, Professor Wyld identified four major benefits of online auctions. First, online auctions can "[o]pen up the surplus sales process to a much wider audience and promote greater visibility and transparency for the auction events."⁵³ Second, online auctions "[c]reate greater liquidity in the sales process through increased bidding activity among a wider group of interested parties, heightening the chances that the auction will culminate in the actual sale and disposal of the asset."⁵⁴ Third, online auctions "[r]aise the final selling prices of surplus items being sold, often at price points that are considerably higher than historical returns on similar assets."⁵⁵ Fourth,

52. WYLD, *supra* note 46, at 81.

53. *Id.* at 7, 25; *see also* Warren E. Agin, *Auctioning Repossessed Assets on the Internet*, LEADER'S EQUIP. LEASING NEWSL., May 2000, at 1 (stating that "[i]nternet auctions possess a number of attributes that make them superior to traditional auctions. A traditional auction requires the participant's physical presence at the auction location at the time of the auction. Online auctions allow anyone with an Internet connection to participate. Another advantage of most online auction mechanisms is their ability to run over an extended period of time, such as a week or even longer. During the auction period, participants can continue to access the auction on the Internet and place a bid"); Michael Korybut, *Online Auctions of Repossessed Collateral*, 31 RUTGERS L.J. 29, 42-59 (1999) (discussing advantages of and limitations to selling tangible goods through online auctions).

54. WYLD, *supra* note 46, at 7; *see also id.* at 25; WARREN E. AGIN, BANKRUPTCY AND SECURED LENDING IN CYBERSPACE at ch.15:8 (2005) (observing that "the auction websites attract significant numbers of visitors The Internet auction provides a mechanism to efficiently match the seller of the estate asset with an interested buyer"); Korybut, *supra* note 53, at 29.

55. WYLD, *supra* note 46, at 7; *see also id.* at 25; United States v. Kaczynski, 446 F. Supp. 2d 1146, 1152 (E.D. Cal. 2006) (stating that "an internet sale, as opposed to a courthouse sale, 'may increase the amounts bid for the sale items' because the internet sale would have 'a longer period of exposure and bidding'" (quoting GOV'T STATUS REPORT, July 31, 2006, ex. A)); *see also id.* ("[T]he auction is calculated to maximize monetary return"); Korybut, *supra* note 53, at 113-16; TitleAuctions, <http://www.titleauctions.com/about/> (last visited Mar. 3, 2007) (observing that "[c]urrently serving 57 credit unions nationwide, TitleAuctions' credit union clients enjoy average sale prices \$2,100 per vehicle

online auctions "[l]ower actual costs outlays, both in direct costs and hidden indirect costs, to agencies to carry out the sale of surplus."⁵⁶ Outside the context of repossession sales or sales of distressed assets, other commentators have made similar arguments about the benefits of online auctions.⁵⁷

higher than traditional remarketing channels, as well as new loan revenue and increased Web site traffic"); TitleAuctions, Credit Union Services, <http://www.titleauctions.com/services/retail.cfm> (last visited Mar. 3, 2007) (arguing that "[o]ur credit union-to-member auction platform empowers credit unions to quickly remarket collateral to their own members, and to millions of member [sic] and consumers nationwide. The result is often substantially higher sale prices than traditional remarketing channels typically deliver, often up to \$2,000 more per vehicle sold. When you sell a repo directly to your own members, you earn higher resale prices, boost loan revenue, sell MBI and GAP coverage, and build member loyalty. Even better, the auction is quick-to-deploy, easy-to-use and takes just minutes per day to manage"); TitleAuctions, Press Releases, Credit Unions Earning up to 107% of Retail Value for Reposs with TitleActions Remarketing Tools, Sept. 12, 2005, <http://www.titleauctions.com/press/story.cfm?nID=14> (last visited Mar. 3, 2007) (noting that "TitleAuctions, Inc. announced today that credit union clients are realizing prices up to 107 percent of retail value when using CUAuctions.com for remarketing repossessions").

56. WYLD, *supra* note 46, at 7; see also *id.* at 25. See generally AGIN, *supra* note 54, ch.15:8 (arguing that "[o]ne advantage of the Internet auction when compared to conventional sales methods is the cost. The process is automated and, because the auction websites attract significant numbers of visitors, the auction cost does not have to be supplemented by advertising expenses"); Agin, *supra* note 53, at 1 (stating that "[o]nline auctions are also very efficient, because the web sites run software that automates the auction process through online bidding. Thus, the expense per transaction can be relatively low and auctioneers can accept fees based solely on the auction's success"); Korybut, *supra* note 53, at 57-58.

57. For the proposition that online auctions reach a larger market population than conventional market channels because online auctions are not limited by, space, time or geography, see Ravi Bapna et al., *Insights and Analysis of Online Auctions*, 44 COMM. ACM 42 (2001).

Millions of globally dispersed consumers now engage in competitive exchange via bidding and can set prices that reflect real-time supply and demand as efficiently as any trading floor. The physical limitations of traditional auctions such as geography, presence, time, space and a small target population virtually disappear in online settings. The Internet provides a critical mass of consumers located on different continents

Id.

In the case of physical auctions . . . market participants must come together at a specific location, and such restrictions in terms of time and place constitute a major barrier to participation. For online auctions, however, anyone can join by using the Internet at any time and from anywhere, and the more widely known the site becomes, the greater number of people who would participate in the auction.

Kazuhisa Inoue et al., *Pricing Strategies in the E-Business Age*, 23 NRI PAPERS 1, 7 (2001), available at <http://www.nri.co.jp/english/opinion/papers/2001/pdf/np200123.pdf>; see also Dan Ariely & Itamar Simonson, *Buying, Bidding, Playing, or Competing? Value Assessment and Decision Dynamics in Online Auctions*, 13 J. CONSUMER PSYCH. 113, 114 (2003), available at http://erationality.media.mit.edu/materials/Electronic_Commerce/auctionjcp.pdf (identifying as distinguishing characteristics that explain the growing popularity of online auctions, authors state that "online auctions eliminate the geographical limitation of many traditional auctions, enabling people from all over the world to participate in any auction. . . . [I]n terms of duration, Internet auctions can last for several days (usually a week) and allow asynchronous bidding, which gives both sellers and bidders more flexibility"); Pinker et al., *supra* note 47, at 1460 (arguing that online auctions reduce "transaction costs for both buyers and sellers;" allow "[e]asier descriptions of complex products;" provide "[t]he ability to conduct complex auctions;" allow access to more participants, "both bidders and sellers;" facilitate "[e]asier collection of data;" and provide "[t]he possibility for participants to join at any time"). For the proposition that online auctions can target specific populations of buyers for specific types of goods, see Patrick Bajari & Ali Hortacsu, *Economic Insights from Internet Auctions*, 42 J. ECON. LITERATURE 457 (2004), available at <http://www.atyponlink.com/AEAP/doi/abs/10.1257/0022051041409075>.

Online auctions are one of the most successful forms of electronic commerce. . . . The rapid development of these markets is usually attributed to three factors [including]. . . . that online auction sites substitute for more traditional market intermediaries such as specialty dealers in antiques, sports cards, and other collectables. . . . Online auctions have extensive listings and powerful search technologies that create liquid markets for specialized product categories.

Id. at 457-58; see also Korybut, *supra* note 53, at 44-55. For the proposition that online auctions increase the selling price over alternative non-Internet market channels, see Ho Geun Lee, *Do Electronic Marketplaces Lower the Price of Goods*, 41 COMM. ACM 73, 73 (1998), available at <http://portal.acm.org/toc.cfm?id=268092&coll=GUIDE&dl=GUIDE&type=issue&idx=J79&part=periodical&WantType=periodical&title=Communications%20of%20the%20ACM&CFID=2632691&CFTOKEN=21896929> (finding that the "average contract price of secondhand cars sold through AUCNET [a Japanese centralized, online wholesale auction market] is much higher than that of traditional, non-electronic markets").

Second, through online auctions, sellers dispose all manner of distressed assets, including tax-delinquent real property,⁵⁸ bankruptcy estate assets,⁵⁹ seized and forfeited assets, including automobiles,⁶⁰ excess inventory,⁶¹ and

To minimize the potential of quality risks, AUCNET focuses on relatively newer secondhand cars. The difference in average car qualities is quite likely the prime reason why the contract prices of cars in AUCNET are higher than those in traditional and non-electronic auto auctions. However, managers in AUCNET are confident in saying that even cars of similar quality can receive a slightly higher price in AUCNET than in traditional auctions because sellers can preserve their asking prices while being able to expose their products to a wider range of buyers. The higher contract prices have made AUCNET attractive to many sellers and have contributed to increasing the number of cars listed. This in turn has attracted more buyers as AUCNET has offered more purchase choices. Buyers are willing to pay a premium (a slightly higher price) because they not only avoid an immense waste of time spent on attending physical auctions but also easily locate a vehicle that best matches their preferences.

Id. at 80. But see Michael D. Smith et al., *Understanding Digital Markets 3* (MIT Sloan Sch. Mgmt., Working Paper No. 140, 1999), available at <http://ecommerce.mit.edu/papers/ude> (discussing limitations of Lee's article). See generally Cameron Healey, *EBay Motors-Is it Part of Your Internet Strategy*, GIADA NEWS, Aug. 2004, available at <http://giada.cms.dealer.com/sites/g/giada/pdf/080408.pdf> (observing that "[v]ehicles on eBay Motors receive an average of eight bids apiece, which is more than a dealer would normally see on a lot"). See also *infra* note 216 and accompanying text (listing studies that support the theory that online commerce should produce lower prices than conventional markets due to lower transactions costs). For the proposition that online auctions lower transaction costs for sellers, see Ariely & Simonson, *supra*, at 114 (stating that online auction "web sites can run auctions at substantially lower operational costs than traditional auction houses and can thus charge lower commission fees and attract more sellers and buyers"); Bajari & Hortacsu, *supra*, at 457 (arguing that "[o]nline auctions are one of the most successful forms of electronic commerce. . . . The rapid development of these markets is usually attributed to three factors [including]. . . . [T]hat online auctions provide a less-costly way for buyers and sellers on locally thin markets, such as specialized collectibles, to meet").

58. See, e.g., Bid4Assets, *supra* note 43; see also WYLD, *supra* note 46, at 60-64 (discussing examples of sales by governmental agencies of tax-delinquent real property through Bid4Assets and other online markets).

59. See, e.g., Bid4Assets, *supra* note 43.

60. See, e.g., *id.*; see also WYLD, *supra* note 46, at 60 (describing Bid4Assets as having developed a "specialty selling seized and surplus goods for government agencies," including automobiles seized by the U.S. Marshals Service).

61. See WYLD, *supra* note 46, at 36.

surplus goods.⁶² Of eBay, one study said the Web site had been labeled a “liquidation machine.”⁶³ Besides eBay, one can find specialized Web sites like Bid4Assets,⁶⁴ that “has developed into the largest seller of tax-defaulted properties on the Internet”⁶⁵ and “developed a specialty selling seized and surplus goods for government agencies”⁶⁶ Similarly, through eBay and other online actions, BKAssets sells bankruptcy assets, and touts itself as “the only full service internet auctioneer dedicated to the sale of bankruptcy related assets”⁶⁷

C. *Anecdotal Evidence of Article 9 Secured Party Slow and Anemic Use of Online Auctions*

In theory, the benefits of online auctions Professor Wyld and others identify should accrue to Article 9 secured creditors selling collateral. And clearly there are online auctions through which sellers dispose distressed property. Given the commercial reasonableness standard’s incorporation directive, and the adverse consequences of conducting a commercially unreasonable sale, one could reasonably expect that in 2006, over ten years after eBay began operations, and when online auctions have become ubiquitous, Article 9 secured parties would routinely be using them to sell all types of collateral. Yet this does not appear to be the case. The author says this does not *appear* to be the case purposefully. The author has found no reliable empirical study about Article 9 secured party use of online auctions to sell repossessed collateral. But there is

62. See *id.* at 39-42 (discussing eBay’s use by government agencies to sell surplus goods).

63. *Id.* at 36 (internal quotations omitted).

64. Bid4Assets, *supra* note 43.

65. WYLD, *supra* note 46, at 59.

66. *Id.* at 60.

67. BKAssets.com, <http://www.bkassets.com/> (last viewed Mar. 3, 2007). As the Web site states, “[t]he bankruptcy trustee appoints Bkassets.com through the United States Bankruptcy Court, which authorizes the sale of each asset. Past auctions include land, timeshares, real estate, autos, RV’s, jewelry, collectibles, artwork, antiques, judgments, notes and accounts receivable, oil & gas, interests and much more!” *Id.*

anecdotal evidence that while some Article 9 secured parties are using online auctions, they are relatively few in number.

1. *Author's Experience and Qualitative Interviews.* The author has many years of experience with the secured lending community having practiced secured lending law for four years, researched and taught secured transactions for nine years, been a member of commercial law communities such as listservs and other organizations, and spoken to many people about online auction use in the secured lending community. From these experiences, the author has come to the firm belief that relatively few Article 9 secured parties are using online auctions.

In particular, in preparing the Article, the author formally interviewed three lawyers and two online auction representatives about secured creditor use of online auctions.⁶⁸ The pool of interviewees was not randomly selected. Rather, the author used a "snowball" technique⁶⁹ to build an interviewee pool by first asking an attorney he knew representing secured creditors for names of people who might be a good source of information about secured creditor use of online auctions. The author contacted these people and interviewed the willing. From these interviewees, the author repeated the process of asking for names, etc. In this way the author interviewed each of the following people for one to two hours.

Lawyer #1 is based on the West Coast, and as outside counsel has many years of experience representing secured creditors, including with foreclosure sales.⁷⁰ Lawyer #2 is based on the East Coast, and as outside counsel has many

68. Thus, the author conducted a non-random "convenience sampling." As such, the author considers the evidence of slow adoption of online auctions obtained through the Interviews as anecdotal. See ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES* 24 (1994) (discussing convenience sampling).

69. *Id.* at 25 (describing the snowball sampling technique).

70. Telephone interview with Lawyer #1 (May 4, 2006) [hereinafter Lawyer #1 Interview]. Throughout the Article the author declines to indicate the specific location of the interviewees, their names, places of employment, or other specific identifying information in order to preserve anonymity.

years of experience representing and advising clients in bankruptcy, secured transactions, and Internet law.⁷¹ Lawyer #3 is based on the East Coast, and as outside counsel has many years of experience representing secured creditors, including with foreclosure sales.⁷² Online Representative #1 works for an online auction site that sells repossessed automobiles.⁷³ Online Representative #2 works for a company that, for a fee, will sell property for clients through eBay. Online Representative #2's company has sold one repossessed automobile.⁷⁴ The interviewees will periodically be referred to collectively as the Interviewees, and individually as an Interviewee.

The author asked the Interviewees three general questions, each with additional sub-questions.⁷⁵ First, did the Interviewee know what percentage of secured creditors used online auctions to sell repossessed collateral? Second, why would a secured creditor use an online auction? Third, why would a secured creditor not use an online auction?

With respect to the first question, all Interviewees said they knew of no empirical data addressing the question. Thus, to the extent Interviewees answered the question, they qualified it as a "best guess" based on their experience. Here are the results. Lawyer #1 said that only about five to ten percent of his/her clients use online auctions to sell repossessed collateral. Of those clients, they tend to use online auctions the majority of the time.⁷⁶ Lawyer #2 said he/she could not hazard a guess about the percentage.⁷⁷ Lawyer #3 said with respect to used vehicles, including repossessed vehicles that had come "off-lease," he/she

71. Telephone interview with Lawyer #2 (Sept. 4, 2006) [hereinafter Lawyer #2 Interview].

72. Telephone interview with Lawyer #3 (Sept. 4, 2006) [hereinafter Lawyer #3 Interview].

73. Telephone interview with Online Representative #1 (Sept. 7, 2006) [hereinafter Online Representative #1 Interview].

74. Interview with Online Representative #2 (Aug. 31, 2006) [hereinafter Online Representative #2 Interview].

75. A copy of these questions is available from the author upon request.

76. See Lawyer #1 Interview, *supra* note 70.

77. See Lawyer #2 Interview, *supra* note 71.

guessed that fifteen to twenty percent are sold through online auctions. In particular, he/she said that some large (unnamed) automobile finance companies are using online auctions to sell such used vehicles.⁷⁸ Online Representative #1 said that, in the United States, there are about 8,800 of a particular type of financial institution that finances and repossesses cars. Of this number, only about 100 were actively exploring or using the Internet as a means of selling their collateral. Of this sub-set, a number of the institutions used Online Representative #1's online auction to sell repossessed cars. The institutions using Online Representative #1's online auction sold seventy percent of their repossessed cars through the Web site.⁷⁹ Online Representative #2 said he/she could not hazard a guess about the percentage of secured creditor use.⁸⁰

From these interviews, it appears that secured creditors as a whole are using online auctions infrequently. More nuanced, it appears that some segments of the secured lending community may be using online auctions more than others, depending on the collateral type and the nature of the secured party (e.g., large repeat sellers like automobile finance companies). But even the highest use estimate of fifteen to twenty percent by Lawyer #3 with respect to used vehicles still suggests that the vast majority of secured creditors selling this type of collateral do not use online auctions.

What was also apparent from talking to these Interviewees was the dearth of any reliable empirical data about whether or not Article 9 secured creditors are using online auctions. That absence of data is important because, as discussed in Part IV, section G, under the incorporation strategy, empirical uncertainty begets legal and business uncertainty.⁸¹ Finally, the Interviewees' answers to the second and third general questions posed by the author (why or why not secured parties are using online auctions) are discussed periodically in Part IV.

78. See Lawyer #3 Interview, *supra* note 72.

79. See Online Representative #1 Interview, *supra* note 73.

80. See Online Representative #2 Interview, *supra* note 74.

81. See *infra* notes 252-54 and accompanying text.

2. *Author and Research Assistants' Searches.* The author and two research assistants conducting independent searches collectively spent over 300 hours scouring Westlaw or Lexis, the Internet generally, and online auction sites in particular, for data about Article 9 secured party use of online auctions.⁸² We found no reliable empirical data about the extent to which Article 9 secured creditors were or were not using online auctions. We did observe some ostensible Article 9 collateral online sales, but found it difficult to verify many sales as an Article 9 repossession sale. For example, one research assistant on eBayMotors.com searched under the terms "repo" and "repossessions," which produced 85 items for sale listed by 30 different sellers. The research assistant was able to contact 16 of these 30 sellers. The research assistant could verify only that two of the sixteen sellers were in fact secured creditors or working for secured creditors.⁸³

From the author's and his two researchers' efforts, two observations can be made. First, given the thousands of automobiles, trucks, and other vehicles listed on eBayMotors.com and other online auctions, it does not appear that many sellers represent that they are selling Article 9 repossessed property. To be sure, it may be that sellers with repossessed vehicles do not want to advertise that fact, and thus the number of repossessed vehicles may be larger. On the other hand, it appears that some cars listed as repossessed vehicles are actually cars being sold for a second time through the online auction after being purchased at a traditional repossession sale. Not only would the online auction then not be considered an Article 9 sale, but the seller apparently believes that advertising it online as a repossession vehicle is advantageous, or at least not disadvantageous.

Second, we could find no specialized online auction for Article 9 secured creditors to sell their collateral.⁸⁴ In

82. Memorandum from Dani Logan to author (Aug. 8, 2005) (on file with author); Memorandum from Scott Bridge to author (Aug. 1, 2006) (on file with author).

83. Memorandum from Dani Logan to author, *supra* note 82.

84. See *infra* notes 268-69 and accompanying text (describing what a specialized online auction would look like).

contrast, there are online auctions specializing in the sale of non-Article 9 distressed properties, as discussed above in Part II, section B.⁸⁵ Perhaps this absence is evidence of a lack of demand from Article 9 secured creditors for such a specialized site.

D. Explaining Apparent Article 9 Secured Creditor Slow and Anemic Use

In the face of this anecdotal evidence of slow and anemic secured creditor use, the author wanted to know why this was happening notwithstanding the heralded benefits of online auctions. The question can be answered by proposing theoretical explanations or by conducting a robust, random qualitative or quantitative empirical study. The author chose the theoretical approach first, in order to explore possible explanations for this slow and anemic use, and thereby identify the questions empirical researchers would want to ask which are common and salient to all types of secured creditors considering a novel, new market like an online auction. To inform the Article's theoretical exploration, the Interviewees' comments are integrated in the text and footnotes where appropriate. However, the anecdotal evidence discussed above merely suggests, rather than confirms, the veracity of some of the theoretical reasons for anemic and slow secured party use set forth next.

III. UNPACKING THE NON-ADOPTION THEORY

To explain the slow and anemic adoption of online auctions by Article 9 secured parties, one could make a number of arguments. Consider first two arguments the Article will not make until Part VI, and then only briefly. First, from the rational choice theory literature comes the proposition that "actors will attempt to maximize their financial well-being or monetary situation."⁸⁶ The veracity

85. See *supra* notes 58-67 and accompanying text.

86. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1066 (2000).

of this theory is hotly debated in various quarters.⁸⁷ In

87. There are divergent views and competing theories about the nature of rationality and human decision-making. See, e.g., Korobkin & Ulen, *supra* note 86, at 1063 (discussing the debate between rational choice theorists and behavioral economists); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (responding to the criticism of scholars of behavioral choice theory).

[T]hey complain with some justice that economists and economically minded lawyers do not always make clear what they mean by "rationality," let me make clear at the outset what I mean by the word: choosing the best means to the chooser's ends. . . . No doubt my definition lacks precision and rigor. But it is good enough to indicate the difference in approach between rational-choice economics and behavioral economics.

Id.; Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 159 (2000) (discussing various accounts of rationality from the perspective of neo-classic economics, behavioral economics, and Richard Posner ("Posnerian rationality")); Edward L. Rubin, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality, Markets, and Human Beings*, 80 CHI.-KENT L. REV. 1091 (2005) (comparing rational choice theory with rat choice theory); see also *infra* notes 284-300 and accompanying text (discussing behavioral economics scholars' attack on the wealth-maximization principle). Even within a particular account of rationality, such as rational choice theory, depending on the scholar or commentator, seemingly different articulations are given. As Korobkin and Ulen note,

[t]here is considerable debate within both the economics and law-and-economics communities about precisely what rational choice theory is and is not. As it is applied implicitly or explicitly in the law-and-economics literature, however, it is understood alternatively as a relatively weak, or "thin," presumption that individuals act to maximize their expected utility, however they define this, or as a relatively strong, or "thick," presumption that individuals act to maximize their self-interest.

Korobkin & Ulen, *supra* note 86, at 1055.

Rational choice theory is the heart of modern microeconomic theory. . . . Unfortunately for the purposes of precise analysis, there is no single, widely accepted definition of rational choice theory. Although the use of the assumption that actors behave rationally is pervasive among law-and-economics scholars, the assumption is most often implicit. As a result, there is rarely a discussion in the legal literature about what, exactly, constitutes rational behavior. In actuality, there are probably nearly as many different conceptions of rational choice theory as there are scholars who implicitly employ it in their work.

Id. at 1060. For some examples, consider the following:

Rational choice theory is defined as a theory of instrumental rationality; that is, the actor has a set of pre-established ends and then decides how these ends are to be achieved. If the actor chooses the optimal means to achieve her pre-established ends, she is rational; if she chooses suboptimal means, she is irrational. The particular claim of rational choice theory is that people are rational in this sense; that is, they choose the optimal means to achieve their ends.

Rubin, *supra*, at 1092.

The rational choice model of human behavior postulates that individuals "can perfectly process available information about alternative courses of action, . . . can rank possible outcomes in order of expected utility . . . [and can] choose the course of action that will maximize [their] personal expected utility" In other words, people should be viewed as rational actors who will seek out information regarding alternatives, skillfully calculate utilities for each option, and select the course of action that will maximize their wealth and preferences.

Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 156-57 (2006) (alterations in original); Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421, 508-09 (2005) (stating that "[e]conomic analysis in general has been dominated by rational choice theory, the view that human beings are logical maximizers of self-interest. Rational choice theory describes 'how people would behave if they followed the dictates of a series of logical axioms, [and] posits that people make outcome-maximizing decisions'").

Rational choice theory presumes that individuals always try to maximize their expected utility, primarily through acting rationally when making decisions involving risks and benefits. Rational-choice theory assumes that "objective criteria exist . . . to differentiate rational from irrational" behavior, that individual behavior is based on rational considerations, and that individuals acting on optimal information can and do rationally assess the risks involved in their choices and seek to maximize utility by choosing from stable preferences.

John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing The World*, 85 NEB. L. REV. 15, 20 (2006). The Article does not seek to resolve the debate over the meaning of rationality set forth in this vast body of literature. In this sense the Article has a modest (and manageable) goal: to provide theoretical reasons why a

particular, the wealth-maximizing proposition has been applied to Article 9's commercial reasonableness standard and the question of whether secured parties have the incentive to maximize the collateral's price at a foreclosure sale. On the one hand, some scholars and commentators argue that secured parties systematically lack the incentive to maximize the collateral's price.⁸⁸ In particular, it is said that secured parties lack the incentive to select the market practices that will maximize the sale price.⁸⁹ On the other

secured party who wants to maximize the value of collateral may not choose a new market due to legal, business, or empirical uncertainty, and that this non-adoption behavior may occur even where the new market is relatively more efficient than the conventional, traditional market.

88. Heiser & Flemma, *supra* note 15, at 495 (noting that "[t]he Consumer Debtor Advocates argue that Article 9 does not currently provide the secured creditor with an incentive to maximize the proceeds from sale of the collateral. . . . Some Consumer Debtor Advocates go so far as to claim that creditors want to increase the size of deficiencies").

Proponents of the Article 9 sale procedure argue that the requirement of a "commercially reasonable sale," backed by the threat to deny some portion of the deficiency, gives incentives to repossessing secured creditors to encourage bidding and seek a market price for the goods. We doubt it In fact, revised Article 9 seems to give secured creditors the incentive to shoot for a double recovery by purchasing the collateral at sale for less than its value, collecting the deficiency from the debtor or guarantor, and then reselling the collateral in a commercially reasonable sale for its own account.

LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 86 (5th ed. 2006); see also Korybut, *supra* note 5, at 1424-31.

89. For example, with respect to his empirical study of a variety of methods of automobile repossession sales and prices received therefrom, Professor Shuchman stated:

Were the automobile repossessioners to use the efficient business practices in resale that they do in dealings with one another, there would be no need for anything except the security of the automobile itself. Were they to resell the repossessed car for deficiency judgment purposes with anything like the zeal with which they originally sold the car, they would have virtually all the profit for which they contracted in most cases.

Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 54 (1969). In particular, at wholesale dealer-only auctions of ninety-two cars, Professor Shuchman found the average sale price to be ninety-three percent of the cars' wholesale price. *Id.* at 45. This finding supported his argument that when they choose so, "the [automobile] dealers can organize their affairs in a manner conducive to maximum post-repossession sale prices." *Id.* at 54; see also Korybut, *supra* note 5, at 1424-31.

hand, some scholars, commentators, and courts argue that secured parties do have the incentive to maximize the collateral's net proceeds, at least up to the amount of the outstanding debt owed by the debtor. They reason that a secured party would rather have the certainty of the maximum amount of resale dollars today than spend time and money litigating a deficiency judgment that she may not collect in full (or not at all in an absolute bar jurisdiction) if the sale is found commercially unreasonable, if the debtor is judgment proof, or if the debtor declares bankruptcy.⁹⁰ While acknowledging this debate in the

90. For scholars and commentators, see Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & ECON. 117 (1983).

Every dollar the creditor nets by resale reduces the outstanding debt by a dollar; every dollar the creditor defers to the deficiency action to collect will reduce the outstanding debt by less than a dollar because the expected value of a litigation dollar is less than one, these dollars being subject to risk and delay. Thus the creditor's incentive to maximize the net gain from resale.

Id. at 127; see also William C. Whitford, *The Appropriate Role of Security Interests in Consumer Transactions*, 7 CARDOZO L. REV. 959, 965-66 (1986) (noting that "Schwartz goes to some lengths to maintain that creditors who repossess will maximize their proceeds on resale, a point with which I generally agree. . . . The new owner has paid something approximating the goods' market price").

In a world where the recovery of deficiency judgments is far from certain . . . why would the creditor not conduct a sale in a way that is likely to bring the best net price? If the probability of a deficiency is low, the creditor's failure to conduct a proper sale falls on the creditor, not on the debtor. Unless we are to say that creditors are stupid (when the debtor cannot pay the deficiency), or vindictive and mean spirited (when the debtor can pay), we fail to understand the incentives for taking a low price. We see strong incentives for getting a high price.

4 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 454 (4th ed. 1995).

Why would creditors routinely engage in a process that does not produce the greatest net recovery (sale price minus expenses, including lost profit) upon foreclosure? Surely creditors desire to maximize the value received from collateral, particularly given the expenses associated with collection of deficiencies and the likelihood that many debtors will be judgment proof.

literatures, for purposes of Parts III, IV, and V, the Article assumes that the secured party is a wealth-maximizer in the sense that, in keeping with Article 9's General Directive, she, in good faith and with due diligence, seeks to identify, assess, and use the reasonably available market best calculated to maximize the collateral's net proceeds, at least up to the amount of the outstanding loan. The Article calls this the First Basic Assumption. In Part VI, this assumption is relaxed.⁹¹

Second, one might argue that the slow and anemic adoption of online auctions is due to the secured party's

James C. Marshall, *Commercial Law*, 44 MERCER L. REV. 99, 114 (1992); see also Heiser & Flemma, *supra* note 15, at 495 (arguing that a secured party has incentive to maximize proceeds to avoid costly deficiency actions); ZINNECKER, *supra* note 30, at 93 (observing that "normally a foreclosing creditor has every incentive to maximize disposition proceeds"). For cases, see *In re Excelllo Press, Inc.*, 890 F.2d 896 (7th Cir. 1989).

[W]hy shouldn't they [secured parties] maximize? Even if the secured party could be assured of a judgment for the full deficiency, why would it forgo a dollar today for the chance to enforce a deficiency judgment tomorrow? The UCC provides that the proceeds from the sale of the collateral are applied first to the expenses incurred in its disposition; the remainder goes to satisfy the debt. . . . So even if the return after expenses is small, the secured party will expend every cost-justified effort because it prefers money now to judgment later. . . . Add the uncertainty of recovery in litigation and this preference for cash grows stronger.

In re Excelllo Press, Inc. 890 F.2d at 901 (citations omitted).

The secured party is required to utilize his best efforts to sell the collateral for the best price and to have a reasonable regard for the debtor's interest. The commercial realities are that the secured party will generally try to obtain the highest possible price for collateral since recovery of any deficiency is usually dubious.

Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 570 P.2d 702, 712 (Wash. Ct. App. 1977) (citing *First Nat'l Bank & Trust Co. v. Holston*, 559 P.2d 440, 444 (Okla. 1976)); see also *Huntington Nat'l Bank v. Elkins*, 559 N.E.2d 456, 459 (Ohio 1990) (arguing that "[g]iven the economic realities of the lending industry, a secured creditor will generally attempt to obtain the highest possible price for the collateral since the recovery of a deficiency judgment against a defaulted debtor is usually dubious").

91. See *infra* note 282 and accompanying text.

lack of perfect legal, business, or empirical information about continuing to use the conventional, traditional market. There is a large, diverse body of literature arguing that decision-makers do not have perfect information⁹² and that imperfect information can adversely affect a person's ability to make efficient choices.⁹³ While acknowledging the varying arguments in the literature, for purposes of Parts III, IV, and V, the Article assumes that the secured party does have perfect legal, business, and empirical information about continuing to use the conventional, traditional market. The Article calls this the Second Basic Assumption. Further, for purposes of the Article's forthcoming analysis, it is worth here noting two sub-assumptions. First, that for the secured party's collateral, there is a conventional, traditional market, and second that the secured party has used this market at least once to sell her collateral. A conventional, traditional market is defined for purposes of the Article as a market that (1) regularly hosts sales of the particular type of property the secured party is selling; (2) has either been blessed by Article 9 precedent or is constructed in a fashion that maximizes the possibility that a court will find its use commercially reasonable; (3) is considered prevailing, commonly accepted, or well-recognized in the relevant commercial community for the collateral type, or has a current critical mass of interested potential bidders who will compete for such collateral; and (4) on-average-over-time realizes reasonable net sale proceeds (price less expenses). In Part VI, the Second Basic Assumption and its two sub-assumptions are relaxed.

A. The Non-Adoption Theory For Novel, New Markets

The Article now proposes its non-adoption theory for novel, new markets to explain the apparent failure of the commercial reasonableness standard's incorporation strategy. The non-adoption theory holds that for any given new market a secured party will have imperfect information due to legal, business, or empirical data uncertainties with respect to identifying, assessing, and

92. See *infra* note 94 and accompanying text.

93. See *infra* note 95 and accompanying text.

using that new market. A secured party may fail to adopt a relatively more efficient new market and continue instead to use the conventional, traditional market due to the aggregate amount of this legal, business, and empirical data uncertainty. For the “riskiest” of new markets, those with the highest aggregate degree of such uncertainty, theoretically it is possible that no or very few secured parties would ever adopt it. For a less risky market, one with a wider range of perceived riskiness among secured creditors, it is theoretically possible that some Article 9 secured creditors would adopt it and others would not.

The non-adoption theory obtains general support from various quarters. First, there are myriad bodies of substantive literature arguing that decision-makers do not have perfect information,⁹⁴ and that imperfect information can adversely affect a person’s ability to make efficient

94. See, e.g., Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 445 (2005) (stating that “economists and scholars of ‘behavioral law and economics’ (BLE) have come to attribute many such [decision-making] irrationalities to a combination of ‘bounded rationality’ and cognitive fallibilities. Bounded rationality postulates that deviations from rational choice are the result of (a) constraints on time and energy for gathering perfect information and (b) constraints on the brain’s information capacities, wiring, and computing speed” (footnotes omitted)); Rubin, *supra* note 87, at 1094 (stating that “[r]ational choice theory . . . asserts that the buyer is rational if his choice is subjectively optimal, namely, as good as it can be given the resources that are available to him The most serious resource constraint is clearly a lack of information, either because no one has the information or because the information is not available to the decision maker. No one knows whether there will be an economic downturn later in the year; each corporation knows its internal plans, but there is no way for the buyer to discover them. Thus, evaluation of alternatives must frequently rely on assigning uncertain probabilities to different outcomes” (footnotes omitted)); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 187 (2004) (stating that “[h]ow does the actual world differ from the idealized world of perfect information, fully specified laws, and impartiality? First, the actual world is characterized by the problem of imperfect knowledge of law and fact. No one citizen has perfect information about the content of the law or the state of the world. Indeed, each of us knows only a small fraction of the information that would be required for perfect compliance with our legal obligations”); Charles J. Tabb, *Of Contractarians and Bankruptcy Reform: A Skeptical View*, 12 AM. BANKR. INST. L. REV. 259, 265 (2004) (stating that the “world of perfect information, no transaction costs, and totally rational human beings [does not hold] in the real world”).

choices.⁹⁵ Second, as a general matter, much and varied literature argues that legal and business uncertainty and lack of predictability may stifle beneficial commercial activity because it reduces commercial actors' ability to assess legal risk and economic risk,⁹⁶ adjust commercial

95. See, e.g., Susan W. Brenner & Leo L. Clarke, *Distributed Security: Preventing Cybercrime*, 23 J. MARSHALL J. COMPUTER & INFO. L. 659, 698 (2005) (discussing economic theory in the context of deterring cybercrime, and stating that "the theory itself depends on assumptions that are not satisfied in the real world. For example, the theory assumes that all market participants have access to perfect information at no cost. The notorious insufficiency of accurate information about the frequency, nature and cost of cybercrime, therefore, indicates that neither government, nor market participants, would have the information necessary to make the precise adjustments required to eliminate externalities without the risk of over-reaction and resulting under-use of cyberspace and information technology"); David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 87 (2005) (stating that "[e]conomists only assume that transactions are efficient under conditions of perfect information, a condition that real markets rarely meet. Transactions based on very good information are likely to be efficient, but transactions based on very poor information are much less likely to be efficient. This would seem intuitively obvious" (footnote omitted)); Russell Korobkin, *A Multi-Disciplinary Approach to Legal Scholarship: Economics, Behavioral Economics, and Evolutionary Psychology*, 41 JURIMETRICS J. 319, 321 (2001) (stating that "[s]ome economists concede that individuals may fail to act in a way that maximizes expected utility because they lack complete information" (footnote omitted)); Schroeder, *supra* note 87, at 170 (stating that "Posner must obviously reject the suggestion that any empirical human being has the type of knowledge posited by the traditional ordered preference hypothesis—such knowledge would only exist in some form of 'perfect market.' Actual markets are characterized not by perfection but by scarcity. Information is often, or usually, not readily, instantaneously and costlessly available. This implies that economic actors are forced to act with imperfect information; thus, they may fail to take and act upon that which is in their best interest because of ignorance (or a misunderstanding) with respect to the consequences of their action").

96. See, e.g., Andrea Coles-Bjerre, *Trusting the Process and Mistrusting the Results: A Structural Perspective on Article 9's Low-Price Foreclosure Rule*, 9 AM. BANKR. INST. L. REV. 351, 377 (2001) (stating that "[t]he unpredictability of standards causes them to deter not only undesirable conduct (such as, in this case, inequitably low bids) but also desirable conduct (such as, in this case, participation in auctions by suspect parties with any bid at all and, ex ante, decisions to lend in the first place)" (footnote omitted)); Raymond T. Nimmer & Patricia A. Krauthaus, *Secured Financing and Information Property Rights*, 2 HIGH TECH. L.J. 195, 199-200 (1987) (stating that when a creditor is deciding whether to make a loan, "[c]larity of law enhances the creditor's ability to assess risks by delineating and converting the legal risks into clear statements of relative position. Conversely, uncertainty regarding the effect of a transaction reduces a lender's willingness to make a loan"); R. J. Robertson, Jr., *The Illinois*

behavior,⁹⁷ and lower transaction costs.⁹⁸ In particular, this non-adoptive behavior can occur in the face of uncertainty

Electronic Commerce Security Act: A Response to Martin Behn, 24 S. ILL. U. L.J. 473, 478 (2000) (stating that "contradictory judicial decisions caused considerable uncertainty about the status of electronic records and signatures. Business persons frequently cited this uncertainty as the basis for their unwillingness to engage in more extensive electronic commerce activities. Accordingly, most commentators concluded that some legislation was necessary to remove this uncertainty by equating electronic records and signatures with 'signed writings'"); *id.* at 489 (arguing that although "many advantages of doing business electronically would probably lead many businesses to engage in electronic commerce even if there were some uncertainty about the legal legitimacy of electronic records and electronic signatures," this uncertainty may not have been easily overcome without legislation—the Illinois Electronic Security Act—that "removes any doubts about the legal legitimacy of electronic records and electronic signatures. This should provide a stimulus to those risk-averse individuals who would otherwise forgo or minimize their involvement in electronic commerce transactions" (footnote omitted)); Task Force on Stored-Value Cards, *A Commercial Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money*, 52 BUS. LAW. 653, 655 (1997) (discussing how existing commercial law may apply to "new electronic retail payments media," and that existing law "should not stifle development of more economically efficient retail-payment systems. The Task Force observes, however, that legal uncertainty may be just as stifling to development of these products because such uncertainty makes it difficult for developers and users to ascertain, control, and appropriately limit risk. What is needed, in the Task Force's view, is a careful balance; there must be sufficiently clear legal rules to assess liability and risk but the rules should not be so constraining and costly that they amount to an iron cage"); Ginger Jin & Andrew Kato, *Blind Trust Online: Experimental Evidence from Baseball Cards* 1, 33-34 (2002), <http://www.vanderbilt.edu/Econ/sempapers/Jin.pdf> (recommending that to address buyer misconception of risks of trading online, "a complete set of property rights must be clearly defined so all parties involved in online auctions—buyers, sellers, auction sites, and credit card companies—have well specified responsibilities Buyers who do not understand their legal rights cannot be expected to take full account of the risks involved" (footnote omitted)). See generally Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89, 108 (1999) (stating that "[i]n addition to considerations of efficiency and fairness, the doctrine of *stare decisis* has also been justified on the basis of a need for certainty in the law. Under this theory, individuals should be able to predict the legal consequences of their behavior and that ability would be seriously eroded if courts were free to disregard precedent" (footnotes omitted)); Wiseman, *supra* note 1, at 513-15 (reporting that Llewellyn's merchant tribunal's "decisions would have 'no precedent building character,'" and that "depriving the panel's decisions of precedential value . . . [came at the] cost of diminishing the positive use of merchant tribunal decisions as a basis for planning, for certainty, and for friendly law").

97. See, e.g., John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 350 (2000) (stating that "[t]he ability to

introduced by electronic commerce and new business practices.⁹⁹ Finally, every Interviewee identified some type of legal or business uncertainty that could adversely affect a secured party's decision to use an online auction.¹⁰⁰

predict the legal consequences of one's actions is of course a primary benefit of the rule of law. Without the greater freedom that predictability brings, citizens cannot plan with confidence for the future. They 'may simply be unable to carry out complex social arrangements that are dependent on legal sanctions being predictable in their application.' As Llewellyn succinctly stated, 'inadequate legal theory makes for *uncertainty* in the results of legal cases. In transaction-law at least, this is a heavy debit item' (footnotes omitted); Hillinger, *supra* note 3, at 1165 (stating that "[i]f you could not predict a court's behavior, you could not adjust your own").

98. See, e.g., Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 393 (2006) (stating that "[t]he transaction costs resulting from these uncertainties affect the open source software community and are potentially substantial obstacles to broader and more rapid adoption of CC licenses" (footnotes omitted)); Thomas R. McLean, *The Future of Telemedicine & Its Faustian Reliance on Regulatory Trade Barriers for Protection*, 16 HEALTH MATRIX 443, 461 (2006) (stating that "unified regulatory schemes have the potential to reduce transaction costs by the elimination of regulation uncertainty" (footnote omitted)); Kurt A. Strasser, *Piercing The Veil In Corporate Groups*, 37 CONN. L. REV. 637, 642 (2005) (stating that "[t]he standards by which veil piercing is effected are vague, leaving judges great discretion. The result has been uncertainty and lack of predictability, increasing transaction costs for small businesses" (quoting Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 481 (2001))). See generally Thomas F. Cotter, *Some Observations on the Law and Economics of Intermediaries*, 2006 MICH. ST. L. REV. 67, 72 (stating that "technology can increase uncertainties and transaction costs under certain conditions" (footnote omitted)).

99. See Nimmer & Krauthaus, *supra* note 96, at 199-200; Robertson, *supra* note 96, at 478; Task Force on Stored-Value Cards, *supra* note 96, at 655.

100. With respect to legal and business uncertainty, Lawyer #1 identified the open question of whether online auctions are commercially reasonable—in particular the issue of how to inspect collateral in cyberspace—and the lack of familiarity with online auctions. Lawyer #1 Interview, *supra* note 70. Lawyer #2 identified the commercial reasonableness question and the concern that if a repossession sale resulted in a low price, the debtor would be more likely to challenge the sale if it was through an online auction rather than a conventional method. He/she also cited the uncertainty of what legal liability a secured creditor would have if it listed collateral on an online auction, bidders have registered their bids, and while the auction was still ongoing the debtor filed for bankruptcy triggering the automatic stay. Could the secured creditor legally and functionally stop the ongoing online auction with current bids outstanding? Lawyer #2 Interview, *supra* note 71. Lawyer #3 indicated that the commercial reasonableness question was an issue. Supplemental Telephone interview with Lawyer #3 (Sept. 7, 2006) [hereinafter Lawyer #3 Supplemental Interview]. However, Lawyer #3 did allow that, with the right facts, he/she

B. *Applying the Non-Adoption Theory*

Because secured parties come in varying levels of sophistication and size,¹⁰¹ and collateral types vary from the common and inexpensive to the unique and expensive,¹⁰² the degree of legal, empirical data, or business

thought the secured party could win a lawsuit challenging the sale. Lawyer #3 Interview, *supra* note 72. Online Representative #1 identified the commercial reasonableness question, in particular stating that in one large state a spokesperson for an association of secured creditor financial institutions had said that he/she thought that under that state's laws, including Article 9, use of an online auction would not be commercially reasonable, while in another large state the lawyer from a similar association of secured creditor financial institutions thought such use would be commercially reasonable. Online Representative #1 Interview, *supra* note 73. Online Representative #2 indicated that potential sellers were unfamiliar with online auctions and were concerned about fraudulent bidding schemes. Online Representative #2 Interview, *supra* note 74.

101. Consider two extremes of secured parties: those that normally engage in the business of selling the collateral type (a merchant secured party) and those that do not (a nonmerchant secured party). A car dealer, for example, repossessing a car and selling it under Article 9 is a merchant secured party since he normally sells cars, even repossessed ones. Professor Gilmore, in the context of an Article 2-314 warranty of merchantability, stated that a financier would not be a merchant while a car dealer would be a merchant. 2 GILMORE, *supra* note 6, at 1239. In contrast, a credit union repossessing and selling a consumer's car may be a nonmerchant secured party where it normally does not sell such collateral type. Between these two extremes lie a rich mix of secured parties with differing levels of experience, capabilities, and resources in selling the collateral type. Where a secured party is not a merchant of the collateral and is not otherwise familiar with or in possession of the market sale channels for that collateral, she may lack the sophistication and resources to identify and implement the proper market or sale procedures for the collateral. *See also* Poscover, *supra* note 15, at 247 (stating that "[i]f the secured lender is inexperienced or the collateral is unusual, the secured lender may not be aware of the best way to dispose of the collateral for the optimum price"). Indeed, some commentators and courts acknowledge this handicap by allowing the nonmerchant secured party more leeway in selecting proper sale procedures. *See* 2 GILMORE, *supra* note 6, at 1183-84 (stating that "[w]hat is 'commercially reasonable' vis-à-vis a businessman who knows the facts of life is not necessarily 'commercially reasonable' vis-à-vis a consumer or small businessman"); *Connex Press, Inc. v. Int'l Airmotive, Inc.*, 436 F. Supp. 51, (1977) (secured party with expertise in selling collateral type held to higher standard); Korybut, *supra* note 5, at 1457.

102. *See* Korybut, *supra* note 53, at 76-79 (defining a range of collateral from "general collateral"—common, widely used, or relatively inexpensive goods—to "specific collateral"—large, expensive, or unique goods.). *See generally* Zubrow, *supra* note 15, at 471 (discussing the uncertainty of resale given that different property requires different marketing approaches).

uncertainty that any given secured party will experience with respect to a novel, new market will differ. Some secured creditors will see the new market as raising a high degree of legal, empirical data, and/or business uncertainty and thus consider it a very "risky" market. Others will see the same market as less risky. Further, given the range of secured parties and collateral types, there surely are many idiosyncratic reasons why a secured creditor would suffer legal, empirical data, and/or business uncertainty with respect to a novel, new market.

The Article seeks to apply the non-adoption theory broadly across the Article 9 secured lending community rather than narrowly to a particular type of secured creditor selling a particular type of collateral. Thus, the Article frames the non-adoption theory as three hypotheses that can be applied to any secured party selling any type of collateral in any new market. First, the more legally and commercially *novel* a new market is when compared to the conventional, traditional market(s) the secured party normally uses, the more legal, empirical data, and/or business uncertainty that the secured party likely will experience with respect to using the new market to sell repossessed collateral. Part IV sets forth seven interrelated progenitors of such legal, empirical data, or business uncertainty that should be salient and common in varying degrees to most, if not all, types of secured creditors selling any type of collateral in any new market. Accordingly, the Article does not attempt to identify and discuss idiosyncratic reasons for legal, empirical data, or business uncertainty. Second, for any secured party, as more of these progenitors in number and degree pertain to a new market, the more the secured party will experience uncertainty about using the new market for the first time. In other words, as more progenitors of uncertainty in number and degree obtain to any given secured party, the more she will perceive the new market as "risky." Third, that for any given secured party, at some point the legal, empirical data, and/or business uncertainty may become too great, and she will forgo the too risky new market and cling instead to the "safer" conventional, traditional market.

The three theoretical hypotheses attempt to explain secured party behavior, a task fraught with difficulty and

limitations.¹⁰³ As indicated in Part II, section D the Article aims to explore possible theoretical explanations for slow and anemic use of online auctions, and thereby identify the questions empirical researchers would want to ask which are common and salient to all types of secured creditors considering a novel, new market like an online auction. Thus, in Part IV each of the seven progenitors is posed as a question a secured party might have with respect to a new market. For each question, the Article explores the legal, business, and empirical data problems that could make its answer uncertain, and thus theoretically cause the secured party not to adopt a relatively more efficient new market and continue instead to use the conventional, traditional market. Necessarily, a robust empirical study using these questions and others raised by the Article must be conducted to test the veracity of the theoretical hypotheses and the seven progenitors of uncertainty.

IV. PROGENITORS OF LEGAL, EMPIRICAL, AND BUSINESS UNCERTAINTY AND THEIR CORRECTIVE MEASURES

In seven sections, Part IV analyzes the non-adoptive effect(s) of seven salient and common progenitors of legal, empirical, and/or business uncertainty. In each section, the Article first describes the progenitor and then applies it through the first and third hypothesis to explore the progenitor's theoretical, non-adoptive effect. In Part V the Article will apply the second hypothesis. As a developmental vehicle, Part IV largely uses the online auction market channel as an example of a novel, new market. Finally, in each section, the Article then discusses legal, empirical, and/or business corrective measures to mitigate each progenitor's uncertainty and its theoretical non-adoptive effect with respect to the novel, new market.

Three preliminary points are necessary. First, as stated in the Article's introduction, the online market channel is "new" in the sense that it is the latest significant market channel to develop as an alternative to conventional, traditional markets for collateral. Second, online auctions

103. See Korobkin & Ulen, *supra* note 86, at 1063.

are "novel" in significant legal and commercial ways from traditional methods of selling goods like conventional public auctions.¹⁰⁴ For purposes of Part IV, consider in particular that conventional repossession sales take place in the real world bounded by time and space. In contrast, online auctions take place in an abstract, boundless "cyberspace."¹⁰⁵ Further, interaction between the seller and potential bidders is done through an Internet Web site using computers rather than face-to-face (or phone-to-phone) contact. While there are many other differences, these are illustrative and they acutely affect the seven progenitors of legal and/or business uncertainty to varying degrees. Third, one might argue that the online auction channel is only one form of new market, and a particularly novel one at that. Thus using it as the Article's illustrative new market proves too little and too much. The criticism misses the point that the non-adoption theory and its three hypotheses are secured party, collateral type, and new market neutral. To be sure, as discussed in Part IV, the online auction channel creates pronounced legal, business, and empirical uncertainties, but it is precisely for this reason that it is useful to explicate as fully as possible the non-adoption theory, its three hypotheses, and the seven uncertainty progenitors. To use a new market that does not evoke such uncertainty hardly seems worth the academic effort. Further, many of the corrective measures discussed in Part IV transcend the market type. Finally, using online auctions allows the Article to address the current non-adoption puzzler.

A. *Will a Sale Through the New Market Be Commercially Reasonable?*

The most important legal question the secured party will ask is whether using the new market is commercially reasonable. For new markets, to varying degrees the answer to that question will be uncertain for doctrinal and

104. See Korybut, *supra* note 53, at 61-63.

105. See *id.* at 106-07.

empirical reasons.¹⁰⁶ Without this legal certainty and empirical certainty, the secured party will not know whether the sale likely will be challenged by a debtor in court, found commercially unreasonable by a reviewing court, or result in the secured party's inability to collect a deficiency and the imposition of possible additional penalties. Concomitantly, the secured party will be uncertain about whether, and the extent to which, he would need to incur litigation costs like attorneys fees, which under certain circumstances the secured party might not recover from the debtor.¹⁰⁷ These uncertainties may lead to non-adoption.

1. *Tension With Article 9 Jurisprudence.* The non-adoption theory's first hypothesis is that the more legally, empirically, and/or commercially novel a new market is when compared to the conventional, traditional market, the more uncertainty a secured party will feel about using the new market to sell repossessed collateral. To refine the point, the more a new market in form and function differs from the markets and their attendant sale practices which have been blessed under Article 9's robust body of commercial reasonableness jurisprudence, the greater the secured party's ex ante legal uncertainty will be about whether the new market ex post will be found commercially reasonable.¹⁰⁸ That is so for two preliminary reasons.

106. The Article considers only Article 9, although other laws may give rise to legal uncertainty about using a new market. For example, in California, the secured party must comply with both the Rees-Levering Motor Vehicle Sales & Finance Act and the California's Uniform Commercial Code to obtain a deficiency judgment after the sale of a repossessed vehicle. *Bank of Am. v. Lallana*, 960 P.2d 1133 (Cal. 1998).

107. Reimbursement for litigation costs may not occur where (1) under the security agreement the secured party is not entitled to such reimbursement, or (2) the secured party is entitled to such reimbursement, but the debtor is not locatable, is judgment proof, or is in bankruptcy. See *supra* note 90 and accompanying text.

108. The debate about whether a commercial reasonableness standard can accommodate new electronic commercial technology and concomitant legal issues is not isolated to Article 9 and online auctions. See Robertson, *supra* note 96, at 495-96 (criticizing one commentator's assertion that with respect to evaluating electronic commercial security procedures "the standard of 'commercial reasonableness' provides insufficient predictability 'because the marketplace has not yet established sufficient customs and practices necessary

First, within the Article 9 literature there still is debate about how easy it is to plan any Article 9 sale, let alone one using a new market. When adopted by the states over forty-five years ago, Article 9's commercial reasonableness standard was criticized as providing the secured party with too little guidance as to how to conduct a commercially reasonable sale.¹⁰⁹ But as discussed in Part I, section B, over the years a robust body of published judicial opinions on what constitutes a commercially reasonable sale has developed. From this Article 9 jurisprudence, doctrinal factors of commercial reasonableness have been established, including publicity (advertising) of the sale; the place of sale; solicitation and receipt of bids; the secured party's familiarity with type of property; the price realized for the collateral; and whether the sale was in accordance with reasonable commercial practices.¹¹⁰ Secured parties (or their advisers) planning sales and courts reviewing them consult these doctrinal factors.¹¹¹ Some commentators maintain that this robust body of Article 9 repossession sale jurisprudence provides secured parties sufficient guidance.¹¹² Yet other commentators disagree.¹¹³ This

to provide substance to [the] factors [used to determine commercial reasonableness], nor have the courts had an adequate opportunity to properly evaluate the marketplace" (alteration in original) (footnote omitted)).

109. See, e.g., WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 335-36 (1973); Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 442 (1997) (stating that "[t]he main criticism of using deliberately vague standards in the Code was the belief that doing so would inevitably lead to uncertainty and lack of uniformity" (footnote omitted)); Poscover, *supra* note 15, at 246 (stating that "Article 9 sales are not without their disadvantages. The secured lender lacks the absolute certainty and security of following precise guidelines as set forth in real estate foreclosure statutes").

110. See *supra* note 35 and accompanying text.

111. See *supra* note 35 and accompanying text; Paul H. Shur, *New Article 9—A Commercial Lawyer's Synopsis*, 116 BANKING L.J. 843, 927-28 (1999) (discussing the factors of commercial reasonableness from the perspective a commercial lawyer). See generally FERRIS & GOLDSTEIN, *supra* note 41, at v (stating that their book is "useful to lawyers who represent creditors and debtors, including counsel at banks and other financial institutions, and to loan officers and other nonlawyers responsible for planning and implementing the disposition itself").

112. See Heiser & Flemma, *supra* note 15, at 495 (stating that "through years of judicial interpretation, the courts have fleshed out Article 9's

disagreement itself suggests that planning a commercially

framework for disposing of collateral in a way that is workable for sales of many types of collateral in many different markets"); Poscover, *supra* note 15, at 246-47; see also Howard Ruda, *Article 9 Works—How Come?*, 28 LOY. L.A. L. REV. 309, 319 (1995) (stating that "[Article 9] neither defines 'commercially reasonable' nor does it spell out the criteria of reasonableness. However, the uncertainty that this would seem to engender does not exist in practice. A secured party can avoid attack by behaving in a way that is unarguably reasonable. In a given fact situation, the proper course of action is not hard to identify."). Ruda also argues that sale costs are limited because the creditor has the incentive to maximize recovery and because "the creditor's conduct is tested by the objective facts of its procedural compliance, and the creditor can make a record of its conduct, avoidance of litigation, much less loss, is almost always achievable" *Id.* (footnote omitted).

113. See, e.g., Ralph C. Clontz, *Guide to a Secured Creditor's Remedies on Debtors' Default*, 7 UCC L.J. 348, 371 (1972) (stating "[t]he drafters of Article 9 and particularly section 9-504 have left the foreclosure path completely uncharted. There is no guidance to the attorney representing either a secured party or debtor who must advise his client as to the elements required for a disposition to be 'commercially reasonable'"); Bennett H. Goldstein, *Sale of Repossessed Collateral Under the Uniform Commercial Code: Building a Record for Trial*, 89 COM. L.J. 180, 186 (1984) (discussing uncertainty of planning a foreclosure sale that case law may exacerbate rather than alleviate); Alvin C. Harrell, *UCC Article 9 Revisions Confront Issues Affecting Consumer Collateral*, 49 CONSUMER FIN. L.Q. REP. 256, 260 (1995) (discussing the request of consumer representatives during the Article 9 drafting process that the commercial reasonableness standard provide a "laundry list" of factors to provide more guidance); John I. Karesh, *Repossession of Collateral and Foreclosure of Security Interests in Leveraged Lease Aircraft Finance Transactions*, AIR & SPACE LAW, Fall 1995, at 9, 13 (stating that "[b]ecause the standards for determining whether a particular disposition of collateral is commercially reasonable are fluid and fact specific, predicting the outcome of a challenge to the commercial reasonableness of any particular disposition is difficult, and the resulting litigation is burdensome, even if successful" (footnote omitted)); Donald J. Rapson, *Who Is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 258-59 (1995) (arguing that the undefined commercial reasonableness standard breeds uncertainty, and "has invited too much litigation and fails entirely to . . . provid[e] a guideline for the conduct of behavior. Consequently . . . without a guideline as to what that behavior should be, there can be no meaningful criteria for determining the propriety of that behavior." (footnote omitted)); Zubrow, *supra* note 15, at 471 (discussing the uncertainty of resale given that different property requires different marketing approaches); Raymond E. Dunn, Jr., Comment, *The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina*, 15 WAKE FOREST L. REV. 71, 73-80 (1979); see also N.C. Nat'l Bank v. Burnette, 256 S.E.2d 388, 391 (N.C. 1979) (stating that "[t]he concept of commercial reasonableness has been notoriously difficult to define and has therefore been unevenly applied by courts and juries").

reasonable sale is not always an easy, certain, or predictable endeavor.

Second, given this general uncertainty arising from Article 9 jurisprudence, it should not be surprising that a secured party may feel additional and increased uncertainty about using a new market which differs in form and function in important respects from conventional, traditional market channels for repossessed collateral, and thus raises myriad novel doctrinal questions under these commercial reasonableness factors.¹¹⁴

Given these sources of legal uncertainty, the first hypothesis predicts that the secured party will see the novel, new market that differs in form and function as legally "risky," and the conventional, traditional market as legally "safer" where the latter market either has been specifically blessed by a court in factually on-point case law precedent, or at minimum does not run afoul of the generic doctrinal factors of commercial reasonableness described above.¹¹⁵ Applying this first hypothesis to the online auction channel, consider two ways the online auction channel is significantly different in form and function from real-world sales and thus raises serious doctrinal questions of commercial reasonableness.

Under Article 9, the secured party must provide the debtor, and certain third-parties, with notice of the sale that contains certain information, including the sale's location.¹¹⁶ The notice's contents differ depending upon the sale's characterization as "private" or "public."¹¹⁷ Article 9 does not define these terms; thus, case law has filled the gap.¹¹⁸ From this case law, one can extract the requirement that for a sale to be considered "public," the general public must have unrestricted access to the sale site.¹¹⁹ This requirement contemplates a physical, geographically bound

114. See Korybut, *supra* note 53, at 61-63.

115. See, e.g., *supra* note 35 and accompanying text.

116. See Revised U.C.C. §§ 9-611(b), 9-613(1)(E).

117. See Revised U.C.C. § 9-613(1)(E).

118. See Korybut, *supra* note 53, at 61-63.

119. See *id.*

real world space. In the boundlessness of cyberspace, who is "the general public," where is the sale "site" located, and what does "unrestricted access" to a cyberspace sale site require are all legitimate and serious doctrinal questions.¹²⁰

Relatedly, consider the case law requirement that for a public sale of tangible collateral, the secured party must give potential bidders a reasonable opportunity to inspect the collateral prior to the sale.¹²¹ Suppose the secured party uses an online auction to sell the repossessed inventory of a defunct computer store located in Santa Clara, California. How exactly does a secured party satisfy the inspection requirement in a cyberspace market? Are pictures of the collateral posted on the Web site sufficient? Can the debtor successfully challenge the sale by arguing that potential online bidders outside of California did not have a reasonable opportunity to inspect the collateral?¹²² Again, these are legitimate and serious doctrinal questions.

Secured parties face other thorny doctrinal questions with respect to the commercial reasonableness of online auctions.¹²³ The author has discussed these issues and recommended solutions elsewhere, and thus this Article does not repeat such analysis.¹²⁴ Rather, the point here is that, absent case law which specifically addresses these doctrinal questions in the context of online auctions, *ex ante*

120. *See id.*

121. *See id.* at 106-07.

122. *See id.* Some commentators have suggested answers. *See, e.g.,* AGIN, *supra* note 54, ch.15:5 (stating in the context of selling bankruptcy estate assets that a "website provides an ideal medium for disseminating detailed information about an asset and the sale process; it can deliver not only written information, but also pictures, video, and more complex data forms. For example, a website could contain a three-dimensional walk-through of a building available for sale or make a spreadsheet containing financial data available for download"); Jin and Kato, *supra* note 96, at 5 (stating that "eBay announced a special quality assurance program for automobiles, featuring escrow service at the expense of \$22 and third party vehicle inspection at \$99").

123. *See* Korybut, *supra* note 53, at 31 (listing novel questions raised by online auction use including whether through an online auction "a reasonable purchase price [will be] realized," whether "legally appropriate advertising of an online auction to the relevant group of potential bidders [can] occur over the Web," and whether it is "ever 'commercially reasonable' for a secured party to employ an online auction to dispose of repossessed collateral").

124. *See id.* at 65.

secured parties may suffer great uncertainty about whether their use of a "risky" online auction will be found commercially reasonable by a court. Indeed, several of the Interviewees provide anecdotal evidence that suggests this hypothesis.¹²⁵

Unfortunately, to date, there is not a single published case discussing the question of whether an *Article 9* secured party's use of an online auction is commercially reasonable, let alone resolving the specific legitimate doctrinal questions discussed above. While there are bankruptcy court cases where the bankruptcy judge has approved the trustee's request to use an online auction to sell bankruptcy assets, none of these cases wrestle with the question of whether using an online auction is commercially reasonable under Article 9.¹²⁶

One notable exception within the bankruptcy context is *In re A.W. Logging, Inc.*¹²⁷ A.W. Logging, Inc. filed for Chapter 11 bankruptcy. Les Bois Leasing, a creditor, received permission from the bankruptcy court to sell certain heavy equipment leased to A.W. Logging, Inc., but the court apparently did not prescribe a method of sale. Les Bois Leasing used the online auction site Iron Planet¹²⁸ to sell the heavy equipment. A.W. Logging, Inc. challenged the sale's reasonableness for a variety of reasons, including an alleged low price and use of an incorrect online auction site.¹²⁹

125. See *supra* note 100 and accompanying text.

126. See, e.g., *In re Computer Learning Ctrs., Inc.*, 268 B.R. 468, 470 (Bankr. E.D. Va. 2001) (stating that the Chapter 7 trustee used "an extensive internet marketing effort" to sell assets); *In re Phoenix Med. Tech., Inc.*, No. CIV.A. 00-07253-W, 2001 WL 1806975, at *1-2 (Bankr. D.S.C. Mar. 30, 2001) (describing how the Bankruptcy Court granted debtor's application to use an Internet auctioneer to help advertise and sell debtor's business, a manufacturer of disposable latex, vinyl, and nitrate gloves); *In re AIOC Corp.*, Nos. 96 B 41895, 96 B 41896, 1999 WL 1327910 (Bankr. S.D.N.Y. Dec. 20, 1999) (authorizing a Chapter 11 trustee to sell some assets through eBay, and finding that "[t]he Sale of the Art by auction in an online trading forum administered by eBay is likely to yield a price that is per se fair and the product of good faith and arm's-length dealings").

127. Slip Copy, 2006 WL 2860808 (Bkrcty. D. Idaho Oct. 4, 2006).

128. <http://www.ironplanet.com> (last visited Mar. 20, 2007).

129. Slip Copy, 2006 WL 2860808 at 7 (Bkrcty. D. Idaho Oct. 4, 2006).

The bankruptcy court reviewed the sale. Because the equipment was leased, the court noted that Article 9 did not directly govern the transaction. However, the court consulted “the Idaho Uniform Commercial Code, and cases interpreting its provisions, for guidance as to what constitutes a commercially reasonable sale”¹³⁰ In particular, the court reviewed the commercial reasonableness of Les Bois Leasing’s choice to use Iron Planet rather than another online auction, the Sawmill Exchange,¹³¹ to sell one of the two pieces of heavy equipment, a sawmill. The court’s discussion on this matter was relatively brief:

Debtor [A.W. Logging Inc.] argues that Creditor’s [Les Bois Leasing] use of Iron Planet to auction the equipment was not commercially reasonable. In his testimony, Mr. Wolske [Debtor’s principal] expressed his belief a better result would have been obtained by using an auction website devoted specifically to this type of equipment, called the “Sawmill Exchange.” As the Court understands this testimony, then, Debtor’s concern is not that the equipment was sold via the internet, but with the particular online auction service selected by Creditor to conduct the sale.

The evidence showed that Iron Planet is a well-respected auction website that specializes in the sale of heavy equipment. While perhaps potential purchasers would first consult the sawmill sale site, the Court is not persuaded that, by listing the equipment for sale on the Iron Planet site, the Sawmill was not exposed a to [sic] broad market. The fact that several bids were placed indicates individuals looking to purchase this type of equipment utilize the Iron Planet website. While Debtor would have preferred a different electronic auction service be utilized, under these circumstances, the Court concludes Creditor has met its burden of showing that the sale of the Sawmill on Iron Planet, a website specializing in heavy equipment auctions, was reasonable.¹³²

No doubt the court’s opinion is welcomed by those advocating for the use of online auctions to sell repossessed collateral. But the brevity of the court’s discussion potentially narrows greatly the opinion’s impact and leaves

130. *Id.* at 7.

131. <http://www.sawmillexchange.com/> (last visited Mar. 21, 2007).

132. Slip Copy, 2006 WL 2860808 at 7-8 (Bankr. D. Idaho Oct. 4, 2006).

much to be desired. A.W. Logging, Inc. argued that if the creditor had used the Sawmill Exchange rather than Iron Planet, “a better result would have been obtained by using an auction website devoted specifically to [selling sawmills].”¹³³ As the court noted, “the Debtor’s concern is . . . with the particular online auction service selected by Creditor to conduct the sale.” Having framed the issue in this manner, one would have expected the court to compare the two sites. Indeed, as discussed below,¹³⁴ under Article 9 where the debtor (or her expert witness) provides credible evidence (1) of a low price, (2) that *ex ante* the secured party had had multiple possible markets (in this case two online auctions) from which to choose and through which similar goods are frequently sold, and (3) that one online auction is relatively more efficient for selling such collateral than the other online auction actually used by the secured party, the court should carefully examine whether the secured party considered using the more efficient online auction and whether it was reasonably available under the circumstances.

In evaluating the efficiency of Iron Planet, the court said it was a “well-respected” auction web site through which the equipment was exposed to a “broad market.”¹³⁵ Yet the court did not discuss the evidence that convinced it that Iron Planet was a “well-respected.” In Part IV, section B, the Article discusses how courts condone markets that are “well-recognized” or “commonly accepted,” and that the secured party must provide evidence of such.¹³⁶ Further, the only evidence the court seems to cite for the assertion that Iron Planet would expose the equipment to a “broad market” was that the sawmill had received “several bids.”

Worse, even though the court conceded that “perhaps potential purchasers would first consult the sawmill sale site” it made no apparent effort to determine whether the Sawmill Exchange would have been the more efficient online auction to use. For example, the court could have

133. *Id.* at 8.

134. *See infra* note 150 and accompanying text.

135. Slip Copy, 2006 WL 2860808 at 8 (Bankr. D. Idaho Oct. 4, 2006).

136. *See infra* notes 171-75 and accompanying text.

asked whether sawmills similar to A.W. Logging, Inc.'s sawmills had been sold through the Sawmill Exchange, in what number and frequency, and at what prices.¹³⁷ Further, the court could have asked whether there was a current critical mass of interested bidders in sawmills at the specialized sawmill site, and, if so, whether such a critical mass likely would have produced more vigorous, competitive bidding (and concomitantly a higher price) than the "several bids" and price realized on Iron Planet.¹³⁸ Perhaps the court made this inquiry and simply did not mention it in its opinion. Or perhaps A.W. Logging, Inc. had not provided credible evidence to support "its belief" that the Sawmill Exchange was the more efficient online auction. Either way, the opinion is silent on these issues.

Finally, perhaps the court's abbreviated discussion was the result of its determination that in fact the price received at the Iron Planet sale was not low, and thus the court did not engage in a careful scrutiny review. While A.W. Logging, Inc. had presented expert testimony to show a low price was received for the equipment because the creditor had used Iron Planet, the court did not find the testimony credible.¹³⁹ "Any complaints Debtor may have about the resulting sale price, in the Court's opinion, are attributable to market factors and the condition of the equipment, and not the result of Creditor's sale methods."¹⁴⁰

Whether *In re A.W. Logging, Inc.*, a recent case (October, 2006), will have a catalytic effect on Article 9 secured creditor use of online auctions outside of the bankruptcy context remains to be seen. But given online

137. See *infra* notes 223-36, 261-63 and accompanying text.

138. See *infra* notes 178, 242, 259-60 and accompanying text.

139. Slip Copy, 2006 WL 2860808 at 2 (Bankr. D. Idaho Oct. 4, 2006).

140. *Id.* at 6.

Debtor presented testimony that comparable, operable sawmills, could be expected to command a price of somewhere between \$42,000-\$54,000. However, the Court regards this opinion with some skepticism, considering that over five years ago the Sawmill was purchased by Creditor for \$52,000. The Court questions the notion that the equipment has suffered little significant depreciation in value.

Id. at 8.

auctions' novel nature when compared to conventional, real world market channels, the near complete absence of on-point case law addressing the thorny doctrinal questions discussed above, and the Interviewees comments, it seems reasonable to hypothesize that secured parties may perceive acute legal uncertainty with respect to whether using online auctions is commercially reasonable under Article 9.

2. *Non-Adoption Effects.* The non-adoption theory's third hypothesis holds that for any given secured party, at some point the legal, empirical, or business uncertainty will become too great, and she will forgo the too risky novel, new market and cling instead to the "safer" conventional, traditional market. To rephrase the point, with respect to the first uncertainty progenitor, the legal uncertainty a secured party ex ante experiences about whether a new market will ex post be found commercially reasonable by a reviewing court may have a non-adoptive effect on her use of a sale method she perceives as legally "risky." Comments by several of the Interviewees suggest this is true.¹⁴¹

Applying this hypothesis to online auctions, it seems reasonable to say that faced with the acute legal uncertainty described above, a secured party may choose to forgo the legally "risky" online auction and stick with a doctrinally "safer" sale method. In this sense, consider that the duality of doctrinally "risky" versus "safer" markets affects a sort of lock-in/lock-out precedent effect. To see this, consider the argument that between rules and standards, as standards are given content through case law precedent,

141. See *supra* note 100 and accompanying text; see also Clontz, *supra* note 113, at 371 (advising secured parties to use public sales for most types of collateral to avoid the difficult "angles" of a complying private sale); David B. McMahon, *Commercially Reasonable Sales and Deficiency Judgments Under UCC Article 9: An Analysis of Revision Proposals*, 48 CONSUMER FIN. L. Q. REP. 64, 65 (1994) (stating that "[i]nstead of choosing an aggressive sales method, litigation conscious secured parties may elect the sale methods that will be least susceptible to a factual or legal challenge regarding the commercial reasonableness of the sale"); Ruda, *supra* note 112, at 319 (stating that "[Article 9] neither defines 'commercially reasonable' nor does it spell out the criteria of reasonableness. However, the uncertainty that this would seem to engender does not exist in practice. A secured party can avoid attack by behaving in a way that is *unarguably* reasonable" (emphasis added)).

they may eventually become more rule-like.¹⁴² Consequently, one can argue that as a standard like "reasonableness" becomes more rule-like, it may gain the benefits rules enjoy of precision and predictability, but concomitantly may lose the benefit enjoyed by standards of accommodating changing factual circumstances and patterns of behavior.¹⁴³ Under these circumstances the ossified standard can lock-in inefficient commercial norms and practices.¹⁴⁴ Concurrently, in effect, the standard's abundant case law locks-out new norms and practices which are passed over in favor of the standard's judicially-blessed norm or practice.

With novel, new markets like online auctions, this lock-in/lock-out effect theoretically will be most pronounced. Consider, for example, that there is plenty of case law on alternative methods of selling repossessed automobiles. Courts have blessed or struck down auto repossession sales that were by public auction,¹⁴⁵ private sales,¹⁴⁶ private

142. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 577-79 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 29-30 (2000).

143. See generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 40-44 (1987) (recounting the general arguments for rules and for standards); Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 558 (2000) (discussing uncertainty from use of open-standards in the U.C.C. (including Article 9) and the fear that such standards produce litigation, and that recent revisions to the U.C.C. (including Article 9) stress "certainty over flexibility" by moving "away from open-ended standards"); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1986) (discussing virtues and vices of rules versus standards).

144. See Kraus & Walt, *supra* note 1, at 217-18 (describing the encrustation critique of the incorporation strategy due to precedents); see also Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 288-305 (1985); Schlag, *supra* note 143, at 413; David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 630 (2001).

145. See generally *In re Galligan*, 10 B.R. 841 (Bankr. D. Me. 1981) (finding sale commercially reasonable); *Teeter Motor Co. v. First Nat'l Bank*, 543 S.W.2d 938, 942 (Ark. 1976) (finding sale commercially reasonable); *Greg Coats Cars, Inc. v. Kasey*, 576 S.W.2d 251 (Ky. Ct. App. 1978) (finding sale commercially reasonable); *Liberty Nat'l Bank v. Greiner*, 405 N.E.2d 317 (Ohio Ct. App. 1978)

dealer-only auctions,¹⁴⁷ and retail and wholesale sales on a dealer's lot.¹⁴⁸ Such abundant case law can lock-in the judicially blessed sale methods because the secured party feels more legally comfortable using such sale methods. Concurrently, this case law may lock-out the use of online auctions to sell repossessed cars. A risk-adverse secured party, for example, may choose a conventional "dealer-only" auction in her home state over an online auction like eBay to sell a repossessed automobile since he knows he's on precedential ground with the former but not the latter.

To all this some critics may argue that eventually online auctions will be incorporated into Article 9 jurisprudence just as other new market channels have been in the past. That may be true, but that is not the real issue here. The real issue is that this incorporation process appears to be happening very slowly which normatively is bad since this undermines and delays realization of the incorporation strategy's price maximization goal. Ten years after eBay opened its doors for business, online auctions are ubiquitous and are used to sell all manner of things, and yet few Article 9 secured parties appear to be using them. Given the commercial reasonableness uncertainty and a

(finding sale commercially reasonable); *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978) (finding sale commercially unreasonable).

146. See generally *Westgate State Bank v. Clark*, 642 P.2d 961 (Kan. 1982) (finding sale commercially unreasonable); *Nelson v. Monarch Inv. Plan, Inc.*, 452 S.W.2d 375 (Ky. 1970) (finding sale commercially reasonable); *Mann v. United Mo. Bank*, 689 S.W.2d 830 (Mo. Ct. App. 1985) (finding sale commercially reasonable); *Vic Hansen & Sons, Inc. v. Crowley*, 203 N.W.2d 728 (Wis. 1973) (finding sale commercially unreasonable).

147. See generally *Daniel v. Ford Motor Credit Co.*, 612 So. 2d 483 (Ala. Civ. App. 1992) (finding sale commercially reasonable); *Garden Nat'l Bank v. Cada*, 738 P.2d 429 (Kan. 1987) (finding sale commercially reasonable); *Ford Motor Credit Co. v. Russell*, 519 N.W.2d 460 (Minn. Ct. App. 1994) (finding sale commercially reasonable); *Ford Motor Credit Co. v. Mathis*, 660 So. 2d 1273 (Miss. 1995) (finding sale commercially unreasonable).

148. See generally *Commercial Credit Corp. v. Lane*, 466 F. Supp. 1326 (M.D. Fla. 1979) (finding sale commercially reasonable); *In re Britt*, 78 B.R. 514 (Bankr. S.D. Ohio 1987) (finding sale from storage facility commercially reasonable); *Teeter Motor Co.*, 543 S.W.2d at 938 (finding sales were commercially reasonable); *Harold Gwatney Chevrolet Co. v. Cooper*, 850 S.W.2d 19 (Ark. Ct. App. 1993) (finding sale commercially reasonable); *Jones v. Union Motor Co.*, 779 S.W.2d 537 (Ark. Ct. App. 1989) (finding sale commercially reasonable).

pronounced lock-in/lock-out precedent effect, unless corrective measures are taken, it may still be a very long time indeed before a satisfactory level of adoption occurs.

3. *Corrective Measures.* How to address the problem of legal or doctrinal uncertainty about whether using online auctions is commercially reasonable under Article 9? The most direct and uniform way would be through uniform legislation to all fifty states' Article 9 code.¹⁴⁹ But given that the arduous seven year drafting process for the Article 9 revisions ended in 2001, undergoing a similar (albeit smaller) project would be unlikely to garner much enthusiasm soon. This leaves case law development in each state. Towards this end, this subsection 3 discusses the ex post review courts should undertake that is both proper under Article 9's current jurisprudence and which would increase the likelihood that courts, and thus eventually secured parties, would consider online auctions commercially reasonable.

i. *Creating Precedent: Careful Judicial Scrutiny.* Where a challenged foreclosure sale has produced a low price, Article 9 directs courts to carefully scrutinize the sale process, including the method and manner of sale.¹⁵⁰ Where the debtor (or her expert witness) provides credible evidence (1) of a low price, (2) that ex ante the secured party had had multiple possible markets from which to choose including an online auction through which similar goods (even non-repossessed ones of the same type) are frequently sold, and (3) the online auction is relatively more efficient for selling such collateral than the market used by the secured party, the court should carefully examine whether the secured party considered using the online auction and whether it was reasonably available under the circumstances. Recall

149. See, e.g., Coles-Bjerre, *supra* note 96, at 382 (recommending that "[in] order to further this goal of generating a more substantial market, reformers should consider requiring details of impending foreclosure auctions (and perhaps even the auction process itself) to be funneled into one or a small number of Internet sites" (footnote omitted)).

150. Revised U.C.C. § 9-610(b), cmt 2; see also Korybut, *supra* note 5, at 1478-1502 (discussing the nature of this careful scrutiny review).

from Part I, section A,¹⁵¹ Article 9 directs the secured party in good faith and with due diligence to identify, assess, and use the market sale practices that she believes are best suited to maximize the collateral's price. However, Article 9 holds the secured party only to those markets and attendant sale practices that are reasonably identifiable, accessible, and usable under the circumstances. In economic terms, the secured party is asked to identify, assess, and use the most efficient market reasonably available under the circumstances.¹⁵²

Currently, although not yet with respect to online auctions, some courts in their published opinions do make this inquiry where there are multiple possible markets.¹⁵³ Less careful courts ask the secured party only whether she used a regularly-used market channel, but fail to inquire

151. See *supra* notes 19-21 and accompanying text.

152. Recall also that there are reasonable grounds for a secured party's failure to consider, or to reject, an alternative market. It may be that due to such variables as the nature and value of the collateral, the costs of identification and implementation, and secured party unsophistication, the only sale channel reasonably available was a distress market or other less efficient market. See *supra* note 14-18 and accompanying text.

153. For example, some courts review the secured party's choice to use a distress market where a non-distress market was available, particularly with expensive collateral whose high value justifies the cost of selling it in a non-distress market. See, e.g., *In re Frazier*, 93 B.R. 366, 370-71 (Bankr. M.D. Tenn. 1989); *Gambo v. Bank of Md.*, 648 A.2d 1105, 1115 (Md. Ct. Spec. App. 1994); cf. *Fedders Corp. v. Taylor*, 473 F. Supp. 961, 968 (D. Minn. 1979); *Dougherty v. 425 Dev. Assocs.*, 462 N.Y.S.2d 851, 856 (App. Div. 1983); *Sumner v. Extebank*, 452 N.Y.S.2d 873, 875 (App. Div. 1982). Similarly, some courts have required the secured party to prove that its choice to use a public sale rather than a private sale was commercially reasonable. See FERRIS & GOLDSTEIN, *supra* note 41, at 159-62. Finally, parties may choose to use a retail versus a wholesale market. See, e.g., FERRIS & GOLDSTEIN, *supra* note 41, at 158-59; WHITE & SUMMERS, *supra* note 90, at 457-58; Schwartz, *supra* note 90, at 130-32. Some courts have reviewed this choice. See, e.g., *Hall v. Owen County State Bank*, 370 N.E.2d 918, 930 (Ind. Ct. App. 1977) (holding that a retail sale is unreasonable when the costs of the sale exceed the difference in market prices); *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 570 P.2d 702, 712 (Wash. Ct. App. 1977) (holding the same). In all these circumstances, secured parties are facing multiple possible markets for their collateral, and essentially courts are asking these secured parties to demonstrate that they selected the reasonably available market best calculated to maximize the sale price. See also *Chrysler Credit Corp. v. B.J.M., Jr., Inc.*, 834 F. Supp. 813, 835 (E.D. Pa. 1993); *In re Hamby*, 19 B.R. 776, 783 (Bankr. N.D. Ala. 1982); *Farmers Bank v. Hubbard*, 276 S.E.2d 622, 626-27 (Ga. 1981).

further whether the secured party ever considered, or unreasonably rejected, an alternative market.¹⁵⁴ Even worse, other courts simply do not ask whether the secured party tried to identify and use the most reasonably available efficient market.¹⁵⁵

Robust careful judicial scrutiny of the market selection process may help create case law precedent that overcomes more quickly the doctrinal non-adoptive effects of the first progenitor of uncertainty. So, for example, imagine the secured creditor uses a "safe" or "less aggressive" *non*-online auction market channel, and the sale results in net proceeds that are insufficient to cover the sale's expenses and the debtor's outstanding loan. The secured party then sues the debtor for the deficiency. The debtor argues that she owes no (or less of a) deficiency because the sale was commercially unreasonable. She provides evidence of a low price thus triggering careful scrutiny review of the sale method, and provides further evidence that eBay was reasonably available and through which property like the collateral is commonly sold for prices higher than that received at the challenged sale. Under these circumstances, the trier of fact might be convinced that the secured party did not carry her burden of proving that she, in good faith and with appropriate due diligence, tried to identify and select the reasonably available market best calculated to maximize the sale price,¹⁵⁶ and thus might find the sale was commercially unreasonable. If published, this opinion

154. See, e.g., *In re Galligan*, 10 B.R. 841, 845 (Bankr. D. Me. 1981) (holding a public sale of a car, at which the only attendee was the secured party who bought the car, commercially reasonable in part because it "was in conformity with reasonable commercial practices among wholesale dealers in used cars," but not discussing whether there were other reasonably available, regularly used market channels); *Sec. State Bank v. Broadhead*, 734 P.2d 469, 472 (Utah 1987) (finding the sale of a truck through a used car lot commercially reasonable, relying in part on secured party's expert who testified that "selling repossessed vehicles through a used car lot was in conformity with usual commercial practice," but not discussing whether there were other reasonably available, regularly used market channels).

155. See, e.g., *United States v. Champion Sprayer Co.*, 500 F. Supp. 708, 710 (E.D. Mich. 1980); *In re Nellis*, 22 U.C.C. Rep. Serv. (CBC) 1318, 1318 (Bankr. E.D. Pa. 1977); see also Korybut, *supra* note 5, at 1473-74.

156. See Korybut, *supra* note 5, at 1481-82 (discussing sufficient evidence of procedural compliance in the face of a low price sale).

should ease the legal uncertainty of using an online auction, and thus hopefully spur secured parties to use online auctions, or at least consider them seriously.

Several things might retard this common law process. First, courts might not buy into the notion that they must aggressively review Article 9 cases to ensure that relatively more efficient markets are at least considered by secured parties. After all, some courts currently do not engage in this type of scrutiny, and thus may not be persuaded to change their minds.¹⁵⁷ Second, as discussed in the balance of Part IV, there is legal, business and/or empirical uncertainty about obtaining evidence of, and proving such matters as, whether a sale method is commonly used or whether an online auction like eBay will get a better price than the conventional, traditional market for the collateral type.¹⁵⁸ Third, debtors may not have the sophistication or resources to marshal this evidence and challenge the low price sale.¹⁵⁹

Finally, consider a stifling paradox. From the anecdotal data collected and set forth in Part II, clearly there are some Article 9 secured parties using online auctions. Suppose though, that given the efficiency benefits of online auctions also discussed in Part II, these secured parties in fact have realized higher net proceeds than any conventional, traditional market would yield. Under these circumstances, it is possible that their debtors will be less likely to challenge the sale's commercial reasonableness. Yet absent legal challenges which produce written precedent, no published case law will emerge to address the legal uncertainty restraining what appears to be a vast majority of risk-adverse secured parties who will not act

157. See *supra* notes 154-55 and accompanying text.

158. See *infra* notes 166-67 and accompanying text (Part IV.A.3.ii); *infra* notes 178-84 and accompanying text (Part IV.B); *infra* notes 201-02 and accompanying text (Part IV.C.2); *infra* notes 222-236 and accompanying text (Part IV.D.3); *infra* notes 242-43 and accompanying text (Part IV.E); *infra* notes 250-71 and accompanying text (Part IV.G).

159. See *infra* note 312 and accompanying text.

unless the commercial reasonableness of an online auction becomes more legally certain and predictable.¹⁶⁰

One might say this is no problem at all; if online auctions are so efficient that no debtor ever challenges the sale, then eventually secured parties will begin to learn this and use online auctions, even absent case law precedent. Perhaps. But the anecdotal data in Part II suggest that even though eBay went public over ten years ago, and Internet commerce generally and online auctions specifically have blossomed, widespread Article 9 secured party adoption does not appear to be the case.

ii. Using the Section 9-627(b)(3) Safe Harbor. At least where new markets like online auctions are being used by dealers of a particular type of property similar to the secured party's collateral, one might argue that secured parties may be able to use the safe harbor of section 9-627(b)(3) to avoid the doctrinal uncertainty of whether use of the new market is commercially reasonable or not. Recall from Part I that section 9-627(b)(3) states that "[a] disposition of collateral is made in a commercially reasonable manner if the disposition is made . . . in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."¹⁶¹ Section 9-627(b)(3) thus creates a commercial reasonableness safe harbor for the secured party: if she uses the reasonable commercial practices used by dealers to sell the particular type of collateral, then a repossession sale using these practices is commercially reasonable.

There are, however, several doctrinal and normative problems with this suggestion. As to the first doctrinal problem, the dealer's commercial practices must be "reasonable." Article 9 on its face offers no guidance on how to identify when dealer commercial practices are reasonable

160. Perhaps this explains the current lack of case law regarding the commercial reasonableness of online auctions. Or perhaps it is because disgruntled debtors have challenged online auction sales, but then settled their lawsuits.

161. Revised U.C.C. § 9-627(b).

within the meaning of section 9-627(b)(3) and when they are not, thus reintroducing uncertainty about whether any particular dealer practices will enjoy protection under the safe harbor. Second, the safe harbor is expressly limited to the commercial reasonableness of the "manner" of sale. This leaves open the question of whether the other aspects of commercial reasonableness, including those enumerated in section 9-610(b) (method, time, place, and other terms), also enjoy protection under the safe harbor. Third, the safe harbor speaks of "dealers" in the plural.¹⁶² How many dealers must use the particular commercial practice in order for it to enjoy protection under the safe harbor? 5%? 25%? A majority? Even if one selects a percentage, say 25%, is this 25% of all similar dealers in the United States, the state where the collateral is located, or the county or city where the collateral is located? Further, even if one decides upon a geographical constraint, say 25% of dealers in the county where the collateral is located, does the geographical constraint make sense in the context of online auctions which have no geographic boundaries?¹⁶³

Remarkably, there is very little commentary on the safe harbor generally, or these doctrinal issues specifically.¹⁶⁴

162. Under the pre-revised Article 9, section 9-507(2) (which was replaced by revised section 9-627(b)(3)), one court defined "dealer" as "a person who normally trades in the collateral property as his business." *Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698, 715 (E.D. Pa. 1968).

163. *See generally* Korybut, *supra* note 53, at 122-28 (discussing similar issues of cyberspace boundlessness).

164. *See* FERRIS & GOLDSTEIN, *supra* note 41, § 6.1, at 144 (calling the safe harbor a "conclusive presumption of commercial reasonableness" under which the secured party "must present evidence of commercial practices typical in the industry, and show both that those practices are reasonable and that the disposition was conducted in conformity with those practices. The mere fact that the collateral was sold by a dealer does not satisfy this standard" (footnotes omitted)); HAWKLAND, *supra* note 19, § 9-627:2 (stating, with respect to the safe harbor, that it "is a bit less certain than [the other two safe harbors] Of course, this section provides that conforming to the practices among dealers will only qualify as a commercially reasonable disposition if those practices are themselves reasonable"); ZINNECKER, *supra* note 30, at 189-90; W. Rodney Clement, Jr., *Enforcing Security Interests In Personal Property In Mississippi*, 67 MISS. L.J. 43, 89 (1997) (stating that in Mississippi, the safe harbor's presumption of commercial reasonableness can be rebutted under the general commercial reasonableness standard of 9-610(b) (old section 9-504)); Bradley Y. Smith, *Secured Transactions*, 40 BUS. LAW. 1487, 1531 (1985) (stating that if

The Article does not seek to resolve them. Rather, given that this section A's focus is legal uncertainty created by the commercial reasonableness standard, the point here is to observe that the scope of the safe harbor itself is uncertain, especially in the context of online auctions, and thus may not provide as much legal comfort to a secured party as initially thought. That this conclusion is true is suggested by the anecdotal evidence that few secured parties appear to be using online auctions.

As to the first normative problem, assume away the three doctrinal questions discussed above and imagine that secured parties find broad and largely unchallenged protection under the safe harbor whenever they use dealer commercial practices. Thus, to the extent that dealers use a new market like an online auction to sell property similar to the secured party's collateral, by using the safe harbor secured parties will significantly reduce their uncertainty about whether their use of the online auction will be commercially reasonable. This presumably would increase secured parties' use of online auctions. But such a reduction in uncertainty also carries a paradoxical cost: fewer debtor challenges to these online auction repossession sales. This in turn means the likely reduction of precedent explicating the commercial reasonableness of online auctions. This harms those unfortunate secured parties for whose collateral no or few dealers are selling through the online auction and thus for whom the safe harbor is unavailable. For these unlucky folks, they are both plagued for lack of precedent by the legal uncertainty of using the online auction and dismayed by the fact that due to the unchallenged, safe harbor sales there is a reduced likelihood that such precedent will emerge. Thus, again assuming away the doctrinal questions discussed above,

the safe harbor "is met, the jury cannot substitute its own criteria of commercial reasonableness"; Zubrow, *supra* note 15, at 511 (applying commercial reasonableness factors to the safe harbor); Ellen B. Corenswet, Note, *I Can Get It For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081, 1097 (1975) (stating that a "[s]ale in conformity with automobile dealer practices is not per se reasonable merely because the practice is widespread. It is no protection for the dealer that many, or even most, automobile retailers sell repossessed cars on the wholesale market. Whether resale on that market is in fact a reasonable practice is a decision which must be left to the courts" (footnote omitted)).

while the safe harbor may provide benefits to some secured parties, it may also deprive others of another benefit.

Second, if robustly applied, the safe harbor has the potential to insulate secured parties' continued use of conventional, traditional dealer sale practices that are less efficient than new market practices. Consider this hypothetical. Imagine a secured party who in the past has used a conventional, car dealers-only auction that satisfies the requirements of section 9-627(b)(3). The secured party is thinking about using this dealer-only auction again, but has recently identified in good faith and after due diligence an online market for selling used automobiles, although none or a minority of the sellers have been *dealers* of such goods, but rather non-dealer businesses getting rid of old equipment (cars) and consumers. Finally, assume that the secured party has evidence suggesting that the online auction on-average-over-time realizes higher prices for used cars than the dealer-only auction. Fearful of using the online auction because she feels that the low percentage of dealer participation jeopardizes the application of the section 9-627(b)(3) safe harbor, the secured party uses the "safe" dealer-only auction. Under these circumstances use of the less efficient market is perpetuated.

How to correct for this problem? On the one hand, a court could hold that in the face of evidence that the new market, like an online auction, is clearly more efficient and reasonably available to the secured party, then the conventional, traditional market is no longer a "reasonable" commercial practice which enjoys protection under section 9-627(b)(3). Indeed, a rationale for the safe harbor is that "the collateral will bring a fair (if not the best) price if it is disposed by reasonable commercial practices through normal channels, thus negating any need to review the commercial reasonableness of the secured party's actions. However, the reasonableness of a dealer's commercial practices remains subject to judicial scrutiny."¹⁶⁵ If the safe

165. ZINNECKER, *supra* note 30, at 190; *see also* Revised U.C.C. § 9-507(2) cmt. 2 (stating that "[o]ne recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the

harbor is shielding inefficient dealer practices, then one should consider whether this rationale is no longer being sufficiently served. To paraphrase Karl Llewellyn, where the reason for a rule stops, so should stop the rule's application.¹⁶⁶ On the other hand, a court's holding under these facts that the dealer practices are "unreasonable" erodes further the certainty of the safe harbor's protection beyond the three doctrinal issues discussed above. Which harm would be greater is not obvious, and would require an empirical study of the extent to which secured parties use the safe harbor to the exclusion of relatively more efficient sale methods versus the benefits of the safe harbor to secured parties (such as reduced risks and costs of investigating, assessing, and using a new market, including potential litigation costs). But it is plausible that shielding and perpetuating the use of less efficient markets and stifling the incorporation of the new, more efficient markets causes the most harm over time.

Finally, consider a slight but important variation of the hypothetical. The secured party has not used the dealer-auction or the relatively more efficient online auction before. The secured party is intrigued about using the online auction. Does the fact that dealers, people who normally buy and sell used cars, have created an exclusive market channel mean that the secured creditor must use it under these facts? One can imagine that a relatively novice secured party who does not routinely repossess and sell cars might think that if dealers sell used cars in this way, that must be the correct way to sell them, especially if there is no legal precedent blessing the online auction.

The doctrinal response here is that, although section 9-627(b)(3)'s safe harbor elevates to a special status the "reasonable commercial practices among dealers,"¹⁶⁷ Official Comment 3 to section 9-627(b) and Comment 2 to pre-revised section 9-507(2) state that with respect to the subsection's three safe harbors, none are "required or

secured party does not usually maintain his own facilities for making such sales").

166. KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 217 (1962) (stating that "where the reason stops there stops the rule").

167. Revised U.C.C. § 9-627(b).

exclusive.”¹⁶⁸ Thus, nothing in Article 9 on its face requires the secured party to use only commercial practices of dealers whether or not the secured party herself is also a dealer. Instead, when faced with multiple markets such as a conventional, traditional market versus a new market, Article 9’s General Directive requires that the secured party identify, assess, and use the market that she, in good faith and after due diligence, believes is best suited to maximize the collateral’s price and is reasonably available under the circumstance.¹⁶⁹ Having selected the market, the secured party must conduct a procedurally regular sale, free from collusion, fraud, or self-dealing.¹⁷⁰ Under the facts of this hypothetical, given that the secured party has evidence that the online auction is the most efficient market for her collateral, if the secured party has reasonable access to the online auction she should use it.

B. Is the New Market Prevailing, Well-Recognized, or Commonly Accepted?

There is one legal reason and one interrelated business reason for secured parties to ask this question, and concomitantly doctrinal, empirical, and business uncertainty about its answer. As to the legal reason, recall that some courts hold that secured parties should sell their repossessed collateral in conformity with “prevailing trade practices,” “accepted commercial practices,” “well-recognized” customs and usages, or “commonly accepted commercial practices.”¹⁷¹ One can see this requirement as a doctrinal strand of the Article 9 General Directive that, when faced with multiple possible markets for her collateral, a secured creditor must, in good faith and with due diligence, identify, assess, and use the market best calculated and reasonably available under the circumstances to maximize the collateral’s price. One can reframe the doctrinal incantations to use “*prevailing* trade

168. Revised U.C.C. § 9-627(b) cmt. 3; Pre-revised U.C.C. § 9-507(2) cmt. 2.

169. See *supra* notes 19-21 and accompanying text.

170. See Korybut, *supra* note 5, at 1450-51, 1465-74.

171. See *supra* notes 36-41 and accompanying text.

practices,” “accepted commercial practices,” “well-recognized” customs and usages, or “commonly accepted commercial practices” as judicial attempts to prompt secured parties to identify the most efficient markets possible for the collateral. That is, unpacking the italicized adjectives reveals that the courts employing them consider it important how many businesses use particular markets and how long those markets have been used. One can see these courts as signaling their belief in a kind of market Darwinism: widely used and long-lasting market channels are so because they are relatively efficient market channels. If they were not, they would perish.¹⁷² As Judge Easterbrook wrote:

172. See generally Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 382-83 (1997) (stating that “it is difficult to argue that commercial practices are not [subject to evolutionary forces]. All other things being equal, commercial actors with efficient practices are more likely to succeed, stay in business, and continue those practices than actors with inefficient practices. In short, this ‘market-based evolutionary’ account holds that efficient practices will be favored in the marketplace”). See also *Bankers Trust Co. v. J.V. Dowler & Co.*, 390 N.E.2d 766, 769 (N.Y. 1979) (stating that commercial reasonableness requires the secured party to implement accepted business practices, and that “[c]ustoms and usages that actually govern the members of a business calling day-in and day-out not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience”); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 285 (1998), stating that:

merchants carry on their trade against a background of trade custom and usage. These trade usages, like folkways, compete under a social Darwinistic model of human behavior to gain acceptance. As stated by Karl N. Llewellyn folkways are ‘like products of natural forces which men unconsciously set in operation, or they are like the instinctive ways of animals, which are developed out of experience, which reach a final form of maximum adaptation to an interest, which are handed down by tradition and admit of no exception or variation, yet change to meet new conditions, still within the same limited methods, and without rational reflection or purpose.’

(quoting Karl N. Llewellyn, *This Cut Rate American Culture* (1927), microformed on Karl N. Llewellyn Papers B.V.3.j. (on file with SMU Law Review)); see also Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 207 (1994) (stating that “[t]here could also be an unreasonably low value at a sale simply because a custom and practice now exists in which everyone knows that only dealers will be bidding,” thus suggesting the lack of attendance and competitive bidding at public repossession sales by non-dealers is due not to improper sale procedures but

[A] court must decide what a reasonable business would have done to maximize the return on the collateral. It must consult "[c]ustoms and usages that actually govern the members of a business calling day-in and day-out [that] not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience."¹⁷³

For a secured party thinking about using any market for the first time, identifying it as "prevailing," "well-recognized," or "commonly accepted" suggests at least to these courts that it is an efficient market.

As to the interrelated business reason, a perfectly rational, maximizing secured party wants to identify the most efficient market for her collateral. From the market Darwinism perspective, figuring out if a market is "prevailing," "well-recognized," or "commonly accepted" does just that. Further, anecdotal evidence from an Interviewee suggests that secured creditors thinking of using a new market engage in this business reasoning.¹⁷⁴

The first hypothesis holds that the more legally and commercially novel a new market is when compared to the conventional, traditional market(s) the secured party normally uses, the more legal, empirical, and business uncertainty the secured party likely will feel about using the new market to sell repossessed collateral. Under this hypothesis, consider the effect of the second progenitor of uncertainty which arises for two reasons: temporally new markets and empirical data uncertainty.

custom). Cf. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996).

173. *In re Excello Press, Inc.*, 890 F.2d 896, 906 (7th Cir. 1989) (alteration in original) (citation omitted).

174. Online Representative #1 said that when he/she is soliciting new secured parties to sell their repossessed cars through his/her online auction, some ask whether similar secured parties are using the Web site to sell their repossessed cars. Online Representative #1 stated that these inquiring prospective customers typically lack experience with repossession sales. They figure if other—especially larger and well-known—similar secured parties are using the online auction, it means these secured parties have investigated the web site and found it to be a better way to sell the cars than any alternative method. Online Representative #1 Interview, *supra* note 73.

1. *Temporally New Markets.* Almost by definition, a temporally new market channel will not be prevailing, commonly accepted, or well-recognized. Doctrinally, the absence of this factor alone should not necessarily mean that a court should find the new market channel commercially unreasonable.¹⁷⁵ Yet coupled with the interrelated market Darwinism business reason, its absence still may cause a secured party some uncertainty about using the new market rather than the conventional, traditional market.

Critics may say that in 2006 the online auction channel is clearly a “prevailing,” “well-recognized,” and “commonly accepted” commercial practice for many commercial and consumer actors. Therefore, secured parties should not suffer much legal or business uncertainty when using an online auction. The criticism, however, is too imprecise for the purposes of Article 9. As discussed in Part I, section A, Article 9’s General Directive holds that the secured party must identify the particular market(s) best suited and reasonably available to sell her particular type of collateral to the relevant commercial and/or consumer community interested in buying the collateral.¹⁷⁶ Thus, the secured party’s focus is not on the online auction market channel as a whole, but on the proposed particular online auction through which she wants to sell the particular type of property. Under this rule, the criticism that the online auction channel generally is “prevailing,” “well-recognized,” and “commonly accepted” will not have purchase in certain circumstances.¹⁷⁷ Consider the following hypotheticals.

175. Courts consider this only one of many factors of commercial reasonableness. Where other factors are regular with respect to a market, the failure of this factor alone might not necessarily amount to a commercially unreasonable sale. Along with other factors like a low price, it very well might.

176. See *supra* notes 19-21 and accompanying text.

177. It will have purchase in two situations. First, imagine an online auction like eBay through which inexpensively obtained data can be obtained that shows the online auction to be a “prevailing,” “well-recognized,” or “commonly accepted” market for many commercial and consumer actors selling the type of property the secured party holds as collateral. Here, there is little uncertainty, and, thus, the second progenitor of legal uncertainty is weak if not non-existent. Second, assume that inexpensive data shows that the online auction is a “prevailing,” “well-recognized,” or “commonly accepted” market, but

In hypothetical #1, assume that inexpensive data shows that an online auction is *not* a “prevailing,” “well-recognized,” or “commonly accepted” market but also shows that there is a sufficient number of current potential bidders for the secured party’s type of collateral that competitive bidding would occur and a fair price for the collateral likely would be realized. Courts look favorably on markets which have competitive bidding among bidders interested in the type of collateral the secured party is selling.¹⁷⁸ This set of facts might occur, for example, with a temporally new online auction that has not had the chance to become “prevailing,” “well-recognized,” or “commonly accepted” but has quickly become a competitive market for the collateral type. Here there is tension between (1) the unsatisfied doctrinal strand and business consideration that merit a “prevailing,” “well-recognized,” or “commonly accepted” market, and (2) alternative evidence of market efficiency. Thus, the secured party may experience legal or business uncertainty about whether to use the market.

For hypothetical #2, assume that the empirical data that might show the online auction to be a “prevailing,” “well-recognized,” or “commonly accepted” market for the secured party’s collateral either does not exist or is prohibitively expensive to obtain relative to the value of the collateral. As discussed in Part II, section A, and Part IV, section D.3, some online auctions provide information respectively about their user-base¹⁷⁹ and types of items sold through the Web site.¹⁸⁰ But others do not, including

not for the type of collateral the secured party holds as collateral. Courts look favorably on markets which have competitive bidding among bidders interested in the type of collateral the secured party is selling, and disfavorably on those that do not. See Korybut, *supra* note 53, at 73, 83, 87-89. If the online auction has no history of sellers selling the type of property the secured party has repossessed, nor any other indication that there will be a sufficient number of potential bidders to spark competitive bidding for the secured party’s collateral, then the secured party puts itself at grave legal (and business) risk should it use that market. Again, there is little uncertainty in this situation.

178. See *id.*

179. For Part II.A, see *supra* notes 48-51 and accompanying text discussing eBay. For Part IV.D, see *infra* notes 223-34 and accompanying text discussing eBay and Title Auctions.

180. See *supra* note 179.

temporally old online auctions. EBay, for example, does not publish historical data for eBayMotors.com, its specialty automotive auction.¹⁸¹ Without this data, the secured party will not know whether the online auction is a “prevailing,” “well-recognized,” or “commonly accepted” market for her particular type of collateral, thus triggering both legal and business uncertainty.

2. *Empirical Data Uncertainty.* Under the first hypothesis, consider how the need to obtain empirical data itself affects uncertainty. As hypothetical #2 illustrates, empirical evidence sufficient to legally convince a court and commercially satisfy the secured party that a particular new market is prevailing, commonly accepted, or well-recognized for the secured party’s collateral may not exist. Alternatively, depending on the nature of the secured party or collateral, it may be too difficult or costly to obtain.¹⁸² With empirical uncertainty, doctrinal and business uncertainty flourish.

The non-adoption theory’s third hypothesis holds that for any given secured party, at some point the legal, empirical, or business uncertainty will become too great with respect to a novel, new market, and she will fail to adopt the too risky market and cling instead to the “safer,” conventional, traditional market. The doctrinal, business, and empirical data uncertainties affected by the second progenitor alone (or in conjunction with other progenitors of uncertainty) may stop a secured party from investigating, assessing, or using a novel, new market like an online auction.

What corrective measures can be employed with respect to the legal, business or empirical data uncertainty discussed in this Part IV, section B? With respect to the

181. Ebay, Frequently Asked Questions About Marketplace Research, http://pages.ebay.com/marketplace_research/faq/index.html (last visited Mar. 3, 2007).

182. See *supra* note 158 and accompanying text; *infra* notes 201-02 and accompanying text (Part IV.A.3.ii); *infra* notes 200-01 and accompanying text (Part IV.C.2); *infra* notes 222-36 and accompanying text (Part IV.D.3); *infra* notes 242-43 and accompanying text (Part IV.E); *infra* notes 250-71 and accompanying text (Part IV.G).

doctrinal tension described in hypothetical #1, consider once again that one can reframe the doctrinal incantations to use "prevailing trade practices," "accepted commercial practices," "well-recognized" customs and usages, or "commonly accepted commercial practices" as judicial attempts to assist secured parties in identifying the most efficient markets possible for the collateral. If these incantations do function merely as proxies for relatively efficient markets,¹⁸³ then if the secured party can provide other evidence that a market, including a temporally new market, is the best market reasonably available under the circumstances to realize the highest price for the collateral, then simply because it is not well-recognized, commonly accepted, or prevailing should not remove it from the secured party's reach. To do otherwise would put form over function. The conundrum, however, is that the alternative evidence of market efficiency itself may not exist, or be too costly or difficult to obtain for a novel, new market. Once again, empirical uncertainty begets legal uncertainty.

The conundrum pertains to hypothetical #2 also. If the secured party for lack of empirical data cannot show that a market is prevailing, well-recognized, or commonly accepted, alternatively he should be able to provide other evidence of the online auction's market efficiency. But that empirical task may itself be difficult and costly, thus raising uncertainty about using the online market in the first place. Part IV, sections D, E, and G explore further the reoccurring empirical data uncertainty issue and its corrective measures.¹⁸⁴

183. While one can dispute the usefulness of these incantations as proxies for identifying maximizing markets, that is not the task the author here undertakes. The author has discussed problems with the evolutionary market forces argument of market Darwinism elsewhere. See Korybut, *supra* note 5, at 1460-61. Rather, the Article takes these proxies as it finds them articulated by the courts.

184. See *infra* notes 222-36 and accompanying text (Part IV.D.3); *infra* notes 242-43 and accompanying text (Part IV.E); *infra* notes 250-71 and accompanying text (Part IV.G).

C. Are There People Like Me Using the New Market?

Why would a secured party ask this question? Doctrinally, the incorporation strategy directs secured parties to use market-based sale practices to sell repossessed collateral. Secured parties necessarily must figure out whether and how other commercial actors are selling assets similar to the secured party's repossessed collateral. But which commercial actors? Businesses generally, dealers of the type of property, other secured parties (whether dealers or not)? Anecdotally, evidence from Online Representative #1 suggests that secured parties do want to know whether people like themselves are using the new market before they use it.¹⁸⁵

Using two hypotheticals, this section C explores some circumstances where these questions may cause legal, business, or empirical uncertainty. The non-adoption theory's third hypothesis predicts that the secured party may be hesitant to use a new market to sell his collateral if either he believes there are too few people like himself using the new market to sell similar property, or empirically he is uncertain about the answer to the question. In other words, a secured party may choose not to use a new market he perceives as risky because it is used predominantly by dissimilar people and will cling instead to a conventional, traditional market that is safer because it is used by similar people.

Before discussing the two hypotheticals, consider that the uncertainty about whether people like the secured party are using the new market is not necessarily mitigated by showing that the new market is "prevailing," "well-recognized," or "commonly accepted" where the commercial or consumer actors using that market are not like the secured party. Neither will the uncertainty necessarily be mitigated by showing that dissimilar people are selling similar collateral in the new market where the secured party wants to know how similar people are selling collateral similar to the secured party's.

185. See *supra* note 174.

1. *Hypothetical #1*. Imagine a credit union (CU) in State X that makes secured consumer car loans to its customers and periodically sells repossessed cars. As such, assume the CU would not be considered a car dealer.¹⁸⁶ The credit union is member of the State Credit Union Association (SCUA).¹⁸⁷ Imagine that none of the other credit unions within the association use online auctions to sell repossessed cars and instead use traditional auctions or private sales. Imagine further that the CU identifies, in good faith and after due diligence, what appears to be a relatively more efficient online market for selling its repossessed consumer automobiles for prices on average better than prices realized through the conventional, traditional markets. But no credit unions, let alone ones in the SCUA, are using the online auction. Should the secured party be worried that because no other credit unions generally, or SCUA members in particular, are using the online auction to sell cars that the CU's use of it will be commercially unreasonable?¹⁸⁸

The answer is no. Neither section 9-610(b), which contains the commercial reasonableness standard, nor its Official Comments require or limit the secured party to the particular commercial practices of any type of person. Further, under Article 2's commercial reasonableness section 2-706,¹⁸⁹ Official Comment 4 states that the seller is enabled "to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances,"¹⁹⁰ thus also not limiting the seller to any

186. Under pre-revised Article 9, section 9-507(2) (which was replaced by revised section 9-627(b)(3)), one court defined "dealer" as "a person who normally trades in the collateral property as his business." *Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698, 715 (E.D. Pa. 1968).

187. For examples of state credit union associations, see the Illinois Credit Union League, <http://www.iculeague.org/> (last visited Mar. 20, 2007); Missouri Credit Union Association, <http://www.mcua.org/index.shtml> (last visited Mar. 3, 2007).

188. Recall that Online Representative #1 indicated that some of his/her prospective secured party customers expressed this concern. See *supra* note 174 and accompanying text.

189. Pre-revised U.C.C. § 2-706.

190. Pre-revised U.C.C. § 2-706 cmt. 4.

particular person's practices. Some courts reviewing Article 9 sales have looked directly to this comment for guidance to define commercially reasonable sale practices.¹⁹¹ Indeed, courts have articulated a range of possible, permissible sources of commercially reasonable sale practices, moving from the more limited source of "dealers,"¹⁹² to "trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business,"¹⁹³ and even more widely to "a reasonable business."¹⁹⁴ When a secured party has multiple, possible markets for her collateral from which to choose, she must heed the General Directive. Under the first hypothetical's facts, because the secured party has evidence that the online auction is the most efficient market for her *particular type* of collateral, if she has reasonable access to the online auction, she should use it.

2. *Hypothetical #2.* Imagine a secured party who, in good faith and after due diligence, identifies what appears to be a relatively efficient online market for selling her type of collateral, although only a relatively small number of such sales have been for similar *repossessed* goods. The secured party has also located a conventional, liquidation market for her type of collateral. Is it commercially reasonable for a secured party selling repossessed collateral

191. See *supra* note 9 and accompanying text.

192. See, e.g., *Old Colony Trust Co.*, 280 F. Supp. at 698.

193. See, e.g., *Investors Acceptance Co. v. James Talcott, Inc.*, 454 S.W.2d 130, 137-38 (Tenn. Ct. App. 1969) (stating that "[t]he requirement that the property be disposed of in a 'commercially reasonable' manner seems to us to signify that the disposition shall be made *in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business*" (quoting *Mallicoat v. Volunteer Fin. & Loan Corp.*, 415 S.W.2d 347, 350 (Tenn. Ct. App. 1966) (emphasis in original)); accord *FERRIS & GOLDSTEIN*, *supra* note 41, at 3; *Lloyd*, *supra* note 41, at 363.

194. See, e.g., *In re Excella Press, Inc.*, 890 F.2d 896, 906 (7th Cir. 1989) (stating that "[a] court must decide what a reasonable business would have done to maximize the return on the collateral. It must consult '[c]ustoms and usages that actually govern the members of a business calling day-in and day-out [that] not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience'" (alteration in original) (citation omitted)); accord *FERRIS & GOLDSTEIN*, *supra* note 41, § 1.2, at 3; *Lloyd*, *supra* note 41, at 363.

to use the online auction even though it infrequently sells *repossessed* goods similar to hers? Or perhaps the secured party should use the online auction precisely because it does not appear to be a liquidation market for the type of goods? In other words, to the extent that there are different markets and attendant sale practices for selling *repossessed* goods versus the same or similar *non-repossessed* goods, which should the secured party use?¹⁹⁵

Doctrinally, that these questions are relevant is suggested by cases where the court has condemned the secured party's use of a distress sale market where a non-distress market was available, such as where the collateral was expensive and, thus, would support the time and cost of selling it in a non-distress market.¹⁹⁶ But far more often, courts make only vague pronouncements about whether and when a secured party may use the reasonable commercial practices among entities selling *repossessed* collateral versus the reasonable commercial practices among entities selling the same, *non-repossessed* collateral.¹⁹⁷ From these disparate doctrinal strands, one

195. These differences exist. See generally JONATHAN SHELDON & ROBERT A. SABLE, *REPOSSESSIONS* 243, 244 (2d ed. 1988) (stating that "the three major automobile creditors have signed agreements with the FTC to sell *repossessed* cars in the same manner as they sell other similar used cars"); see also Korybut, *supra* note 5, at 1426-27; Shuchman, *supra* note 89, at 54 (arguing that automobile repossessioners use less efficient selling resale methods than when they deal with each other).

196. See, e.g., *In re Frazier*, 93 B.R. 366, 370 (Bankr. M.D. Tenn. 1989); *Gambo v. Bank of Md.*, 648 A.2d 1105, 1115 (Md. Ct. Spec. App. 1994). Cf. *Fedders Corp. v. Taylor*, 473 F. Supp. 961, 968 (D. Minn. 1979); *Dougherty v. 425 Dev. Assocs.*, 462 N.Y.S.2d 851, 856 (App. Div. 1983); *Sumner v. Extebank*, 452 N.Y.S.2d 873, 875 (App. Div. 1982).

197. Courts have held that the secured party may use the accepted commercial practices of a business or dealer not necessarily engaged in the sale of *repossessed* collateral. See *Pioneer Bank & Trust Co. v. Mitchell*, 467 N.E.2d 1011, 1014 (Ill. App. Ct. 1984) (noting that, under section 9-507(2), where a bank sold a motorhome in private sale, one of several issues of fact left unresolved was "what the reasonable commercial practices among dealers of motorhomes are"); *Morrell Employees Credit Union v. Uselton*, 28 U.C.C. Rep. Serv. (CBC) 269, 274-75 (Tenn. Ct. App. 1979) (stating that a "disposition must be made in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or similar business," and that the sale must be in "conformity with reasonable commercial practices among automobile dealers"). Some Courts have suggested that repossession sale practices are sufficient. See *United States v. Terrey*, 554

can imagine that a secured party may be uncertain about the legal relevance of whether a new market like an online auction has commercial actors selling repossessed collateral or not of a type similar to the secured party's.

The doctrinal corrective measure here is the same as for the first hypothetical: heed the General Directive and use the most efficient market reasonably available for the secured party's type of collateral.¹⁹⁸ Thus, imagine a secured party with a repossessed tractor wants to sell it on eBay, which in fact lists used tractors for auction.¹⁹⁹ Even if no secured parties selling repossessed Article 9 tractors have ever used eBay before, the secured party should be able to use the online auction if she, in good faith and after

F.2d 685, 695, (5th Cir. 1977) (finding that the choice of a public sale by the SBA could have been found to be commercially unreasonable by a jury because it disregarded its own relevant trade and usage practices of liquidating a computer parts business, because it made no history of the business, did not take inventory, conducted no appraisal, contacted no competitors of the failed business, and held a public sale); *Jackson County Bank v. Ford Motor Credit Co.*, 488 F. Supp. 1001, 1011 (M.D. Tenn. 1980), *vacated*, 698 F.2d 1220 (6th Cir. 1982) (holding that, under section 9-507(2), for a secured party selling repossessed vehicles, the relevant inquiry to determine commercial reasonableness of a private sale and a public sale was what the reasonable commercial practices are among dealers for inventory liquidation or vehicle sales); *In re Braten Apparel Corp.*, 68 B.R. 955, 965 (Bankr. S.D.N.Y. 1987) (finding that, in assessing bank's efforts to collect and sell defaulting debtor's account receivables under section 9-507(2), "conformity with reasonable commercial practices among others collecting receivables would establish that a collection effort was done in a commercially reasonable manner"); *Ford Motor Credit Co. v. Mathis*, 660 So. 2d 1273, 1276-77 (Miss. 1995) (holding that a private wholesale automobile dealer auction was commercially reasonable because it was the usual manner of selling repossessed automobiles and conformed to reasonable commercial practices among dealers in repossessed automobiles); *Chrysler Dodge Country, U.S.A., Inc. v. Curley*, 782 P.2d 536, 538-40 (Utah Ct. App. 1989) (reviewing, under Utah's version of section 9-507(2), commercial reasonableness of private sale of automobile against the reasonable commercial practices among car dealers who dispose of repossessed vehicles). To the extent there are different types of sellers and dealers and concomitant selling practices for non-repossessed goods versus the same repossessed goods, the case law ambiguity muddies the analysis of whether the secured party conformed to the relevant commercial practices. Evidence for differing practice exists. See Korybut, *supra* note 5, at 1461 n.300; *supra* note 182.

198. See *supra* notes 19-21.

199. On September 3, 2006, eBay.com listed 467 items under its category "Tractors & Farm Machinery," including tractors. http://business.search.ebay.com/tractor_Tractors-FarmMachinery_W0QQsac atZ91952.

due diligence, marshals evidence that it is the most efficient market reasonably available to sell the used tractor.²⁰⁰ Further, limiting the Article 9 secured party to only those markets which have been used by at least one other Article 9 secured party selling similar collateral would be illogical since no secured party would ever be able to go first.

Having invoked the General Directive, the uncertainty of the availability and cost of empirical data required to prove the new market's relative efficiency over the conventional, traditional market appears as it did in Part IV, section B.²⁰¹ Where the information does not exist or is too expensive to obtain relative to the collateral's value, then doctrinal and business uncertainty is reintroduced, proving once again that empirical uncertainty is doctrinal or business uncertainty. Absent cheap reliable data of the new market's relative efficiency, a secured party may choose to continue using the conventional, traditional market, especially where it has been blessed by legal precedent. Part IV, sections D, E and G explore further the empirical data uncertainty issue and its corrective measures.²⁰²

D. *Will a Sale of My Collateral Through the New Market Realize Higher Net Proceeds Than Through the Conventional, Traditional Market?*

For obvious business reasons the perfectly rational, maximizing secured party will want to know what the benefits are of using the new market. To such a secured party, perhaps the most important benefit would be the new market's ability to produce higher net proceeds (price less costs)²⁰³ for the collateral than the conventional,

200. See *supra* notes 19-21.

201. See *supra* notes 182, 184 and accompanying text.

202. See *infra* notes 222-36 and accompanying text (Part IV.D.3); *infra* notes 242-43 and accompanying text (Part IV.E); *infra* notes 250-71 and accompanying text (Part IV.G).

203. After a foreclosure sale, the secured party may first deduct from the sale proceeds "reasonable expenses," including attorneys' fees, if so provided by agreement between the secured party and the debtor and not prohibited by

traditional market. In particular, there are three main reasons why such a secured party *ex ante* would want to know whether a new market would obtain higher net proceeds for the collateral than the conventional, traditional market. First, she would rather receive the highest price possible from the sale to quickly recover all her loan money in order to re-lend it again rather than resort to a time-consuming (and possibly fruitless) pursuit of the debtor for a deficiency.²⁰⁴ Second, it seems sensible to hypothesize that a debtor is less likely to contest a high-price sale than a low-price sale. Finally, although price is not a term of commercial reasonableness, a low price will trigger the reviewing court's careful scrutiny of the sale process, including the secured party's choice of sale method.²⁰⁵

The non-adoption theory's first hypothesis holds that the more legally and/or commercially novel a new market, when compared to the conventional, traditional market, the more legal, empirical, or business uncertainty a secured party will feel about using the new market to sell repossessed collateral. In the context of online auctions, the hypothesis' explication can be bifurcated into whether there is any uncertainty about whether (1) the online auction channel as a whole, or (2) a particular online auction receives higher net proceeds for the type of repossessed property the secured party wants to sell when compared to conventional, traditional markets. Because Article 9 doctrine holds that in selecting the commercially reasonable market the secured party must consider the particular type of collateral to be sold, the focus is better placed on particular online auctions and the type of property sold thereon.²⁰⁶ However, evidence that the online auction channel itself is a mechanism to realize higher prices could be useful absent data on specific online auctions.

state law. Then the secured party may allocate the remaining proceeds toward payment of the outstanding debt. Revised U.C.C. § 9-615(a)(1).

204. *See supra* note 90 and accompanying text.

205. *See supra* notes 25-27 and accompanying text.

206. *See supra* notes 19-21, 177 and accompanying text.

1. *The Online Auction Channel*. Despite the popular notion that online auctions like eBay are an efficient means to sell all sorts of property, the Article 9 secured party may be uncertain about whether a sale through the online auction channel will produce higher net proceeds for the type of repossessed property the secured party wants to sell rather than a sale through the conventional, traditional market(s). One can find theoretical and hard and soft empirical literature suggesting that the online auction channel is better at realizing higher net proceeds than conventional markets, and other literature suggesting that it is not. This literature ultimately is limited by the fact that no reliable study of which the author is aware specifically addresses the question of whether the online auction channel generally is better than conventional markets with respect to selling repossessed *Article 9 collateral* generally, let alone specific types of Article 9 collateral. Similarly, two Interviewees believed online auctions fetch better prices than alternative sale methods, but another said that there was uncertainty about this issue.²⁰⁷

For distressed property, the most salient reliable study of which the author is aware is Professor Wyld's, discussed in Part II.²⁰⁸ In the context of surplus, seized, used, and lost assets held by public sector actors such as the federal and state governments, Professor Wyld concluded that "online auctioning is proving to be *the* most effective method for disposing" of such assets.²⁰⁹ From five case studies of the use of online auctions, Professor Wyld argues that online auctions can "[r]aise the final selling prices of surplus items being sold, often at price points that are considerably

207. Perhaps not surprisingly, Online Representative #1 and Online Representative #2 each said they felt online auctions would get better prices. Online Representative #1 Interview, *supra* note 73; Online Representative #2 Interview, *supra* note 74. Lawyer #2, however, said people can be uncertain about what an asset will fetch through an online auction and they feared that a debtor would be more likely to challenge the low-price sale if it was through an online auction rather than a conventional method. Note that Lawyer #2 did say that eBay sales do sometimes get good prices. Lawyer #2 Interview, *supra* note 71.

208. See *supra* notes 52-57 and accompanying text.

209. WYLD, *supra* note 46, at 81.

higher than historical returns on similar assets [and] [l]ower actual cost outlays, both in direct costs and hidden indirect costs, to agencies to carry out the sale of surplus."²¹⁰ In other words, for the sellers and online auctions Professor Wyld examined, they generally sold such assets for higher prices and lower transaction costs than conventional market channels.

But extending Professor Wyld's conclusions to Article 9 repossession sales may be inappropriate for two reasons. First, it is not apparent from the study itself whether Professor Wyld examined Article 9 secured creditors selling distressed goods through these online auctions. To the extent there were such creditors, the study's price conclusions clearly do not separate out the price results from Article 9 collateral sales. This is important because Professor Wyld's study, at least in part, observed online auctions getting better prices when compared to inefficient foreclosure laws, and those foreclosure laws may well have been less efficient than the markets Article 9 secured creditors access through the commercial reasonableness standard.

For example, Professor Wyld studied the online auction Bid4Assets.com, through which government tax authorities sold tax-delinquent real property.²¹¹ Traditionally, these sales are governed by legislatively mandated rules which generally have been criticized as being very inefficient and resulting in low prices.²¹² Not surprisingly, Professor Wyld

210. *Id.* at 7; *see also id.* at 25.

211. *Id.* at 60-65.

212. Professor Wyld alludes to this fact, stating that "the online auction mechanism will likely produce far better results than the traditional auctions held on the 'courthouse steps,' both in terms of the number of properties sold and the prices paid for them, due to the increased reach that the Internet brings to the process." WYLD, *supra* note 46, at 61; *see also id.* at 62 (stating that "Kern County [California] had sold delinquent properties through physical auctions, held three times a year in the chambers of the county's board of supervisors"). *See generally* Scott B. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives*, 71 VA. L. REV. 933, 961 (1985) (describing inadequate advertising requirement for real estate foreclosure sales); Martha Lassiter Sewell, *Avoidance of Foreclosure Sales Under Section 548 of the Bankruptcy Code: A Balancing of Interests*, 27 WAKE FOREST L. REV. 1011, 1027-30 (1992); John L. Woodruff, *Certiorari to In re BFP: The Eve of Decision to a Dozen Years of Durrett Conflict—Will Resolution of the*

observed that the online auction sales realized much better prices than the conventional auctions. What is not clear, however, is whether the same magnitude of price increase would result if prices for Article 9 personal property sold through an online auction like BidAssets.com were compared to prices realized through conventional, traditional markets for Article 9 collateral. Professor Gilmore replaced the rigid and inefficient foreclosure sale rules of the Uniform Conditional Sales Act (UCSA) with Article 9's commercial reasonableness standard in order to allow access to more efficient market-based sale practices and thus improve the low prices received under the UCSA.²¹³ Whether Professor Gilmore's goal has been realized is hotly debated.²¹⁴ Nevertheless, it is possible that historical prices for market-based Article 9 sales are on average better than those under the tax-delinquent real property auctions studied by Professor Wyld. Thus, it is also possible that the price differentials Professor Wyld observed in his study would be larger than that which would be observed between Article 9 sales through online auctions versus conventional, traditional markets.

Second, the extension of Professor Wyld's price conclusions to Article 9 collateral sales is problematic in that some of his observed sales were of distressed real property. Real property cannot serve as collateral under Article 9.

Issue Solve the Real Problem?, 24 MEM. ST. U. L. REV. 773, 790 (1994); Comment, *In re BFP: Mortgage Foreclosures and Bankruptcy Code's "Reasonably Equivalent Value,"* 8 DEPAUL BUS. L.J. 227, 236, 243 (1996).

213. See Gilmore, *Article 9*, *supra* note 6, at 7 (stating that "the tight system of mandatory regulation adopted in the Uniform Conditional Sales Act had failed. In the context of commercial financing it set up burdensome formal requirements, compliance with which did no one any good; in the consumer context the requirements had not been successful as deterrents to fraud. The Act's insistence on a public auction sale—thus depriving the vendor of the use of commercial channels open to him—had proved a sure guaranty that the property would go for less than it was worth"); see also 2 GILMORE, *supra* note 6, § 44.4, at 1227 (stating that "[t]here is general agreement that the UCSA provisions worked very badly indeed. . . . A better system for guaranteeing deficiency judgments could hardly be designed"); Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste*, 40 UCLA L. REV. 695, 704 (1993); JORDAN & WARREN, *supra* note 15, at 267-68.

214. See Korybut, *supra* note 5, at 1424-31.

Given the lack of on-point studies comparing prices for Article 9 repossessed collateral sold through online auctions versus conventional, traditional markets, a secured party might venture a bit farther afield to the rich body of theoretical and empirical economic literature examining whether Internet prices (including those realized through online auctions) are higher or lower than those in conventional retail markets. Much of this literature attempts to prove or disprove one of the oft-cited economic predictions about Internet commerce: that due to lower transaction costs it will be "frictionless," or at least less frictioned than conventional market channels.²¹⁵ The theoretical result of such a frictionless market would be that buyers would enjoy lower prices when compared to conventional markets, and sellers would enjoy higher net proceeds (price less costs) due to lower transaction costs.²¹⁶

215. See, e.g., Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 *MANAGEMENT SCIENCE* 563 (2000), available at <http://www.atypon-link.com/INF/doi/abs/10.1287/mnsc.46.4.563.12061>; Ho Geun Lee et al., *Is the Internet Making Retail Transactions More Efficient?: Comparison of Online and Offline CD Retail Markets*, 2 *ELECTRONIC COMMERCE RESEARCH & APPLICATIONS* 266, 276 (2003), available at http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6X4K48TM2CG2&_user=681891&_coverDate=12%2F31%2F2003&_rdoc=1&_fmt=&_orig=search&_sort=d&view=c&_acct=C000037419&_version=1&_urlVersion=0&_userid=681891&md5=7357ba8581513cbd8f2aae81367a612c (stating that "[i]t has been widely speculated that [sic] Internet will make retail transactions more efficient by lowering search costs that buyers must incur to obtain information on products and prices"); Lee, *supra* note 57, at 73 (discussing the reduced price hypothesis of electronic marketplaces).

216. See Brynjolfsson & Smith, *supra* note 215, at 564-65 (reviewing literature supporting and refuting the proposition that prices on the Internet are lower than on conventional market channels, and whose study concluded that for books and CDs, prices "on the Internet average 9-16% less than identical items sold via conventional channels," and that this and other studies' results "provide support for the hypothesis that the Internet is a more efficient channel in terms of price levels and menu costs. However, the price dispersion results suggest that retailer heterogeneity with respect to factors such as branding, awareness, and trust remain important factors to understanding Internet markets"); Lee, *supra* note 215, at 276 (stating that "[o]ur analysis indicates that Internet retailers [of CDs] charge lower prices than conventional retailers"); Anindya Ghose, Michael D. Smith & Rahul Telang, Comment, *Internet Exchanges for Used Books*, 30 (2005), <http://ssrn.com/abstract=584401> (stating that "prices of used books sold on the Internet are 38-75% lower than comparable prices in physical stores."); Arup Daripa & Sandeep Kapur, *Pricing on the Internet*, 2 (2001), <http://129.3.20.41/eps/mic/papers/0312/0312007.pdf>

While the frictionless market hypothesis has been challenged,²¹⁷ it also finds support in the literature.²¹⁸ While much of this literature focuses on Internet retailers, rather than online auctions, and thus may have limited application to this Article's inquiry,²¹⁹ it suggests some uncertainty about a number of questions. First, whether sellers, by virtue of this frictionless environment, will enjoy a sufficiently large reduction in selling costs to offset a reduced online price such that the net proceeds of the sale (price less costs) are higher with online auctions. If not, perhaps this might help explain why secured parties are not using online auctions.²²⁰ Second, would a lower net-

(stating that with respect to internet markets other than online auctions "[i]n some sectors such price transparency has resulted in intense price competition and substantially lower prices for consumers"); Bernhard Rumpe, *E-Business Experiences with Online Auctions*, 109-10 (2003), <http://www4.in.tum.de/~rumpe/ps/IRMARumpe.pdf> (stating in the context of a business' procurement process that "[o]nline auctions . . . have proven their immediate effects. It is possible to reduce the price paid for commodities, as well as for strategic materials and goods, within hours, after only a few days of preparation").

217. See Brynjolfsson & Smith, *supra* note 215, at 564-65 (reviewing literature supporting and refuting the proposition that prices on the Internet are lower than on conventional market channels); see also Daripa & Kapur, *supra* note 216, at 7-11 (discussing reasons why Internet markets, other than online auctions for homogeneous goods, might produce possibly higher prices than expected); Lee, *supra* note 57, at 73 (discussing the reduced price hypothesis of electronic marketplaces); WYLD, *supra* note 46, at 36 and accompanying text.

218. See *supra* note 57 and accompanying text.

219. See Karen Clay, Ramayya Krishnan & Michael Smith, *The Great Experiment: Pricing On The Internet*, 8 (2001), <http://www.heinz.cmu.edu/wpapers/detail.jsp?sessionId=1914601161351859144?id=424> (last visited Apr. 9, 2007) (reviewing the literature on prices on Internet markets other than auctions versus conventional markets other than auctions, and stating that "[m]arkets with price discrimination and auction markets may have different efficiency metrics than the consumer markets discussed [in their literature review]"); Smith et al., *supra* note 57, at 3 (discussing limitations of Lee's article cited in *supra* note 57, and stating that "[a]t first glance, this finding [of higher online prices] seems opposed to the efficiency hypothesis. However, two aspects of his study are important to note. First, Lee studies an auction market and the characteristics of auction markets are different than retail markets. In auction markets efficiency results when the good is sold to the bidder with the highest valuation. Thus, higher prices may be a signal of more efficient auction markets *ceteris paribus*").

220. See generally Rumpe, *supra* note 216, at 113 (stating in the context of a buyer's procurement process and its use of an online auction to purchase

proceeds effect pertain to all types of collateral or only some?²²¹ If only some, perhaps this might help distinguish the relatively few Article 9 secured parties using online auctions from those who are not.

Given their empirical nature, the author cannot resolve these questions here. Rather, given the absence of any robust theoretical or empirical studies comparing prices received for Article 9 collateral through online auctions versus conventional market channels, the limitations of extending Professor Wyld's study to Article 9 repossession sales, the economic literature's open questions, and the Interviewees' statements, the relevant observation is that a secured party cannot conclude from this body of literature with theoretical or empirical certainty that online auctions generally fetch better net proceeds for Article 9 repossessed collateral.²²² Given this uncertainty, the non-adoption theory's third hypothesis, that predicts that a secured party may fail to adopt the online auction channel, seems plausible.

2. *Specific Online Auction.* One can also find studies about the efficiency of specific online auctions. For example, Professor Wyld did case studies on eBay and Bid4Assets. But the limitations of extending Professor Wyld's

supplies that sellers (suppliers) may not want to use an online auction to sell certain materials given that online auctions lower the price for such materials and thus the profits enjoyed by the sellers).

221. There is literature suggesting that the type of goods sold on the Internet is an important variable in setting the price. See Clay et al., *supra* note 219, at 7 (reviewing the literature on prices on Internet markets other than auctions versus conventional markets other than auctions, and stating that "[m]arkets for more expensive products [than books, CDs, and software] may have different search intensities and therefore different efficiency characteristics").

222. See *id.* at 18 (reviewing the literature on prices on Internet markets other than auctions versus conventional markets other than auctions, and stating that "[w]e do not yet have definitive answers to the questions of whether Internet markets are more efficient than their physical counterparts or whether Internet markets are themselves becoming more efficient over time. The primary barrier to addressing these questions is obtaining data that covers a wide range of products sold in both Internet and physical stores over a reasonably long time span. Early studies suggest that prices are lower on average online. At least for some products, lower online prices appear to put pressure on offline prices, narrowing differences between the two channels").

comparative price conclusions to Article 9 collateral pertain here too. And apart from Professor Wyld's study, no other robust study of which the author is aware analyzes comparative prices for distressed property, let alone Article 9 collateral, sold through online auctions versus conventional markets.

3. *Corrective Measures.* The corrective measure is an empirical one placed upon the secured party who must assemble her own comparative net proceeds data for a particular online auction and the particular type of collateral being sold, or hire someone to do so. This approach keeps faith with the twin Article 9 doctrines that (1) for selecting a commercially reasonable method of sale the particular collateral is the touchstone, and (2) the secured party in good faith and with due diligence should try and identify, assess, and use the reasonably available market calculated to fetch the highest price possible under the circumstances. A secured party with comparative net proceeds data about whether a particular online auction with a history of selling the same or similar property held by the secured party goes a good distance in performing this task.

For some types of collateral on some online auctions, obtaining this comparative price data is possible. For example, eBay, for a fee, provides its customers with historical data for categories of items sold through eBay, presumably because customers want, and will pay for, this information.²²³ "EBay Marketplace Research enables research on up to 90 days of completed items data and provides consolidated metrics on those items."²²⁴ Sellers and buyers can obtain data about how much their item is worth ("the average selling price for the item you're selling or bidding on") and "how many items [similar to the seller's item] were listed and how many of those sold successfully within a selected time period."²²⁵ Further, eBay's "Top

223. EBay, http://pages.ebay.com/marketplace_research/index.html (last visited Mar. 3, 2007).

224. EBay Marketplace Research Overview, http://pages.ebay.com/marketplace_research/tutorial.html (last visited Mar. 3, 2007).

225. *Id.*

Searches" feature provides data about "exactly what buyers are looking for on eBay, within a certain category or on the entire site."²²⁶ Having obtained this information for some types of items, like computers, the secured party should be able to obtain comparative published retail and wholesale valuations.²²⁷ Armed with these sets of comparative price data, the secured party can evaluate whether the online auction is likely to fetch higher net proceeds. Unfortunately, eBay does not publish historical data for eBayMotors.com, its specialty automotive auction,²²⁸ and for which there are various automotive appraisal books with which to compare prices.²²⁹ Similarly, Bid4Assets.com (studied by Professor Wyld) provides some historical price data through its "Power Search" application, but the data is less robust than eBay's.²³⁰

226. *Id.*

227. See, for example, the Orion Blue Book, that publishes used good prices for various equipment, such as cameras, computers, guns, and videos. Orion Blue Book, <http://www.orionbluebook.com/orionnew/index.asp> (last visited Mar. 3, 2007). Orion Blue Books for each category of equipment are available online for fees ranging from \$600 to \$38. See *id.* The IRON Official Guide also lists used farm equipment values. See IRON Guides Home Page, <http://www.ironguides.com> (last visited Mar. 3, 2007).

228. eBay FAQ About Marketplace Research, http://pages.ebay.com/marketplace_research/faq/index.html#15 (last visited Mar. 3, 2007).

229. See, e.g., N.A.D.A., OFFICIAL USED CAR GUIDE, available at <http://www.nadaguides.com>. Courts consult this and similar guidebooks for automobile valuation purposes. See *Lee v. Trust Co. Bank*, 418 S.E.2d 407, 408 (Ga. Ct. App. 1992) (using Black Book of wholesale automobile values); *Wombles Charters, Inc. v. Orix Credit Alliance, Inc.*, 39 U.C.C. Rep. Serv. 2d (CBC) 599, 608 (S.D.N.Y. 1999) (using National Bus Trader "Round Up" price list to value bus); *Atlas Constr. Co. v. Dravo-Doyle Co.*, 3 U.C.C. Rep. Serv. (CBC) 124, 130-31 (Pa. Com. Pl. 1965) (consulting the Green Guide Book for the sale of a crane); see also Russell L. Wald, *Secured Party's Failure to Sell Collateral in Commercially Reasonable Manner*, 4 AM. JUR. 2D *Proof of Facts* § 14 (2002). But see *Carter v. First Fed. Sav. & Loan*, 347 S.E.2d 264, 267 (Ga. Ct. App. 1986) (including a secured creditor's testimony that N.A.D.A. valuation of mobile home was inaccurate); *Medling v. Wecoe Credit Union*, 678 P.2d 1115, 1125 (Kan. 1984) (stating that "the Court wasn't helped a whole lot by the welter of the different figures by black, red and whatever other color books are used by the various dealers"); *Jones v. Morgan*, 228 N.W.2d 419, 424 (Mich. Ct. App. 1975) (finding lower court did not commit reversible error by disallowing expert testimony of car's Blue Book value where no adjustment was made to reflect the car's poor condition).

230. See Bid4Assets, <http://www.bid4assets.com/> (last visited Mar. 3, 2007).

Another online auction, TitleAuctions, provides a different source of comparative price data. TitleAuctions sells Article 9 cars repossessed by credit unions.²³¹ Its Web site asserts that "TitleAuctions' credit union clients enjoy average sale prices \$2,100 per vehicle higher than traditional remarketing channels, as well as new loan revenue and increased Web site traffic."²³² Further, the Web site provides four case studies of sellers receiving higher prices for their automobile sales through the online auction than they had historically received through alternative, conventional markets.²³³ While its comparative price data is anecdotal and not particularly robust, TitleAuctions is at least trying to aid Article 9 secured parties in their quest to identify markets that will potentially maximize the collateral's price and be found commercially reasonable.²³⁴

For online auctions that do not have robust historical price data, an Article 9 secured creditor could try to assemble the data herself or hire an expert to do so. Even if the secured party or expert was permitted access to the online auction's database (an unlikely occurrence), compiling that data would be time-consuming and expensive. Except for expensive collateral, or secured parties who are repeat repossession sellers and thus can amortize the costs over future sales, these costs may be prohibitive.²³⁵ Absent reliable and inexpensive data about a specific auction, it seems sensible to hypothesize that a

231. See TitleAuctions, <http://www.titleauctions.com> (last visited Mar. 3, 2007).

232. About TitleAuctions, <http://www.titleauctions.com/about> (last visited Mar. 3, 2007). TitleAuction's Web site does not provide or explain the raw data from which this assertion is based.

233. See TitleAuctions Credit Union Services, <http://www.titleauctions.com/services/retail.cfm> (last visited Mar. 3, 2007).

234. See TitleAuctions Press Room, <http://www.titleauctions.com/press/story.cfm?nID=14> (last visited Mar. 3, 2007) (stating that "[online] [a]uctions that result in better than wholesale prices demonstrate the credit union has made an extra effort to remarket the collateral in a commercially reasonable manner, which mitigates legal risks" (emphasis added)).

235. See *infra* note 267.

secured party may choose not to use that online auction.²³⁶ In the end, reliable and inexpensive empirical data, not doctrinal fixes, will damper the uncertainty affected by this fourth progenitor of the non-adoption theory.

E. *Which Manifestation of the New Market Channel Should I Use?*

Consider the dealer-only market channel for used cars. That market channel is now well-established and has manifestations in every state, indeed, likely more than one in each state. A variety of factors would inform a potential seller which manifestation, which particular dealer-only auction, she should use to sell her car. These might include the business considerations discussed in Part IV, such as which dealer-only auction is well-recognized and which will realize the highest net proceeds. Another important factor would be geographical location of the dealer-only auction. For business reasons, a maximizing secured party might not use a dealer-only auction that is geographically remote from the collateral. For example, the maximizing secured party will not incur transportation costs to get the car to the remote market unless he knows these costs will be more than off-set by a higher price he will get at the remote market versus the local market. Further, Article 9 case law doctrine requires that, for relatively inexpensive collateral, secured parties advertise the repossession sale to the general public living within a reasonable distance from the sale site since only such people would be willing to travel to attend the sale.²³⁷ Thus, doctrinally, for such collateral, geography eliminates the secured party's need to investigate using markets outside of this geographic area.²³⁸

236. Alternatively, in part, the secured party could try and obtain data that the particular online auction is a commonly accepted, prevailing, or well-recognized Web site to sell the secured party's type of property. Recall these are proxies for market efficiency, as discussed in Part IV.B. The rub is that this user data itself may not exist or is prohibitively expensive to purchase or assemble.

237. See Korybut, *supra* note 53, at 72-75.

238. See *id.* at 125-26.

The non-adoption theory's first hypothesis is that the more legally and/or commercially novel a new market channel when compared to the conventional, traditional market, the more legal, empirical and business uncertainty a secured party will feel about using the new market channel to sell repossessed collateral. The fifth progenitor holds that faced with multiple manifestations, the secured party may feel uncertain about which particular manifestation of the new market channel to use. In the context of online auctions, the uncertainty is particularly acute because online auctions are conducted in a boundless cyberspace with no geographical constraints.

As discussed in Part II, one of the heralded benefits of Internet commerce generally, and online auctions in particular, is that sellers remote from their potential buyers have an inexpensive means to reach these buyers, even for inexpensive goods. Thus, for online auctions, market manifestation elimination by geography is less effective: initially, all online auctions, regardless of geography, are potentially available to the secured party.²³⁹ The Internet Auction List, for example, lists under the category "Online Auctions" hypertext links to eighty-five online auctions.²⁴⁰ Additionally, there are online auctions not listed on The Internet Auction List.²⁴¹ From this pool of online auctions, a secured party will have to identify the auction she feels is the best suited to sell her collateral.

Given this task, and recalling Part IV, sections A-D, from this pool of potential online auctions, the secured party, at a minimum, must determine (1) which of these online auctions are constructed in a fashion that maximizes the possibility that a court will find the site's use commercially reasonable, for example, by allowing the secured party to post digital pictures of her collateral so that bidders can "inspect" the collateral; (2) which of these online auctions is considered prevailing, commonly

239. *See id.*

240. The Internet Auction List, <http://www.internetauctionlist.com/Results.asp?CategoryID=13&LocationID=0> (last visited Mar. 3, 2007).

241. *See, e.g.*, TitleAuctions Press Room, <http://www.titleauctions.com/press/story.cfm?nID=14> (last visited Mar. 3, 2007).

accepted, or well-recognized in the relevant commercial community for the collateral type, or has a current critical mass of interested potential bidders who will compete for such collateral; and (3) which, if any, of these online auctions on-average-over-time produce net sale proceeds for property similar to the secured party's that is higher than what could be realized in the conventional, traditional market.²⁴² Further, if more than one online auction meets these requirements, the secured party should choose the best one reasonably available under the circumstances. Thus, the problems discussed in Part IV, sections A-D, that give rise to uncertainty with regard to answering these questions, coalesce with the secured party's need to select an online auction. Additional uncertainty and costs arise when one considers that answering these questions requires empirical data which may be unavailable or prohibitively expensive.

Under the non-adoption theory's third hypothesis, it seems plausible that a secured party who must answer these questions for multiple manifestations of a new market channel, in particular the online auction channel, might instead choose to forgo the new market channel and use the conventional traditional market. The corrective measures here are twofold. First, because these questions raise the doctrinal, business, and empirical uncertainty problems discussed in Part IV, sections A-D, the respective corrective measures discussed in each section apply here too. Second, with respect to the problem of the costs and uncertainty of acquiring empirical data to answer these questions, further corrective measures are discussed in Part IV, section G.

F. *How Do I Sell My Collateral in the New Market?*

For any new market, the secured party will need to learn the process of selling her collateral in that new market. The non-adoption theory's first hypothesis holds that the more legally and commercially novel a new market is when compared to the conventional, traditional market(s) the secured party normally uses, the more legal, empirical,

242. See Korybut, *supra* note 53, at 86-128; AGIN, *supra* note 54, at ch. 15:9.

or business uncertainty that secured party likely will feel about using the new market to sell repossessed collateral. Consider again the case of online auctions.

Assume the secured party wants to use an online auction, and must do the investigative work to identify one that, at a minimum, meets the requirements of the General Directive.²⁴³ Assume also that while she has some familiarity with using the Internet, the secured party is a first-time online seller through an online auction. In these circumstances she will need to be able to access the Internet generally, review online auction Web sites, and eventually select a particular online auction. Then she will need to subscribe in some form to the Web site and learn the process of selling items through it. This process will include the secured party creating her own auction on the Web site, taking digital pictures of the collateral and uploading them to the auction's site, setting the duration of the auction, and setting a minimum bid. Some first-time online-selling secured parties may find these tasks daunting and expensive,²⁴⁴ raising uncertainty about whether they can perform them,²⁴⁵ or even whether they are willing to perform them.²⁴⁶ Under these circumstances, the third hypothesis holds that such a secured party may chose to forgo the new market and stick to the conventional, traditional market process she knows. Indeed, several

243. See *supra* notes 19-21 and accompanying text.

244. See WYLD, *supra* note 46, at 75 (discussing the costs of using an online auction).

245. *Id.* (quoting an analyst at Jupiter Media Metrix, noting that "[s]etting up an online auction yourself can be difficult and time-consuming"). But see Brynjolfsson & Smith, *supra* note 215, at 569 (stating that "[o]ne widely discussed aspect of Internet channels is low entry costs for Internet retailers. According to this view, an Internet retailer needs only a web page and a relationship with book or CD distributors to effectively 'enter' the market").

246. See Rumpe, *supra* note 216, at 110 (explaining why businesses may be reluctant to improve the purchasing process through online auctions, and stating that "some people are interested in improving the purchasing process, whereas others would like to stay with the old, approved paths, because they do not wish to revise their habits or opinions").

Interviewees made comments regarding online sale process issues that deter secured party use.²⁴⁷

G. *How Much Time and Money Do I Need to Spend
Answering All of These Questions?*

Part IV, sections A-F have posed questions that a secured party may ask with respect to a new market for her collateral. Each section has described the respective doctrinal, business, and/or empirical uncertainties and their corrective measures that accompany each question. With this in mind, the secured party will want to know how much of her time and money she must spend answering these questions.²⁴⁸ This last question itself acts as a

247. Online Representative #1 said that one deterrent for sellers using online auctions is unfamiliarity and lack of access to the Web. Online Representative #1 Interview, *supra* note 73. Online Representative #2 said that one obstacle to having secured creditors and other sellers use online auctions was unfamiliarity with the Internet generally and online auctions in particular. Online Representative #2 Interview, *supra* note 74. Lawyer #1 said one reason his/her clients may not use online auctions is lack of familiarity. Lawyer #1 Interview, *supra* note 70. Lawyer #2 said that some people do not have a computer or Internet access. Lawyer #2 Interview, *supra* note 71. Lawyer #3 said that some dealers of automobiles may not have access to the Internet and thus could not participate in online sales. Lawyer #3 Interview, *supra* note 72. But in a supplemental telephone interview, Lawyer #3 also said that as time goes on, fewer people are ignorant of online auctions. Lawyer #3 Supplemental Interview, *supra* note 100.

248. See generally Rubin, *supra* note 87, at 1095.

In many situations, a decision maker can reduce uncertainty by gathering more information, or spending more time analyzing the problem at hand. To assume that additional information gathering or analysis is always warranted, however, is an error. . . . Information gathering and analysis always has costs; if these costs exceed the benefit, it is not rational for the decision maker to incur them, assuming once again that his pre-established goal is to maximize his wealth. In the case of an individual, the trade-off between the cost and benefit of information gathering can be computationally complex, because it requires the person to determine the value of his time. The issue can be simplified however, by considering an organization; because the organization can only act through human agents, whom it needs to pay, the cost of information gathering or analysis is automatically monetized in this situation.

Id.; see also Schroeder, *supra* note 87, at 170-71.

Information is often, or usually, not readily, instantaneously and costlessly available . . . [which] implies that it may also be rational not

progenitor of uncertainty due to which the secured party may fail to adopt the new market.

Consider a secured party who is in the early stages of thinking about using an online auction for the first time. Part IV, sections A-E have described the considerable amount and degree of legal, business, and empirical uncertainty that a secured party may experience about investigating, assessing, and using an online auction. Under these circumstances, the secured party may not be able to predict with sufficient certainty how much time and money it will take to answer the questions posed by the preceding six progenitors and then mitigate their cumulative and interrelated uncertainties, or even whether this can be done to an acceptable level of risk regardless of how much time and money she spends. In the face of this preliminary uncertainty about time and money costs and the efficacy of its expenditure, it seems sensible to hypothesize that a secured party may choose to forgo spending more time and money investigating further the use of an online auction and stick to the conventional, traditional, market she knows.

Consider three illustrative, not exhaustive, examples drawn from Part IV.

1. *Legal Costs.* A secured party may hire a lawyer to sell the repossessed collateral through a new market. In the context of an online auction, counsel will have to opine whether, given the nature of the collateral and the particular online auction, the sale through the Web site likely would be considered commercially reasonable. Given the lack of on-point precedent about whether online auctions are commercially reasonable, the lawyer will have to carefully apply the General Directive and the seventeen

to seek whatever information would be necessary in order to make an informed decision. That is, if search "costs are positive" the economic actor may calculate that the expected costs of obtaining such information would exceed the expected costs to the actor of guessing incorrectly. As Posner himself acknowledges, people are not omniscient, but incompletely informed decisions are rational when the costs of acquiring more information exceed the likely benefits in being able to make a better decision.

Id.

guiding factors of commercial reasonableness to the online auctions that might be proper to sell the secured party's collateral.²⁴⁹ Accordingly, he will need to obtain the types of empirical data discussed in Part IV, sections A-E.²⁵⁰ Even if, early on, the lawyer can provide his secured party client with an estimate of how much time and money his investigation will take, given the vexing doctrinal commercial reasonableness questions discussed in Part IV, section A²⁵¹ and the difficulty and costs of obtaining empirical data discussed in the next subsection, he might also tell the client that no matter how much time and money he spends he will not be able to eliminate all the uncertainties and thus the risks of using the online auction. For some secured parties, that alone could prevent the use of the online auction.

2. *Empirical Data Costs.* Article 9's commercial reasonableness standard and its incorporation strategy requires an empirical investigation of merchant reality: how do commercial or consumer actors sell the particular type of property repossessed by the secured party? More specifically, for the doctrinal reasons discussed in Part IV, secured parties will need to conduct a variety of empirical inquiries. In this sense, Article 9 does not so much tell secured parties or courts what the law is, but rather how to find the law.²⁵² Indeed, Professor Danzig's observation about Article 2 also can be applied to Article 9's commercial reasonableness standard: "The law is found not in doctrine, not in policy, but in directed exploration of the 'fact-pattern of common life.'"²⁵³ Given the incorporation strategy's reliance on empirical inquiry to discover the law, empirical

249. See *supra* notes 110-11 and accompanying text.

250. See *supra* notes 158; see also *supra* notes 166-67 and accompanying text (Part IV.A.3.ii); *supra* notes 178-84 and accompanying text (Part IV.B.1 & B.2); *supra* notes 201-02 and accompanying text (Part IV.C.2); *supra* notes 222-36 and accompanying text; (Part IV.D.3); *infra supra* notes 242-43 and accompanying text (Part IV.E); *supra* notes 251-71 and accompanying text (Part IV.G).

251. See *supra* notes 116-25 and accompanying text.

252. See Danzig, *supra* note 1, at 626.

253. *Id.*

uncertainty about market-based practices is doctrinal uncertainty. Further, given there are legitimate business reasons for a secured party's empirical inquiry (as discussed in Part IV), empirical uncertainty is also business uncertainty. This subsection explores those uncertainties and non-adoption behavior.

Recall the General Directive: when faced with multiple markets such as a conventional, traditional market versus a novel, new market, Article 9 requires that the secured party identify, assess, and use the market that she, in good faith and after due diligence, believes is best suited to maximize the collateral's price and is reasonably available under the circumstance.²⁵⁴ How exactly does a secured party perform this investigation? A number of sections in Part IV described disparate doctrinal strands and corresponding empirical data-gathering tasks that fall under the General Directive's umbrella.

In sections B²⁵⁵ and E,²⁵⁶ the Article discussed the secured party's need to determine whether a new market was prevailing, well-recognized, or commonly accepted for the secured party's type of collateral. This is an empirical inquiry. As also discussed in section B, in the context of online auctions, this data may or may not exist and could be cumbersome, difficult, and costly to obtain.²⁵⁷ That is also true for other types of markets.²⁵⁸ In sections B²⁵⁹ and E,²⁶⁰

254. See *supra* notes 19-21 and accompanying text.

255. See *supra* notes 171-78 and accompanying text.

256. See *supra* note 242 and accompanying text.

257. See *supra* notes 179-84 and accompanying text.

258. See Korybut, *supra* note 5, at 1481. In discussing how to make a case of commercial unreasonableness, Sheldon and Sable's advice to debtor attorneys suggests a high level of sophistication and cost necessary to obtain data about the regularity and reasonableness of repossessed car sale practices.

[D]ebtor attorneys must look at the pattern of a dealer's sale of used cars—comparing the percentage of repossessed cars versus the percentage of other used cars that are sold at wholesale auction. Until 1987 in the case of Ford and 1988 in the case of General Motors (GM), the FTC order required Ford, GM, and Chrysler dealers to keep records of the percentage of repossessed cars sold retail and wholesale. These dealers should also have the same breakdown for the other used cars they sell. . . . Faced with a dealer that sells most repossessed cars at wholesale auction, debtor attorneys should determine if the same sales

the Article argued that a secured party may need to provide empirical evidence that the new market has a critical mass of current, interested potential bidders who will compete for such collateral. As discussed in sections B²⁶¹ and E,²⁶² in the context of online auctions, this data may or may not exist and could be cumbersome, difficult, and costly to obtain. In section D, the Article discussed the secured party's desire for comparative net proceeds data for the conventional, traditional market and the new market.²⁶³ Relatedly, as discussed in section A, the secured party must be sure that the new market is not prone to fraudulent or collusive bidder behavior.²⁶⁴ Because both sets of data may or may not exist and/or could be cumbersome, difficult, and costly to acquire, empirical data uncertainty may not be quelled.

The collective uncertainty of the time and money costs surrounding these disparate empirical inquiries may contribute to the secured party's failure to adopt an online auction. The third hypothesis holds that for any given secured party, this uncertainty alone, or in conjunction with the other progenitors of uncertainty, may render the new market too risky.

3. *Direct Transaction Costs of Using a New Market.* Using an online auction as its example, Part IV, section F described the potentially daunting tasks a secured party may have to undertake to learn and implement the process of selling her collateral through the new market for the first time. The costs associated with that process may too be

pattern holds for other used cars sold by that dealer.

SHELDON & SABLE, *supra* note 195, at 245.

259. *See supra* notes 178, 182-83 and accompanying text.

260. *See supra* note 242 and accompanying text.

261. *See supra* notes 177, 182-83 and accompanying text.

262. *See supra* note 242 and accompanying text.

263. *See supra* notes 219-33 and accompanying text.

264. *See supra* notes 20, 170 and accompanying text. Also, Online Representative #2 indicated that potential sellers were concerned about fraudulent bidding schemes instigated by bidders. Online Representative #2 Interview, *supra* note 73.

uncertain early in the secured party's investigation of online auctions, thus ending the inquiry.

4. *Corrective Measures.* There are several corrective measures for the ex ante uncertainty that a secured creditor may feel about time and money costs associated with identifying, assessing, and using a new market. First, the secured party could hire an expert like a lawyer or auctioneer.²⁶⁵ As discussed in Part IV, section G, subsection 1, in some cases with novel, new markets for which there is no legal precedent, hiring a lawyer may not sufficiently quell the uncertainty. But for other types of costs it should. So, for example, in the context of online auctions, the secured party could hire a third party intermediary to set up and conduct the sale.²⁶⁶ Further, the intermediary may

265. Where the collateral's value is sufficiently high to justify the expense, some courts require that the secured party hire a person familiar with selling the collateral, such as a professional auctioneer. *See, e.g., United States v. Conrad Publ'g Co.*, 589 F.2d 949, 952 (8th Cir. 1978) (inexperience of auctioneer contributed to finding of commercial unreasonableness); *Equibank v. Auer*, 103 B.R. 700 (Bankr. W.D. Pa. 1989); *Huntington Nat'l Bank v. Elkins*, 559 N.E.2d 456 (Ohio 1990); *Am. State Bank v. Hewson*, 411 N.W.2d 57 (N.D. 1987). *Cf. Wainright Bank & Trust Co. v. Railroadmen Fed. Sav. & Loan Ass'n.*, 806 F.2d 146 (7th Cir. 1986) (in real estate foreclosure sale, the failure to use professional auctioneer was insufficient to overcome totality of circumstances of an otherwise commercially reasonable sale). Using an experienced auctioneer is particularly important where the collateral is unique and/or expensive, and where such use is the industry custom. *See Pers. Jet, Inc. v. N.D. Callihan v. Paris Jet, Inc.*, 624 F.2d 562 (5th Cir. 1980).

266. *See, for example, AGIN, supra note 54, ch. 15:8, discussing BKAssets.com,*

an online auction service that tries to simplify selling items on eBay for the bankruptcy practitioner. BKAssets provides services similar to those of any auctioneer, except that it uses eBay as its auction forum. BKAssets does all of the work of setting up the auction, running the auction on eBay, and closing the sale transaction. BKAssets provides stock language for trustees to include in their sale motions and uses sale notices on the eBay listings to make sure that potential purchasers know that the assets are being sold subject to bankruptcy court jurisdiction and come without warranty.

See also WYLD, supra note 46, at 76; Hiring a Trading Assistant—FAQ, <http://pages.ebay.com/tradingassistants/questions.html#1> (last visited Mar. 3, 2007) (discussing the decision as to whether a customer conducts the online auction herself or uses a third-party service provider, eBay has a feature that allows prospective sellers to locate a trading assistant. "Trading Assistants are

be able to quickly provide an estimate of its costs. Nevertheless, while this eliminates some costs uncertainty, if the estimated costs are prohibitive, it also means the secured party will not use the online auction.²⁶⁷

Second, the costs associated with the investigation, assessment, and use of an online auction would be reduced if there was a specialized online auction for selling Article 9 collateral that was explicitly constructed in a fashion that maximized the possibility that a court would find the site's use commercially reasonable, and that provided the secured party with the technical assistance and empirical data required. No online auction the author has found explicitly demonstrates that it has thought about and addressed the type of Article 9 legal, business, and empirical data issues discussed in Part IV. In contrast, there are specialized online auctions, like Bid4Assets.com, which sell bankruptcy estate assets,²⁶⁸ which may help explain why bankruptcy

experienced eBay sellers from throughout the eBay user community who have indicated they are willing to sell your items for you for a fee").

267. The secured party's ability to identify and use the most efficient market possible to sell his collateral is constrained where the collateral's value is small relative to the expenses required to repossess the collateral and conduct a foreclosure sale. See Korybut, *supra* note 5, at 1458. Even where, however, the value of the collateral sold through the first online auction sale is disproportionately small to these transaction costs, a large, repeat secured party seller in theory might be willing to pay for these costs itself and amortize them over time in future transactions. Under these circumstances, the secured creditor might be willing to incur the start up costs associated with its first online auction sale. On the other hand, smaller and one-time-selling secured parties may not be able or willing to bear the initial costs or amortize them over future transactions. See Larry T. Garvin, *The Changed (And Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 342-43, (1999) (discussing the costs to secured parties from the implementation of the Revised Article 9 that "[l]arge banks and frequent credit users may find the added certainty of the new Article 9 attractive, as their transition costs can be spread over a good many transactions. Small banks and relatively infrequent credit users may, however, find the changes less pleasing. Just like their more active competitors, they will have to change their forms and, in a good many instances, their methods of doing business, but they will have fewer transactions over which to spread their costs. At least in the short run, the change to new Article 9 may thus make smaller creditors less competitive").

268. See AGIN, *supra* note 54, at ch. 15:9 ("Bid4assets.com, focuses on auctions of significant bankruptcy assets such as vehicles, real estate, industrial equipment, and even whole factories. The site provides all the features needed for a bankruptcy trustee to auction assets over the Internet, including assistance in scanning pictures of the assets, pre-qualifying bidders

trustees appear to be increasingly using online auctions to sell bankruptcy assets. One commentator states that

specialized online bankruptcy asset websites can better attract a focused audience of individuals and companies interested in purchasing assets from bankruptcy estates[,] . . . specialized websites can focus on the specific requirements of the Bankruptcy Code, [and] . . . the fact that the websites target the sale of bankruptcy assets can increase the confidence bankruptcy practitioners, trustees, and judges have in the auction mechanism.²⁶⁹

Absent a specialized Article 9 Web site, perhaps it should not be surprising that secured parties lack this confidence and will not use online auctions to sell Article 9 collateral.²⁷⁰

Third, the secured party could try and use the section 9-623(b)(3) safe harbor. This couples the presumed efficiencies of using dealer sale practices with the safe harbor's shelter from some of the legal uncertainty about whether the use of the new market is commercially reasonable.²⁷¹ The rub, however, is that this corrective

and obtaining court approval. Such websites are already being used to effectively auction bankruptcy estate assets and obtain results not possible using conventional sale mechanisms.”).

269. *Id.*

270. One lawyer/commentator has predicted that “specialized Internet auctions” will develop to sell Article 9 repossessed assets. Agin, *supra* note 53, at 1 (stating, in the non-bankruptcy context, that “[w]hile Internet auctions seem strange and complex now, that will change. Eventually, as specialized Internet auction mechanisms like bid4assets.com grow and develop, using Internet auctions will be as routine a task as is using traditional auctions today”). One can only speculate why online auctions specializing in Article 9 assets have not developed. Perhaps one reason might be lack of sufficient demand from Article 9 secured parties. If true, the lack of demand may be due, in part, to the non-adoption theory's chilling progenitors. This leads to the possibility that if one removes or mitigates one or more of these progenitors, secured party demand may increase for specialized Article 9 auctions. But in some respects, one faces a proverbial chicken and egg problem: until somebody builds a specialized Article 9 online auction which mitigates uncertainty, few secured parties will come. However, if few secured parties presently are unwilling to signal a desire to come, who is going to build the specialized Article 9 online auction site in the first place?

271. See *supra* note 165 and accompanying text; see also Martin B. White, *Consumer Repossessions and Deficiencies: New Perspectives from New Data*, 23 B.C. L. REV. 385, 391 (1982) (stating that “it is reasonable to suppose that a

measure brings its own doctrinal uncertainties and normative problems discussed in Part IV, section A.

V. USING "SAFER" BUT LESS EFFICIENT CONVENTIONAL, TRADITIONAL MARKETS

Part V focuses on the non-adoption theory's second hypothesis and its interrelation with the third hypothesis to explore the most problematic theoretical effect of the legal, empirical data, and/or business uncertainties discussed in Part IV. Under what theoretical circumstances might non- or slow adoption of a novel, new market occur even where, in fact, the new market is more efficient relative to the conventional, traditional market(s) for the collateral? The answer is important because such the non-adoption or slow adoption behavior is normatively undesirable as it undermines the incorporation strategy's price-maximization goal and lets slip the opportunity to reduce the number of low price foreclosure sales and thus the incidence of litigation.

In its analysis, Part V, section A continues to hold true the First Basic Assumption that the secured party is a wealth-maximizer who, in good faith and with due diligence, tries to identify, assess, and use the market best calculated to maximize the collateral's net proceeds, and the Second Basic Assumption (and its two sub-assumptions) that the secured party has perfect legal, business, and empirical data information about continuing to use the conventional, traditional market.

A. *The Omniscient Secured Party*

What are the circumstances under which this non- or slow adoption of a relatively more efficient novel, new market will occur? To answer the question, recall that the non-adoption theory's second hypothesis holds that for any

dealer will do a better job selling the collateral than will a financier"); Schwartz, *supra* note 90, at 131 (stating that "[d]ealers, however, commonly can retail repossessed cars at less cost than banks or finance companies because financiers have expertise in the lending business but not in the used goods business, while dealers commonly have the reverse competencies").

secured party, as more of these progenitors, in number and degree, pertain to a new market, the more the secured party will experience uncertainty about using the new market for the first time. In other words, as more progenitors of uncertainty, in number and degree, obtain to any given secured party, the more she will perceive the new market as "risky." The third hypothesis holds that for any given secured party, at some point the legal empirical data or business uncertainty may become too great, and she will forgo the too-risky new market and cling instead to the "safer" conventional, traditional market.

To explore the theoretical interrelated effect of these two hypotheses, consider this working hypothetical. Assume a secured party who has never used an online auction before but is omniscient in that she suffers from none of the legal, empirical, or business uncertainties discussed in Part IV. This secured party wants to maximize the sale's net proceeds (at least up to the value of the debtor's obligation) in order to be able to use the net proceeds to satisfy the debtor's obligation. In keeping with the general assumption of an omniscient, maximizing secured party, invoke these seven sub-assumptions. The secured party (1) knows of a certain online auction through which sellers, including a few Article 9 secured parties, have sold property similar to hers, (2) knows that sales through this online auction of this similar property have historically realized prices which are on-average-over-time higher than the prices realized on the conventional, traditional market, (3) knows her sale will also realize such a higher price, (4) knows her sale is commercially reasonable, (5) knows her sale will not be challenged by the debtor, (6) knows how to use the online auction, and (7) knows she can predict down to the penny her time and money transaction costs related to identifying, assessing, and using the online auction. Would this all-knowing, maximizing secured party use this online auction? Yes, save for some idiosyncratic reason.

But, does such an omniscient secured party exist? This is highly unlikely in theory. The Interviews suggest that even experienced commercial actors are far from omniscient with respect to legal, empirical, and business issues

surrounding online auctions.²⁷² Far more likely is that, with respect to any secured party using an online auction for the first time, many of the seven sub-assumptions do not hold. Once one starts to relax some of these sub-assumptions, one sees theoretical circumstances under which a secured party intent on price maximization nevertheless may choose the less efficient conventional, traditional market over the relatively more efficient online auction. One can construct a multitude of variations on the less-than-omniscient secured party hypothetical by creating combinations of held and relaxed assumptions. Consider one scenario that, given the Interviews, seems plausible.

Consider a perfectly rational, maximizing secured party for whom sub-assumptions (3), (4), and (5) do not apply. Thus, imagine this secured party has chosen eBay to sell her collateral. Imagine further that she has evidence that other sellers, including Article 9 secured creditors, have used eBay to sell her type of property; she has comparative price data showing that on-average-over-time the Article 9 secured parties and other sellers received higher prices on eBay than she could receive for her collateral on the conventional, traditional market; she knows how to set up and conduct an eBay auction; and she can predict with a sufficient degree of certainty the amount of her direct costs of using eBay which she feels are not prohibitive given the value of her collateral.²⁷³ Will this maximizing secured

272. See *supra* notes 100, 207 and accompanying text.

273. When a customer lists an item on eBay, she is charged an Insertion Fee (a listing fee). If the item sells, the customer is also charged a Final Value Fee. There are also fees for optional features like assistance with photographs that help to promote a customer's item. Fees vary depending upon the eBay site used (e.g., eBay.com or eBaymotors.com) and the item's listed category. See *What Does it Cost to Sell on eBay*, <http://pages.ebay.com/help/sell/questions/what-fees.html> (last visited Mar. 3, 2007). For example, for items listed on eBay, the highest Insertion Fee is \$4.80, which is levied where the item's starting or reserve price is \$500 or more. The highest Final Value Fee rate is for items equal to or over \$1,000.01, and is calculated as follows: 5.25% of the initial \$25.00 (\$1.31), plus 3.25% of the initial \$25.01 - \$1,000.00 (\$31.69), plus 1.50% of the remaining closing value balance (\$1000.01 - closing value). See *Ebay Fees*, <http://pages.ebay.com/help/sell/fees.html> (last visited Mar. 3, 2007); see also AGIN, *supra* note 54, ch. 15:8 (stating that "[s]elling through an Internet auction costs very little," and describing eBay's fee structure).

party use the eBay auction? In theory, yes, but also in theory, no.

The theoretical argument for non-adoption runs as follows. Given the relaxation of sub-assumptions (3), (4), and (5), *ex ante*, the maximizing secured party will remain uncertain about whether such a sale is commercially reasonable for the doctrinal and empirical data reasons discussed in Part IV, sections A, B, and C,²⁷⁴ and whether, despite her comparative price data, her sale in fact will realize greater net proceeds than could be realized through the conventional, traditional market.²⁷⁵ Thus she will remain uncertain about the size of a deficiency and whether a disgruntled debtor will challenge the sale in court and possibly win.²⁷⁶

To be sure, the secured party may get some comfort from knowing that if the debtor challenges the sale's commercial reasonableness, the secured party can argue that, given the comparative price data, she, in good faith and after due diligence, believed that eBay would produce the highest price possible for the collateral under the circumstances. But as discussed in Part I, section B, doctrinally price is not a term of commercial reasonableness, although a low price will trigger the court's careful scrutiny of the sale process.²⁷⁷ Rather, under Article 9 and the incorporation strategy, a sale's commercial reasonableness is measured by its procedural regularity and reasonableness as compared against actual market practices.²⁷⁸ Thus, with doctrinal authority, albeit formalistically applied, the debtor might argue that eBay is not a prevailing, commonly accepted, or well-recognized method to sell *repossessed* Article 9 collateral, and that, under traditional Article 9 doctrine, the sale was not

274. Some Interviewees' comments support this assertion. See *supra* note 100 and accompanying text.

275. Lawyer #2's comments offer some general support for this assertion. See *supra* note 207 and accompanying text.

276. Lawyer #2's comments offer some general support for this assertion. See *supra* notes 100, 207 and accompanying text.

277. See *supra* notes 24-27 and accompanying text.

278. *Id.*

procedurally regular since there was no way for a potential geographically distant buyer to physically inspect the collateral in cyberspace or to attend the sale if the potential buyer did not have access to a computer and the Internet.

An enlightened court would dismiss these arguments, especially if, *ex post*, there is no low price triggering careful scrutiny. On the other hand, a less enlightened court might not. The problem is that, *ex ante*, the secured party cannot predict the outcome of the trial given the doctrinal uncertainties discussed in Part IV, sections A, B, and C. And where the secured party is uncertain whether the potential costs associated with such a potential lawsuit outweigh any potential increase in net proceeds from using the online auction, it is not unreasonable to suggest that these collective uncertainties might be sufficient to deter the maximizing secured party from using the online auction and to stick to the conventional, traditional market she knows. In this sense, the secured party intent on price maximization nevertheless may forgo a relatively more efficient new market for the "safer" market.²⁷⁹

B. Human Error

Consider two ways that human error with respect to the information captured in the seven sub-assumptions may lead to non-adoption of a relatively more efficient market. First, a secured party may have sufficient information to decide which market is the most efficient for selling her collateral, but makes a computational error and chooses the less efficient market.²⁸⁰ Second, a secured party may not adopt a relatively more efficient market over the conventional, traditional market if she mistakenly believes she has enough information, but in fact does not, and, based on the incomplete information, she concludes that the new

279. Outside the context of Article 9, Jody Kraus suggests such non-adoptive behavior is possible. He argues that evolutionary market forces will not produce more efficient commercial practices and less than optimal commercial practices will endure where it costs commercial actors less to use existing sub-optimal practices than to individually develop more efficient ones. Kraus, *supra* note 172, at 383, 405-08.

280. See generally *supra* notes 95-96 and accompanying text.

market is less efficient than the conventional, traditional market when, in fact, it is more efficient.²⁸¹

VI. RELAXING THE TWO BASIC ASSUMPTIONS

The Article has assumed throughout that Two Basic Assumptions hold with respect to a secured party. First, that the secured party is a wealth-maximizer who tries in good faith and with due diligence to identify, assess, and use the reasonably available sale method best calculated to maximize the collateral's net proceeds at the repossession sale, at least up to the amount of the outstanding obligation. Second, that the secured party has perfect legal, business, and empirical data information about continuing to use the conventional, traditional market. The Article also stated that this second assumption itself has two important sub-assumptions. First, that for the secured party's collateral, there is a conventional, traditional market, and second, that the secured party has used this market at least once to sell her collateral.²⁸² A conventional, traditional market was defined for purposes of the Article as a market which (1) regularly hosts sales of the particular type of property the secured party is selling; (2) has either been blessed by Article 9 precedent or is constructed in a fashion that maximizes the possibility that a court will find its use commercially reasonable; (3) is considered prevailing, commonly accepted, or well-recognized in the relevant commercial community for the collateral type, or has a current critical mass of interested potential bidders who will compete for such collateral; and (4) on-average-over-time realizes reasonable net sale proceeds (price less costs).

In Part VI these Two Basic Assumptions and two sub-assumptions are relaxed and the attendant effects on the non-adoption theory are discussed. The principal question in each case is what effect this relaxation will have on the secured party's inclination to use a new market. The answer is explored in the context of online auctions. Part VI's discussion is brief and does not seek to prove or

281. See generally *id.*

282. See *supra* notes 91-93 and accompanying text.

disprove the debates reflected in the various literatures described below. Rather, it should be understood only as illustrative of further research questions.

A. *The Irrational Decision-Maker*

Why else might a secured party choose not to use a relatively more efficient new market like an online auction? The answer may be because secured parties, like all human beings, make irrational choices. The idea of a perfectly rational, maximizing secured creditor is grounded in neoclassical economic analysis of law that holds, as a central tenet, that people's decisions are motivated by "a rational desire to 'maximize welfare' as measured by an increase in wealth."²⁸³ Increasingly, however, legal scholars employing behavioral decision theory (BDT) have challenged the rational actor model and its wealth-maximization principles as accurate tools to predict people's decisions.²⁸⁴ In turn, legal behavioral decision theorists have been criticized from various quarters.²⁸⁵ The author does not seek to resolve the disagreement. Rather, he merely asks whether BDT concepts of human decision-making may apply to the secured party who is deciding for the first time whether to continue to use a conventional, traditional market or to switch to a new market like an online auction that is relatively more efficient. The author acknowledges that the empirical and experimental data upon which these BDT concepts are based are not on point

283. Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 717 (2000).

284. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Jones & Goldsmith, *supra* note 94, at 445; Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); Korobkin & Ulen, *supra* note 86, at 1063; Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 587 (2003); Rubin, *supra* note 87, at 1092; Tabb, *supra* note 94, at 265.

285. See, e.g., Hillman, *supra* note 283, at 718; see also Thomas A. Lambert, *Two Mistakes Behavioralists Make: A Response To Professors Feigenson et al. and Professor Slovic*, 69 MO. L. REV. 1053 (2004); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded For Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002).

here, but are tantalizing enough that avoiding them altogether seems remiss.²⁸⁶

For example, Professors Robert Prentice and Jonathan Koehler argue that instead of being the perfectly rational decision-makers of the law and economic literature, people have a bias in favor of inaction over action due to an omission bias,²⁸⁷ and a bias in favor of normal over the abnormal due to a normality bias.²⁸⁸ The authors assert that although

there are often economic advantages associated with a preference for inaction over action (avoidance of start-up costs, for example) and for the usual over the unusual (reduced uncertainty). . . . [r]esearch shows that even when economic considerations are absent or held constant, peoples' judgments and choices are systematically biased in favor of inaction and normality.²⁸⁹

Further, "a potentially undesirable side effect of this [normality] bias is that it discourages people from deviating from accepted protocols of behavior, even when the individual circumstances would seem to warrant it."²⁹⁰

Professors Prentice and Koehler support their analysis of the omission and normality biases' effects on decision-making by discussing "related behavioral heuristics and biases,"²⁹¹ including the status quo bias.²⁹² The status quo bias holds that "[p]eople tend to stick to the old, even when

286. See generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625-26 (1998) (applying a BDT concept of status quo bias to the preference-exogeneity assumption of rational choice theory, and stating that "there is a significant body of empirical and experimental data that, while not precisely on point, at least suggests that the assumption might be false").

287. Prentice & Koehler, *supra* note 284, at 587 (stating that the omission bias is "the tendency of people to find more blameworthy bad results that stem from actions than bad results that stem from otherwise equivalent omissions").

288. *Id.* at 595 (arguing that the normality bias holds that "people prefer the usual to the unusual, the arguments of the majority to those of the minority, the conventional to the unconventional, and the normal to the abnormal").

289. *Id.* at 590.

290. *Id.* at 596.

291. *Id.* at 588.

292. *Id.* at 597-99.

they would choose the new if they were starting afresh.”²⁹³ Put another way by another scholar, “[p]eople systematically favor maintaining a state of affairs that they perceive as being the status quo rather than switching to an alternative state, all else being equal.”²⁹⁴ Put yet another way by yet other scholars, “[i]n appraising a potentially beneficial but also risky course of action, they [individuals] fall back on the maxim ‘[b]etter safe than sorry’ to justify inaction.”²⁹⁵ Professors Prentice and Koehler observe that “[t]he status quo bias often presents itself alongside the normality bias because current states are usually normal states.”²⁹⁶

Generally, Professors Prentice and Koehler observe that “[t]he existence of status quo biases, endowment effects,²⁹⁷ and loss aversion²⁹⁸ . . . challenges the standard economic model of rational choice. Moreover, these effects can lead to inconsistent and suboptimal decisions.”²⁹⁹ Put another way by other scholars, “[i]n tandem, these dispositions [arising from loss aversion, endowment effects, and status quo biases] generate a species of conservatism

293. Prentice & Koheler, *supra* note 284, at 597.

294. Korobkin, *supra* note 286, at 625; *see also* Prentice & Koehler, *supra* note 284, at 597.

295. Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1078 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005)).

296. Prentice & Koehler, *supra* note 284, at 599.

297. “The endowment effect holds that for a given individual, the perceived value of an item increases when it becomes part of that individual’s endowment. Accordingly, people will demand more to part with what they have than they would be willing to pay to acquire it in the first place.” *Id.* at 600.

298. Loss aversion

holds that people tend to suffer losses more keenly than they enjoy comparable gains. . . . Loss aversion theory’s implicit suggestion that the potential downside associated with new activities is larger than the potential upside has many implications for the legal world. . . . By calling attention to the losses that might arise from a change in the current state, loss aversion reinforces both the tendency to inaction (omission bias) and a favoritism toward the current state (normality bias).

Id. at 601-02.

299. *Id.* at 602.

that causes individuals to seize on the potential 'losses produced by any newly introduced risk, or by any aggravation of existing risks,' to block new technologies without 'concern . . . [for] the benefits that are forgone as a result.'"³⁰⁰

Given this brief glimpse into several BDT concepts of human decision-making, it seems worth asking whether a secured party deciding whether to use a relatively more efficient new market like an online auction will do so as a perfectly rational decision-maker. Perhaps not. Consider two examples.

First, as discussed in Part IV, Sections B and C, Article 9 doctrine condones markets that are prevailing, commonly accepted, or widely recognized. One might ask whether the secured party who currently uses a conventional, traditional market that is prevailing, commonly accepted, or widely recognized will suffer from the normality bias intertwined with the status quo bias. That is, perhaps the secured party will consider the conventional, traditional market as the normal state because it is prevailing, commonly accepted, or widely recognized and will see the new market (especially a novel one) as uncommon or abnormal. Consequently, she will feel comfortable sticking with the normal market (the status quo market) rather than switching to the abnormal, new market, even if the latter holds the possibility of being relatively more efficient than the former. This inaction might not result if the secured party could predict with certainty that the online auction would realize a sufficiently better price than the conventional market and not be challenged as commercially unreasonable.³⁰¹ But as discussed in this Article, such certainty may not pertain with respect to a novel, new market like an online auction.

300. Kahan et al., *supra* note 295, at 1078.

301. See Korobkin, *supra* note 286, at 659 (stating that "[i]f regret avoidance provides the correct motivational explanation for the status quo bias as it applies to contract default rules, the status quo bias should diminish when it is nearly certain that the benefits to be gained by deviating from the status quo will exceed the costs and, consequently, there is little or no reason to fear the possibility of future regret").

Second, in Part IV, section G, the Article discussed the non-adoption effect of some of the legal, empirical, and transaction costs of investigating, assessing, and using a new market. Once expended, one might characterize some or all of these as sunk costs, which is defined as "a cost that was incurred in the past and that will not be affected by any future decision."³⁰² One argument not presented in Part IV, section G was that having incurred sunk costs with respect to the conventional, traditional market, the secured party would have a strong incentive to keep using that market rather than incur those sunk costs again for the new market.

The reason that this argument was not made in Part IV, section G is because there the Article still assumed that the secured party was a wealth-maximizer. Classic economic theory holds that commercial actors should not consider sunk costs when deciding whether to engage in a new economic activity which will incur costs. "Economists widely agree that sunk costs should be ignored when deciding whether to take on additional costs."³⁰³ But in this Part VI, that assumption has been relaxed, allowing consideration of Professors Prentice and Koehler's argument that "numerous studies show that people do allow sunk costs to influence their decisions across a wide range of situations. . . . The sunk costs made it difficult for decision makers to take action (omission bias) to change what had become the accepted situation (normality bias)."³⁰⁴ Thus, the secured party may indeed feel the anchor of the conventional, traditional market's sunk costs and stay moored in that bay.

B. *The Non-Maximizing Secured Party*

What if the secured creditor does not have the intent to maximize the collateral's price by using the most efficient market reasonably available under the circumstances? There is much Article 9 literature about whether such a

302. Prentice & Koehler, *supra* note 284, at 604.

303. *Id.* at 604-05.

304. *Id.* at 605.

person exists and the reasons for her non-maximizing behavior. However, whether a non-maximizing secured party will or will not use a relatively more efficient new market like an online auction is not clear and demands further research. From this literature, some illustrative examples are useful.

First, one oft-cited reason a secured party may not want to realize the highest price for the collateral is self-dealing.³⁰⁵ Imagine a secured party who wants to sell her collateral to herself (or a related party) at a public sale³⁰⁶ for a low price, collect the deficiency from the debtor, and then resell the collateral for a higher price and pocket the ill-gained profits. This self-dealing secured party will lack the incentive to maximize the first sale's price.³⁰⁷ For the self-dealing scheme to work, the secured party must be able to collect a deficiency, which means that the sale must be commercially reasonable, otherwise the rebuttable presumption rule (or the absolute bar rule), and perhaps other penalties, will apply.³⁰⁸ That this self-dealing, non-maximizing secured party wants to be able to predict that its sale will be commercially reasonable means she too will be wary of new markets like online auctions for the reasons discussed in Part IV, sections A, B, and C. This secured party might also worry that, given the heralded benefits of online auctions, an online auction might fetch too high a price for her scheme to be worthwhile.

Second, some commentators maintain that where secured parties want to sell their collateral cheaply and quickly they may lack the incentive to use the price-maximizing sale practices normally used to sell the particular type of collateral.³⁰⁹ Would such a non-

305. See Korybut, *supra* note 5, at 1427, 1430-31, 1472.

306. A secured party may purchase her own collateral at a public sale. Revised U.C.C. § 9-610(c)(1).

307. See Revised U.C.C. § 9-615 cmt.6 (1997).

308. See *supra* notes 29-33 and accompanying text. Even if the sale was commercially reasonable, this self-dealing secured party also will have to contend with U.C.C. § 9-615(f).

309. Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 137-38 (1997) (noting that "the secured party, for example, might simply wish to sell the

maximizing secured party forgo using an online auction? On the one hand, given that online auctions may reduce transaction costs,³¹⁰ perhaps even this type of non-maximizing secured party would be inclined to use an online auction. On the other hand, these secured parties will want to use predictably commercially reasonable sales, and thus they too may be wary of online auctions.

Third, other commentators maintain that a secured party would repossess collateral even knowing that she may be not be able to collect a deficiency from the debtor where the repossession signaled to other debtors the secured party's resolve to repossess despite the loss. In such circumstances, one might argue that such a secured party is less inclined to worry about the sale's commercial reasonableness or realizing the highest price,³¹¹ and thus does not care about the uncertainties discussed in Part IV, sections A-C. But she might care about the uncertainty discussed in Part IV, section D regarding the question of whether online auctions realize higher prices than conventional, traditional markets. If, as Professor Wyld and

collateral as quickly or cheaply as possible"); see also Hillebrand, *supra*, at 137-38 (describing different sale practices for repossessed automobiles sold by an automobile dealer which "included offering for sale all the cars that Ford [the dealer] owned first, while placing the dealer-owned disposition sale cars at the end of the dealer-only auction, and withholding dealer incentives normally offered by Ford on cars it sold for its own account"); McMahon, *supra* note 141, at 65 (listing nine reasons why "secured parties do not adopt procedures that would recover the best value for repossessed consumer good").

310. See *supra* notes 56-57 and accompanying text.

311. See Robert E. Scott, *Rethinking The Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 773 (1989) (stating that "[c]learly, creditors have incentives to maximize their net returns from enforcing security interests. But the resale motivation is partially skewed by the need to maintain a credible reputation for subsequent debtors. Large uncollectible deficiencies signal to other debtors the creditor's resolve to fulfill the repossession commitment regardless of the cost. The resulting advertising expense may be a profit-maximizing marginal cost that generates corresponding revenues through improved performance of other credit contracts"); see also William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1099 (arguing that creditors may choose less efficient collection remedies to increase their leverage over debtors). Professor Scott further argues that the secured creditor's maximization intent will be tempered where "[t]o the extent that repossession despite large deficiencies advertises its resolve, the creditor can charge the deficiencies off against subsequently successful transactions." Scott, *supra*, at 760.

other commentators suggest, online auctions do in fact realize higher prices for lower transactions costs, it is possible that the secured creditor's online sale will realize a high price. That is not the kind of signal that this non-maximizing secured party seems to want to send her debtors.

Finally, the last species of non-maximizing secured party is one who does not think her debtor will or can challenge the repossession sale. Some commentators argue that with consumer-debtor transactions, consumer-debtors often lack sufficient finances or legal sophistication to litigate.³¹² For this non-maximizing secured party, she does not feel the potential bite of the litigation costs and penalties associated with conducting a commercially unreasonable sale. But does that mean that the secured

312. For consumer-debtor transactions, some secured parties may feel less at risk where they believe *ex ante* that financial or sophistication asymmetries will stop the debtor from challenging a commercially unreasonable sale. See, e.g., Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549, 566, (1997) (stating that "[u]ncertainty in the law about what conduct breaches the peace and about what the remedy is for a breach . . . undercuts this system by making litigation infeasible, resulting in too little deterrence"); Corenswet, *supra* note 164, at 1081 & n.3 (1975) (stating that although the commercial reasonableness standard "is intended to impose fairness limitations on the creditor's behavior in disposing of the collateral. . . [u]nfortunately, a secured creditor may act within the strict letter of the law, while the fairness of his actions remains highly questionable"); John C. Firmin & Robert Simpson, Comment, *Business as Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 CONN. L. REV. 511, 528 (1971) (arguing that "[s]ince 96% of the consumers who have their automobiles repossessed and are defendants in deficiency suits never retain legal counsel or even appear in court, the legal rights available to these consumers are of no practical significance"); Heiser & Flemma, *supra* note 15, at 495 (describing the position of the Consumer Debtor Advocates that former Article 9's default provisions were insufficient to incentivize secured parties to maximize sale proceeds); Hillebrand, *supra* note 309, at 133-34 ("[E]ven if the commercial reasonableness standard should work in theory, it presents factual questions that can be resolved only through expensive litigation. It can be difficult and expensive for a consumer to develop and offer proof of a bad sale procedure because typically only the creditor knows how the sale was conducted."); see also Lloyd, *supra* note 213, at 740 (describing how the absolute bar rule "probably has minimal deterrent effect"); Philip Shuchman, *Condition and Value of Repossessed Automobiles*, 21 WM. & MARY L. REV. 15, 40-41 (1979) (describing empirical work that suggests that notwithstanding remedies under Article 9, debtors infrequently litigate due to lack of knowledge and financial burden).

party, for that reason, will choose not to use an online auction?

On the one hand, this secured party may not be moved to look into online auctions at all since she knows that the debtor is unlikely to challenge the sale with the argument that an online auction would have been the best method to sell the collateral under the circumstances. On the other hand, such a secured party's inclination to use an online auction would not be chilled, or chilled less, by some of the non-adoption theory's progenitors discussed in Part IV. For example, she would not care, or would care far less, about the commercial reasonableness questions surrounding online auctions if she did not think the debtor would sue. And for this secured party, if she thought the online auction would maximize the price, she just might use it for that reason.

C. No Conventional, Traditional Market

Recall the Second Basic Assumption's sub-assumption that for the secured party's collateral, there is a conventional, traditional market that the secured party has used at least once to sell her collateral. What if there is no conventional, traditional market for the collateral? Recall that the Article defined this market as one which (1) regularly hosts sales of the particular type of property the secured party is selling; (2) has either been blessed by Article 9 precedent or is constructed in a fashion that maximizes the possibility that a court will find its use commercially reasonable; (3) is considered prevailing, commonly accepted, or well-recognized in the relevant commercial community for the collateral type, or has a current critical mass of interested potential bidders and buyers for such collateral; and (4) on-average-over-time realizes reasonable net sale proceeds (price less costs). Where any or all of the four conditions is relaxed, uncertainty is introduced with respect to continuing to use the conventional, traditional market. Where this uncertainty exceeds that with respect to using an online auction, even the maximizing secured party may use the online auction.

The important empirical question demanding additional research is how prevalent conventional, traditional markets are for any given type of collateral. For the most commonly sold Article 9 collateral like automobiles,³¹³ it seems sensible to hypothesize that such markets exist.³¹⁴ For unique or not commonly sold repossessed collateral it also seems sensible to hypothesize that there is no (or few) conventional, traditional market as defined above, although some type of market may exist.³¹⁵ The author is not aware of any empirical study on these issues in the Article 9 context. However, it is interesting to note that outside of Article 9, there are studies that suggest that online auctions are particularly well-suited for unique property for which there is a limited and geographically-dispersed population of potential buyers.³¹⁶

D. Imperfect Information About the Conventional, Traditional Market

Now relax the Second Basic Assumption that the secured party has perfect information about the costs and benefits of continuing to use the conventional, traditional market. Who might this ill-informed secured party be? For illustrative purposes, take the most extreme example of a secured party thinking about using an online auction who has never sold any collateral before anywhere and has absolutely no information about investigating, assessing, or using either a conventional, traditional market or a novel,

313. Professor Ronald Mann's empirical study indicates that automobiles and consumer goods are the most frequently repossessed goods. Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159, 227-30 (1997).

314. Secured parties have used a myriad of market channels to sell repossessed automobiles. See *supra* notes 145-48 and accompanying text.

315. See, e.g., *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 547-48 (S.D.N.Y. 2001) (rejecting secured party's argument that it had sold collateralized mortgage obligations (CMOs) "in conformity with reasonable commercial practices among dealers" since secured party offered little evidence "as to an accepted commercial practice for the liquidation of CMOs" and because the bankruptcy trustee's factual findings indicated "a lack of a generally accepted commercial practice for the liquidation of CMOs" (quoting N.Y. U.C.C. § 907(2) (McKinney 1990))).

316. See Korybut, *supra* note 53, at 44-46.

new market like an online auction. In other words, both types of markets are new to her.

Under these facts, with no sunk costs of the type discussed in Part VI, section A associated with either market, which will the secured party use? Assuming she is a perfectly rational maximizer, the one that has the highest net benefits. Which market that is, and whether such a calculation is possible given the likely state of imperfect information about both markets, are complex questions. So, for example, one might ask for which type of market, the conventional or new market, would the empirical data discussed in Part IV be easier and cheaper to acquire? For which market would it be easier and cheaper for the secured party to use? The analysis becomes even more complex if one also relaxes the assumption that the secured party is a maximizer. Under CBT, would the normality bias and status quo bias affect the secured party's decision if she had never used either market?

CONCLUSION

Article 9's harnessing of market-based sale methods was a great improvement over the rigid and inefficient legislatively mandated sale methods of the old Uniform Conditional Sales Act and the like. But the incorporation strategy brings its own limitations, not least of which is its faith that secured parties can and will in fact use the most efficient markets possible under the circumstances. The Article has theorized about some, but certainly not all, circumstances why non-adoption behavior might occur and possible corrective measures. What is needed now is a robust empirical inquiry into how and why Article 9 secured creditors choose particular markets, and in particular whether and why, in fact, they are or are not adopting online auctions which appear to be relatively more efficient, reasonably available markets for certain types of property. The author's aspiration is that the Article's theoretical inquiry, and such robust empirical data when it emerges, will assist secured parties, debtors, their agents, legislators, and courts in crafting informed solutions to non-adoption behavior, and continue the pursuit of Professor Gilmore's

goal of maximizing the collateral's price for the benefit of all.