2002

Searching for Commercial Reasonableness Under the Revised Article 9

Michael Korybut
Saint Louis University School of Law

Searching for Commercial Reasonableness Under the Revised Article 9

*Michael Korybut**

* Assistant Professor, Saint Louis University School of Law; J.D., Stanford Law School. I thank Bob Lloyd, Don Rapson, and Tim Zinnecker for their comments on earlier drafts, and Tiffany Gatesh for her research assistance. I also thank the faculties at Saint Louis University School of Law and the University of Kentucky College of Law for their comments during workshops at which I presented parts of the Article.

INTRODUCTION

Don Fraser and Lu Durhan were tree loggers in Washington State. On secured credit of $222,173, their company Diamond Timber, Inc. leased a log loader machine from Cascade Loggers Supply, Inc. in June of 1979, which then assigned the contract to Leasing Service Corp.[1] When fifteen months later Don and Lu refused to continue payments because the machine did not work, Leasing Service Corp. repossessed the logger and conducted a public foreclosure sale under the former Article 9 of the Uniform Commercial Code. At the public sale, Leasing Service Corp. bought the equipment for $62,700.[2] It then sued Diamond Timber, and Don and Lu as guarantors of their company's lease, for a $248,518 deficiency. This amount represented the unpaid lease and expenses consisting of late payment charges, attorney's fees and taxes minus the $62,700 sale price. Leasing Service Corp. won the lawsuit.[3] It thus kept the logger and the right to collect $248,518 from Don, Lu, and their company. Whether this seemingly egregious outcome is unfair and whether it will continue to occur under the revised Article 9 of the Uniform Commercial Code is this Article's topic.[4]

Diamond Timber had objected to the sale as being commercially unreasonable under section 9-504(3) which required that "every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable."[5] But the court held otherwise. It reasoned that commercial reasonableness of a sale depended on the sale procedures employed and not the amount of the $62,700 sale proceeds.[6] The court found commercially reasonable both the notice of a public sale that Leasing Service Corp. had sent to its lessee/debtor and the advertising for the sale placed in the three newspapers on four occasions each and once in the trade magazine *The Contractor's Hotline*.[7] Quoting section 9-507(2), the court stated "'[t]he fact that a better price could have been obtained by a sale at a different time or in a different method . . . is not itself sufficient to establish that the sale'" was commercially unreasonable.[8] Further, the court stated

---

1. Leasing Serv. Corp. v. Diamond Timber, Inc., 559 F. Supp. 972, 974 (S.D.N.Y. 1983), *aff'd.* 729 F.2d 1442 (2d Cir. 1983). Because the court did not discuss the issue, presumably the "lease" uncontrovertibly had been considered as creating a security interest under section 1-201(37) and thus governed by Article 9.

2. *Id.* at 975.

3. *Id.*

4. In all but four states, the revised Article 9 of the U.C.C. became effective on July 1, 2001. Connecticut's effective date was October 1, 2001; Alabama's, Florida's, and Mississippi's effective date was January 1, 2002.

5. *Leasing Serv.*, 559 F. Supp. at 978, (quoting U.C.C. § 9-504(3) (1972)).

6. *Id.* at 979.

7. *Id.* at 978.

8. *Id.* at 979 (quoting U.C.C. § 9-507(2) (1972)).

that the secured party's purchase of its own collateral did not demonstrate commercial unreasonableness.[9]

The case illustrates one of the most vexing phenomena under former Article 9 foreclosure sales: the procedurally regular, non-collusive sale that yields a seemingly low price. More pointedly, the case involves the striking situation where the secured party purchases its own collateral at a public sale for a seemingly low price and then gets to collect a large deficiency to boot. These twin occurrences raise a larger question that has spawned great debate among courts and commentators: should solely the foreclosure sale process and its procedural regularity measure the sale's commercial reasonableness or should the main focus of inquiry be the reasonableness of the proceeds produced by the sale?

This question spawned a dizzying variety of conflicting and non-uniform judicial approaches under the former Article 9. The simple taxonomy of "procedures test" courts versus "proceeds test" courts is illustrative. The *Diamond Timber* case represents jurisdictions that subscribed to the so-called procedures test.[10] Under the procedures test, where the secured party sued for a deficiency,[11] it had the burden of proving that all aspects of the sale were commercially reasonable. Leasing Service Corp. met its burden by proving that the sale was procedurally regular and reasonable. In function, the secured party was charged with exposing the collateral to the marketplace by employing the sales procedures normally used in the relevant business community to sell the type of collateral. Under the procedures test, the collateral's sale price was not considered an "aspect" or "term" of commercial reasonableness, and the secured party did not have to prove that the sale price itself was reasonable by using secondary source evidence of value and fair price, such as expert appraisals or price guidebooks. Since the sale was procedurally regular, reasonable, and non-collusive, the sale was found commercially reasonable notwithstanding an allegedly low price. Once there was a finding of commercial reasonableness, the sale price less the outstanding debt and additional expenses set the deficiency amount. Thus, Diamond Timber not only lost its logger, but also had to pay Leasing Service Corp. a deficiency greater than the original contract price.

The theoretical underpinning of the procedures test was that only

---

9. *Id.*

10. *See infra* notes 52–56 and accompanying text. Although not explicitly employing procedures test rhetoric, the *Diamond Timber* court in effect used the approach rather than a proceeds test.

11. The Article assumes the context of a secured creditor suing a debtor for a deficiency rather than a debtor suing a secured party for a loss or damages caused by the secured party's failure to conduct a commercially reasonable sale. The latter suit by the debtor under revised section 9-625 (1999) is distinct from a suit by the secured party for a deficiency under section 9-626 (1999) and for which the secured party bears the burden of proof in non-consumer transactions.

through exposure to the marketplace could the collateral's fair market price be accurately determined for purposes of assessing a sale's commercial reasonableness and calculating a deficiency.[12] Proponents argued that secondary source evidence of value and fair price (e.g., expert appraisals or price guidebooks) were inaccurate tools for a variety of doctrinal, valuation technique and policy problems; thus price should not be a term of commercial reasonableness through which secondary source evidence of a low price enabled a debtor to upset a market-based sale price. A logger machine like Diamond Timber's may really be worth only $62,518 if its owners abused it, its value depreciated quickly, and the used logging equipment market at the time of the foreclosure sale was in a slump due to cheap imports. In this example, secondary source evidence suggesting that a higher price could have been achieved should not alone convert a complying sale like Leasing Service Corp.'s into a commercially unreasonable one.

In contrast, in a number of jurisdictions under the former Article 9 courts held that, although not specifically mentioned in section 9-504(3), price was an "aspect" or "term" of commercial reasonableness.[13] In these so-called proceeds test jurisdictions, although the secured party had to prove the sale was procedurally regular and reasonable, the sale price functioned as the decisive factor of commercial reasonableness. Therefore, a low price *alone* could render a sale commercially unreasonable. To prove price reasonableness, typically the secured party and the debtor engaged in a valuation battle by introducing conflicting secondary source evidence of the collateral's value and/or fair price and comparing them against the sale's price.

Proceeds test proponents argued that procedures test advocates misplaced their faith in the marketplace to set a fair sale price. Secured creditors lacked the incentive to maximize the sale's proceeds, and foreclosure sales often failed to evidence accurately the collateral's true value or fair price.[14] Thus, debtors like Don and Lu should be allowed to use secondary source evidence of value and fair price to make the argument that, notwithstanding procedural regularity, the unreasonably low sale price warranted a finding of commercial unreasonableness. To this end, the collateral's price functioned as a "term" of commercial reasonableness that alone could render an otherwise complying sale unreasonable.

In both procedures test jurisdictions and proceeds test jurisdictions, where the sale was found commercially unreasonable, the sale's price was not used to establish the debtor's deficiency.[15] Rather, under the former

12. *See infra* notes 67–158 and accompanying text.
13. *See infra* notes 45–52 and accompanying text.
14. *See infra* notes 159–80 and accompanying text.
15. *See infra* notes 64–66 and accompanying text.

Article 9, a majority of courts presumed that the collateral's fair price was the amount of the outstanding debt plus expenses.[16] To establish a deficiency, the secured party had to rebut the presumption by proving that the collateral's fair price was below this presumed amount. Had *Diamond Timber* occurred in a proceeds test jurisdiction rather than a procedures test jurisdiction, the sale would have been found commercially unreasonable (even though the sale's notice and advertising procedures were reasonable) if Leasing Service Corp. failed to prove a reasonable sale price using, for example, a price guidebook of used farm machinery prices. Thus, to collect a deficiency from Diamond Timber, Leasing Service Corp. would have had to prove that the logger's fair price was in fact less than the presumed amount of the collateral and the outstanding debt plus expenses. Moreover, the deficiency would have been limited to the difference between the two figures. For example, if Don and Lu proved that the logger's fair price on the day of its public sale (given depreciation and market conditions) was $148,518, Leasing Service Corp.'s deficiency would have been reduced to $100,000—the difference between the $248,518 outstanding debt plus expenses and the $148,518 proven fair price. In a minority of jurisdictions, where the sale was found commercially unreasonable (even if due solely to the unreasonable price), Leasing Service Corp. would have been absolutely barred from collecting *any* deficiency.

Given the history of the debate over procedures versus proceeds, it is not surprising that the question of whether the price received for collateral at a foreclosure sale should be considered a term of commercial reasonableness became "one of the most difficult and contentious issues considered by the revised Article 9's Drafting Committee."[17] Donald Rapson, a Drafting Committee member, acknowledged that "[p]resent law is very uncertain on this important issue and differs among the states."[18] Mr. Rapson, commenting on revised section 9-627(a)[19] states:

> Does that provision make "price" irrelevant for purposes of

16. Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste*, 40 UCLA L. REV. 695, 724 (1993); *see, e.g.*, Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank & Constr. Co., 568 P.2d 1007, 1013–14 (Alaska 1977); Hall v. Owen County State Bank, 370 N.E.2d 918, 928 (Ind. Ct. App. 1977).

17. Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 74 CHI.-KENT L. REV. 893, 918 (1999).

18. *Id.*

19. Section 9-627(a) reads:

> The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

U.C.C. § 9-627(a) (1999).

> determining whether the secured party has satisfied the requirement of "commercial reasonableness," without, however, precluding an inquiry into whether the "fair value" of the collateral has been credited against the obligation for purposes of calculating a deficiency claim? Or, does it mean that if the procedural requirements of "commercial reasonableness" have been complied with, the price received, no matter how low, is binding for all purposes, including the establishment of a deficiency claim?[20]

Mr. Rapson explains that the Drafting Committee resolved these "difficult and contentious issues" in two ways: through two new Official Comments and a new section 9-615(f).[21] Under the two Official Comments, where there is a "low price," the court should "carefully scrutinize" the sale's "aspects."[22] Under section 9-615(f), the court must examine directly the adequacy of the sale's proceeds, but only in a set of limited circumstances: (1) where the sale is commercially reasonable under revised section 9-610(b), the successor to former section 9-504(3),[23] (2) where the purchaser is an interested party, such as the secured party herself or a related party, and (3) where the sale yields a price "significantly below" the amount that would have been received if the sale had been to a disinterested third-party purchaser.[24]

Unfortunately, neither these two resolutions nor anywhere else in the revised Article 9 explains clearly whether courts should now use a procedures test or a proceeds test to assess a sale's commercial reasonableness under revised section 9-610(b); whether a low price alone can render a procedurally regular sale unreasonable; or whether price is a "term" of commercial reasonableness. Yet the resolution of these questions is extremely important. The commercial reasonableness of foreclosure sales was already heavily litigated under the former Article 9.[25] To the extent the revisions muddy already murky waters, *ex ante* secured creditors and their debtors will find it more difficult to determine the requirements and limits of commercial reasonableness. Such uncertainty raises the costs of planning

---

20. Rapson, *supra* note 17, at 918.

21. *Id.*

22. U.C.C. §§ 9-627 cmt. 2, 9-610 cmt. 10 (1999).

23. U.C.C. § 9-610(b), which reads almost identically to section 9-504(3), states that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." U.C.C. § 9-610(b) (1999).

24. U.C.C. § 9-615(f) (1999).

25. Donald J. Rapson, *Repurchase (Of Collateral?) Agreements and the Larger Issue of Deficiency Actions: What Does Section 9-504(5) Mean?*, 29 IDAHO L. REV. 649, 681 (1992) (stating that "the issue of whether there has been a 'commercially reasonable' disposition has been one of the most litigated issues under Article 9"); Lloyd, *supra* note 16, at 698 n.22 (stating that "suits in which the secured party seeks a deficiency judgment, and the debtor uses the secured party's failure to follow the procedures as a defense, are the most common type of lawsuits under the UCC").

and conducting foreclosure sales, and provokes even more litigation. Further, *ex post* judges and juries must know which test to implement. Adopting a procedures test where a low price alone *cannot* render a procedurally regular, non-collusive sale commercially unreasonable would, for example, change the law in such jurisdictions as California, Connecticut, Georgia, New York, Ohio, Oregon, and Vermont.[26] In the face of the revised Article 9's statutory ambiguity, courts may be tempted to fashion their own construction of the revisions according to precedent under the former Article 9 and their sensibilities about the relative advantages of the procedures test over the proceeds test and vice versa.[27] Yet, a uniform standard of commercial reasonableness adheres to the Uniform Commercial Code's policy to "simplify, clarify and modernize the law governing commercial transactions" and "make uniform the law among the various jurisdictions."[28]

Thematically, this Article makes three related arguments. First, it argues that, through a patchwork of provisions and various Official Comments, the revised Article 9 requires that a sale's commercial reasonableness be measured primarily by the sale's procedures rather than the amount of the proceeds; that a low price alone cannot render a procedurally regular sale unreasonable; and that price is not a "term" of commercial reasonableness that the secured party must prove using secondary source evidence of value and fair price. The Article also argues, however, that under the revised Article 9's provisions, price's role in assessing commercial reasonableness is ambiguous. Given this ambiguity, price's role can be construed to retain an important but limited function in assessing the sale's commercial reasonableness. Second, the Article argues that with the procedures test and

---

26. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 34-16, at 456 (4th ed. Practitioner Treatise Series 1995) [hereinafter WHITE & SUMMERS, TREATISE SERIES]. Curiously, these respected commentators have overlooked this implication. In their treatise under the former Article 9, White and Summers discuss at length the fact that under the former Article 9 certain jurisdictions considered that price alone could render a sale commercially unreasonable. *Id.* Yet in their new hornbook covering the revised Article 9, they say that that "the commentary to section 9-610 and the text of 9-627 will modify the prior case law in certain *limited* ways." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 25-10, at 903 (5th ed. Hornbook Series 2000) [hereinafter WHITE & SUMMERS, HORNBOOK SERIES] (emphasis added).

27. *See* Richard C. Tinney, Annotation, *What is "Commercially Reasonable" Disposition of Collateral Required By UCC § 9-504(3)*, 7 A.L.R.4th 308, 320 (1981) (Supp. 1998) (mentioning courts' proclivity to decide cases based on their "preconceptions" rather than on the facts and law).

28. U.C.C. § 1-102(2)(a), (c) (1999); *see* Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9*, 73 AM. BANKR. L.J. 83, 115 (1999) [hereinafter Braucher, *Deadlock*] ("Opposition to uniform consumer rules sits uneasily with the UCC's stated purpose to 'make uniform the law among the various jurisdictions.' Uniformity, although hard to achieve, is an important goal in consumer law." (footnotes omitted)). *But see generally* Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549 (1997) (questioning the goal of legal certainty in commercial law, a derivative goal of uniformity).

its fair-price determining function's ascendancy, their shortcomings take on heightened importance under the revised Article 9. For the revised Article 9's commercial reasonableness standard *cum* procedures test to have normative force, these problems must be analyzed and addressed. Third, the Article recommends that these problems be addressed by (1) reserving a limited but important signaling function for low price evidenced by secondary sources, and by (2) conducting a robust and careful scrutiny review of all of the sale's aspects.

Part I reviews former Article 9's default rules and the variety of ways that courts factor a foreclosure sale's procedures and its proceeds into commercial reasonableness review. Part I also examines the fair-price determining function theory of the foreclosure sale and the arguments about the superiority of evidencing the collateral's value and fair price through a non-collusive, procedurally regular sale rather than with secondary sources of value and fair price, such as expert appraisals and price guidebooks. To this end, Part I discusses various doctrinal, valuation technique, and policy problems with the proceeds test and secondary sources. But Part I also addresses the central critique of the procedures test: the secured party's lack of incentive to conduct a foreclosure sale that maximizes the sale's proceeds.

Part II provides a primer on the revised Article 9. It also argues that revised Article 9's provisions and its Official Comments mandate that the procedures test is primary, that price alone is insufficient to render a sale commercially unreasonable, and that price is not a "term" of commercial reasonableness the secured party must prove with secondary source evidence of value and fair price. But Part II contends that under the revised Article 9's provisions and comments, price retains a role, albeit ambiguous, in assessing a sale's commercial reasonableness.

Part III examines the doctrinal and evidentiary problems associated with the procedures test. To this end, Part III analyzes the limitations of three assumptions underlying the procedures test and the fair-price determining function. First, they assume that the secured party selling the collateral has the incentive to maximize the collateral's price. Second, they assume that even a presumptively maximizing secured party planning a sale can identify and implement sale procedures suited to attain her goal of price maximization. The third assumption is that a judge or jury reviewing a sale's procedures can accurately determine whether the secured party selected the proper procedures to maximize the collateral's price. In particular, Part III considers the genesis of many of these assumptions' limitations to be the commercial reasonableness standard's incorporation strategy, which directs these actors to identify the regular and reasonable market practices merchants use to sell the repossessed collateral and compare them to the sale practices the secured party used in the contested sale.

In light of the procedures test's ascendancy over the proceeds test

under the revised Article 9, Part IV examines commercial reasonableness review under the Official Comment's suggestion that courts "carefully scrutinize" all of the "aspects" of a "low price" sale. Part IV proposes that through careful scrutiny review of low price sales, courts should engage in a robust incorporation strategy review of merchant reality using expert testimony and appropriate precedent in order to determine whether all of the sale's aspects were commercially reasonable. To counteract some of the doctrinal and evidentiary problems associated with the incorporation strategy and its reliance on merchant reality, low price evidenced through secondary sources of value and fair price should play an important, but limited, role: signaling possible, unreasonable error in the sale process. The Article warns that price's role cannot be expanded too far beyond its signaling function or one increasingly risks abrogating the procedures test and in effect converting the commercial reasonableness standard to a *de facto* proceeds test.

I. CONFLICTING APPROACHES OF COMMERCIAL REASONABLENESS AND THE TREATMENT OF DEFICIENCIES UNDER FORMER ARTICLE 9

Former Article 9 did not specifically mandate how a secured party should dispose of repossessed collateral nor did it provide detailed procedural requirements for a repossession sale.[29] Instead, the commercial reasonableness standard essentially directed the secured party to use the market sale practices that she in good faith believed were best suited to maximize the collateral's price and which were reasonably available to the secured party.[30] The loosely defined standard of commercial reasonableness and its incorporation of market practices was Professor Gilmore's and the other original drafters' response to earlier personal property legal regimes whose legislatively proscribed sale procedures proved disastrous in producing reasonable sale prices. The Uniform Conditional Sales Act (USCA), for example, mandated public sales and other rigid default rules which resulted in historically low prices.[31] Gilmore hoped that by

29. The sale must be properly noticed and "every aspect of the disposition [of collateral] including the method, manner, time, place, and terms must be commercially reasonable." U.C.C. § 9-504(3) (1995). Beyond this mandate, "commercial reasonableness" was not defined in the former Article 9, although some instruction was provided in former section 9-507(2)'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 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.5, at 1234–35 (1965).

30. *See infra* notes 32–34, 264–75 and accompanying text.

31. 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*]. Gilmore states:

> [T]he 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.

empowering the secured party to select and use market-based sale procedures rather than inefficient, legislatively proscribed procedures, the secured party would maximize the collateral's price and thus provide a suitable benchmark for determining a sale's commercial reasonableness and calculating a deficiency.[32] Article 9 thus vested the secured party with a great amount of discretion and relied upon her to select the market sale channel most suited to obtain a high price.[33] In selecting the proper market and its attendant sale procedures, Professor Gilmore said 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].'"[34]

> 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.

Id.; 2 GILMORE, *supra* note 29, § 44.4, at 1227 ("[T]here is general agreement that the USCA provisions worked very badly indeed . . . . A better system for guaranteeing deficiency judgments could hardly be designed."); *see also* ROBERT L. JORDAN ET AL., COMMERCIAL LAW 288 (5th ed. 2000); Lloyd, *supra* note 16, at 704.

32. Professor Gilmore had wanted Article 9's foreclosure rules to be ones "which would promote the highest possible yield on disposition of the collateral." Gilmore, *Article 9*, *supra* note 31, at 7; *see* William E. Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 207 (1962) ("The 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."); *see also* Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 714–15 (E.D. Pa. 1968) (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'" (quoting Hogan, *supra* at 219–20 (citing Gilmore, *Article 9*, *supra* note 31 at 7, 9))), *aff'd*, 398 F.2d 310 (3d Cir. 1968); Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491, 501–502 (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 29, § 44.6, at 1240)); *infra* notes 268–71 and accompanying text.

33. *See* 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) ("While 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)); JORDAN, ET AL., *supra* note 31, at 288.

34. 2 GILMORE, *supra* note 29, § 44.5, at 1237. For an exemplary case, see Commercial Credit Equip. Corp. v. Parsons, 820 S.W.2d 315, 323 (Mo. Ct. App. 1991). The *Commercial Credit* court stated that the secured party has 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.

Id. (citations omitted); *see also* United States v. Terry, 554 F.2d 685, 695 (5th Cir. 1977) (stating

Professor Gilmore and the other drafters recognized a countervailing concern that arose from the extraordinary freedom granted the secured party in Article 9's default provisions: the protection of the debtor from secured party overreaching and its unreasonable disregard for the debtor's interest in the highest price possible, and from actual fraudulent sale activity.[35] To guard against these problems, Article 9 "relies principally" on the courts' *ex post* review of the sale's commercial reasonableness.[36]

A. *SALE PROCEDURES VERSUS SALE PROCEEDS AS A MEASURE OF COMMERCIAL REASONABLENESS*

In their commercial reasonableness review under former Article 9, courts typically assessed a variety of aspects in determining a sale's commercial reasonableness, including the type and nature of the collateral, whether the sale was at a public auction or private sale through a dealer,[37] the nature of advertising and notice, the place and time of sale, the number of bids, and whether the sale was through the wholesale or retail market.[38] However, the price received at the foreclosure sale became the most controversial factor in assessing a sale's commercial reasonableness. The reasonableness of the price and the other sale factors were generally treated as a question of fact to be decided by the trier of fact (judge or jury)[39] and for which the secured party generally bore the burden of proof.[40]

The debate over whether price was a "term" of commercial reasonableness for which the secured party bore the burden of proof and concomitantly whether a low price *alone* could render an otherwise

---

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) ("Ultimately, commercial reasonableness requires that the secured party act in good faith to maximize returns on collateral.").

35. Gilmore, *Article 9*, *supra* note 31, at 7:

> There remained the problem of protecting the debtor and his other creditors from abuse of the new freedom. It is idle to pretend that there is no danger of abuse—of actual fraud and of overreaching which, although it may be short of fraud in law, may be equally harmful.

Id.

36. *Id.* at 4, 8; *see also* 2 GILMORE, *supra* note 29, § 44.4, at 1228; JORDAN ET AL., *supra* note 31, at 288 (stating "as 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").

37. Under the former Article 9, a secured party, after taking possession of its collateral following default, could sell it in a public or private sale. U.C.C. § 9–504(3) (1995).

38. For additional factors, see *infra* note 303 and accompanying text.

39. CHRISTINE A. FERRIS & BENNETT H. GOLDSTEIN, DISPOSITION OF REPOSSESSED COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE § 6.1, at 140–41 & § 6.2, at 148–50 & § 6.3, at 156–57 (1990).

40. *Id.*, § 6.2, at 148–50 & § 6.3, at 156–57; WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34–17, at 459.

commercially reasonable sale unreasonable was at first an interpretative quarrel. Although "price" was not explicitly mentioned, section 9-504(3) required that "every aspect" of the sale be commercially reasonable. Yet section 9-507(2) admonished that the fact that a better price could have been obtained using a different method of sale or at a different time was not itself sufficient to establish commercial unreasonableness.[41] One set of influential commentators said that, here, Article 9 "speaks here with forked tongue."[42] The academy and practitioners produced a litany of conflicting interpretations about the proper role and scope of price in assessing a sale's commercial reasonableness arising from this "apparent inconsistency."[43]

Generally, two conflicting lines of authority emerged out of the courts: the proceeds test and the procedures test.[44] The simple taxonomy belies the

---

41. U.C.C. § 9-507(2) (1995).

42. WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 455.

43. WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 904; *see, e.g.*, ROBERT BRAUCHER & ROBERT A. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 501 (1977). Braucher and Riegert state:

> Presumably the price is a term of the sale, and a secured party who fails to obtain a commercially reasonable price may, on that basis alone, have violated the mandate of Section 9-504. However, the oft-quoted Section 9-507(2) gives the secured party some protection . . . .
>
> A careful reading shows that the extent of this provision is quite limited. In essence it 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.

Id.; see also 68A AM. JUR. 2D *Secured Transactions* § 646 (1993) (stating that price is a term of commercial reasonableness, but low price alone will not render a sale commercially unreasonable); William Mark Rudow, *Determining the Commercial Reasonableness of the Sale of Repossessed Collateral*, 19 UCC L.J. 139, 144–47 (1986) (analyzing the broad spectrum price plays—or does not play—in courts' analysis); Steven O. Weise, *Survey Uniform Commercial Code: Part 2 U.C.C. Article 9: Personal Property Secured Transactions*, 54 BUS. LAW. 307, 340 (Nov. 1998) (stating that "the price obtained at a foreclosure sale should not be considered a 'term' of the sale").

44. *See, e.g.*, First Interstate Credit Alliance, Inc. v. Clark, 11 UCC Rep. Serv. 2d (CBC) 1012, 1016 (S.D.N.Y. 1989) ("Two tests measure the commercial reasonableness of a resale of collateral: the 'procedures' test, which examines the procedural fairness of the sale; and the 'proceeds' test, which looks solely to the price received for the goods."); Bankers Trust Co. v. Dowler & Co., 390 N.E.2d 766, 769 (N.Y. 1979) ("[S]ome authorities suggest that optimizing resale price is the prime objective of the code's default mechanisms and that the other factors listed are merely designed to ensure that the highest price is achieved . . . . Others would have commercial reasonableness turn on the procedures employed."); *see also* Rapson, *supra* note 25, at 681–82. Mr. Rapson states that there is:

> uncertainty as to whether "commercial reasonableness" is determined solely by the procedural fairness of the sale, irrespective of the price received, or whether the price must also be scrutinized. Two lines of authority have developed—even within an important federal district. One line holds that the procedures alone govern, the

variance and subtleties amongst jurisdictions concerning the role and scope of procedures versus price in commercial reasonableness review. Nevertheless, the taxonomy frames the central characteristics of the conflicting opinions, and brings into relief the hard questions about price's role in assessing a sale's commercial reasonableness: should courts use a proceeds test or a procedures test; should price be a "term" of commercial reasonableness; and should a low price alone render an otherwise procedurally regular sale unreasonable.

Under the proceeds test, the primary concern of the court's commercial reasonableness review was the reasonableness of the foreclosure sale's proceeds rather than the regularity and reasonableness of its procedures.[45] To be sure, in the typical case where the secured party was suing for a deficiency, both parties would introduce secondary source evidence not only of the price's fair price but also of the sale's procedural regularity. But for many courts under the proceeds test, unless the secured party proved that a low sale price for the collateral was reasonable for "legitimate justifications,"[46] the low price alone could render an otherwise procedurally regular sale commercially unreasonable, especially where the price was very low.[47] The proceeds test's focus on price reasonableness

---

other looks at price, sometimes alone and other times only under special circumstances that indicate a discrepancy with fair market value.

Id. (citations omitted).

45. *See supra* note 44; *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.3, at 152–53.

46. *See* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456–57 (distinguishing between low price sales and very low (wide) sales, and stating that courts allowed secured parties to explain away the very low price due to "special conditions"); *see also infra* notes 408–12 and accompanying text.

47. *See, e.g.*, ITT Indus. Credit Co. v. Chasse, 25 U.C.C. Rep. Serv. (CBC) 914, 917–18 (Conn. Super. Ct. 1978); Farmers Bank v. Hubbard, 276 S.E.2d 622, 626–27 (Ga. 1981) (stating that price is a term of commercial reasonableness that the secured party must establish is fair and reasonable, and that where the secured party fails to show the sale was commercially reasonable it is barred from collecting a deficiency except where the sole defect is a low price in which case the secured party is subjected to the rebuttable presumption rule); McMillian v. Bank S., N.A., 373 S.E.2d 61, 62 (Ga. Ct. App. 1988) (stating that the sale's method and manner were commercially reasonable, but that price was a "term" and that it was unreasonable at $150 less than the value assigned by the secured party's appraiser); FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 955 n.8 (N.Y. App. Div. 1981) (stating that a "wide or marked discrepancy in disposal and sale prices is an independently adequate reason to question the commercial reasonableness of a disposition"); *id.* at 955:

> [E]ven if the collateral's resale was shown to be procedurally proper, so as to resolve the factual issue of commercial reasonableness under the general rule of the "procedures" test, such a resolution is not conclusive on this issue. When the collateral's disposal price is measured in terms of the highest price available under the "proceeds" test, or according to the wide discrepancy exception under the "procedures" test, the commercial reasonableness of the collateral's disposal . . . remains a question of fact to be determined at trial.

Id.; *see also*, 1 BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM

required that the secured party and the debtor battle over the collateral's fair price using secondary source evidence of value and fair price. To evidence what a fair price should be under the particular sale's market conditions, litigants presented expert testimony by appraisers, price guidebooks, the original contract price, and other secondary source evidence.[48] When suing the debtor for a deficiency, most courts applying some form of a proceeds test held that the secured party bore the burden of proof as to the sale's commercial reasonableness and thus the collateral's fair price.[49] While some courts couched the proceeds test in the assertion that price was a "term" of commercial reasonableness,[50] others did not, and stated only that the primary factor in assessing a sale's commercial reasonableness was the price.[51]

In contrast, under the procedures test, the regularity and reasonableness of the sale's procedures assumed priority in the court's

---

COMMERCIAL CODE, ¶ 4.08[8][b], at 4-252–253 (rev. ed. 2001) (discussing cases); 9 WILLIAM D. HAWKLAND, HAWKLAND UNIFORM COMMERCIAL CODE SERIES, § 9-507.8, at 9-1047, n.8 (Sept. 2001) (listing cases).

48. 1A PETER F. COOGAN, ET AL., SECURED TRANSACTION UNDER THE UCC, 8–79 (1988); FERRIS & GOLDSTEIN, *supra* note 39, § 6.3, at 156–57.

49. *See, e.g.*, Savoy v. Beneficial Consumer Disc. Co., 468 A.2d 465, 467 (Pa. 1983); *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.2, at 148–50 & § 6.3, at 156; WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 455.

50. *See, e.g.*, Comfort Trane Air Conditioning Co. v. Trane Co., 592 F.2d 1373, 1387 (5th Cir. 1979) stating that:

> in order for the secured party to First [sic] meet its burden of proving every aspect of the sale to be commercially reasonable, it must first establish affirmatively that the 'terms' of the sale were commercially reasonable; this includes a burden to show that the resale price was the fair and reasonable value of the collateral.

Id.; Terrell v. John Deere Co., 491 So. 2d 918, 920 (Ala. 1986); Farmers Bank, Union Point v. Hubbard, 276 S.E.2d 622, 636–37 (Ga. 1981) (stating that price is a term of commercial reasonableness that the secured party must establish is fair and reasonable, and that where the secured party fails to show the sale was commercially reasonable it is barred from collecting a deficiency except where the sole defect is a low price in which case the secured party is subjected to the rebuttable presumption rule); Granite Equip. Leasing Corp. v. Marine Dev. Corp., 230 S.E.2d 43, 44 (Ga. 1976).

> [I]n order for the secured party to first meet its burden of proving every aspect of the sale to be commercially reasonable, it must establish affirmatively that the 'terms' of the sale were commercially reasonable; this includes a burden to show that the resale price was the fair and reasonable value of the collateral.

Id. (citations omitted); McMillian v. Bank S., N.A., 373 S.E.2d 61, 63 (Ga. Ct. App. 1988) (stating that the sale's method and manner were commercially reasonable, but that price was a "term" and that it was unreasonable at $150 less than the value assigned by the secured party's appraiser); *see also* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456–57.

51. *See, e.g.*, Brewer v. Trust Co. Bank, 424 S.E.2d 74, 76–77 (Ga. Ct. App. 1992) (requiring that the secured party prove that the sale terms were "commercially reasonable" and that the resale price was the "fair and reasonable" value of the collateral); Bryant v. Gen. Motors Acceptance Corp., 361 S.E.2d 529, 530 (Ga. Ct. App. 1987) (stating that the secured party must prove the resale price was "fair and reasonable").

analysis, not the amount of the proceeds.[52] Some courts held that while procedures were primary, price was a relevant factor in deciding the sale's commercial reasonableness, but it alone could not spell commercial unreasonableness.[53] Thus, under the procedures test, a non-collusive, procedurally regular sale that yielded a seemingly low price (when compared to secondary source evidence of fair price) would nevertheless be found commercially reasonable.[54] For a sale to be commercially unreasonable in such courts, a low price had to be combined with a procedural irregularity.[55] Conflicting expert testimony about the regularity

---

52. *See, e.g.*, FDIC v. Lanier, 926 F.2d 462, 467 (5th Cir. 1991); Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 545 (S.D.N.Y. 2001); United States v. Excellair, Inc., 637 F. Supp. 1377, 1384 (D. Colo. 1986); *In re* Zsa Zsa Ltd., 352 F. Supp. 665, 671 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. 1973); Sierra Fin. Corp. v. Brooks-Farrer Co., 93 Cal. Rptr. 422, 425–26 (Cal. Ct. App. 1971); Maine Nat'l Bank v. Jopet Jewelers, Inc., 538 A.2d 270, 272 (Me. 1988); Lilly v. Terwilliger, 796 P.2d 199, 203–04 (Mont. 1990); Huntington Nat'l Bank v. Elkins, 559 N.E.2d 456, 459 (Ohio 1990); First State Bank of Oilton v. Perryman, 746 P.2d 706, 707 (Okla. Ct. App. 1987); Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 570 P.2d 702, 711 (Wash. Ct. App. 1977); *see also* CLARK, *supra* note 47, ¶ 4.08[8][b], at 4-253:

> In light of the plain language of § 9-507(2), which provides that the fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner, the court should avoid looking at price alone. It is suggested that the burden to prove commercial reasonableness in the procedures surrounding the sale should be on the secured creditor. Once this burden is met however, the proceeds received from the sale should not be a factor, unless it is clear that the disposition was not handled in good faith . . . . In any case, the courts should refrain from injecting themselves into the question of price adequacy, if all the procedures surrounding the sale are handled correctly.

Id.; Steven O. Weise, *U.C.C. Article 9—Personal Property Secured Transactions*, 47 BUS. LAW. 1593, 1639 (1992) ("U.C.C. Section 9-504(3) requires only that the procedures involved be commercially reasonable and not that they generate a commercially reasonable price."); WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 458 (discussing procedures test cases).

53. *See, e.g.*, *Zsa Zsa Ltd.*, 352 F. Supp. at 671 (advocating a procedures test but also calling price a factor to be considered in the sale's commercial reasonableness); Youngblood Auto. Fin. Servs. v. Youngblood (*In re* Youngblood), 167 B.R. 870, 874–75 (Bankr. W.D. Tenn. 1994) (stating that when the value of collateral loses ninety percent of its value, concerns are more grave); *In re* Four Star Music Co., 2 B.R. 454, 461 (Bankr. M.D. Tenn. 1979) (listing price as a factor); *Huntington Nat'l Bank*, 559 N.E. 2d at 458–59 (same); *Mount Vernon Dodge*, 570 P.2d at 711–12 (same); *see also* 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, 497 (1994) (advocating a procedures test, but also observing that that "[m]any courts treat price as an important factor in determining commercial reasonableness").

54. *See e.g.*, Gen. Elec. Capital Corp. v. Stelmach Constr. Co, 45 U.C.C. Rep. Serv. 2d (CBC) 675, 675 (D. Kan. 2001) (finding a procedurally regular sale commercially reasonable notwithstanding "large" difference between secured party's expert's valuation $457,400 and debtor's expert's valuation of $311,000); *Sierra Fin. Corp.*, 93 Cal. Rptr. at 426 (stating that even though there was a "great disparity" between the sale price and the collateral's fair market value, this difference alone did not render the sale commercially unreasonable, and that the sale was otherwise conducted in a reasonable manner).

55. *See, e.g.*, *Lanier*, 926 F.2d at 467 (holding that, although guarantors could cite affidavits

and reasonableness of the procedures, as well as the reasonableness of the proceeds in many cases, characterized litigation under the procedures test. The trier of fact decided whether the sale was non-collusive and procedurally regular and reasonable.[56]

As discussed, the simply taxonomy of procedures versus proceeds belies the myriad variations thereof. Some courts called price a "term" or "aspect" of commercial reasonableness, but held that a low price alone would not render a sale commercially unreasonable. This blurred the line between the proceeds and the procedures tests.[57] Another variation was the "totality of the circumstances" test where courts judged the sale's commercial

---

establishing high value of goods, they could show no procedural irregularities explaining allegedly low sale price; the sale was commercially reasonable); Nadler v. Baybank Merrimack Valley, N.A., 733 F.2d 182, 184 (1st Cir. 1984) (stating that "although the price obtained may be one relevant factor . . . a plaintiff must point to specific deficiencies in the conduct of the sale that render it commercially unreasonable"); Prince v. R&T Motors, Inc., 953 S.W.2d 62, 66 (Ark. Ct. App. 1997) (finding that the secured creditor, which submitted evidence "as to every relevant detail of the disposition of the collateral" had established a prima facie case that the sale was conducted in a commercially reasonable manner and that debtor "produced no evidence, other than the bare assertion that a better price might have been realized, to show that the sale was conducted in a commercially unreasonable fashion"); *Huntington Nat'l Bank*, 559 N.E.2d at 458–59 (holding that, when secured party sold collateral through auction company that properly advertised in newspapers, sent individual announcements, gave notice of sale, and complied with all procedural requirements, sale was commercially reasonable even though price obtained was below wholesale value); *see also* CLARK, *supra* note 47, ¶ 4.08[8][b], at 4-254 –256 (discussing cases where low price sales were found commercially reasonable given absence of procedural irregularities); FERRIS & GOLDSTEIN, *supra* note 39, § 6.3, at 152 (stating that "although price is very important, it is not dispositive of the commercial reasonableness issue. Low price must be combined with other questionable aspects of the sale to support a finding of commercial unreasonableness."); 9 HAWKLAND, *supra* note 47, § 9-507.8, at 1045–46 (stating that "[a] low price, coupled with other factors of commercial unreasonableness . . . will usually result in a finding of commercial unreasonableness. When a low price is present without any other factors of commercial unreasonableness . . . courts have generally upheld the reasonableness of the sale."); Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. REV. 445, 513 (1994) (stating that "[u]nder the 'commercially reasonable' standard, absent procedural irregularities, collateral dispositions are not invalidated based on 'facile assertions concerning . . . the large price that the collateral 'could' bring.").

56. *See Gen. Elec. Capital Corp.*, 45 U.C.C. Rep. Serv. 2d (CBC) at 680; *Zsa Zsa Ltd.*, 352 F. Supp. at 671.

57. *See, e.g.*, In re *Youngblood* 167 B.R. at 873 ; Daniel v. Ford Motor Credit Co., 612 So .2d 483, 484 (Ala. Civ. App. 1992) (stating that even though price is a term of commercial reasonableness, a disparity between the collateral's market value and its sale price alone will not establish that the sale was commercially unreasonable); Kobuk Eng'g. & Contracting Servs. v. Superior Tank & Constr. Co., 568 P.2d 1007, 1010–13 (Alaska 1977) (calling price an "aspect" of commercial reasonableness that the secured party must prove, but also saying that a "seemingly low price does not in itself establish that the amount bid at the sale by Superior (the secured party) was not commercially reasonable," and that "[o]ther facts must be considered;" and applying careful scrutiny to find that the sale was commercially unreasonable due to inadequate notice and not in accordance with reasonable commercial practices); Villella Enters. v. Young, 766 P.2d 293, 296 (N.M. 1998); *see also* 68A AM. JUR. 2D *Secured Transactions* § 646 (May 2002 Supp.) (stating that price is a term of commercial reasonableness, but low price alone will not render a sale commercially unreasonable).

reasonableness under the totality of the sale's circumstances, which included both its procedures and its price.[58] These "totality of the circumstances" courts included procedures test and proceeds test courts. At least one court appeared to advocate a stringent proceeds test outcome where price, if the sole unreasonable "circumstance," could render the sale commercially unreasonable.[59] Other courts advocated explicitly or implicitly a procedures test outcome where, although price was a relevant "circumstance," a low price alone could not render an otherwise procedurally regular sale unreasonable.[60]

As a third variation, in many procedure test and proceeds test jurisdictions, courts employed careful scrutiny review of a seemingly low price sale.[61] A subset of these courts, in effect, used a procedures test and careful scrutiny review of a seemingly low price sale, but stated that the low price alone would not render the sale unreasonable. This suggested that they would hold a low price but procedurally regular sale commercially reasonable.[62] In contrast, other courts employing a proceeds test and careful scrutiny review of the sale stated that low price alone could render a sale commercially unreasonable.[63]

---

58. *See, e.g.*, *Primavera Familienstifung*, 130 F. Supp. 2d at 545; Van Dorn Retail Mgmt., Inc. v. Jim's Oxford Shop, Inc., 874 F. Supp. 476, 484–85 (D.N.H. 1994); *Four Star Music Co.*, 2 B.R. at 461–63; Assocs. Capital Servs. Corp. v. Riccardi, 454 F. Supp. 832, 834 (D.R.I. 1978); *Zsa Zsa Ltd.*, 352 F. Supp. at 671; Hall v. Owen County State Bank, 370 N.E.2d 918, 930 (Ind. Ct. App. 1977); Savoy v. Beneficial Consumer Disc. Co., 468 A.2d 465, 467 (Pa. 1983).

59. *Savoy*, 468 A.2d at 467.

60. *See, e.g.*, In re *Youngblood*, 167 B.R. at 874–875; *Zsa Zsa Ltd.*, 352 F. Supp. at 671; *Prince*, 953 S.W.2d at 66; Monahan Loan Serv., Inc. v. Janssen, 349 N.W.2d 752, 756 (Iowa 1984); First Bank of S.D. v. VonEye, 425 N.W.2d 630, 636–37 (S.D. 1988).

61. *See, e.g.*, *Primavera Familienstifung*, 130 F. Supp. 2d at 545; Connex Press, Inc. v. Int'l Airmotive, Inc., 436 F. Supp. 51, 56 (D.D.C. 1977); *Zsa Zsa Ltd.*, 352 F. Supp. at 671; *Kobuk*, 568 P.2d at 1012; Eagle Bank and Trust Co. v. Dixon, 15 S.W.3d 695, 697 (Ark. Ct. App. 2000); Walker v. McTague, 737 N.E.2d 404, 410 (Ind. Ct. App. 2000); *Hall*, 370 N.E.2d at 929; Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 920 (Nev. 1977); *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.3, at 153; *cf.* FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 954 (N.Y. App. Div. 1981) (stating that the procedures test has a "narrow exception" that "even where procedural propriety has been observed, a '*wide* discrepancy between the sale price and the value of the collateral signals a need for close scrutiny'") (quoting *Zsa Zsa Ltd.*, 352 F. Supp. at 671).

62. *See, e.g.*, *In re* Excello, 890 F.2d 896, 905–06 (7th Cir. 1989); *Primavera Familienstifung*, 130 F. Supp. 2d at 546–46; *Connex Press*, 436 F. Supp. at 56; *Zsa Zsa Ltd.*, 352 F. Supp. at 671; *Eagle Bank*, 15 S.W.3d at 697; *Hall*, 370 N.E.2d at 930; Commercial Credit Equip. Corp. v. Parsons, 820 S.W.2d 315, 322–23 (Mo. Ct. App. 1991); *Levers*, 560 P.2d at 920 .

63. *See e.g.*, First Interstate Credit Alliance v. Clark 11 U.C.C. Rep. Serv. 2d (CBC) 1012, 1016 (S.D.N.Y. 1989); Granite Equip. Leasing Corp. v. Marine Dev. Corp., 230 S.E.2d 43, 44 (Ga. Ct. App. 1976); FDIC v. Forte, 463 N.Y.S.2d 844, 849 (N.Y. App. Div. 1983); *Herald Square Fabrics Corp.*, 439 N.Y.S.2d at 954; Rapson, *supra* note 25, at 681–82. *But see* Walker v. McTague, 737 N.E.2d 404, 410 (Ind. Ct. App. 2000) (stating that although the "primary factor to be considered is the price received by the secured party," a low price alone was insufficient to render a sale commercially unreasonable, but a court should closely scrutinize all of the sales

Under the former Article 9, where a sale was found to be commercially *reasonable*, the secured party could sue the debtor for any deficiency between the proceeds of the sale and the outstanding debt plus reasonable expenses.[64] Thus, the sale price was used to calculate the deficiency. Where the sale was commercially *unreasonable*, the former Article 9 said nothing with respect to the secured party's right to collect a deficiency. While the majority of courts used the rebuttable presumption rule, a notable minority used the absolute bar rule which precluded the secured party from any recovery.[65] Where the secured party failed to comply with Article 9's default rules, the debtor also could sue him for any ensuing loss.[66] Thus, under the former Article 9, it was very important to secured parties, debtors, and courts alike to know whether the sale was commercially reasonable.

B. ACCURATE VALUATIONS AND FAIR PRICES: THE FOUNDATIONAL DEBATE

One can recharacterize the debate over the procedures test versus the proceeds test as a debate over accurate methods for determining the collateral's value and the circumstances under which a sale price that was less than the collateral's value should nevertheless be considered a fair price (thereby enabling the secured party to collect a deficiency from the debtor). To match the simple but useful doctrinal taxonomy of procedures test versus proceeds test, the Article proposes the following concomitant taxonomy.

Generally, procedures test advocates believed that the sale price was fair, even if below the collateral's true value, where it was the product of a non-collusive, procedurally regular and reasonable foreclosure sale. Thus, the secured party needed to prove the integrity of the sale process rather than the sale price's fairness using secondary source evidence such as expert appraisals or price guidebooks. In contrast, proponents of the proceeds test argued that often a non-collusive, procedurally regular foreclosure sale would not evidence the collateral's true value, and that such sales frequently produced sale prices unfairly below the collateral's true worth for a variety of reasons, the most prominent of which was secured parties' lack of incentive to maximize the sale proceeds.[67] Thus the procedures test, which based fairness in price on procedural regularity, unfairly allocated the loss of secured party misbehavior to the debtor in the form of a deficiency judgment. To remedy the situation, proceeds test advocates argued that price should be a term of commercial reasonableness which the secured party had to prove reasonable not through procedural regularity alone, but

---

circumstances due to the low price, including choice of wholesale or retail market, number of bids, and time and place of sale).

64. U.C.C. § 9-504(2) (1995).

65. Lloyd, *supra* note 16, at 724; *see, e.g.*, C.I.T. Corp. v. Anwright Corp., 237 Cal. Rptr. 108, 111 (Cal. Ct. App. 1987); Assocs. Capital Servs. Corp. v. Riccardi, 408 A.2d 930, 931 (R.I. 1979).

66. U.C.C. § 9-507(1) (1995).

67. See *infra* note 159-61.

also through secondary source evidence of value and fair price. If the secured party could not explain or justify the low price, then the low price alone should render the sale commercially unreasonable. Exploring these two positions in more detail is instructive.

1. Fair Price Through the Non-Collusive, Procedurally Regular, and Reasonable Foreclosure Sale

In the procedures camp, there existed varying degrees of fidelity to the theory that the commercially reasonable sale (a non-collusive, procedurally regular and reasonable sale) produces a fair price for the collateral. Judge Easterbrook penned one of the most strident positions in In re *Excello Press, Inc.*:

> The product of a commercially reasonable sale *is* the fair market value. If the secured party can prove that the sale was commercially reasonable, it has proved the market value of the collateral. . . . The price obtained in a commercially reasonable sale is not *evidence* of the market value, which can be discounted or thrown out. It *is* the market value. Whether the sale was commercially reasonable thus is the central inquiry. . . . The third-party evidence (such as an appraiser's estimate), which the bankruptcy judge thought essential to establish the market value and which the district court called superior "direct evidence" . . . is at best second-best. What someone pays in a commercially reasonable sale is the market price; an appraisal (that is, what an expert thinks someone would pay in a commercially reasonable sale) is useful only when the price of such a sale cannot be got at directly. . . . In the end, the "principal limitation on the secured party's right to dispose of the collateral is the requirement that he proceed in good faith (Section 1-203) and in a commercially reasonable manner." . . . Whether a sale was commercially unreasonable is, like other questions about "reasonableness", a fact-intensive inquiry; no magic set of procedures will immunize a sale from scrutiny. . . . In the end, the 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."[68]

68. In re *Excello Press, Inc.*, 890 F.2d at 904–06 (citations omitted); *see also* Thrower v. Union Lincoln-Mercury, Inc., 670 S.W.2d 430, 432 (Ark. 1984) (stating that "[w]hen the sale is conducted according to the requirements of the code, the amount received is evidence of the collateral's true value in such an action"); *Hall*, 370 N.E.2d at 928 (stating that "'it is only where the sale is conducted according to the requirements of the code that the amount received or

Despite Judge Easterbrook's use of the word "value" several times ("fair market value" and "market value"), one must believe that he means "price" instead (hence his final reference to "market price"). To understand the problem with Judge Easterbrook's use of the word "value" rather than "price," consider Professors Lawless and Ferris's argument (in the context of bankruptcy valuations) that courts frequently use rhetoric that confuses the economic distinction between an asset's value and the price it fetches at a sale:

> An asset ultimately has only one value—its market value. To be sure, an asset may bring different prices in different types of sales [e.g. non-distress sale versus distress sale], but these different prices do not arise because the asset has different values. Rather, the price differences result from the circumstances surrounding the sale or the varying expectations of market participants. Price and value are different concepts . . . .[69]

To evidence an asset's value, one can sell it in an efficient, competitive market transaction.[70] In such a market, individual investors (bidders), who have made their own subjective valuations, will compete for the asset. Consequently, a market consensus of the asset's value will be evidenced in

---

bid at a sale of collateral is evidence of its true value in an action to recover a deficiency'" (quoting Universal C.I.T. Credit Co. v. Rone, 453 S.W.2d 37, 39–40 (Ark. 1970))); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 535 P.2d 1077, 1082 (N.M. 1975) (stating that "[w]here the sale is conducted in accordance with § 9-504(3) the sum received at sale is evidence of the market value. But if the sale is not conducted according to the Code, the amount received is not evidence of the market value of the collateral."); Richardson Ford Sales, Inc. v. Johnson, 676 P.2d 1344, 1353 (N.M. Ct. App. 1984) (stating that "[w]here the sale is conducted in accordance with § 9-504(3) the sum received at sale is evidence of the market value"); First Nat'l Bank and Trust Co. of Enid v. Holton, 559 P.2d 440, 444 (Okla. 1976) (stating that "[w]here the sale of collateral is conducted in compliance with the UCC, the sale of collateral is evidence of market value"); Heiser & Flemma, *supra* note 53, at 498 (stating that "[m]oreover, for most repossessed collateral there is no available method for accurately determining value short of a commercially reasonable sale to determine what a buyer is willing to pay"). In the context of real estate foreclosures and fraudulent conveyances under section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. § 548(a)(2), see Scott B. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives*, 71 VA. L. REV. 933, 966 (1985) (stating that "[i]f the [sale] procedures were adequately structured to produce a competitive bid and the sale was regularly conducted, federal courts should presume that the amount paid for the debtor's interest was reasonably equivalent, regardless of any disparity between retail market value and the price bid at the sale"); Alan S. Gover & Glenn D. West, *The Texas Nonjudicial Foreclosure Process—A Proposal to Reconcile the Procedures Mandated by State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code*, 43 SW. L.J. 1061, 1080 (1990); Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 CARDOZO L. REV. 581, 602–03 (1987).

69. Robert M. Lawless & Stephen P. Ferris, *Economics and the Rhetoric of Valuation*, 5 J. BANKR. L. & PRAC. 3, 4 (1995).

70. *Id.* at 12.

the sale price.[71] "If the marketplace for an asset is efficient, it ultimately will force a convergence between the market price and the value estimated by investors."[72]

By stating that "[t]he price obtained in a commercially reasonable sale is . . . the [collateral's] market value," Judge Easterbrook either confuses "value" with "price," or worse, implies that a commercially reasonable sale *must* be one conducted in an efficient marketplace where prospective individual investors' subjective valuations converge to produce a sale price that reflects the collateral's true value. If the latter is true, this position would mean that there can never be a low price under a commercially reasonable sale since, under the efficient market hypothesis, at such a sale the collateral's market value has been realized.

But Article 9 foreclosure sales are typically (and permissibly) conducted in distress or forced-sale markets.[73] Even where a secured creditor is presumptively a maximizing actor (i.e., one selling to disinterested third-party purchaser), where he uses distress market channels to sell collateral, one should not be surprised if the sale price is lower than the price that would be produced in an non-distress market. Nor should one be surprised if the sale price falls lower than the collateral's true value as produced in a perfectly efficient market. Distress markets for repossessed collateral may produce lower prices than non-distress markets for a number of reasons other than the lack of secured party misbehavior. These include the relatively swift nature of forced sales,[74] the "undeveloped state of most used

---

71. *Id.*

72. *Id.* Professors Lawless and Ferris describe the characteristics of an efficient market to include a sufficient number of bidders, uninhibited flow of financial resources, no informational asymmetries (lack of relevant information by market participants), adequate exposure of the asset to the marketplace, and zero transaction costs (which they say is a hypothetical state). *Id.* at 12–15. *See also* John F. Shampton, *Statistical Evidence of Real Estate Valuation: Establishing Value Without Appraisers*, 21 S. ILL. U. L.J. 117–18 (1996):

> The appraisal process, however, is subject to a number of serious objections as well as significant sources of error. Even the most fundamental of underlying assumptions of the appraisal process, that prices are equivalent to values, has been subjected to attack. The assumption requires the existence of an "efficient market" for real estate transactions, a market which does not appear to exist.

Id.

73. Rapson, *supra* note 32, at 508 (stating that "foreclosure sales are usually under distress conditions and are made in a forced sale marketplace"). The incidence of sale in the forced sale versus non-forced sale context is ultimately an empirical question beyond the scope of this Article.

74. *See infra* note 150 and accompanying text; *cf.* Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 891 (1985) (stating in the context of real estate foreclosure sales, that "[s]ome buyers who might otherwise be interested shy away from the swift and sudden nature of the foreclosure sale" (footnote omitted)). *But see infra* note 171 and accompanying text.

goods markets,"[75] inadequate advertising due to prohibitive costs relative to the value of the collateral,[76] the condition and stigma of repossessed goods,[77] potential buyers' difficulty assessing the collateral's condition and worth prior to sale,[78] bargain-hunting, foreclosure specialist buyers,[79] potential purchasers' difficulty getting financing for expensive collateral,[80] and lack of buyer demand for the particular type of collateral.[81] If one equates a commercially reasonable sale only with nondistress markets, then the secured party could never conduct a commercially reasonable sale using a distress market even if that was the only market reasonably available. Thus, Judge Easterbrook must be charged only with sloppy rhetoric that confuses "value" for "price"—an error other courts and commentators commit in their discussions of price and commercial reasonableness.[82]

Of course, an Article 9 foreclosure sale can theoretically occur in a nondistress market and produce a sale price that evidences the collateral's true value. One would need empirical data to understand the frequency of such an occurrence, but it is sensible to hypothesize that, since the commercial reasonableness standard directs the secured party to employ marketplace

---

75. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. Rev. 1047, 1060; *see also* Ralph C. Clontz, Jr., *Guide to a Secured Creditor's Remedies on Debtors' Default*, 7 UCC L.J. 348, 366 (1975) (mentioning the "usual poor market for repossessed merchandise").

76. *See* Michael Korybut, *Online Auctions of Repossessed Collateral Under Article 9*, 31 RUTGERS L.J. 29, 83 (1999); *infra* note 289 and accompanying text.

77. *See* Heiser & Flemma, *supra* note 53, at 493. *But see* JONATHAN SHELDON & ROBERT A. SABLE, REPOSSESSIONS 243 (National Consumer Law Center 2d ed. 1988).

78. Heiser & Flemma, *supra* note 53, at 493.

79. *See* Ehrlich, *supra* note 68, at 959 (discussing the matter in the context of real estate foreclosure sales).

80. *See* Basil H. Mattingly, *The Shift From Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77, 100 (1996) (discussing the matter in the context of real estate foreclosure sales).

81. *See In re* Sackman Mortgage Corp., 158 B.R. 926, 936 (Bankr. S.D.N.Y. 1993) (stating that "the combination of a low price obtained for collateral and the lack of bidders is not necessarily the result of a commercially unreasonable sale, but can merely indicate a lack of demand for the collateral"); Sumner v. Extebank, 452 N.Y.S.2d 873, 875 (N.Y. App. Div. 1982), *aff'd as modified*, 449 N.E.2d 704 (N.Y. 1983) (finding that "[t]he low price paid and the lack of bidders were not the result of a commercially unreasonable sale, but were rather indicative of the lack of demand for a disabled vessel"); N. Fin. Corp. v. Kesterson, 287 N.E.2d 923, 925 (Ohio Ct. App. 1971)

> [T]he sale of the laundry equipment was advertised and all interested parties notified directly, yet none of the defendants nor any bidder appeared. The conclusion is inescapable; there was no market for the chattels and without a market they could have no fair market value. An owner, himself unwilling or unable to bid, cannot establish a value by giving his personal opinion of value to himself. As the ancient aphorism goes: "If wishes were horses, beggars would ride."

Id.; see also Zubrow, *supra* note 55 at 469 (discussing exogenous factors (those beyond the secured party's control) that affect prices, including a poor market for the goods).

82. *See supra* note 68 for cases and commentators using "value" rhetoric.

practices to sell repossessed collateral, the more efficient those markets, the closer the sale price will approximate the collateral's true value. Case law probably does not reflect many of these happy occurrences since litigation is less likely when the sale price approximates the collateral's true value.

Other courts and commentators employed the proper rhetoric and argued that the commercially reasonable sale would produce a fair price.[83] Thus, both these courts and commentators, and Judge Easterbrook and company, advocated what this Article refers to as the *fair-price determining function of the non-collusive, procedurally regular and reasonable sale.*[84] Under this

---

83. *See, e.g.*, Lilly v. Terwilliger, 796 P.2d 199, 203–04 (Mont. 1990) ("This Court has previously interpreted [9-507(2) and 9-504(3)] to mean that the 'reasonableness of the sale is not determined by price but the manner in which the sale was conducted. In other words if the sale is considered commercially reasonable, then the price is reasonable.'"); *see also* 2 GILMORE, *supra* note 29, § 44.6, at 1245 ("As the best way to produce a fair price, the Code relies on the mechanism of a public sale, notification and publicity. If the mechanism, properly operated, fails to produce any bids except the secured party's a reasonable inference is that there was no value to be salvaged." (footnote omitted)); William M. Burke & Edwin E. Smith, *Enforcement of Rights and Remedies Under Part 5 of Article 9*, C878 A.L.I.-A.B.A. 355, 394 (1993), *available at* WL C878 A.L.I.-A.B.A. 355 ("[A] secured party who conducts a commercially reasonable disposition should be entitled to rely on the commercial reasonableness of the disposition and not be second-guessed concerning the price. In other words, the price received at a commercially reasonable disposition is a fair price."); Rapson, *supra* note 32, at 495 (stating that Professor Gilmore believed that where "the sale satisfies the procedural requirements of 'commercial reasonableness,' the transaction is 'unassailable'"); *cf.* Pers. Jet, Inc. v. Callihan, 624 F.2d 562, 568 (5th Cir. 1980) ("A sale is commercially reasonable where it is done in public, during business hours, upon adequate notice within a reasonable time of repossession, and under conditions reasonably calculated to bring a fair market price." (citations omitted)); Clark Equip. Co. v. Mastelotto, Inc., 150 Cal. Rptr. 797, 802 (Cal. Ct. App. 1978):

> "Reason dictates that sale of repossessed collateral, to be of protection to a debtor, must ordinarily be done in public, during business hours, upon adequate notice within a reasonable time of repossession and under conditions reasonably calculated to bring the fair market price if the code requirements are to be met." Here the sale of the equipment was made in a public place, during business hours, and upon adequate notice. Under all of the facts, the jury could find that the delay after repossession was reasonable and for defendant's benefit and that the price obtained was adequate.

Id. (citations omitted); Brigham Truck and Implement Co. v. Fridal, 746 P.2d 1171, 1172 (Utah 1987):

> Whether a particular sale is commercially reasonable is to be determined on a case-by-case basis. That determination depends on whether the circumstances of the sale and the manner- of-business context in which it occurred support a conclusion that the sale was conducted in a commercially reasonable manner. Of primary importance are the secured party's attempts to obtain a fair price for the collateral by advertising the collateral or otherwise notifying potential buyers that the collateral is for sale.

Id. (citations omitted).

84. *See* Rapson, *supra* note 32, at 502 ("Gilmore was convinced that 'the price-determining function of the market' could be relied upon 'to establish the fair value of the collateral.'" (footnote omitted)).

function, even if the contested sale's price were lower than the collateral's true value, the sale would be commercially reasonable so long as the secured party conducted a non-collusive, procedurally regular and reasonable sale.

Finally, other commentators eschewed the rhetoric of fair price and the idea that a non-collusive, procedurally regular and reasonable sale necessarily produced a fair price. To them, the sale price was just the sale price. Where the sale was non-collusive, procedurally regular and reasonable, whether the sale price was commercially unreasonable was legally irrelevant and thus normative labels like "fair" price were irrelevant.[85]

2. Some Doctrinal, Valuation Technique, and Policy Problems Associated with Using Secondary Source Evidence of the Collateral's Value and Fair Price Under the Proceeds Test

Regardless of whether a court or commentator falls into the fair-price determining function camp or the price agnostics camp, central to both camps' view is not only the primacy of market-based sale procedures, but also a hostility to the proceeds test advocates' reliance on secondary sources of fair price. The crux of this hostility is that such secondary source evidence of fair price is flawed for various doctrinal, valuation technique, and policy reasons. Thus, using such secondary source evidence to argue that the sale's price is unfair or commercially unreasonable is itself unfair, especially when used alone to find non-collusive, procedurally regular and reasonable sales commercially unreasonable. Doing so upsets the market-based determination of a fair price (or market determination of commercial reasonableness for the price agnostics camp).[86] Judge Easterbrook

---

85. *See* Weise, *supra* note 52, at 1639 ("U.C.C. Section 9-504(3) requires only that the procedures involved be commercially reasonable and not that they generate a commercially reasonable price."); E-Mail from Steven Weise to Michael Korybut (Dec. 26, 2001):

> I [Mr. Weise] disagree with Judge Easterbrook's analysis. A secured party that conducts a procedurally commercially reasonable sale does not generate 'fair market value,' the price is just an amount. I get to the same result as Easterbrook because whether the amount garnered at the foreclosure sale is "fair market value" or not, it's an OK amount for Article 9 purposes because the sale was procedurally "commercially reasonable."

Id. (on file with Iowa Law Review). Mr. Weise also states that "[t]he important point is (contra to Judge Easterbrook) that the price is not itself 'commercially reasonable' nor is the price the 'fair market value' of the collateral. The price is just the price and there is no label put on it.". *Id.*; *cf.* Marion W. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHI.-KENT L. REV. 1255, 1281 (1999) (stating, while not advocating a procedures test or the fair price-determining function, that revised section 9-615(f) "rejects the idea that an *unjustifiably* low price in a sale to any of those [interested] parties is necessarily a commercially unreasonable sale subjecting the secured party to the statutory damages that are imposed in favor of consumer debtors") (emphasis added).

86. *See* Heiser & Flemma, *supra* note 53, at 498 (stating that "for most repossessed collateral there is no available method for accurately determining value short of a commercially reasonable sale to determine what a buyer is willing to pay"); *infra* notes 155–58 and accompanying text.

demonstrated his hostility by concluding that, upon conducting a commercially reasonable sale, secondary source evidence of fair price like expert appraisals had no evidentiary use for assessing the collateral's fair market price. Secondary source evidence may include not just expert testimony or price guidebooks obtained *ex post* for litigation purposes, but also presale appraisals conducted by the secured party (and perhaps the debtor) to establish "let-go" prices for the collateral.[87]

Indeed, secondary source evidence of fair price (such as pre-sale appraisals, expert valuations, and price guidebooks) is beset with numerous doctrinal and valuation technique problems. Further, using such evidence to upset otherwise commercially reasonable sales conflicts with some important Article 9 policies. This Section discusses some of these *ex post* and *ex ante* problems and draws upon both Article 9 and Bankruptcy Code cases and literature.[88]

---

87. *See infra* notes 144, 336–38, 381–86. A "let-go" price is a price floor below which a secured party will not accept offers.

88. For example, a debate similar to the procedures versus proceeds debate has taken place under section 548(a)(2) of the Bankruptcy Code which allows the bankruptcy trustee to avoid property transfers by the debtor made within one year of filing for bankruptcy as fraudulent conveyances where the debtor received in exchange for the collateral less than its "reasonably equivalent value." Under this section, the question arose whether a secured creditor's low price foreclosure sale of the debtor's property (the collateral) constituted an avoidable fraudulent conveyance because the collateral's proceeds were less than the collateral's reasonably equivalent value. To answer the question, the collateral's value had to be determined and compared to the proceeds amount. A variety of conflicting federal circuit court approaches arose on how to value the collateral properly for this purpose. Under the *Durrett* approach, where a real estate foreclosure sale yielded proceeds less than seventy percent of the collateral's fair market value, the sale was avoided as a fraudulent transfer for producing less than the collateral's reasonably equivalent value. *See* Durrett v. Wash. Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980). To determine the collateral's fair market value, *Durrett* courts relied on appraisals submitted by the litigants. *See* Vic Sung Lam, Comment, *Avoidability of Foreclosure Sales under Section 548(a)(2) of the Bankruptcy Code: Revisiting the Transfer Issue and Standardizing Reasonable Equivalency*, 68 WASH. L. REV. 673, 683–84 (1993). In this sense, the *Durrett* approach resembled a proceeds test under former Article 9 where low price evidenced through secondary sources could alone render a non-collusive, procedurally regular sale commercially unreasonable. Under the *Bundles* approach, a non-collusive, procedurally regular real estate foreclosure sale raised a *rebuttable* presumption that the sale proceeds were the collateral's reasonably equivalent value. *See In re* Bundles, 856 F.2d 815, 824 (7th Cir. 1988). The *Bundles* approach called for the court to assess the sale's procedural regularity and non-collusiveness in the totality of the sale's circumstances. *Id.*; *see* Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1269, 1270 (1999). In particular, under *Bundles*, the court needed to conduct an inquiry into the foreclosure sale's procedures to see if they were adequate so that the sale price could be rebuttably presumed to be the collateral's reasonably equivalent value. Ehrlich, *supra* note 68, at 964–65. The *Bundles* approach thus resembled Article 9's careful scrutiny review of all of the sale's aspects. Under the *Madrid* approach, a non-collusive, procedurally regular real estate foreclose sale raised the *conclusive* presumption that the price received for the collateral was its reasonably equivalent value. *See In Re* Madrid, 10 B.R. 795, 800 (Bankr. D. Nev. 1981), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, 469 U.S. 833 (1984). The United States Supreme Court finally weighed in on the matter in *BFP v. Resolution Trust Corporation*, holding

a. Ex Post *Doctrinal and Valuation Technique Problems*

First, where the price itself had to be proven fair under a proceeds test, courts needed to select and articulate a legal standard of fair price for the collateral against which to measure the sale's proceeds. As with the Bankruptcy courts and various Bankruptcy Code provisions, courts reviewing Article 9 sales used varying legal standards such as the collateral's "wholesale value,"[89] "retail value,"[90] "fair market value,"[91] "reasonable value,"[92] and "fair and reasonable value."[93] This inconsistency occurred even within the same jurisdiction.[94] Just as Professors Lawless and Ferris observed with respect to courts and various Bankruptcy Code sections, these Article 9 courts frequently confused "value" with "price." Even where courts used the right word, the standards could be vacuous: the collateral's "optimum sale price"[95] or "fair price" means what? Indeed, the revised Article 9 Drafting Committee rejected a proposal to require that the collateral fetch its "fair value" as being "unworkable, cumbersome and vague."[96]

---

that the price received at a non-collusive, procedurally regular real estate foreclosure sale *conclusively* established that the collateral was exchange for its reasonably equivalent value, thus apparently adopting the *Madrid* approach. BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994). *See* COLLIER ON BANKRUPTCY, ¶ 548.05(1)(b), at 548–37 (Lawrence P. King ed., 15th ed. 1998). The approaches thus ranged, respectively, from a heavy reliance on fair price proved through secondary source evidence of value and fair price to a conclusive presumption of reasonably equivalent value based on procedural compliance. The literature both praising and criticizing these approaches is thus useful to the Article's analysis, and is cited throughout the Article's footnotes.

89. *See infra* notes 97–102 and accompanying text.

90. *Id.*

91. Conn. Bank & Trust Co. v. Incendy, 540 A.2d 32, 38 (Conn. 1988); Knierim v. First State Bank, 488 N.W.2d 454, 458 (Iowa 1992); Owen v. Ostrum, 855 P.2d 1015, 1020 (Mont. 1993); Lilly v. Terwillinger, 796 P.2d 199, 204 (Mont. 1990); Dulan v. Mont. Nat'l Bank, 661 P.2d 28, 32 (Mont. 1983); Fritts v. Selvais, 404 S.E.2d 505, 507 (N.C. 1991); Reuter v. Citizens & N. Bank, 599 A.2d 673, 681 (Pa. Super. Ct. 1991).

92. Bryant v. Gen. Motors Acceptance Corp., 361 S.E.2d 529, 529 (Ga. Ct. App. 1987).

93. Lee v. Trust Co. Bank, 418 S.E.2d 407, 408 (Ga. Ct. App. 1992); Cent. & S. Bank v. Craft, 379 S.E.2d 432, 433 (Ga. Ct. App. 1989); Am. State Bank v. Hewson, 411 N.W.2d 57, 64 (N.D. 1987).

94. *See* Ryder v. Bank of Hickory Hills, 612 N.E.2d 19, 23 (Ill. App. Ct. 1993) (citing Illinois precedent where court found a commercially reasonable sale where the price was sixty-two percent of the collateral's "fair market value," and then the *Ryder* court holding that forty-six percent of "actual market value" was also commercially reasonable).

95. FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 954 (N.Y. App. Div. 1981).

96. Alvin C. Harrell, *1994 Meetings Refine Proposed Article 9 Revisions*, 48 CONSUMER FIN. L.Q. REP. 326, 328 (1994); *see* Heiser & Flemma, *supra* note 53, at 498 (noting that the "fair value" standard is unworkable because the fair value of personal property is hard to ascertain); Memorandum from Profs. Steven L. Harris & Charles W. Mooney, Jr. to Article 9 Drafting Committee 2 (July 30, 1996), *reprinted in* Rapson, *supra* note 32, at 542 app. 1 (stating that "[v]aluation, especially the valuation of personal property on foreclosure, is inherently problematic"). *But see* Rapson, *supra* note 32, at 524("[T]he Reporters [Professors Harris and Mooney] are exaggerating the difficulty of making valuations.") (quoting Memorandum from

The lack of a comprehensible and consistent legal standard of fair price creates uncertainty for the trier of fact assessing whether the price received at the sale is fair under a proceeds test. A leading example is the ongoing struggle about whether the sale's proceeds should be judged against a "retail price" benchmark or the lower "wholesale price" benchmark,[97] particularly with respect to challenged consumer used car sales.[98] In the typical case where the secured party sells in the wholesale market for the repossessed goods, the debtor argues the sale is commercially unreasonable since the goods should have been sold in the retail market for a higher price and thus a smaller deficiency. Where courts agree with the debtor, the secured party is typically a merchant in the goods with ready access to the retail market channel.[99] Where, however, the secured party is not a merchant of the repossessed goods, courts typically do not hold him to the retail market price standard. Courts reason that such non-merchant secured parties lack the facilities and expertise for retail sales. To make such a secured party incur the expenses of arranging a retail sale would offset the gain in price and would take longer to complete the sale, thus incurring additional

---

Donald J. Rapson to Article 9 Drafting Committee 1-3 (Aug. 8, 1996) *reprinted in* Rapson, *supra* note 32, at 543 app. 2); *but cf.* JOHN O. HONNOLD ET AL., THE LAW OF SALES AND SECURED FINANCING 1087 (2002) (calling the determination of section 9-615(f)'s criteria of "very low" proceeds a "highly speculative and hypothetical amount"). With respect to section 548 of the Bankruptcy Code's requirement that a foreclosure sale price reflect the collateral's reasonably equivalent value, the *Durrett* approach critics argued that its seventy percent of fair market value rule was arbitrary and did not take into account the "price-reducing characteristics of foreclosure sales." Lam, *supra* note 88, at 684; *see also* Ehrlich, *supra* note 68, at 964–65; Lisa Pendley, Comment, In re BFP*: Mortgage Foreclosures and the Bankruptcy Code's "Reasonably Equivalent Value,"* 8 DEPAUL BUS. L.J. 227, 235–36 (1996); Martha Lassiter Sewell, Comment, *Avoidance of Foreclosure Sales Under Section 548 of the Bankruptcy Code: A Balancing of Interests*, 27 WAKE FOREST L. REV. 1011, 1025–26 (1992). Critics also argued that courts following *Bundles* created different, often conflicting, valuation standards. *See* Jeffery M. Sharp, *Returning Confidence to Prepetition Foreclosure Sales Under the Bankruptcy Code: Scrutinizing Federal Policy and a Vague Statute*, 32 AM. BUS. L.J. 185, 231 (1994). Commentators also argued that the *Madrid* approach was good because it primarily examined the adequacy of the sale's procedures rather than the adequacy of the sale price measured against the collateral's "fair market value." *See* Ehrlich, *supra* note 68, at 966 (advocating a procedures test where "state [foreclosure] procedures are properly designed to generate competitive bidding for the property"); Gover & West, supra note 68, at 1064 (stating that "the authors believe that the pertinent inquiry in the bankruptcy courts for reasonable equivalence in the context of a foreclosure sale is whether the procedures employed were designed to achieve the highest price possible, not whether the price obtained constituted a specified percentage or approximation of fair market value"); Sewell, *supra* at 1031 (advocating the *Madrid* approach because it "assures the lender, before the loan transaction, that the lender can recover the loan amount through state foreclosure proceedings without the risk of the sale being avoided as a fraudulent transfer, as long as the lender complies with state foreclosure law").

97. FERRIS & GOLDSTEIN, *supra* note 39, § 6.4, at 158–59; WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 457–58; Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & ECON. 117, 130–32 (1983).

98. Schwartz, *supra* note 97, at 130–32.

99. FERRIS & GOLDSTEIN, *supra* note 39, § 6.4, at 159.

storage and interest costs.[100] Some commentators insist that retail price should be the required standard.[101] In response, critics claim that wholesale price is the correct standard since, once one deducts the additional costs the secured party must incur in retailing the collateral, there is little difference between retail price and wholesale price.[102]

Even if in a particular jurisdiction the courts attempted to consistently use one legal standard of fair price to create uniformity, the goal would be vexingly elusive. Consider the "mess" and "uncertainty"[103] wrought by conflicting standards used to determine the collateral's value under section 506(a) of the Bankruptcy Code. The Supreme Court took aim at this mess in *Associates Commercial Corp. v. Rash.*[104] *Rash* held that, for purposes of a "cramdown" under Chapter 13, the proper valuation standard under section 506(a)'s definition of "value" was the goods' "replacement" value.[105] This was supposed to resolve lower courts' use of conflicting standards, such as retail or wholesale. Accordingly, the Court rejected "a ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases."[106] But since *Rash,* courts and commentators now argue about the proper interpretation of "replacement" value and advocate

---

100. *See, e.g.,* Hall v. Owen County State Bank, 370 N.E.2d 918, 930 (Ind. Ct. App. 1977); Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 570 P.2d 702, 712 (Wash. Ct. App. 1977) (both holding that retail sale is unreasonable when the costs of the sale exceed the difference in market prices); *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.4, at 159.

101. Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale,* 22 STAN. L. REV. 20, 31–33 (1969) [hereinafter Shuchman, *Archival Study*]; Ellen Barrie Corenswet, Note, *I Can Get It For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments,* 27 STAN. L. REV. 1081, 1104 (1975); *see also* Philip Shuchman, *Condition and Value of Repossessed Automobiles,* 21 WM. & MARY L. REV. 15, 26 (1979) [hereinafter Shuchman, *Condition and Value*]; Martin B. White, *Consumer Repossessions and Deficiencies: New Perspectives from New Data,* 23 B.C. L. REV. 385, 393–408 (1982).

102. Schwartz, *supra* note 97, at 130–32; *see also,* Credit Practices Rule: Statement of Basis and Purpose, and Regulatory Analysis, 49 Fed. Reg. 7740, 7783 (March 1, 1984) (to be codified at 16 C.F.R. pt. 444) [hereinafter Statement of Purpose] (rejecting "a provision that would have required valuing collateral other than household goods at its retail price for purposes of calculating deficiencies"). *But see* Captain Darryll K. Jones, *Common Sense and Article 9: A Uniform Approach to Automobile Repossessions,* ARMY LAW., Dec. 1988, at 8, 12 (stating that the higher costs of retail selling are not present in most automobile repossession cases and that secured party should attempt to use retail market); *but cf.* David Gray Carlson, *Car Wars: Valuation Standards in Chapter 13 Bankruptcy Cases,* 13 BANKR. DEV. J. 1, 7, 27–29 (1996) (arguing that the distinction between retail and wholesale prices is false when one considers the higher costs of retail selling); Lawless & Ferris, *supra* note 69, at 15–18 (arguing for wholesale price because retail price reflects not just the asset's true value but also the added value of the retailer).

103. Jean Braucher, *Getting It For You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After* Rash, 102 DICK. L. REV. 763, 765 (1998).

104. Assocs. Commercial Corp. v. Rash, 905 U.S. 953 (1997).

105. *Rash,* 905 U.S. at 965. Section 506(a) states in part that "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use [of such property] . . ." 11 U.S.C. § 506(a) (1994).

106. *Rash,* 905 U.S. at 965 n.5.

different standards, including retail and wholesale![107] No wonder one judge lamented that "[people] have all but driven themselves mad in an effort to definitize [value's] meaning."[108]

Second, putting aside the problems with imprecise and varying legal standards of fair price, the trier of fact faces numerous evidentiary problems in assessing whether the sale price met the selected legal standard. Assume the selected standard is "fair foreclosure price," a standard recommended by various commentators because it reflects the typical distress market conditions of an Article 9 foreclosure sale.[109] It also accommodates the idea that a commercially reasonable price can fall within a range of prices.[110] To

---

107. *See, e.g.*, Braucher, *supra* note 103, at 776; Katheryn R. Heidt & Jeffrey R. Waxman, *Supreme Court's* Rash *Decision Fails to Scratch the Valuation Itch*, 53 BUS. LAW. 1345, 1359–66 (1998). For a description of other Bankruptcy Code provisions raising valuation problems, see David Gray Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations*, 41 AM. U. L. REV. 63, 65–70 (1991); Heidt & Waxman, *supra* at 1347–52; Lawless & Ferris, *supra* note 69, at 7–11; Steven L. Pottle, Note, *Bankruptcy Valuation Under Selected Liquidation Provisions*, 40 VAND. L. REV. 177, 177–222 (1987).

108. Heidt & Waxman, *supra* note 107, at 1347 (quoting Andrews v. Comm'r of Internal Revenue, 135 F.2d 314, 317 (2d Cir. 1943); *see also* Heidt & Waxman, *supra* note 107, at 1346 stating:

> One of the most significant problems in valuation is the variety of terms of art. Courts often use terms such as retail, replacement, commercially reasonable, fair market, wholesale, foreclosure, and liquidation values. In practice it is difficult to distinguish among many of these terms used by courts, as they are often seemingly synonymous standards.

Id. (citations omitted); Kaaran E. Thomas, *Valuation of Assets in Bankruptcy Proceedings: Emerging Issues*, 51 MONT. L. REV. 126, 129 (1990) stating with respect to various Bankruptcy Code sections:

> The drafters of the [Bankruptcy] Code left these valuation standards undefined, intending that courts would apply the valuation concepts "in light of the facts of each case and general equitable principles." Unfortunately, courts have construed this flexibility as providing them with carte blanche to avoid imposing any legal standards on valuation. These lack-of-value standards cause difficulty for practitioners and judges alike.

Id. (citation omitted).

109. Rapson, *supra* note 32, at 508–10; U.C.C. ARTICLE 9 DRAFTING COMMITTEE, REPORT OF THE CONSUMER ISSUES SUBCOMMITTEE, *in* 50 CONSUMER FIN. L.Q. REP. 332, 337 (1996) (stating in the context of deficiency recovery that "reasonable foreclosure value of the collateral might be the basis on which to determine the amount of the deficiency").

110. Rapson, *supra* note 32, at 508–10; *see also* Zubrow, *supra* note 55, at 512 ("[U]nder the present version of Article 9 . . . the creditor need not obtain the best possible price to meet the 'commercial reasonableness' test. Any disposition price within a range of reasonable outcomes will suffice.") (citations omitted); U.C.C. § 9-507 reporter's cmt. 6 (Discussion Draft May, 1996) *available at* http://www.law.penn.edu/bll/ulc/ucc9/am96ucc.pdf at 293) (last visited July 27, 2002) (on file with the Iowa Law Review) (commenting on the inconsistency between proposed section 9-507(d) and 9-504(d), saying that "the Drafting Committee stated that . . . [i]n most cases there is a range of commercially reasonable prices that collateral will fetch. Disposing of collateral for a price within that range may be commercially reasonable even though the particular price is not the best price.").

determine whether the sale price was the collateral's fair foreclosure price, the trier of fact (judge or jury) must either itself possess the expertise to value the collateral and determine its fair foreclosure price, or the trier of fact must hear experts' valuations or consult price guidebooks.[111] Yet these evidentiary sources all pose problems.

With respect to the triers of fact relying solely on her/their own expertise, the likelihood that a judge or jury will have the background to value collateral competently and determine its fair foreclosure price seems remote. Varying with asset type, valuation can be a complex task, and techniques of valuation differ markedly across asset type.[112] In the Article 9 context, the job is even more complicated because whether the sale realized a fair foreclosure price must be determined in the particular circumstances of the challenged sale (the time of the sale, the prevailing market for the collateral, the geographical location of the sale, etc.) which may affect the collateral's price.[113] Procedures test advocates further argue that some sale specific variables, such as poor market conditions, fall outside the secured party's control.[114] To be fair to the secured party, the trier of fact should segregate these variables from ones the secured party can control (e.g. sale advertising) to estimate the collateral's fair foreclosure price, thus introducing even more complexity and uncertainty to the task.[115] Some proceeds test courts seem to have acknowledged the distinction and allowed the secured party to explain away a low price by citing such justifications as a

---

111. *See, e.g.*, Don Jenkins & Son Ford-Mercury, Inc. v. Catlette, 297 S.E.2d 409, 411 n.2 (N.C. Ct. App. 1982) (stating all elements of the sale must be considered together, and factors used to consider in deciding if the resale price was adequate are (1) price handbooks, (2) expert testimony about fair market value, and (3) price received on a second resale).

112. Rapson, *supra* note 32, at 504–05 (comparing the valuation of a repossessed used card with a used jet airliner). *See generally* MICHAEL F. BEAUSANG JR., TAX MANAGEMENT, ESTATES, GIFTS AND TRUSTS VALUATION: GENERAL AND REAL ESTATE (1992); JAMES R. ECK ET AL., 1 ASSET VALUATION (1991); GORDON V. SMITH & RUSSELL L. PARR, VALUATION OF INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS (2d ed. 1994); Shampton, *supra* note 72, at 114–48 (describing difficulties appraising real estate).

113. Heiser & Flemma, *supra* note 53, at 498.

114. *Id.*

115. The *Durrett* approach critics argued that its seventy percent of fair market value rule was arbitrary and did not take into consideration the "price-reducing characteristics of foreclosure sales." Lam, *supra* note 88, at 684; *see also* Ehrlich, *supra* note 68, at 964–65 (arguing that a comparison of fair and forced market value will lead to inherent inconsistencies); Pendley, *supra* note 96, at 235–36 ("The seventy percent line fails to consider the circumstances of the sale and results in the risk of inequity to both debtor or and purchaser."); Sewell, *supra* note 96, at 1026 (noting that reliance on "fair market value" is inappropriate in real estate foreclosure setting where "neither the buyer nor the seller is a willing party to the transaction;" and because "[f]air market value on the open market may be very different from fair market value in a foreclosure sale where factors such as the amount of advertising and the method of sale can affect property value"). Critics argued that similar to the *Durrett* rule, *Bundles* inappropriately applied a fair market value standard to the foreclosure sale context. *See, e.g.*, William A. Walsh, *In re* Bundles*: Finding a New Basis for Determining "Reasonable Equivalent Value" Under Section 548 of the Bankruptcy Code*, 40 DEPAUL L. REV. 175, 196–97 (1990).

poor market or deteriorated collateral.[116] But the exercise proves the point: figuring out a collateral's fair foreclosure price can be a complex evidentiary task.

Relatedly, in any sale, the secured party incurs transaction costs related to the identification of potential purchasers and the implementation of the foreclosure sale.[117] Where reasonable, such costs are recoverable expenses that reduce the amount of proceeds applied to the debt and may increase the debtor's deficiency.[118] In trying to figure out whether a fair foreclosure price was received for the collateral, courts thus must also determine whether the sale expenses incurred to realize that price were reasonable.

Assume the trier of fact undertakes these tasks with the assistance of secondary source evidence of value and fair foreclosure price presented through expert valuations and price guidebooks. With respect to guidebooks, a judge or jury could consider, and often do, standard price guidebooks to determine the sale price's commercial reasonableness. A typical example is the N.A.D.A. Official Used Car Guide or other similar automobile price guidebook for used automobiles.[119] But commentators

---

116. *See infra* notes 408–12 and accompanying text (discussing explanations for low prices sales).

117. *See* Clontz, *supra* note 75, at 364-66 (discussing costs of credit sale transactions); Peter Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 600 n.32 (1995) ("In some cases, the transaction costs of locating the highest valued user of the property seized are so high that the lender elects to sell the seized property to a retailer who can locate the ultimate buyer at a lower cost."); William C. Whitford, *The Appropriate Role of Security Interests in Consumer Transactions*, 7 CARDOZO L. REV. 959, 961 (1986) (stating that the lost value phenomena results from the transaction costs of repossession and resale, including the costs of locating a new owner).

118. Given the importance of recovering sale expenses and, where deducted from the sale proceeds, their impact on the calculation of a deficiency, both the secured party and the debtor frequently litigate about the reasonableness of expenses and whether certain types of expenses are recoverable. CLARK, *supra* note 47, ¶ 4.06(1), at 4-156-159; FERRIS & GOLDSTEIN, *supra* note 39, § 6.7, at 164–65; TIMOTHY R. ZINNECKER, THE DEFAULT PROVISIONS OF REVISED ARTICLE 9 85-86 n.383 (1999).

119. N.A.D.A. Official Used Car Guide, http://www.nadaguides.com (last visited July 26, 2002). For examples of cases that have used such guidebooks, see 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); Lee v. Trust Co. Bank, 418 S.E.2d 407, 408–09 (Ga. Ct. App. 1992) (using Black Book of wholesale automobile values); 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* 1, § 14 (July 2002 Supp.). *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).

debate the accuracy and fairness of such automobile price guidebooks, especially when applied to the foreclosure sale context. Some commentators advocate their use[120] while others do not.[121] Further, price guidebooks may not exist at all for a particular type of collateral.

Where no ready price guidebooks exist, and even where they do, litigants may engage in a battle of experts as to the collateral's value and

---

120. *See, e.g.*, SHELDON & SABLE, *supra* note 77, at 242 ("A common method of demonstrating that the sale price is inadequate is to use a pricing guide."); Gail Hillebrand, *The Redrafting Of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 207 (1994) (arguing in the context of Article 9 foreclosure sales that "[i]t is easy to measure fair value for automobiles, which are the most common type of consumer collateral involving potentially large deficiencies" using the Blue Book value); Shuchman, *Condition and Value*, *supra* note 101, at 31–32 n.45, stating:

> Some observers believe that only the result of a well-advertised auction sale open to all buyers can determine the fair-market value, retail or wholesale, of any particular car for any purpose. For these observers, the market value can be defined as that price at which a sale is made between informed and willing, not coerced, buyers and sellers. Although in theory this definition holds for any specific transaction, in practice virtually everyone involved in automobile sales-dealers, financers, and insurance carriers—uses one or more of the guidebooks in day-to-day business. This is also true of the wholesale auctions at which only dealers may buy and sell. Those in attendance use the guidebook values as their standard. Similarly, many taxing authorities use the guidebooks to determine the personal-property value, or range of values, of used cars.

Id.; *cf.* Braucher, *supra* note 103, at 780–83 (describing "deficiencies of published book retail values," but also advocating their use with adjustments); Carlson, *supra* note 102, at 5 (stating that bankruptcy judges can easily refer to car price guide books and supplement them with evidence of the car's condition).

121. *See, e.g.*, Alvin C. Harrell, *Revised Article 9 Moves Closer to Completion*, 52 CONSUMER FIN. L.Q. REP. 93, 94 (1998) (discussing problems of using "notoriously unreliable" book values); Alvin C. Harrell, *UCC Article 9 Drafting Committee Considers October 1996 Draft*, 51 CONSUMER FIN. L.Q. REP. 54, 57 (1997) [hereinafter Harrell, *October 1996 Draft*] ("[T]he use of price guides is not always simple and clear. (Previous meetings have discussed the limited usefulness of standard price guides as regards collateral, such as vehicles, for which actual sales prices can vary dramatically due to variations in condition, appearance, public taste, regional economic conditions, etc.)"); Heiser & Flemma, *supra* note 53, at 498, stating:

> Moreover, for most repossessed collateral there is no available method for accurately determining value short of a commercially reasonable sale to determine what a buyer is willing to pay. Even in the case of motor vehicles for which various published price lists are available, there is a wide variance in listed values based on objective and subjective factors, such as mileage of the vehicle and the condition of the vehicle. If fair values were set for various types of collateral in accordance with the average value of property similar to the collateral, the average would fail to take into account the variations among items of collateral or the fact that repossessed goods will undoubtedly bring a lower than average price for the reasons discussed above.

Id.; *cf.* Alvin C. Harrell, *UCC Article 9 Revisions Confront Issues Affecting Consumer Collateral*, 49 CONSUMER FIN. L.Q. REP. 256, 262 (1995) [hereinafter Harrell, *Consumer Collateral*] (discussing debate during the Article 9 drafting process over using standard price quotations for determining the collateral's value). *See generally* ZINNECKER, *supra* note 118, at 55 n.263.

whether the sale price was commercially reasonable (in our hypothetical, a fair foreclosure price).[122] In some cases, nonexpert witness such as the secured party (or her agent),[123] a potential purchaser or the purchaser of the collateral,[124] and the debtor are allowed to testify as to the collateral's value.[125] Putting aside the bias each side's expert or nonexpert will bring to the courtroom,[126] valuation and fair price determination in the foreclosure sale context is an inexact science, even for experts.[127] The secured party and the debtor (or their respective experts) frequently produce strikingly different values and fair price numbers for the collateral.[128] These disparate

---

122. *See, e.g.*, Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 707 (E.D. Pa. 1968), *aff'd*, 398 F.2d 310 (3d Cir. 1968); Deutz-Allis Credit Corp. v. Bakie Logging, 824 P.2d 178, 185 (Idaho Ct. App. 1992); Gambo v. Bank of Md., 648 A.2d 1105 (Md. Ct. Spec. App. 1994); *cf.* Lawless & Ferris, *supra* note 69, at 10–11 n.31 (describing the "battle of the experts" during bankruptcy valuations).

123. *See, e.g.*, Jones v. Morgan, 228 N.W.2d 419, 422 (Mich. Ct. App. 1975); Corenswet, *supra* note 101, at 1094 n.61.

124. *See, e.g.*, Altas Constr. Co. v. Dravo-Doyle Co., 3 U.C.C. Rep. Serv. (CBC) 124, 127 (Pa. Com. Pl. 1965); Corenswet, *supra* note 101, at 1095 n.61.

125. *See* Wald, *supra* note 119, at § 13; Corenswet, *supra* note 101, at 1095 n.61.

126. *See, e.g.*, Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 260 (1st Cir. 1997) (finding debtor's expert changed his valuation from $10,238,000 to $12,738,500 after the secured party moved for summary judgment); *see also* Robin E. Phelan & Mark X. Mullin, *How Much Is That Doggie In The Window: Valuation Issues In Bankruptcy*, 46 CONSUMER FIN. L.Q. REP. 107, 114 (1992) (discussing valuation under the "reasonably equivalent value" requirement of section 548 of the Bankruptcy Code); Shampton, *supra* note 72, at 118–27 (describing variables in appraising real estate and sources for error).

127. *See* Shampton, *supra* note 72, at 114. Shampton states that in the context of real estate appraisals:

> Reliance on the testimony of experts to determine market value is far from ideal. Expert testimony as to value is based on estimates. Such estimates, however, can be based on as many 'theories of value' as there are experts, usually resulting in a competing 'battle of experts.' . . . Appraisals are ultimately products of opinion rather than pure calculation.

Id.; *see also* Lawless & Ferris, *supra* note 69, at 11–13 (describing how individuals value assets); Phelan & Mullin, *supra* note 126, at 107–08. In the context of bankruptcy litigation, Phelan and Mullin argue:

> In economically distressed regions or industries, however, appraisal testimony can be particularly unreliable. Appraisals often rely upon market comparables. When there are few comparables or when such comparables are affected by general economic conditions, the appraisal testimony may not be an accurate measure of the value of the property. Moreover, in operating cases in which the entirety of the assets have value as part of a going business enterprise, appraisal testimony may be of little use.

Id.

128. *See, e.g.*, Commercial Credit Equip. Corp. v. Parsons, 820 S.W.2d 315, 318 (Mo. Ct. App. 1991) (finding that the tractor's salvage value was $6600 while debtor's expert had appraised it at $27,000 at the time it was repossessed); Caterpillar Fin. Servs. Corp. v. Wells, 651 A.2d 507, 511 (N.J. Super. Ct. Law Div. 1994) (finding that the debtor priced some of the

valuation and fair price numbers occur not only with unique and expensive collateral,[129] but also with more common and inexpensive goods like automobiles.[130] Once again, even if experts are used, whether the sale price is the collateral's fair foreclosure price must be answered in the context of the particular foreclosure sale's many variables.[131] Thus, the court must assess not only fair foreclosure price evidence but also the experts' competency, valuation techniques, the nature of the collateral, and the circumstances surrounding the sale.[132]

Even if experts can accurately determine the collateral's value and its fair foreclosure price, the trier of fact must still decide whose expert to believe. This places the trier of fact back in the position of determining the collateral's fair foreclosure price, albeit based on expert testimony.[133] Critics argue that "courts are unduly optimistic about the value of the goods and unduly receptive to the debtor's evidence of comparatively higher prices . . . . Courts should have skepticism about hired experts' testimony concerning the value of the collateral, about facile assertions concerning the ease of its resale and the large price that the collateral 'could' bring."[134]

Third, determining the collateral's true value and fair foreclosure price

---

collateral (wheel loader and the 1989 excavator) at $248,392 while the secured party priced it at the forced sale price of $178,000).

129. *See e.g.*, Gen. Elec. Capital Corp. v. Stelmach Constr. Co., 45 U.C.C. Rep. Serv. 2d (CBC) 675, 678 (D. Kan. 2001) (finding a procedurally regular sale commercially reasonable notwithstanding "large" difference between secured party's expert's valuation of $457,400 and debtor's expert's valuation of $311,000 of repossessed furniture); Hoch v. Ellis, 627 P.2d 1060, 1064 (Alaska 1981) (finding debtor's $40,000 appraisal of Laundromat equipment "speculative and unreliable"; third party's (Jim Moran) $3810 assessment of the collateral "did not rise to level of an appraisal"; and buyer's $10,000 price was the collateral's "fair market value").

130. *See, e.g.*, Medling v. Wecoe Credit Union, 678 P.2d 1115, 1124–25 (Kan. 1984). The *Medling* court found that the creditor had used the National Auto Research publication "Black Book" to fix the "relative values for financing, wholesale and retail . . . at $3,965.00, $4,375.00 and $5,075.00" while the debtor claimed a $6000 to $6250 retail price. *Id.* The judge admitted that the "Court is not an expert in the values of vehicles," and 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." *Id.* With respect to other types of common collateral, see Republic Nat'l Bank v. DLP Indus., 441 S.E.2d 827, 828 (S.C. 1994), stating that the debtor valued the clothing collateral at $82,000 and other testimony valued it at $11,000.

131. Heiser & Flemma, *supra* note 53, at 498.

132. *See, e.g.*, Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 258–60 (1st Cir. 1997) (stating examination procedures by courts); Conn. Bank and Trust Co. v. Incendy, 540 A.2d 32, 41 (Conn. 1988) (same); *see also* Phelan & Mullin, *supra* note 126, at 114–15 (discussing valuation under the "reasonably equivalent value" requirement of section 548 of the Bankruptcy Code); Shampton, *supra* note 72, at 118–27 (1996) (describing variables in appraising real estate and sources for error).

133. *See* Key Bank of Me. v. Dunbar, 28 U.C.C. Rep. Serv. 2d (CBC) 398, 408–09 (E.D. Pa. 1995) (finding that the secured party's outside appraisal of collateral was not credible); Wallwork Lease & Rental Co. v. Schermerhorn, 398 N.W.2d 127, 131 (N.D. 1986) (finding that defendants' expert's testimony of collateral's value was not credible).

134. WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-15, at 454.

involves subjective considerations.[135] With respect to secured party and debtor disputes, for example, owners (debtors) of the collateral may value their goods higher than other people, suggesting that even in a nonforeclosure sale of the goods, the price would appear low to them due to this "lost value" phenomena.[136] When the triers of fact must determine the collateral's true value and fair foreclosure price, not only must they grapple with the subjective nature of the task, but also they must take into account the particular circumstances of the challenged foreclosure sale. No wonder one bankruptcy judged observed that "reasonable minds may always differ as to issues of valuation."[137]

Fourth, it may cost a great deal to determine whether the collateral's price was its fair foreclosure price. Experts must be hired, appraisals done, testimony presented.[138] For those with meager resources, challenging a sale becomes difficult.[139] On the other hand, in a proceeds test jurisdiction

---

135. *See* Lawless & Ferris, *supra* note 69, at 12 (stating that "an asset's value is originally investor specific, because judgments regarding the elements of present value will be subjective and vary across individuals"); *cf.* Carlson, *supra* note 107, at 64 ("[V]alues derived by bankruptcy courts are not objective or even subjective facts. Rather, they are subjunctive facts—facts that can be assessed only contingently in the context of a hypothetical universe which can never be.").

136. *See* Schwartz, *supra* note 97, at 139–48 (describing the lost value hypothesis); Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 734–40 (1989) (same); Whitford, *supra* note 117, at 961–62 (discussing the two sources of "lost value" arising from execution sales, the second of which is the "special relationship a debtor frequently has with the goods repossessed"); Statement of Purpose, *supra* note 102, at 7763 (discussing disproportionate impact in loss of value to debtor for repossessed household goods). *But see* Schwartz, *supra* note 97, at 139–48 (questioning the extent of the lost value hypothesis).

137. *In re* Ridner, 102 B.R. 247, 250 (Bankr. W.D. Okla. 1989). With respect to section 548 of the Bankruptcy Code, the *Durrett* approach, which relied on appraisals of the collateral to determine whether the real estate foreclosure sale had realized seventy percent of its fair market value, raised similar problems of valuation through secondary sources. *See* Sewell, *supra* note 96, at 1025–26 (stating that valuing assets is a subjective determination, and that creates uncertainty for secured lenders and debtors); Zinman, *supra* note 68, at 594–595 (criticizing valuation of commercial real estate properties as an inexact science and a complex task).

138. In procedures test jurisdictions, the trier of fact must also hear expert testimony, albeit about procedural regularity. Which test is more difficult and thus costly to implement? No empirical data exists, and this Article does not undertake the task, but commentators have expressed their opinions. *Compare* Zubrow, *supra* note 55, at 513, stating:

> Several policies support this emphasis on procedure, particularly in the context of a third party purchaser. . . . First, it is easier for courts to assess the adequacy of procedures than to evaluate conflicting expert testimony about adequacy of price. Under the "commercially reasonable" standard, absent procedural irregularities, collateral dispositions are not invalidated based on "facile assertions" concerning . . . the large price the collateral "could" bring.

Id., *with* Rapson, *supra* note 32, at 545 ("Courts and other forums regularly determine valuation issues and even though the process of dealing with conflicting expert testimony is sometimes difficult, it is no more so than determining what is 'commercially reasonable.'").

139. *See* Phelan & Mullin, *supra* note 126, at 109 (discussing the costs of expert testimony).

where convincing secondary source evidence of an unfair price alone renders a sale commercially unreasonable, poor or unsophisticated debtors may have an easier time challenging a sale than discovering and proving whether the sale's procedures were flawed. But critics of the proceeds test argue that debtors abuse this freedom by challenging the sale price not because they believe it is low, but as a means of gaining leverage for negotiating down a deficiency payment or avoiding a deficiency suit altogether. Debtors in proceeds test jurisdictions can—by simply asserting a low price and providing some secondary source evidence thereof—turn the deficiency suit into a *de facto* valuation hearing (or "strike suit") that forces the secured party to incur the time and cost of proving the collateral's fair foreclosure price.[140] Rather than incur these costs, secured parties may settle for a lower deficiency amount or avoid collecting the deficiency at all.[141] As one court put it, foreclosure sales will rarely "bring the highest bids or the highest value for the collateral and therefore such sales could always be vulnerable to attack by showing that a higher price might have been obtained under different circumstances."[142]

Given these doctrinal and valuation technique problems, the proceeds test's reliance on secondary source evidence of value and fair price can be seen as abrogating the fair price-determining function of the non-collusive, procedurally regular and reasonable foreclosure sale. The non-collusive, procedurally regular and reasonable sale's fair price-determining function evidences a price produced in the totality of the sale's aspects, and thus takes into account the sale's aspects that the secured party can control (such as advertising the sale), and those it cannot control such as poor market conditions.[143] Thus, procedures test proponents like Judge Easterbrook

---

140. *See infra* note 308.

141. The drafters of section 9-615(f) appear to have had this problem in mind where, for non-consumer transactions, they allocated the burden of proof to the debtor. Comment 5 states that "[w]ere the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor." U.C.C. § 9-626 cmt. 5 (1999); *see also* JORDAN ET AL., *supra* note 31, at 301–02 (arguing that section 9-615(f) gives debtors leverage); *cf.* Whitford, *supra* note 75, at 1099 (arguing that creditors may choose less efficient collection remedies to increase their leverage over debtors and that creditors frequently do not settle).

142. Hall v. Owen County State Bank, 370 N.E.2d 918, 929 (Ind. Ct. App. 1977).

143. Similarly, with respect to section 548 of the Bankruptcy Code's requirement that a foreclosure sale price reflect the collateral's reasonably equivalent value, some commentators argued that by looking at the sale process rather than the sale price, the *Madrid* approach properly took into account the forced sale nature of the foreclosure sale. *See e.g.*, Ehrlich, *supra* note 68, at 957; Johnny L. Woodruff, *Certiorari to In re* BFP*: The Eve of Decision to a Dozen Years of* Durrett *Conflict—Will Resolution of the Issue Solve the Real Problem?*, 24 MEM. ST. U. L. REV. 773, 789 (1994); Robert Zinman et al., *Fraudulent Transfers According to Alden, Gross, and Borowitz: A Tale of Two Circuits*, 39 BUS. LAW. 977, 994, 1002, (1984); Edward Goodman, Note, *Regularly Conducted Non-Collusive Mortgage Foreclosure Sales: Inapplicability of Section 548(a)(2) of the Bankruptcy Code*, 52 FORDHAM L. REV. 261, 275 (1983).

argue that, once the court has determined the sale is non-collusive, procedurally regular and reasonable, it effectively has determined the fair market price for the collateral. Under his view, the court can and should avoid secondary source evidence of value and fair price and its doctrinal and valuation problems.

b. Ex Ante *Doctrinal and Valuation Technique Problems*

Ex ante, some secured parties regularly conduct appraisals prior to sale and establish "let go" prices.[144] Beyond setting a minimum bid, secured parties may find pre-sale appraisal prices useful during a sale as a means of monitoring the efficacy of their selected sale process. That is, a low price offer for the collateral should alert the secured party to a possible procedural flaw. Many of the *ex post* problems discussed above may affect the secured party's reliance on pre-sale appraisal for these purposes.

First, the lack of a comprehensible and consistent legal standard of fair price creates uncertainty for both the secured creditor (and debtor) setting the collateral's let-go price. To establish a fair minimum bid, presumably the secured party must know the proper legal standard of fair price. Second, even if the secured party knows the proper legal standard such as fair foreclosure price, it may be difficult to calculate a fair let-go price. Nonmerchant secured parties may not possess the expertise to conduct a proper appraisal. If they rely on price guidebooks, the problems discussed above will attend. They can hire a professional appraiser, but the limitations with expert valuations will also apply. Further, where the collateral is not worth much, the cost of hiring a professional appraiser may be prohibitive. Although merchant secured parties may hold some expertise in appraising

---

Similarly, some commentators argued that, like the *Madrid* approach, the *Bundles* approach appropriately took into account the forced sale setting of the foreclosure sale. *See, e.g.*, Gover & West, *supra* note 68, at 1078–80 (describing a *Bundles* like approach that required a review of all of the sale's facts and circumstances); Pendley, *supra* note 96, at 254–56 (arguing for *Bundles* approach); Lam, *supra* note 88, at 689–91. Further, unlike the *Madrid* approach, the *Bundles* approach broadened the courts' review beyond just collusion and improperly conducted sale procedures to include other relevant sale factors. Micheal L. Welcott, Comment, *Avoidance of Foreclosure Sales as Fraudulent Transfers Under Section 548(A) of the Bankruptcy Code: An Impetus to Changing State Foreclosure Procedures*, 66 NEB. L. REV. 383, 407–09 (1987).

144. Rapson, *supra* note 32, at 498–99:

> [S]ecured parties routinely make or obtain valuations of the collateral prior to the foreclosure sale in order to establish an upset or let go price. This valuation is done so that the secured party will be prepared to "bid up" the collateral to a conservatively pre-determined amount before it can let the collateral go to a third-party bidder.

Id. (footnotes omitted); Bennett H. Goldstein, *Sale of Repossessed Collateral Under the Uniform Commercial Code: Building a Record for Trial*, 89 COM. L.J. 180, 181 (1984) (stating that "if it appears clear that the market for the collateral will be poor and that the secured party or dealer will end up the owner, documentation of value through one or more contemporaneous appraisals is crucial to setting a justifiable minimum bid price.").

collateral, they may not where the collateral is unique or expensive and valuation is complex. Third, for both types of secured parties, using pre-sale appraisals to monitor the sale processes' efficacy and assess the fairness of bids presents the quandary that the secured party must take into account the particular circumstances of the ongoing sale. That is, before accepting or rejecting a bid, the secured party needs to assess whether any price reducing sale aspects are reasonable (or would be considered reasonable if the sale is challenged). *Ex ante*, predicting which price-reducing aspects are reasonable may be difficult, as discussed in Part III. Thus, the pre-sale appraisal in setting a minimum bid and monitoring the sale process may be inaccurate.

c. Competing Policies

Professor Gilmore, other commentators, and many courts explicitly acknowledge that one of the central goals of the Article 9's default provisions is for the collateral to fetch a high price.[145] As discussed above, the secured party must keep in mind the debtor's interest in realizing a high price and reducing or eliminating any deficiency when conducting a foreclosure sale. But Professor Gilmore did not argue for the highest price; he argued for the highest *possible* price. A number of competing policies temper the debtor's highest price goal and limit the secured party's accountability for failing to maximize collateral price.

First, 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.[146] 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

---

145. As for Professor Gilmore, see Gilmore, *Article 9*, *supra* note 31, at 7 (stating that he wanted default rules "which would promote the highest possible yield on disposition of the collateral"); *cf.* Hogan, *supra* note 32, at 207 ("The 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."); John I. Karesh, *Repossession of Collateral and Foreclosure of Security Interests in Leveraged Lease Aircraft Finance Transactions*, 10 AIR & SPACE LAW., Fall 1995, at 9, 10; *see also* Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 711–18 (E.D. Pa. 1968) (indicating that "[c]ommentary on Article 9 has convincingly pointed out 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'" (quoting Hogan, *supra* note 32, at 219–20 (citing Gilmore, *Article 9*, *supra* note 31, at 7, 9))), *aff'd*, 398 F.2d 310 (3d Cir. 1968).

146. *See* BRAUCHER & RIEGERT, *supra* note 43, at 501, stating:

> In essence [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.

Id.; 2 GILMORE, *supra* note 29, § 44.5, at 1237.

sufficient to establish that the sale was not made in a commercially reasonable manner,"[147] 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."[148] Similarly, some critics of the proceeds test argue that the secured party should not be held accountable for uncontrollable market aspects that adversely effect the price.[149]

Second, balanced against the secured party's need to act in good faith, act in due diligence, and remember the debtor's interest in realizing a high price, is the secured party's interest in disposing of its collateral quickly and cheaply in order to generate proceeds to satisfy the debtor's outstanding debt.[150] 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.[151] As one court

---

147. U.C.C. § 9-507(2) (1995).

148. 2 GILMORE, *supra* note 29, § 44.5, at 1237.

149. *See supra* notes 113–16 and accompanying text.

150. *See* Zubrow, *supra* note 55, at 513 (stating 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 resale price"); 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:

> Because 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.

Id.; Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 946 (1985); Heiser & Flemma, *supra* note 53, at 499; *cf.* Ehrlich, *supra* note 68, at 960–61 (stating in the context of real estate foreclosure sales that the "state interest in assuring mortgagees an expeditious and final opportunity to resort to the mortgaged property justifies some unavoidable reduction in value at the forced foreclosure sale"); Alex M. Johnson, Jr., *Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy*, 79 VA. L. REV. 959, 989 (1993). Professor Johnson criticizes proposed real estate foreclosure rule reforms that seek to "mimic the operation of the retail market" so as to maximize the property's price as misguided, in part, because:

> The current procedure attempts to ensure that the creditor-mortgagee has some relatively inexpensive and expeditious way of realizing on the land and structures that secured the debt. . . .
>
> The ability of a [real estate] lender to foreclose on a mortgage in an inexpensive and expeditious manner is a key element of the ex ante bargain struck between creditor and debtor, a bargain that allows the debtor to obtain a loan at a very attractive interest rate, at least compared with other forms of debt such as personal loans.

Id. (citations omitted).

151. JORDAN ET. AL., *supra* note 31, at 287–88 (stating that "[t]he law has long struggled

stated, "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."[152]

Finally, as discussed in Part III, Section B, varying 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.

Given these competing policies, Article 9 asks that a secured party act in good faith and due diligence to maximize the proceeds, not that he actually does maximize them.[153] As the court in In re *Zsa Zsa* stated, "[t]he code requires reasonableness; it does not make the secured party an insurer of a hypothetical expected return."[154] Instead, many commentators and courts say that there is an acceptable range of fair prices within which the sale price can safely fall.[155] Yet even with this range, to the extent that secondary source evidence of value and fair price suffers the discussed doctrinal and valuation technique problems and also fails to take into account these competing policies, it overstates the collateral's fair price. Procedures test advocates can

---

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").

152. Appleton State Bank v. Van Dyke Ford, Inc., 279 N.W.2d 443, 449 (Wis. 1979) (holding the sale commercially reasonable); *see also* Chrysler Dodge Country, U.S.A., Inc. v. Curley, 782 P.2d 536, 541 (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"); Clark Equip. Co. v. Mastelotto, Inc., 150 Cal. Rptr. 797, 802 (Cal. Ct. App. 1978) holding the sale commercially reasonable, and stating:

> Whether 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)].

Id.; *cf.* Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 570 P.2d 702, 711 (Wash. Ct. 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 obtain for the collateral for the benefit of the debtor. The secured party does not have to use 'extraordinary means' to accomplish this result").

153. Meadows, *supra* note 33, at 246–47 ("While 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."); *see also* Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 554 n.222 (1999) (stating that the commercial reasonableness standard "largely governs procedure and does not ensure value maximization" (citation omitted)).

154. *In re* Zsa Zsa Ltd., 352 F. Supp. 665, 672 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. 1973).

155. *See, e.g.*, Rapson, *supra* note 32, at 508. Further, revised section 9-615(f)(2) speaks of a permissible "range of proceeds." U.C.C. § 9-615(f)(2) (1999).

be seen as opposing the collective and cumulative adverse effects of these secondary source evidence problems. Using price as a term of commercial reasonableness that the secured party must prove reasonable (or fair or whatever legal standard is selected) abrogates the non-collusive, procedurally regular and reasonable foreclosure sale's fair price-determining function,[156] replaces it with less reliable and less accurate judicial determinations of value and fair price,[157] and raises the costs of foreclosure and resale.[158] In contrast, the procedures test makes the fair sale process the arbiter of the collateral's fair price, and offers the opportunity (as Judge Easterbrook suggests) to bar secondary source evidence of fair price, thereby eliminating its attendant problems from the commercial reasonableness calculation.

3. The Non-Maximizing Secured Party and Procedurally Regular and Reasonable Low Price Sale Problems Under the Procedures Test

A central critique of the procedures test's reliance on market-based sale procedures and its equation of fair price with the price produced at a non-collusive, procedurally regular and reasonable foreclosure sale is that it assumes incorrectly that secured parties, vested with much discretion in conducting foreclosure sales, systematically have the incentive to maximize the sale proceeds.[159] Critics of the procedures test argue that non-collusive,

---

156. *See supra* note 84 and accompanying text; *see also* Harrell, *October 1996 Draft*, *supra* note 121, at 56, stating:

> Previously the Drafting Committee rejected judicial determination of an appropriate price as a dispositive issue, due perhaps to the inability of courts to deal consistently with valuation issues. . . .
>
> . . . [T]here is no way to escape the fact that this would mean that courts would be overriding the market price in estimating the value of collateral, something they are ill-equipped to do.

Id.

157. *See supra* notes 86–152 and accompanying text.

158. *See supra* notes 138, 142 and accompanying text; *see also* Fred H. Miller, *UCC Proposals Concerning Consumer Transactions (Article 2 and 9)*, SC36 A.L.I.-A.B.A. 185, 224 (1997) (stating that "[a]bandoning a procedurally sound sale in the hope that a higher price can be received later requires the creditor to invest additional amounts of its own money, or at least defer receipt of cash, for a second sale," which may not be more advantageous than the first).

159. *See* 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, 64 (1994); Rapson, *supra* note 32, at 502, stating that:

> Gilmore was convinced that "the price-determining function of the market" could be relied upon "to establish the fair value of the collateral." His faith in the elixir of commercial reasonableness reflected Gilmore's belief that this duty was equivalent to the fiduciary obligation of the secured party to the debtor "to use his best efforts to see that the highest possible price is received from the collateral." Thus, it is quite clear that Gilmore not only believed in the goal of realizing fair value, but was also convinced that the Article 9 foreclosure duty of commercial

procedurally regular and reasonable low price sales occur too frequently[160] and that secured parties systematically *lack* the incentive to maximize the collateral's price at foreclosure sales.[161] This lack of incentive is said to manifest in two major ways.

---

reasonableness was the best way of accomplishing that goal.

> Unfortunately, Professor Gilmore's faith in procedural commercial reasonableness as the best way "to see that the highest possible price is received from the collateral" was much too optimistic and unrealistic.

Id.; Shuchman, *Archival Study*, *supra* note 101, at 52, stating:

> The Official Comments to section 9-504 of the Uniform Commercial Code state the reasons for not regulating more specifically the notice and conduct of the resale of collateral by the secured party. The Commissioners wanted to encourage private sales of various kinds that would be appropriate to the merchants and to the type of collateral involved. They made the a priori assumption that such flexibility would result in better resale prices for the collateral. Like so much legal conjecture, that appears to be unfounded when viewed against the empirical data.

Id.

160. *See* Rapson, *supra* note 32, at 495. Some critics of Article 9's reliance on the secured party's incentive to select and implement efficient sale procedures or pay/accept a fair price for the collateral use as empirical evidence, three empirical studies of the price results from automobile foreclosure sales. Shuchman, *Archival Study*, *supra* note 101, at 32; Shuchman, *Condition and Value*, *supra* note 101, at 25–26 & n.31; Corenswet, *supra* note 101, at 1085–88; John C. Firmin & Robert Simpson, Note, *Business as Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 CONN. L. REV. 511, 515–21 (1971); *see also* Wechsler, *supra* note 74, at 850; White, *supra* note 101, at 393–96. Collectively, the studies' results indicate that repossessed automobiles yield foreclosure sale prices that are lower than those from other wholesale used car sales. For example, prices in the trio averaged from seventy-one to eighty-four percent of book wholesale value. White, *supra* note 101, at 394.

The studies have been criticized. For example, the author of a later car study argued that the trio's methodology did not distinguish between recourse and non-recourse sales, and thus their conclusion about the inadequacy of repossession sales and resulting deficiencies was unclear. *Id.* at 394–95. Further, this later car study and other articles questioned the trio's conclusions on a variety of other grounds. *Id.* at 393; *see also* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-10, at 430–31; Schwartz, *supra* note 97, at 130 n.34.

161. LOPUCKI & WARREN, SECURED CREDIT: A SYSTEMS APPROACH 104 (3rd ed. 2000), stating:

> 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.

Id.; Heiser & Flemma, *supra* note 53, at 495 (stating 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").

First, secured parties do not use sale procedures that maximize the sale price. For example, with respect to his empirical study of a variety of methods of automobile repossession sales and prices received there from, Professor Shuchman stated:

> Were the automobile repossessors 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.[162]

In particular, at wholesale dealer-only auctions of 92 cars, Professor Shuchman found the average sale price to be 93 percent of the cars' wholesale price,[163] supporting his argument that when they choose so, "the [automobile] dealers can organize their affairs in a manner conducive to maximum post-repossession sale prices."[164]

Second, where purposefully or serendipitously a secured party conducts what appears to be a non-collusive, procedurally regular and reasonable sale but which is poorly attended and thus has minimal bidding for the collateral, the secured party might buy the collateral (at a public sale) but pay a low price for lack of the incentive to credit-bid in the amount of the outstanding loan or the collateral's fair price, or might sell the collateral to a related party (public or private sale) below the collateral's fair price.[165] In particular, critics lambaste the poorly attended public auction of repossessed collateral where, as Professor Gilmore claimed, the secured party is frequently the purchaser.[166] Critics of the procedures test argue that at such sales there are reasons besides worthless collateral or procedural irregularity

---

162. Shuchman, *Archival Study*, *supra* note 101, at 54; *see also* Zubrow, *supra* note 55, at 467–69, 525.

163. Shuchman, *Archival Study*, *supra* note 101, at 45.

164. *Id.* at 54.

165. Article 9 specifically allows the secured party to purchase its collateral at a public sale, and absent collusion, there is no statutory prohibition for selling to a related party. Critics argue that secured creditors push the limits of non-collusive behavior with sweetheart deals with business associates. *See infra* notes 179, 324–25; *see also* Hillebrand, *supra* note 120, at 206–07 (discussing business relationships between financing institutions and car dealers that result in car dealers lacking the incentive to maximize the sale's proceeds); Zubrow, *supra* note 55, at 492–94, 525.

166. 2 GILMORE, *supra* note 29, § 43.2, at 1188–89 (stating that "the person who buys at the [public] sale today, nine times out of ten, is . . . the holder of the security interest who pays not in cash but by a credit against the debt"). Professor Gilmore offers no empirical evidence for this proposition. Professor Gilmore recognized public sales as having a long history producing poor attendance and dismal results. *Id.*, § 44.6, at 1245 ("The concourse of bidders at the typical foreclosure sale, be it ever so 'public,' is apt to be about as lively as a group of mourners at a funeral.").

for attendance to be poor and bidding anemic.[167] Consequently, critics argue, courts in procedures test jurisdictions too often bless unreasonably low price public sales that are otherwise non-collusive and procedurally regular.[168] The secured parties get their deficiency judgments and enjoy a double windfall if they or a related party bought the collateral and then sold it a second time for a profit.[169] Hence the procedure test's decried dual and related problems: the non-maximizing secured party and the low price, non-collusive, procedurally regular and reasonable sale.[170]

Besides making a quick buck, commentators offer a variety of explanations why a secured party may lack the incentive to use efficient sale procedures or maximize the sale's proceeds. Some maintain that secured creditors want to save a buck, and exploit their "interest" in cheaply and quickly disposing of collateral. Thus, secured parties do not follow the sales practices normally used to sell the subject type of collateral.[171] Other

---

167. Rapson, *supra* note 32, at 504. Mr. Rapson's two examples could, however, also be characterized as procedural flaws.

168. Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B, and 9 be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 133–34 (1997); McMahon, *supra* note 159, at 65; Rapson, *supra* note 32, at 496, 505.

169. McMahon, *supra* note 159, at 65; Rapson, *supra* note 32, at 496, 505; Zubrow, *supra* note 55, at 491–92. Courts will look at a higher second sale price as evidence of the first sale's commercial unreasonableness. For cases holding the first sale commercially reasonable, see generally First Ala. Bank, N.A. v. Parsons, 426 So. 2d 416 (Ala. 1982); LaSalle Motor Car Sales, Inc. v. Calumet Nat'l Bank, 440 N.E.2d 9 (Ind. Ct. App. 1982); Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. Ct. App. 1977). For cases holding the first sale commercially unreasonable, see generally Liberty Nat'l Bank & Trust Co. v. Acme Tool, 540 F.2d 1375 (10th Cir 1976); *In re* Solfanelli, 230 B.R. 54 (M.D. Pa. 1999); Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank & Constr. Co., 568 P.2d 1007 (Alaska 1977).

170. Similar criticisms were made of the *Madrid* approach and the *Bundles* approach under section 548 of the Bankruptcy Code. With respect to *Madrid*, come critics argued that *Madrid's* conclusive presumption of reasonably equivalent value based on procedural regularity was unfair because forced sales under inefficient state real estate foreclosure sale rules inevitably brought less than the property's fair market value. *See, e.g.*, Ehrlich, *supra* note 68, at 961 (describing inadequate advertising requirement for real estate foreclosure sales); Sewell, *supra* note 96, at 1027–28; Woodruff, *supra* note 143, at 790; Pendley, *supra* note 96, at 236.

Similarly, the *Bundles* approach was criticized as too deferential to flawed state law foreclosure procedures. Sewell, *supra* note 96, at 1029–30; Pendley, *supra* note 96, at 243.

As discussed *infra* at notes 266–71 and accompanying text, Article 9 sales incorporate real world business practices which are presumably more efficient than rigid, legislatively proscribed procedures as under the U.S.C.A. This presumption is questioned in the Article 9 literature discussed in this Section and further in Part III of the Article. Second, *Madrid* was criticized for its reliance on foreclosure sales characterized by non-maximizing creditors, buyers hunting for bargains, and a cash-bid requirement, and thus *Madrid's* reliance on the noncollusive, procedurally regular sale to capture the property's fair market value was inappropriate. *See e.g.*, Ehrlich, *supra* note 68, at 957–59, 961 (describing inadequate advertising requirement for real estate foreclosure sales); Woodruff, *supra* note 143, at 790; Pendley, *supra* note 96, at 235–36; Sewell, *supra* note 96, at 1027–28.

171. McMahon, *supra* note 159, at 65–66; *see* Hillebrand, *supra* note 168, at 137 (stating that "[t]he secured party, for example, might simply wish to sell the collateral as quickly or cheaply

commentators assert that secured parties want to engage in predictably safe sales that will survive judicial review, which leads them to select less "aggressive" sale channels.[172] Secured creditors who are dealers rather than merely lending institutions may not want to sell repossessed goods like cars in competition with their normal inventory for which they could realize greater profits and thus use less efficient sale practices.[173] Some secured creditors may be simply lazy or careless, and thus do not select market channels calculated to maximize the collateral's price.[174] Others argue that a secured party would repossess even knowing that it may be stuck with an uncollected deficiency where the act signaled to other debtors the secured party's resolve to repossess despite the loss. Hence, one might argue that such a secured party is less inclined to worry about the propriety of the sale process and getting a fair price.[175] One particularly common criticism is that, because the secured party can collect a deficiency from the debtor, he is indifferent as to whether the price he receives for the collateral is maximized at the foreclosure sale, or worse. Either way, the secured party collects his money.

With respect to the assertion that secured parties are disincented because they can collect a deficiency from the debtor, counter-critics make a

---

as possible"); *see also id.*, at 138 (describing different sales practices for repossessed automobiles sold by automobile dealers, than those that "offer[ed] 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").

172. McMahon, *supra* note 159, at 66 (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"); *cf.* Clontz, *supra* note 75, at 371 (advising secured parties to use public sales for most types of collateral to avoid the difficult "angles" of a complying private sale).

173. SHELDON & SABLE, *supra* note 77, at 243; Michael W. Dunagan, *Vehicle Repossessions and Resales Under Revised UCC Article 9: The Requirements and the Consequences of Non-Compliance*, 54 CONSUMER FIN. L.Q. REP. 192, 199 (2000); McMahon, *supra* note 159, at 65.

174. *See* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-15, at 454; Lloyd, *supra* note 16, at 738–39 (describing "understandable mistakes"); Schwartz, *supra* note 97, at 124.

175. *See* Scott, *supra* note 136, at 773:

> Clearly, 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.

Id.; Whitford, *supra* note 75, at 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* note 136, at 760.

forceful rebuttal regarding sales to disinterested purchasers. The theoretical counter-argument generally runs like so: up to the amount of the outstanding debt owed by the debtor, 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.[176] Indeed, argue some counter-critics, there is

---

176. *In re* Excello Press, Inc., 890 F.2d 896, 901 (7th Cir. 1989):

> But why shouldn't . . . [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.

Id.; Huntington Nat'l Bank v. Elkins, 559 N.E.2d 456, 459 (Ohio 1990):

> Given 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.

Id.; 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)):

> 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.

Id.; *see also* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-15, at 454:

> 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.

Id.; ZINNECKER, *supra* note 118, at 93 ("Normally a foreclosing creditor has every incentive to maximize disposition proceeds."); Heiser & Flemma, *supra* note 53, at 495 (arguing secured party has incentive to maximize proceeds to avoid costly deficiency actions); Schwartz, *supra* note 97, at 127:

> [E]very 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 is to maximize the net gain from resale.

Id.; Whitford, *supra* note 117, at 965–66 ("Schwartz goes to some lengths to maintain that creditors who repossess will maximize their proceeds on resale, a point with which I generally

insufficient evidence that secured creditors prevalently sell at low prices.[177]

In contrast, critics of the fair price-determining function theory are on firmer grounds when they argue that the secured party systematically lacks the incentive to maximize the collateral's price where he sells to interested purchasers: the secured party himself who purchases at a public sale, a party related to the secured party who purchases at a public or private sale, or a recourse party who purchases at a public or private sale.[178] In these situations, not only does the secured party get to collect the deficiency from the debtor, but also the interested purchaser can sell the collateral

---

agree. . . . The new owner has paid something approximating the goods' market price."); *cf.* Ehrlich, *supra* note 68, at 961 (stating in the context of real estate foreclosures that where a third-party purchases the property, "the amount of the bid is usually close to, if not exactly, the amount of the underlying mortgage debt"). *But see* Zubrow, *supra* note 55, at 451 (arguing that oversecured creditors lack the incentive to maximize a surplus even where the sale is to a disinterested third party purchaser).

177. Statement of Purpose, *supra* note 102, at 7783–84, stating:

> Sizeable deficiencies occur in the majority of transactions involving automobile repossessions; average automobile deficiencies range from 25 to 50 percent of the balance owing at the time of default. Little evidence addresses deficiencies for other types of collateral. Creditors apparently pursue a deficiency only infrequently, and on average creditors recover no more than 5 to 15 percent of the deficiency. As the Presiding Officer noted, under these circumstances creditors have an incentive to obtain the best possible price, net of sales costs, for collateral. There is, therefore, insufficient evidence that problems in the valuation of collateral are prevalent.
>
> . . . .
>
> The fact that repossessed cars are sold for prices below wholesale book value can often be explained by differences in the condition of repossessed cars and the average "good" used car, and hence there is little basis for concluding that undervaluation of collateral is prevalent.

Id.; see also Heiser & Flemma, *supra* note 53, at 496 (citing an FTC report, concluding "that given the circumstances of the marketplace, the majority of creditor sales of repossessed collateral are made at the highest possible prices"); Schwartz, *supra* note 97, at 136–37 (arguing that certain empirical studies show that creditors sell repossessed cars at approximately eighty percent of their wholesale value and that some of the twenty percent discount is explained by transaction costs, all-year markets, and risk from purchasing from financiers).

178. *See, e.g.*, Kobuk Eng'g & Contracting Servs., Inc. v. Superior Tank & Constr. Co., 568 P.2d 1007, 1011–12 (Alaska 1977):

> Ordinarily, the creditor establishes that [the duty to conduct a commercially reasonable sale] has been fulfilled by showing that the collateral was sold for its fair market value. It might be argued that the price for which the collateral sells is evidence of its fair market value. But in this case, . . . [the secured creditor] was the only bidder at the sale . . . . The price at which a creditor 'buys in' the collateral . . . is not a reliable indicator of the fair market value of the collateral because the transaction is self-serving.

Id.; Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 920 (Nev. 1977) (applying close scrutiny of a low price sale where the secured party purchased the collateral and finding the sale commercially unreasonable); *see also infra* note 373.

purchased at a low price for a profit. Even the vociferous counter-critics concede that where the secured party conducts a commercially reasonable but poorly attended public sale and has the opportunity to purchase her own collateral, she may lack the incentive to maximize the sale price.[179]

To combat the linked problems of the non-maximizing secured creditor and the non-collusive, procedurally regular and reasonable low price sale, proceeds test advocates argue that price needs to be a term of commercial reasonableness the secured party has to prove not solely through a showing of procedural regularity and reasonableness,[180] but also by proving the price is fair. To do this, secondary source evidence of the collateral's fair price such as expert testimony and price guidebooks is necessary. If the secured party fails to carry his burden of proof, the unfairly low price alone should render the otherwise non-collusive, procedurally regular sale commercially unreasonable.

4. Other Criticisms of the Procedures Test

Other criticisms of the procedures test are scattered throughout the Article 9 literature. Perhaps the most frequently made is that the loosely defined standard of commercial reasonableness provides too little guidance to a secured party conducting a sale.[181] Even if a secured party has all the incentive in the world to maximize the collateral's price, Article 9 offers him very little guidance on how to achieve his goal of price maximization.[182] Procedures test advocates retort that commercial reasonableness is a *standard*, not a set of rigid legislatively proscribed rules. As a standard, it

---

179. *See* Statement of Purpose, *supra* note 102, at 7784:

> [There are] some problems in valuation of collateral when the creditor and the buyer are closely related. When the creditor sells the car to itself or in a 'sweetheart' deal, there is an incentive to undervalue it to the extent that recovery on a deficiency is possible. However, the evidence does not indicate that such undervaluations are prevalent, and they frequently violate existing state law.

Id.; Heiser & Flemma, *supra* note 53, at 498 (stating that where the creditor sells to himself or to another person in a "sweetheart" deal, the creditor does not have the incentive to maximize the price); Schwartz, *supra* note 97, at 132–39 (stating that a lack of incentive may exist where secured party buys its own collateral at a public sale). With respect to related party and recourse party purchasers (cartels), counter arguments are made. *Id.* Finally, oversecured parties may lack the incentive to realize more than the amount of debt. Zubrow, *supra* note 55, at 451.

180. In the bankruptcy literature on section 548, the *Durrett* approach to calculating the reasonably equivalent value of real estate sold at foreclosure sale was praised for its rejection of inefficient state mandated real estate foreclosure procedures as a means of determining the collateral's reasonably equivalent value. *See, e.g.*, Steven Alden et al., *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the* Durrett *Problem*, 38 BUS. LAW. 1605, 1608–10 (1983); William H. Henning, *An Analysis of* Durrett *and its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C. L. REV. 257, 259 (1985); Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 559–60 (1987).

181. See *infra* notes 277–79 and accompanying text.

182. *Id.*

seeks to harness the presumptively more efficient market-based practices to sell repossessed collateral. Lack of statutory precision is the standard's virtue, not its vice. Besides, the responders would continue; case law over the past forty years since Article 9's adoption among the states has fleshed out relevant factors for commercial reasonableness which now guide the secured party.[183]

Part II of the Article argues that the revised Article 9 mandates a procedures test. Part III then develops a more comprehensive critique of difficulties that the secured party planning a sale and the trier of fact reviewing the sale may face under the loosely defined commercial reasonableness standard. Part III analyzes how the standard's incorporation strategy, which looks to merchant reality to define commercially reasonable sale procedures, raises serious problems that unaddressed will undermine the normative force of the commercial reasonableness standard *cum* procedures test in evidencing a fair price for the collateral.

II. THE ASCENDANCY OF PROCEDURES OVER PROCEEDS UNDER THE REVISED ARTICLE 9'S COMMERCIAL REASONABLENESS STANDARD

The revised Article 9 does not explicitly indicate whether commercial reasonableness is to be measured by the sale's procedural regularity, whether a low price alone can render unreasonable an otherwise procedurally regular sale, or whether price is a "term" or "aspect" of commercial reasonableness that the secured party must prove reasonable using secondary sources of value and fair price. Under a patchwork of Code provisions and Official Comments, however, commercial reasonableness should be measured primarily through examination of the sale's procedures rather than its price; price alone cannot render an otherwise procedurally regular sale unreasonable; and price is not a "term" or "aspect" of commercial reasonableness that the secured party must prove reasonable using secondary sources of value and fair price. However, price plays a lingering, but undefined role in commercial reasonableness review under the two careful scrutiny Official Comments.

A. A REVIEW OF REVISED ARTICLE 9'S DEFAULT PROVISIONS

Under the revised Article 9, a secured party may sell or "otherwise dispose" of its collateral after taking possession of it.[184] Under section 9-610(b), "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable."[185] Section 9-627(a), replacing former section 9-507(2), states that "[t]he fact that a greater amount could have been obtained by . . . disposition . . . at a

183. *Id.*

184. U.C.C. § 9-610(a) (1999).

185. U.C.C. § 9-610(b) (1999).

different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the . . . disposition . . . was made in a commercially reasonable manner."[186] Under the revised Article 9, commercial reasonableness remains generally a question of fact[187] to be determined by the trier of fact, and the secured party in non-consumer transactions now statutorily bears the burden of proof as to the sale's commercial reasonableness.[188]

Under the two new Official Comments, where there is a "low price," the court must "scrutinize carefully" the sale's "aspects." Official Comment 2 to section 9-627 states that:

> [s]ome observers have found the notion contained in subsection (a) (derived from former Section 9-507(2)) (the fact that a better price could have been obtained does not establish lack of commercial reasonableness) to be inconsistent with that found in Section 9-610(b) (derived from former Section 9-504(3))(every aspect of the disposition, including its terms, must be commercially reasonable). There is no such inconsistency. While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.[189]

Official Comment 10 to section 9-610 states that "[w]hile not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable."[190]

Under the revised Article 9, where a sale is commercially *reasonable* and the collateral is bought by a *disinterested third party purchaser* (one who is not the secured party, a secondary obligor,[191] or a party related to the secured party), the secured party may sue the debtor for a deficiency. Any surplus must be turned over to the debtor. Hence, under the revised Article 9, the

---

186. U.C.C. § 9-627(a) (1999).

187. ZINNECKER, *supra* note 118, at 48.

188. U.C.C. § 9-626(a)(2) (1999). In a consumer transaction, the allocation of the burden of proof has been left to the courts. U.C.C. § 9-626(b) (1999).

189. U.C.C. § 9-627 cmt. 2 (1999).

190. U.C.C. § 9-610 cmt. 10 (1999).

191. For example, a car dealer may have to repurchase the goods from a financier/secured party under a repurchase agreement. The dealer will then resell the car. If the first sale is an Article 9 "disposition," section 9-615(f) will be triggered due to the dealer's "secondary obligor" status under section 9-102(71). Benfield, *supra* note 85, at 1277–82. Alternatively, the repurchase sale from the secured party to the dealer may not be considered a "disposition" under revised section 9-618 and thus it will not be subject to the commercial reasonableness standard or be used to set a deficiency.

sale proceeds are used to set the deficiency or surplus for commercially reasonable sales to disinterested third party purchasers.

Under new section 9-615(f) (for which there was no counterpart under the former Article 9), where a sale is commercially *reasonable* but the collateral is bought by an *interested purchaser* (the secured party, a secondary obligor, or a party related to the secured party) and the proceeds amount is significantly low, the proceeds amount will not be used to establish the debtor's deficiency or surplus, irrespective of whether the transaction is a consumer or non-consumer one.[192] Rather, if the sale proceeds are significantly low and the appropriate litigant proves that a greater amount would have been realized in a commercially reasonable sale to a disinterested third-party purchaser, that greater amount is used to calculate the deficiency or surplus. For non-consumer transactions, section 9-626(a)(5) allocates the burden of proving section 9-615(f)'s elements to the debtor.[193] For consumer transactions, the allocation of the burden of proof remains within the court's discretion.[194] Section 9-615(f) thus decouples the inquiry into the sale's commercial reasonableness under section 9-610(b) from the calculation of the deficiency under section 9-615(f). As a result, even if under section 9-615(f) the sale proceeds are significantly low, the finding of commercial reasonableness stands and the secured party avoids section 9-625(b)'s rebuttable presumption rule and possible damages under sections 9-625(b)-(f).[195]

Section 9-615(f) has not been fleshed out by the courts. However, one point seems clear: similar to the rebuttable presumption rule under the former Article 9, section 9-615(f) will involve a direct inquiry as to the appropriateness of the amount of proceeds through expert testimony, appraisals, price guidebooks, and other secondary source evidence of value and fair price.[196]

---

192. Section 9-615(f) reads:

> The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with [Part 6 Default] to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if: (1) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and (2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

U.C.C. § 9-615 (1999).

193. U.C.C. § 9-626(a)(5) (1999).

194. U.C.C. § 9-626(b) (1999).

195. *See infra* notes 197–201 and accompanying text.

196. Rapson, *supra* note 32, at 522–23. Mr. Rapson also argues that "market practices and conditions for dispositions of the kind or type of collateral at the time and place of the disposition of the collateral" would be relevant, which presumably means that the challenged sale's procedures would be relevant. *Id.*

Where the sale is commercially *unreasonable*, the proceeds received for collateral are not used to establish the debtor's deficiency or surplus. Revised section 9-626 adopts the rebuttable presumption rule for non-consumer transactions.[197] For consumer transactions, the revisions defer the issue to the courts, and thus it is possible that some courts may continue to use the absolute bar rule.[198] Either way, for commercially unreasonable sales, the sale's price will not set the deficiency or surplus.

Finally, as under the former Article 9, revised Article 9 indicates that, where the sale is found commercially *unreasonable*, the secured party also may be liable for certain damages.[199] 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.[200] In particular, where the collateral is consumer goods, under section 9-625(c)(2) the debtor may recover a potentially significant amount where the loan amount and interest rate (credit service charge) are large.[201]

B. THE STATUTORY AND OFFICIAL COMMENT-BASED ARGUMENT

Under the revised Article 9, commercial reasonableness is measured primarily by the sale's procedural regularity rather than the reasonableness of the sale's proceeds. Section 9-615(f) and several Official Comments provide support for this argument. Section 9-615(f) applies only where the sale in question is found to be procedurally regular and reasonable (commercially reasonable), even if the price received appears to be low.[202] Official Comment 2 to section 9-627 states that "[t]he law long has grappled with the problem of dispositions of personal and real property which comply with applicable procedural requirements (e.g., advertising, notification to interested persons, etc.) but which yield a price that seems low. This Article

197. U.C.C. § 9-626(a) (1999). 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. *Id.* If a deficiency remains, the secured party may collect it. *Id.*

198. U.C.C. § 9-626(b) (1999). *See* ZINNECKER, *supra* note 118, at 185-86 (discussing the future applicability of the absolute bar rule).

199. U.C.C. § 9-625(b) (1999).

200. U.C.C. § 9-625(b)-(e) (1999).

201. U.C.C. § 9-625(c)(2) (1999). Heiser & Flemma, *supra* note 53, at 500 (arguing that the consumer goods penalty is too onerous and should be abolished). *But see* Jones, *supra* note 102, at 12 (arguing under former Article 9 that such penalty amount may be small).

202. ZINNECKER, *supra* note 118, at 94–95; Rapson, *supra* note 17, at 919. Alternatively, a debtor could concede the sale's commercial reasonableness and bring an action directly under section 9–615(f). HONNOLD ET AL., *supra* note 96, at 1087 (discussing how section 9-615(f) can reduce a deficiency "without the necessity of determining that the disposition . . . was not made in a commercially reasonable manner"); *cf.* Benfield, *supra* note 85, at 1282 (stating that "[p]resumably, in a case in which Revised section 9-615(f) comes into issue, the debtor will allege that the sale was not commercially reasonable").

addresses that issue in section 9-615(f)."[203] Additionally, Official Comment 6 to section 9-615(f) states that "the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price."[204] For section 9-615(f) and these Comments to make sense, commercial reasonableness under section 9-610(b) primarily must be a question of the disposition's procedural compliance and not its price.

A patchwork of revised Article 9's provisions and the two Official Comments taken together also arguably reject the proposition that a low price alone can render an otherwise complying sale commercially unreasonable. Section 9-627(a) states that, even though the secured party could have obtained a "greater amount" for the collateral at a different time or by using a different sale method, that "is not *of itself* sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner."[205] Similarly, the two Official Comments begin with the admonition that a low price is "not itself sufficient to establish a violation of this Part [*e.g.*, commercial reasonableness]."[206] Both of these provisions can be interpreted to mean that a low price *alone* will not render a sale commercially unreasonable. For example, Steven Weise, a Drafting Committee member, states that "[e]ach aspect of a foreclosure sale must be 'commercially reasonable.' Some debate has occurred over whether the foreclosure sale price must satisfy that test. Revised Article 9 indicates that low price alone will not cause a foreclosure sale to be 'not commercially reasonable.'"[207]

Despite section 9-627(a) and the two Official Comments' preambles, contrary arguments can be made. For example, with respect to the former section 9-507(2)'s admonition that the fact a better price could have been obtained was not itself sufficient to render a sale commercially unreasonable, White and Summers observed that "[s]ome courts have read this very text to mean that a low price alone is not enough."[208] But they argued that "9-507(2) does not have to be so read. For one thing, the

---

203. U.C.C. § 9-627 cmt. 2 (1999).

204. U.C.C. § 9-615 cmt. 6 (1999).

205. U.C.C. § 9-627 (1999) (emphasis added).

206. U.C.C. § 9-627 cmt. 2 (1999); U.C.C. § 9-610 cmt. 10 (1999).

207. Steven O. Weise, *An Overview of Revised UCC Article 9, in* THE NEW ARTICLE 9 1, at 11 (Corinne Cooper, ed. 1999) (quoting U.C.C. §§ 9-610(b), 9-627(a) (1999)) (citations omitted); *see also* Barkley Clark, *Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default*, 4 N.C. BANKING INST. 129, 180 (2000) (stating that section 9-627 "continues current law in providing that low price alone is not enough to make a foreclosure sale commercially unreasonable. Except in situations covered by [section] 9-615(f), the key continues to be *procedural irregularity* in enforcement of the security interest.") (emphasis added).

208. WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456.

language only says 'a better price', not '*a much better price.*' For another, the language might be read to mean 'of itself (i.e. unless not explained away)."[209] White and Summers then report that, "[i]n any event, the case law here is in conflict. If the price is low enough, that is, if there is a *wide* discrepancy between the price and apparent value, a number of courts [under former Article 9] hold or state that this alone spells commercial unreasonableness."[210] Viewed in isolation from revised section 9-615(f) and the other revised provisions discussed in this subsection, courts and commentators looking solely at section 9-627(a) and the two Official Comments' preambles might draw similar conclusions, especially courts in proceeds test jurisdictions under the former Article 9.

But one cannot look at section 9-627(a) and the two Official Comments' preambles in isolation from section 9-615(f) which only applies where the proceeds of the sale are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought."[211] In other words, section 9-615(f) only applies where the sale price is significantly below the collateral's fair price. But as indicated above, section 9-615(f) also applies only if the sale is procedurally complying (commercially reasonable). Thus, for section 9-615(f) to make sense, a significantly low price alone cannot render a sale procedurally noncomplying (commercially unreasonable).[212] As Official Comment 6 to 9-615(f) states in part, it "rejects the view that the secured party's receipt of such a price [one where the proceeds are 'significantly below the range of proceeds that a complying disposition to a person other than the secured party . . . would have brought'] necessarily constitutes noncompliance with Part 6."[213] If a significantly low price alone cannot render a sale commercially unreasonable, then neither can "a *wide* discrepancy between the price and apparent value."[214] Put another way, section 9-615(f) deals with the wide discrepancy cases, at least where they meet section 9-615(f)'s other qualifying criteria.[215] Thus, neither section 9-627 nor the two Official Comments should be interpreted to make a significantly low price (or a widely low price, or a very low price, or other similar adjectival description)

---

209. *Id.*

210. *Id.*; *see also* Corenswet, *supra* note 101, at 1093–94 (arguing that former section 9-507(2) is "susceptible to several interpretations" including that a grossly low price alone spells commercial unreasonableness).

211. U.C.C. § 9-615(f)(2) (1999).

212. *Cf.* HONNOLD ET AL., *supra* note 96, at 1087 (calling section 9-615(f)'s triggering price "very low").

213. U.C.C. § 9-615(f) cmt. 6 (1999). *A fortiori*, if a *significantly* low price alone will not render a sale procedurally noncomplying, then neither will a mere low price.

214. WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456.

215. *Cf.* HONNOLD ET AL., *supra* note 96, at 1086–87.

alone render an otherwise complying sale commercially unreasonable. Indeed, Professors Harris and Mooney, the two Official Reporters for the Article 9 Drafting Committee, state that the two careful scrutiny Official Comments "reject the result in cases holding a *really* low price is ipso facto sufficient to spell commercial unreasonableness under Former Article 9. See F9-504(3) ('terms' must be commercially reasonable)."[216]

Perhaps one might argue that because section 9-615(f) deals with interested purchasers, a low price (or perhaps just a significantly low price) alone should be able to render an otherwise complying sale commercially unreasonable only in sales to disinterested purchasers. One might argue that this both plugs a hole left by section 9-615(f) and helps avoid the problem that absent some strong role for price, a secured party will opt to sell at a low price to a disinterested purchaser rather than risk entrapment in section 9-615(f)'s snare.[217] This is an unwise construction for several reasons.

First, where the sale is to a disinterested purchaser by a presumptively maximizing secured party, one is safer to assume than with a sale to an interested party by a presumptively nonmaximizing secured party[218] that the presumptively maximizing secured creditor acted in good faith, did what he could to maximize the proceeds, and thus should not be made to prove the price's reasonableness through secondary sources of value and fair price.

Second, given the differently allocated burdens of proof for non-consumer transactions under section 9-610(b)'s commercial reasonableness standard (on the secured creditor)[219] versus section 9-615(f) (on the debtor),[220] it creates bizarre incentives to require only the secured party selling to a disinterested purchaser to prove price reasonable. If a secured

---

216. *Id.* at 1084. *But see* JORDAN ET AL., *supra* note 31, at 302, arguing that Section 9-615(f) "arguably describes an impossible case" because "[a]ccepting a bid 'significantly' outside that range [of feasible bids], as contemplated by [sic] Rev. 9-315(f)(2), is commercially unreasonable." This suggests that the authors either see a significantly low price as a de jure term of commercial reasonableness that alone can render a sale commercially unreasonable, or believe that a significantly low price is not such a term, but creates a conclusive presumption of procedural irregularity with the resulting conclusion of a commercially unreasonable procedural disposition. *See* 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, 359 (2001) (making the latter interpretation of these authors' position). It seems unlikely, however, that the revised Article 9 drafters would draft a completely superfluous Code provision in section 9-615(f), the conclusion that Jordan et al.'s interpretation of the role of a significantly low price under commercial reasonableness review requires. Would it not be better to argue the revised Article 9 drafters intended section 9-615(f) to address the wide discrepancy of cases under former Article 9, and thus one should advocate the interpretation of the commercial reasonableness standard *cum* procedures test and price's limited role therein advanced by this Article?

217. *See* Harrell, *October 1996 Draft*, *supra* note 121, at 56–57 (describing arguments made at the 1996 drafting committee meeting).

218. *See supra* notes 160–77 and accompanying text.

219. U.C.C. § 9-626(a)(2) (1999).

220. U.C.C. § 9-626(a)(5) (1999).

party needs to prove the price's reasonableness only where she sells to a disinterested purchaser, she may try to avoid this additional burden and sell to the interested purchaser and risk section 9-615(f)'s scrutiny where the debtor has the burden of proof as to the proceeds' adequacy.[221] Further, if the secured party sells to an interested purchaser and thus she need not prove the price's reasonableness, if she otherwise conducts a commercially reasonable sale, she avoids possible damages under section 9-625 for any "loss" due to noncompliance. In contrast, if the secured party sells to a disinterested purchaser and must carry the additional burden of proving the price's reasonableness, where she fails to prove the price reasonable, she may expose herself to a noncompliance damages action under section 9-625.[222] And to collect a deficiency, under section 9-626 the secured party has the burden of rebutting the presumption that the collateral's fair price is the amount of the debt. These sanctions create incentives for the secured party to sell to an interested purchaser or at least a disincentive to sell to a disinterested purchaser.[223]

Is price a "term" or "aspect" of commercial reasonableness under the revised Article 9? Although no Code provision or Official Comment explicitly excludes or includes price as a term, the patchwork of revised Article 9's provisions and two Official Comments taken together arguably reject the proposition that price is a "term" or "aspect" of commercial reasonableness that the secured party must prove reasonable through secondary sources. First, recall that under revised Section 9-610(b) "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable."[224] Recall further that under Section 9-615(f), a significantly low price alone cannot render an otherwise complying sale commercially unreasonable.[225] If a significantly low price alone cannot render a sale commercially unreasonable, then arguably price is not a "term" or "aspect" of commercial reasonableness. Professors Harris and Mooney state that "the fact that subsection [9-615](f) contemplates a commercially reasonable disposition that yields a very low price supports the inference that, at least under the Revised Article 9 if not also under Former Article 9, the price for which collateral is disposed is not an 'aspect' or 'term' of the disposition. See R9-610; R-9627, Comment 2."[226]

---

221. *But see* Coles-Bjerre, *supra* note 216, at 371–72 (arguing that section 9-615(f) may or may not chill interested purchasers from bidding).

222. U.C.C. § 9-625 (1999).

223. *Cf.* Henning, *supra* note 180, at 278 (discussing the potential chilling effect of the *Durrett* seventy percent approach on third-party purchasers).

224. U.C.C. § 9-610(b) (1999).

225. *See supra* notes 205–16 and accompanying text.

226. HONNOLD ET AL., *supra* note 96, at 1087. To avoid the revised Article 9's adoption of the procedures test and its fair-price determining function, unhappy attorneys and courts might argue that such adoption is partially based on Official Comments to sections 9-610(b), 9-615(f),

Mr. Rapson states that the "Drafting Committee concluded that . . . 'low price' is not itself an aspect of 'commercial reasonableness . . . .'"[227] With respect to the revised Article 9, White and Summers state similarly that "price is not an 'aspect' of the sale and a low price does not show that any 'aspect' was commercially unreasonable."[228]

Despite the above assertions, one might argue that section 9-615(f) and price as a term of commercial reasonableness under section 9-610(b) are not mutually exclusive since all section 9-627 really means is that, even if price is a term of commercial reasonableness, it alone fails to render the sale commercially unreasonable. Thus, it is possible to have a commercially reasonable sale with a significantly low price where price is a term if the only flaw in the sale is the low price.

A response to this argument is that making price a term of commercial reasonableness, albeit with this special limitation, would gut the rationale for the different allocations of the burden of proof for non-consumer transactions under section 9-610(b)'s commercial reasonableness standard (on the secured creditor) versus section 9-615(f) (on the debtor). Under this allocation regime, if price were a term of commercial reasonableness under section 9-610(b), then the *secured party* would have the burden of

---

9-627, and that such comments are not binding law. *See* Kenneth C. Kettering, *Repledge Deconstructed*, 61 U. PITT. L. REV. 45, 230 (1999) (discussing authority of Official Comments generally); Donald J. Rapson, *Deficiencies and Ambiguities In Lessor's Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875, 875 (1988) (same). But courts infrequently decline to follow an Official Comment. Peter A. Alces & David Frisch, *Commenting on "Purpose" In the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 441 (1997); Kettering, *supra* at 231; Rapson, *supra* at 877; Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 975 (1990). One commentator explicitly argues for a high degree of judicial fidelity to revised Article 9's Official Comments. Kettering, *supra* at 234. *See also* Hannaway, *supra* at 974–78 (generally arguing for fidelity to the Official Comments); Rapson, *supra* at 877 (same); Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 631 (1966) ("As an aid to understanding . . . the Code, courts may be expected to pay very serious attention" to the comments.). *But see* Alces & Frisch, *supra* at 447, 452, 458 (generally arguing for less deference to the Official Comments); Skilton, *supra* at 606–631 (describing limitations and flaws to certain comments); Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *Revision or Clarification Through the Use of Code Comments*, 16 DEL. J. CORP. L. 996, 996 (1991) (stating that "it is not unusual to find that [Comments] were not followed in a case either because it was thought that their application would lead to an inappropriate result, or would effectively vary the plain language of the statute"); Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV 993, 994 & 1033 (1995) (generally arguing for less deference to the Official Comments). Even if a court chose to ignore the relevant revised Official Comments, section 9-615(f), section 9-627, and section 9-626 (burden of proof allocations) standing alone offer strong statutory support for the procedure test's and its fair-price determining function's ascendancy under the revised Article 9 as discussed throughout Part II.

227. Rapson, *supra* note 17, at 918.

228. WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 906.

proving that it was reasonable, while under section 9-615(f), the *debtor* would have the burden of showing the price was significantly low. With this allocation in mind, consider what happens in a sale to an interested purchaser where the secured party fails to prove that the price is commercially reasonable, but this is the only unreasonable sale aspect. Since the low price alone will not render the sale commercially unreasonable and the sale is to an interested purchaser, section 9-615(f) will apply. Now the debtor bears the burden of proving the price is significantly low. The rationale for placing the burden on the debtor is to deter him from engaging in strike suits[229] and talking low price.[230] The problem is that once one has made price a term that the secured party must prove reasonable, then for this rationale to have meaning one is forced to argue that not all commercially unreasonable sale prices under section 9-610(b) are significantly low prices under section 9-615(f). For if all commercially unreasonable sale prices are significantly low prices, then allocating the burden of proof to the debtor under section 9-615(f) is a chimera; the secured party already lost the battle under section 9-610(b). If there is a difference, exactly what is it and do we want a rule that requires such fine parsing? By not making price a term of commercial reasonableness, one escapes this problematic statutory allocation of the burden of proof.[231] Indeed, here lies one argument why the debtor should bear the burden of proof as to "low price" under the two Official Comments, which allocation is possible where price is not a term of commercial reasonableness.[232]

---

229. *See* U.C.C. § 9-626 cmt. 5 (1999) ("Were the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor.").

230. *See* ZINNECKER, *supra* note 118, at 188 ("Rarely, if ever, will post-default activity yield maximum proceeds, making this safe harbor 'necessary to prevent every disgruntled debtor from making a jury case by talking price.'" (citing Nadler v. Baybank Merrimack Valley, N.A., 733 F.2d 182, 184 (1st Cir. 1984))).

231. One might try to argue that section 9-626(a)(2) would not control the allocation of the burden of proof even if price were a term of commercial reasonableness since an unreasonable price alone can never render an otherwise complying sale unreasonable, and thus the secured party's burden to show that the "disposition was conducted in accordance with this part" within the meaning of section 9-626 should not include price. Just making the argument seems odd. It means that on the one hand, price is a term of commercial reasonableness under section 9-610(b), but on the other hand, it is not a term that needs to be conducted in accordance with Article 9's default rules within the meaning of section 9-626. If this is the argument, to what end making price a term of commercial reasonableness?

232. There may be reasons to allocate the burden of proving "low price" to the secured party under the Official Comments, especially in a consumer transaction where the section 9-610(b)/section 9-615(f) burden of proof conflict does not exist because section 9-626(b) leaves to the courts the respective allocation of burdens of proof in consumer transactions for these two sections. U.C.C. § 9-626(b) (1999). The Article does not address these reasons, which under the former Article 9 caused much consternation and debate in the literature and the courts. For a discussion of these issues, see ZINNECKER, *supra* note 118, at 182–84. Further, because the burden of proof conflict does not exist for consumer transactions, those Part II arguments that

Second, under the two Official Comments' suggestion that the courts carefully scrutinize a "low price" sale's "aspects," those aspects cannot include the sale's price. To hold otherwise would mean that the court, upon finding the existence of a low price, would then carefully scrutinize the low price *cum* aspect. This practice would be circular; it would mean that the reason the court determines whether there is a low price is to see if it should carefully scrutinize the low price. Thus, "aspects" necessarily excludes price and centers on an inquiry into the propriety of the sale's statutory (e.g., notice) and incorporated, market-based sale practices.[233]

Because price is not a term of commercial reasonableness under section 9-610(b), the secured party as part of its burden of proof of the sale's commercial reasonableness need not prove the sale price is reasonable through secondary sources of value and fair price.[234] Generally, burden of proof means both the burden of producing evidence to get to trial and survive a motion for summary judgment or a motion for directed verdict,[235] and the burden of persuading the judge or jury at trial by a particular standard of persuasion.[236] For Article 9 commercial reasonableness litigation, the standard is by a preponderance of the evidence.[237]

---

price cannot be a term of commercial reasonableness which are based on the conflict are undermined. This may lead to the argument that for consumer transactions only, price should be a term of commercial reasonableness, albeit with the special limitation. This argument has several shortcomings. First, it conflicts with all the other arguments made in Part II that price is not a term. Second, it conflicts with the position of creditor representatives during the drafting process who explicitly opposed different treatment for non-consumer and consumer transactions with respect to the price as a term issue. Alvin C. Harrell, *UCC Article 9 Revisions Move Toward Summer 1998 Approval, Pt. II*, 52 CONSUMER FIN. L.Q. REP. 227, 234 (1998).

233. Part III addresses this point. *See infra* notes 266–75 and accompanying text; *see also* Part IV, *infra* notes 345–50 and accompanying text.

234. U.C.C. § 9-626 (1999).

235. COUND ET AL., CIVIL PROCEDURE Ch. 14, § B.3 (7th ed. 1997) [hereinafter COUND]. With respect to allocating to the secured party the burden of producing evidence of "compliance," Comment 3 to section 9-626(a)(1) states that "[u]nder paragraph (1), the secured party need not prove compliance . . . as part of its prima facie case. If, however, the debtor . . . raises the issue (in accordance with the forum's rules of pleading and practice), then the secured party bears the *burden of proving* that the . . . disposition . . . complied." U.C.C. § 9-626 cmt. 3 (1999) (emphasis added). Further, the "normal rule" is to allocate both the burden of production and the burden of persuasion to the plaintiff and moving party. Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems In—And Solutions For—The Uniform Commercial Code*, 1984 DUKE L.J. 92, 98 (1984). This means in a non-consumer transaction, the secured party bears the burden of production in a deficiency suit. Section 9-626(b) leaves the allocation to the courts in consumer transactions. U.C.C. § 9-626(b) (1999).

236. With respect to the burden of persuasion, where the debtor puts the secured party's compliance in issue, section 9-626(a)(2) states that "the secured party has the *burden of establishing* that the . . . disposition was conducted in accordance with this part." U.C.C. § 9-626(a)(2) (1999) (emphasis added). This means in a non-consumer transaction, the secured party bears the burden of persuasion in a deficiency suit. "Section 1-201(8) defines 'burden of establishing' as 'the burden of persuading the triers of fact that the evidence of the fact is more probable than its non-existence.'" Allen & Hillman, *supra* note 235, at 98. Professors Allen and Hillman argue that section 1-201(8) "refers to the allocation of [the] burden of persuasion." *Id.*

C. SOME CONTRARY ARGUMENTS

One respected commentator, Professor Lloyd, reads the Official Comments to mean that price is a term of commercial reasonableness, although with a special limitation.

> The Official Comment [Comment 2 to 9-627] explains the relationship between these two seemingly inconsistent rules [sections 9-627 and 9-610(b)]. Even though the price is a "term" and thus must itself be commercially reasonable, a low price obtained when the collateral has been fully exposed to the market is not commercially unreasonable. What a low price should do, as the Official Comment now makes clear, is alert the court to the possibility that the secured party did not do what was necessary to fully expose the collateral to the market.[238]

With Professor Lloyd's comment that price is a "term" of commercial reasonableness, albeit with a special limitation, he aligns himself with cases under the former Article 9 holding that, although price was a term of commercial reasonableness for which the secured party bore the burden of proof, a low price alone would not render an otherwise complying sale unreasonable.[239]

Although Professor Lloyd does not say it, to support his position, one could make the argument discussed above that section 9-615(f) and price as a term of commercial reasonableness under section 9-610(b) are not mutually exclusive since, even if price is a term of commercial reasonableness, it alone will not render the sale commercially unreasonable. Thus, one need not conclude from section 9-615(f)'s appearance that price is not a term of commercial reasonableness.[240]

Further, one could look at the drafting history of revised Article 9's default provisions and ask if the Drafting Committee wanted to exclude price as a term of commercial reasonableness, why did it not do so explicitly in either a Code section or in an Official Comment? Indeed, in an early draft a price term appeared under section 9-610(b)[241] and was discussed in

---

at 98. Section 9-626(b) leaves the allocation to the courts in consumer transactions. U.C.C. § 9-626(b) (1999).

237. *See, e.g.*, Beard v. Ford Motor Credit Co., 850 S.W.2d 23, 29 (Ark. Ct. App. 1993); First Natl. Bank v. Cianelli, 598 N.E.2d 789, 794 (Ohio Ct. App. 1991); Gen. Motors Acceptance Corp. v. Johnson, 746 A.2d 122, 124 (R.I. 2000).

238. Robert M. Lloyd, *The New Article 9: Its Impact on Tennessee Law (Part II)*, 67 TENN. L. REV. 329, 363 (2000) (citations omitted).

239. *Id.*

240. This argument is rebutted *supra* notes 229–31 and accompanying text and during the balance of this Section C.

241. U.C.C. § 9-610(b) (Proposed Official Draft Feb. 1997), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/m11draft.htm (on file with the Iowa Law Review).

the Reporters' Comments to early drafts.[242] But as Mr. Rapson records, the Drafting Committee by its March 7-9, 1997, meeting unanimously preferred the approach of section 9-614 (to become section 9-615(f) in the final draft) "rather than making price a term of 'commercial reasonableness.' Under that approach [section 9-614], 'commercial reasonableness' is strictly a matter of procedural compliance, and the reasonableness of the foreclosure sale price or credit is treated separately in the context where it is most relevant—deficiency claims."[243] Towards this end, Reporters' Comment 10 to section 9-610(b) in the March 1998 draft, for example, stated that "[t]he amount of proceeds received in a disposition (e.g., the cash price if the disposition is by way of sale) need not be commercially reasonable. However, a low price may suggest that a court should scrutinize more carefully all aspects of a disposition, including the method, manner, time, place, and other terms, to ensure that each was commercially reasonable."[244] The March 1998's Reporters' Comment 2 to section 9-626 (which would become section 9-627 in the final draft) stated in part that

> The law long has grappled with the problem of dispositions of personal and real property that comply with applicable procedural requirements . . . but which yield an extremely low price. . . . A low price is relevant to whether a disposition has been commercially reasonable only to the extent that a low price suggests the need for careful judicial scrutiny of other aspects of the disposition. In fact, where the price is extremely low, other aspects of the disposition (e.g., the time and manner) might well have been commercially unreasonable. But if they were not, then the disposition complies with the requirements of this Article.[245]

---

242. As to early drafts' Reporters' Comments setting forth the option of including price as a term, see U.C.C. § 9-507 cmt. 7 (Proposed Official Draft Mar. 5, 1996) *available at* http:www.law.upenn.edu/bll/ulc/ucc9/part5m3.htm (on file with the Iowa Law Review); U.C.C. § 9-507 cmt. 7 (Proposed Official Draft July/Aug 1995) *available at* http://www.law.upenn.edu/bll/ulc/ucc9/ucc9.htm (on file with the Iowa Law Review); U.C.C. § 9-507 cmt. 6 (Proposed Official Draft May 1996), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/am96ucc9.htm (on file with Iowa Law Review); U.C.C. § 9-507 cmt. 6 (Proposed Official Draft Annual Meeting 1996), *available at* http://www.law.upenn/edu/bll/ulc/ucc9/ucc9sec.htm (on file with the Iowa Law Review); U.C.C. § 9-610 cmts. 1, 2 (Proposed Official Draft Feb. 1997), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/m11draft.htm (on file with the Iowa Law Review). For an example of the Drafting Committee discussions to include price as a term, see, Miller, *supra* note 158, at 225–26 (describing a 1997 Memorandum from the Consumer Issues Subcommittee of the Article 9 Drafting Committee to the Article 9 Drafting Committee where the Subcommittee set forth a number of options, including making price a "term" of commercial reasonableness).

243. Rapson, *supra* note 32, at 534.

244. U.C.C. § 9-610(b) cmt. 10 (Proposed Official Draft Mar. 1998), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/m14draft.htm (on file with the Iowa Law Review).

245. *Id.* U.C.C. § 9-626 cmt. 2. Earlier, the 1997 Annual Meeting Draft contained the

But in the final draft of Revised Article 9 and its Official Comments, the Drafting Committee stripped out any explicit exclusion of price as a term and substituted "softer" language.[246] The overriding force behind this change appears to have been consumer debtor representatives who opposed

---

following Reporters' Comments to section 9-610: "The amount of proceeds received in a disposition (e.g., the cash price if the disposition is by way of sale) is not a term that must be commercially reasonable." U.C.C. § 9-610 cmt. 10 (Proposed Official Draft Annual Meeting 1997), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/ucc997.htm (on file with the Iowa Law Review). The 1997 Annual Meeting Draft also contained the following Reporters' Comments to section 9-626 (later to become section 9-627):

> This Article thus rejects the view that the price is one of the "terms" that, under Section 9-610(b), must be commercially reasonable. Rather, except as otherwise provided in Section 9-614(b), a low price is relevant to whether a disposition has been commercially reasonable only to the extent that a low price suggests the need for careful judicial scrutiny of other aspects of the disposition. In fact, where the price is extremely low, other aspects of the disposition (e.g., the time and manner) might well have been commercially unreasonable. But if they are not, then the disposition complies with the requirements of this Article.

U.C.C. § 9-626 cmt. 2 (Proposed Official Draft Annual Meeting 1997), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/ucc997.htm (on file with the Iowa Law Review). For similar provisions, see U.C.C. § 9-610 cmt. 10 (Proposed Official Draft Aug. 7, 1997), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/ucc9897.htm (on file with the Iowa Law Review); and U.C.C. § 9-626 cmt. 2 (Proposed Official Draft Oct. 1997), *available at* http://www.law.upenn.edu/bll/ulc/ucc9/m12draft.htm (on file with the Iowa Law Review).

246. *See* Harrell, *supra* note 232, at 234–35. Commenting on a Mar. 17, 1998, Memo Draft, Mr. Harrell states that the Drafting Committee considered a:

> [c]omment to convey the following concept: "A low price (may) suggest that a court more carefully scrutinize all of the aspects of the sale, including the method, manner, time, place and terms to ensure that each aspect of the sale was commercially reasonable." (To appear instead of comments that say price is not a term.) . . . Consumers want nothing to say price is not a term, will accept current law.

Id. at 234. Mr. Harrell then states, with respect to the Mar. 17, 1998, Memo Draft, section 9-610, and the issue of whether a low price alone can render a sale commercially unreasonable, the following:

> The Memorandum of Understanding called for the Reporters not to close the door on this issue, prohibiting a statement indicating that current law is that price alone is not a factor in commercial reasonableness. . . . The Memorandum of Understanding was modified at the last meeting when the Drafting Committee voted to specify in a comment that price alone is not a factor. . . . The consumer representatives also objected to this language. Harry Sigman noted again that this had been carefully considered by the Drafting Committee. He suggested, however, use of "extremely low" rather than "unreasonably low," to make clear that price is not a term to be considered for purposes of compliance with the commercial reasonableness requirements, and made a motion to that effect. Gail Hillebrand argued that this is a major point for consumer representatives, which could disrupt the compromise. Neil Cohen then offered "softer" language to substitute for Harry Sigman's proposal: (line 13, delete up to "however," and substitute: "While not itself establishing a violation of this section, . . . "). This was approved.

Id. at 235.

strongly any provision in the Code or an Official Comment explicitly excluding price.[247] One might argue that the eventual stripping out of the provisions excluding price as a term provide substantive meaning to the final draft: to wit, that the final draft should not be interpreted to mean that price is not a term that the secured party must prove reasonable.

Despite Professor Lloyd's assertion and these contrary arguments, the statutory arguments made in Section B and further below should tip the balance in favor of eliminating price as a term of commercial reasonableness. Added to these Section B arguments, the remainder of this Section C argues that Professor Lloyd's use of price as a term of commercial reasonableness, and his adherence to former Article 9 precedent that calls price a term (albeit with the special limitation), goes too far and seems unnecessary given section 9-615(f) and the two Official Comments' directives to carefully scrutinize low price sales and price's limited, but important, role therein.

First, in the drafting process, tension clearly existed over the issue of price as a term of commercial reasonableness. But from such history, one can argue that price is not a term. The final draft does not contain language explicitly including price as a term of commercial reasonableness. Coupled with the statutory arguments set forth above and below, one can argue that the "softer" language of the final draft reflects a last minute compromise in form rather than in substance in an effort to win over the consumer debtor representatives, a key constituency for the revisions' approval.[248] While other respected commentators such as Professor Lloyd (and perhaps even some Drafting Committee members) might argue otherwise, four Drafting Committee members, two of whom were the Official Reporters, as well as other commentators,[249] argue explicitly or tacitly that price is not a term of commercial reasonableness under the revised Article 9. Commenting on the final draft (and thus the "softer" language), Mr. Rapson, a member of the Drafting Committee and the chief architect of Section 9-615(f), states that

---

247. *Id.* at 235.

248. *Id.* at 234. *See generally*, Benfield, *supra* note 85, at 1255–60 (generally discussing negotiations between creditor and consumer representatives in the revised Article 9 drafting process).

249. As to the four Drafting Committee members, for Professor's Harris and Mooney and Mr. Rapson, respectively see *supra* notes 226 & 227 and accompanying text; for Mr. Weise, see Steven O. Weise, *A Comparison of Current and Revised Article 9, in* THE NEW ARTICLE 9 107, at 124 (Corinne Cooper, ed. 1999) (stating with respect to section 9-615(f) that "[t]he Drafting Committee chose this approach rather than adopting a rule that would treat the price as a term of the sale"). As to other commentators, see CLARK, *supra* note 47, ¶ 4.08[8][e], at 4-267 (stating that with respect to section 9-615(f), "[t]he Revision chose this approach rather than adopting a flat rule that would treat the price as a term of the sale that must be commercially reasonable"); WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 906 (arguing that price is not an aspect of commercial reasonableness under the revised Article 9); Coles-Bjerre, *supra* note 216, at 355–56 (arguing price is not a term of commercial reasonableness under the revised Article 9).

"the Drafting Committee concluded that . . . 'low price' is not itself an aspect of 'commercial reasonableness.'"[250]

Second, by focusing on whether the collateral was exposed fully to the market to determine whether the sale price is reasonable, Professor Lloyd appears to advocate a procedures-like review of the sale process.

> If, as frequently happens, the debtor introduces evidence to the effect that the fair market value of the collateral is considerably more than the collateral was sold for, this normally means one of two things. Either there was something wrong with the secured party's sale procedures that kept it from attracting buyers who would pay the market price, or there is something wrong with the debtor's evidence.[251]

Assuming that Professor Lloyd equates a lack of full market exposure with a flawed sale process,[252] the low price sale will be found commercially unreasonable due to the procedural flaw(s) (lack of full exposure to the appropriate market) under a procedures test. If the sale process is not flawed (i.e., full exposure to the appropriate market), then even though a low price sale does not evidence the collateral's true value, it would be considered reasonable under the procedures test. Thus, if the low price is the debtor's only objection, the sale will be commercially reasonable. Consequently, what function would be served by also making price a term where it alone cannot spell commercial unreasonableness?[253]

---

250. Rapson, *supra* note 17, at 918.

251. Lloyd, *supra* note 238, at 363.

252. This seems a safe assumption given his statement that "[e]ither there was *something wrong with the secured party's sale procedures that kept it from attracting buyers who would pay the market price*, or there is something wrong with the debtor's evidence." *Id.* (emphasis added).

253. By qualifying his statement that "normally" one of these two things is true (procedural error or low price evidence error), Professor Lloyd appropriately leaves room for the occurrence of the non-collusive, procedurally regular sale at which a significantly low price occurs. Indeed, he says that "a low price obtained when the collateral has been fully exposed to the market is not commercially unreasonable." *Id.* For such a sale, it may be that both the sale procedures are regular and the debtor's evidence of a low price is accurate.

For example, consider the case discussed in Part I where the only market reasonably available to the secured party is an inefficient distress market at which it would not be surprising to find a sale price that accurately is less that the collateral's true value. *See supra* notes 73–82 and accompanying text. Assume that the secured party used the distress market's attendant sale practices perfectly. It seems unlikely that Professor Lloyd would say that the collateral has not been fully exposed to the market and thus the sale is commercially unreasonable under these circumstances since this would mean that the only commercially reasonable market is an efficient one. More likely is that Professor Lloyd's concern is whether the collateral was fully exposed in the permissible or appropriate market. When one relaxes the assumption that the collateral was fully exposed in the appropriate market, Professor Lloyd would seem to say that the low price sale process is flawed. But then the low price sale would be commercially unreasonable under the procedures test, as discussed above. So again, to what end making price a term where it alone cannot spell commercial unreasonableness?

Third, Professor Lloyd states correctly that the debtor's evidence of low price may be inaccurate as an alternative explanation for a seemingly low price sale. Perhaps one might argue that for the court to see if there is something wrong with the debtor's evidence of low price, price needs to be a term of commercial reasonableness. But this argument is fallacious. Under the Official Comments, the court must perform a preliminary determination of "low price" (using in part secondary source evidence of value and fair price) to trigger the court's careful scrutiny of the sale process.

A rebuttal to this counter-argument is that before the court levels this heightened scrutiny, someone should first have to prove that the sale price is in fact low. But as between the secured party and the debtor, who has the burden of proof as to low price? One might argue that making price a term of commercial reasonableness under section 9-610(b) would partially answer this question. For non-consumer transactions, courts would allocate the burden of proof with respect to price to the secured party under section 9-626(a)(2).[254]

This rebutted argument is weak for several reasons. First, one does not need to make price a term of commercial reasonableness in order to effect section 9-626(a)(2)'s allocation of the burden of proof with respect to proving "low price" under the Official Comments. If price were not a term of commercial reasonableness, and thus section 9-626(a)(2) was inapplicable, courts could allocate the burden of proof as to "low price" as they saw fit. Vesting courts with this type of discretion should not undermine this position; for consumer transactions, section 9-626(b) already leaves to the courts the allocations of the respective burdens of proof for section 9-610(b) and section 9-615(f). Second, as discussed above, if making price a term of commercial reasonableness means in non-consumer transactions that the secured party carries the burden of proving the price commercially reasonable, this allocation creates the tension with the burden of proof allocation under section 9-615(f) which rests on the debtor. Eliminating price as a term of commercial reasonableness avoids this problem.

Fourth, to say that price is a term of commercial reasonableness under section 9-610(b) means that for non-consumer transactions, courts will allocate the burden of proof with respect to price to the secured party under section 9-626(a)(2).[255] This places the court's and trier of fact's focus squarely on the price's reasonableness directly rather than indirectly under the procedures test and the fair-price determining function of the non-collusive, procedurally regular and reasonable sale. Avoiding price as a term of commercial reasonableness properly elevates the primary focus to the sale process rather than its result.

A rebuttal to this last argument is that careful scrutiny under the two

254. *See supra* notes 219, 229–30 and accompanying text.

255. *Id.*

Official Comments is predicated upon a finding that there is a "low price." Thus, the court's and trier of fact's attentions will be directed at the sale price anyway. But this argument overstates price's role under the Official Comments. What a low price determination should do is alert the court to a possible unreasonable procedural flaw, and the court or trier of fact then should look carefully at the sale process to see if the secured party, in Professor Lloyd's words, did what was necessary to fully expose the collateral to the market. The court's scrutiny is thus channeled by the low price finding back to the sale process. To be sure, the trier of fact may still consciously or unconsciously overweight price's role in commercial reasonableness review.[256] As discussed in Part IV, this raises the specter of the doctrinal, valuation technique, and competing policy problems of secondary sources of value and fair price abrogating the price-determining function of the non-collusive, procedurally regular and reasonable sale.[257] But invoking price as an explicit term of commercial reasonableness will not mitigate this problem and will likely worsen it. Professor Lloyd's proper observation about price alerting the court to the possibility of less than full market exposure of the collateral can be realized without labeling price a term of commercial reasonableness, with the added benefit of losing the label's baggage. Given the confused jumble of opinions about the role of price under the former Article 9, courts under the revised Article 9 should refrain from using the statutory nomenclature of price as a "term" or "aspect" of commercial reasonableness. Price is not a term or aspect of commercial reasonableness under the revised Article 9.

D. THE LINGERING ROLE OF PRICE UNDER REVISED ARTICLE 9'S COMMERCIAL REASONABLENESS STANDARD.

Even if one concedes that price is not a term or aspect of commercial reasonableness under the revised Article 9, price and secondary source evidence thereof retains a role under the revised Article 9 with respect to determining the sale's commercial reasonableness. The two Official Comments each state that "[w]hile not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable."[258] By their own terms, the Comments force two inquires. First, is there a "low price?" Second, *if so*, are all of the sale's aspects commercially reasonable under the court's careful scrutiny? Thus, revised Article 9 links the sale price to the commercial reasonableness calculation. But how far does this link extend? The revisions do not elaborate further on price's role in the commercial reasonableness calculation.

---

256. *See infra* notes 419–24 and accompanying text.

257. *Id.*

258. U.C.C. § 9-610 cmt. 10 (1999); U.C.C. § 9-627 cmt. 2 (1999).

Under the Official Comments, a low price determination cannot create conclusive presumption of procedural irregularity. To do so makes price a *de facto* term of commercial reasonableness and allows low price alone to render the sale commercially unreasonable. Somewhere between a mere alert to possible procedural irregularity and a conclusive presumption of procedural irregularity lies price's role under the revised Article 9's commercial reasonableness standard.

Several questions require answers. In particular, what is price's role in careful scrutiny review? May a court look at secondary source evidence of fair price in its careful scrutiny review? Should a low price create an inference of procedural irregularity? White and Summers, for example, seem to suggest that it does.[259] But they also argue that price is not a sale "aspect" and a low price does not demonstrate that any "aspect" was commercially unreasonable.[260] Mr. Rapson states that although a "'low price' is not itself an aspect of 'commercial reasonableness,' [a low price] may be relevant to the determination of whether the statutory aspects have been met."[261] He does not, however, elaborate further. Similarly, Professor Zinnecker says that "[a]lthough [section 9-627(a)] suggests that the court should shine its spotlight on the procedures followed by the creditor, rather than the amount of proceeds yielded by those procedures, it would be imprudent for a creditor to believe that a court will completely ignore allegations of an inadequate price when reviewing the propriety of the creditor's actions."[262] Professors Harris and Mooney state that "[a]lthough R9-627(a) seems to instruct that the failure to sell for the highest price possible does not ipso facto render the disposition commercially unreasonable, it is clear enough that whether procedures followed in a disposition are commercially reasonable is a function of the price that those procedures could be expected to produce."[263] Part IV of the Article addresses the nature of careful scrutiny review and the limited but important role of price therein under revised Article 9's commercial reasonableness standard *cum* procedures test where price is not a term and a low price alone cannot upset an otherwise complying sale.

III. THE INCORPORATION STRATEGY AS A SOURCE OF PROCEDURES TEST PROBLEMS

Before Part IV's analysis, however, Part III takes a closer look at the problems raised by revised Article 9's reliance on the procedures test, the fair-price determining function, and the incorporation of merchant reality

259. WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 904.

260. *Id.* at 906.

261. Rapson, *supra* note 17, at 918.

262. ZINNECKER, *supra* note 118, at 188.

263. HONNOLD ET AL., *supra* note 96, at 1084.

to define commercially reasonable sales and evidence fair prices. Under the incorporation strategy, the commercial reasonableness standard *cum* procedures test in function directs the secured party to use the market sale practices that she in good faith believes are best suited to maximize the collateral's price and which are reasonably available to the secured party. Courts reviewing the sale must also explore merchant reality to ascertain the prevailing trade practices for selling the collateral in order to compare them against those the secured party employed. Under the rhetoric of the procedures test, a secured party must conduct a procedurally regular and reasonable sale, and the trier of fact must determine whether the sale was in fact procedurally regular and reasonable. Procedural regularity should be distinguished from procedural reasonableness. By "regular," the commercial reasonableness standard's incorporation directive looks merely at real world sale practices; the inquiry is not prescriptive (what should the practices be) but merely descriptive (what the actual practices are). "Reasonable" necessarily cannot mean that the practices are prevailing or widely used in the commercial world otherwise reasonableness here would be synonymous with "regular" business practices. Rather, a secured party must use not only regular but reasonable sale practices. The trier of fact must assess whether the selected procedures were regular, and the court must ensure that these sale practices are reasonable.[264]

Given its reliance on the incorporation strategy, the commercial reasonableness standard *cum* procedures test rests on the validity of three assumptions. First, the secured party has the incentive to maximize the sale price for the collateral and concomitantly the incentive to use the market and attendant sale procedures best calculated to realize the goal of price maximization. Second, *ex ante* this maximizing secured creditor is able to identify and access the appropriate market calculated to attain her goal of price maximization and implement its attendant sale procedures.[265] Third, *ex post* the trier of fact, during its judicial review of the challenged sale, is able to identify both collusive behavior and irregular and unreasonable sale procedures.

No matter whether one subscribes to the position that a commercially reasonable sale produces the market value of the collateral, or the collateral's fair price, or just a price (the price agnostics), one should be concerned about the systemic invalidity of these assumptions. Where any of

---

264. 2 GILMORE, *supra* note 29, § 44.5, at 1236–37; *see* Richardson Ford Sales, Inc. v. Johnson, 676 P.2d 1344, 1352–53 (N.M. Ct. App. 1984) (finding that even though secured party provided evidence that dealers used the challenged sale practice, it was insufficient to show that those practices were reasonable); *see also* 9 HAWKLAND, *supra* note 47, § 9-507: 9, at 1052–53.

265. *See* Schwartz, *supra* note 97, at 125 (noting that "two deeper assumptions" to the maximizing secured creditor argument are "that creditors act as if they attempt to maximize profits and that by and large people act effectively in pursuit of their goals, which means here that creditors will maximize resale proceeds if maximizing is their most profitable strategy").

these assumptions is not or cannot be systematically fulfilled, then the justification for allocating the loss from a commercially reasonable sale's low price to the debtor in the form of a deficiency judgment is undermined and the normative force of the commercial reasonableness standard *cum* procedures test is eroded. Unaddressed, this sews the seeds for an expansion of price's role under commercial reasonableness review. Part I explored the limitations on fulfilling the first assumption (e.g., secured party incentive to maximize price). Part IV discusses the ramifications of these limitations for price's role. This Part III, however, focuses on limitations on the latter two assumptions, with particular emphasis on the incorporation strategy. Then Part IV discusses their ramifications as well.

A. *WHENCE THE INCORPORATION STRATEGY UNDER ARTICLE 9?*

Neither the former nor revised Article 9 uses the term "incorporation strategy" explicitly, nor do they mandate specifically that the secured party, debtor, or trier of fact reviewing a challenged sale look to market-based procedures as the benchmark for commercial reasonableness.[266] To the extent there is any statutory support, it comes from the limited safe harbor of revised section 9-627(b)(3) (former section 9-507(2)) under which a sale is commercially reasonable if the secured party uses the "reasonable commercial practices among *dealers* in the type of property [sold]."[267] The hope is that where a secured party follows these reasonable commercial practices, a fair price will be realized.[268] Many courts under the former Article 9 expanded the safe harbor beyond the dealer context, and made compliance with reasonable commercial practices a requirement for all sales.[269] This expansion makes sense given the absence under the former

---

266. The sale must be properly noticed. *See* U.C.C. §§ 9-611, 9-612, 9-613 (1999). "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." U.C.C. § 9-610(b) (1999). Beyond this mandate, "commercial reasonableness" is not defined in the Code, although some instruction is provided in former section 9-507(2), now 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 29, § 44.5, at 1234–35.

267. U.C.C. § 9-627(b) (1999) (emphasis added); *see* Lloyd, *supra* note 238, at 363–64 (discussing Tennessee case law interpreting the phrase "commercially reasonable" sale).

268. 9 HAWKLAND, *supra* note 47, § 9-507:9, at 1052–53; *see also* Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 712 (E.D. Pa. 1968) (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 pubic 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)), *aff'd*, 398 F.2d 310 (3d Cir. 1968).

269. *See, e.g.*, *In re* Excello Press, Inc., 890 F.2d 896, 905–06 (7th Cir. 1989).

> [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

and revised Article 9 of any other proscribed foreclosure sale guidelines for how a secured party should dispose repossessed collateral, and how courts should review a sale's commercial reasonableness. Indeed, as a policy matter, Professor Gilmore wanted the loosely defined standard of commercial reasonableness to move foreclosure sales away from the inefficient and rigid default rules of earlier statutes like the UCSA which had resulted in predictably low prices,[270] and move towards more efficient markets and higher prices.[271]

> govern the members of a business calling day-in and day out [sic] [that] not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience."

Id. at 906; *see* Jackson County Bank v. Ford Motor Credit Co., 488 F. Supp. 1001, 1009 (M.D. Tenn. 1980), *vacated*, 698 F.2d 1220 (6th Cir. 1982); *In re* Four Star Music Co., 2 B.R. 454 (Bankr. M.D. Tenn. 1979); Wilkerson Motor Co. v. Johnson, 580 P.2d 505, 509 (Okla. 1978) ("Generally, 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."); Investors Acceptance Co. v. James Talcott, Inc., 454 S.W.2d 130, 137–38 (Tenn. Ct. App. 1969) ("The 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. Volunterr Fin. & Loan Corp., 415 S.W.2d 347, 350 (Tenn. Ct. App. 1966))); *accord* FERRIS & GOLDSTEIN, *supra* note 39, § 1.2, at 3; Lloyd, *supra* note 238, at 363.

270. *See supra* notes 29–31 and accompanying text. Similarly, the literature on section 548 of the Bankruptcy Code's "reasonably equivalent value" requirement criticizes the real estate foreclosure sales of *Durrett*, *Madrid*, *Bundles* and *BFD* because such sales were governed by mandatory, inflexible, state proscribed default rules which generally require a public sale for cash and paltry advertising. Wechsler, *supra* note 74, at 883–85; Pendley, *supra* note 96, at 231, 251–52. Outside of the section 548 literature, see Debra Pogrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639, 650–52 (1997) (discussing unfairness and inefficiency of real estate foreclosure laws). Like the USCA, these inefficient state real estate foreclosure laws are notoriously bad at producing values approximating the collateral's reasonably equivalent value. *See* generally Ehrlich, *supra* note 68, at 957–62; Lam, *supra* note 88, at 686; Pendley, *supra* note 96, at 251–52. Many of these critics propose that courts reviewing sales under section 548 use a commercial reasonableness standard similar to Article 9's. *See infra* note 334.

271. Gilmore hoped that a flexible standard of commercial reasonableness allowing the secured party extensive freedom to dispose of the collateral in the manner most suited to obtain a high price would lead to the development of new market channels, in particular private sale forums, which in turn would result in higher prices. Gilmore said in 1952: "The 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." Gilmore, *Article 9*, *supra* note 31, at 7. Gilmore had hoped that private sale's channels would be developed that would improve the poor results under the USCA and public sales. 2 GILMORE, *supra* note 29, § 44.6, at 1245–46. Comment 1 to section 9-504 states that "[a]lthough public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties." U.C.C. § 9-504 cmt. 1 (1995). *See also* JORDAN ET AL., *supra* note 31, at 288 ("They encouraged the creditor to resell in private sales at market prices."). One of the "underlying purposes and

Second, although Karl Llewellyn's jurisprudential sensibilities as a Legal Realist[272] and his role in drafting the UCC were most keenly reflected in Article 2, Article 9 bears a commercial reasonableness standard similar to Article 2, section 2-706's which governs the resale of goods.[273] Comment 4 to Section 2-706 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.[274]

Some courts reviewing former Article 9 sales looked directly to this comment for guidance and it informs Article 9's reliance on merchant reality to define commercially reasonable sale practices.[275]

---

policies" of the Uniform Commercial Code is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." U.C.C. § 1-102(2)(b) (1995); see *supra* notes 32-34 and accompanying text.

272. *See generally* Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989). Speaking of the Legal Realist movement, he said:

> The 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.

Id. at 170–71; *see also* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 501 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE (1986)) (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). There is now a robust body of literature surrounding Article 2's incorporation strategy. *See generally* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, *in* THE JURISPRUDENTIAL FOUNDATION OF CORPORATE AND COMMERCIAL LAW 193 (Kraus & Walt eds., 2000).

273. 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 (2) 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." U.C.C. § 2-706 (1995).

274. U.C.C. § 2-706 cmt. 4 (1995). And the Official Comment to former section 9-504 cross-refers to section 2-706. U.C.C. § 9-504 cmt. 1 (1995).

275. *See, e.g.*, United States v. Terrey, 554 F.2d 685, 694 (5th Cir. 1977); Old Colony Trust

To begin to understand why the incorporation strategy may create difficulties for the secured party, debtor, trier of fact, and judge (for questions of law) in identifying regular and reasonable business practices, begin with Professor Danzig's observation about Article 2 and Karl Llewellyn's legal realist jurisprudence:

> Article II frequently speaks as though courts should discover the law merchant from a careful, disinterested examination of custom and fact situations. Article II 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."[276]

If the secured party, the debtor, the trier of fact, or the judge cannot find the law, then errors in conducting or assessing a commercially reasonable sale which produces a fair price cannot be far behind. The next section explains why the secured party may experience difficulty in discovering the law of commercially reasonable sales.

B. BARRIERS TO SECURED PARTY IDENTIFICATION, ACCESS, AND IMPLEMENTATION OF PROPER MARKET SALE PROCEDURES

To have normative force, the commercial reasonableness standard *cum* procedures test and its fair price-determining function ideally should not suffer from, or erect before the secured party, barriers to identifying the market and sale procedures best suited to maximize the collateral's price, to accessing this market, and to implementing its sale procedures. Even if one assumes that secured parties intend to maximize the collateral's price and concomitantly to use the most efficient market practices in the relevant business community, secured parties for a variety of reasons may encounter difficulties accomplishing these tasks. As evidence for this proposition, consider these conflicting positions about Article 9's lack of detailed statutory foreclosure sale rules. Some commentators argue that the loosely defined standard of commercial reasonableness is too vague and provides insufficient guidance to the secured party planning a foreclosure sale.[277] But

---

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 v. Eidson, 796 S.W.2d 920, 923 (Mo. Ct. App. 1990).

276. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 626 (1975).

277. Clontz, *supra* note 75, at 371 ("The 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'. . . ."); Goldstein, *supra* note 144, at 186 (discussing uncertainty of planning a foreclosure sale that case law may exacerbate rather

others assert that case law has created adequate details as to proper sale procedures, or at least the factors courts deem relevant to a sale's commercial reasonableness, and planning a foreclosure sale is not a mysterious undertaking[278] or a costly endeavor.[279] Yet the disagreement itself suggests that the incorporation strategy's directive to use the proper market and its regular and reasonable commercial business practices may prove difficult at times.

As further evidence for this proposition, consider cases where the trier of fact has found that a presumptively maximizing secured party (one selling to a disinterested purchaser) used a commercially *unreasonable* sale procedure(s).[280] One might argue that these cases require one to revisit the

---

than alleviate); Harrell, *Consumer Collateral*, *supra* note 121, at 260 (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); Karesh, *supra* note 145, at 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"); Donald J. Rapson, *Who Is Looking Out for the Public Interest? Thoughts About the U.C.C. Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 258–59 (1994) (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 . . . [and] without a guideline as to what that behavior should be, there can be no meaningful criteria for determining the propriety of that behavior"); Zubrow, *supra* note 55, 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, 391–92 (N.C. 1979) (stating that the "concept of commercial reasonableness has been notoriously difficult to define and has therefore been unevenly applied by courts and juries").

278. *See* Heiser & Flemma, *supra* note 53, at 495 ("[T]hrough years of judicial interpretation, the courts have fleshed out Article 9's framework for disposing of collateral in a way that is workable for sales of many types of collateral in may different markets."); Poscover, *supra* note 150 at 246–47; Howard Ruda, *Article 9 Works—How Come?*, 28 LOY. L.A. L. REV. 309, 319 (1994):

> [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.

Id.

279. Ruda, *supra* note 278, at 319 (arguing 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" (citation omitted)).

280. *See, e.g.*, United States v. Conrad Publ'g Co., 589 F.2d 949, 953–55 (8th Cir. 1978); Farmers Equip. Co. v. Miller, 482 S.W.2d 805, 808–10 (Ark. 1972); BVA Credit Corp. v. May, 264 S.E.2d 32, 32–33 (Ga. 1979); Granite Equip. Leasing Corp. v. Marine Dev. Corp., 230 S.E.2d 43,

question of whether in each case the creditor was a maximizer notwithstanding the sale to a disinterested purchaser.[281] Alternatively, one might argue that the court decided these cases wrongly; that in fact the sale was procedurally regular and reasonable.[282] One could also concede these cases were accurately decided and that the secured party had maximization intent, but then one is left to ponder why a maximizing secured party would use a commercially unreasonable sale procedure. The answer may lie in the barriers the incorporation strategy erects before the secured party trying to identify the proper market, access this market, and implement its attendant sale procedures. Ultimately, however, insufficient empirical evidence exists to explain secured parties' and debtors' foreclosure sale planning behavior and to prove that they in fact face the foreclosure sale barriers discussed next. But the following observations seem sensible based on the case law and the literature.

First, 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.[283] In contrast, a bank repossessing and selling non-purchase money equipment may be a nonmerchant secured party where it normally does not sell such collateral type.[284] 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.[285]

779–80 (Ga. Ct. App. 1976); Westgate State Bank v. Clark, 642 P.2d 961, 969–71 (Kan. 1982); De Lay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 243 N.W.2d 745, 750–51 (Neb. 1976); Sec. Sav. Bank, SLA v. Tranchitella, 592 A.2d 284, 287–89 (N.J. Super. Ct. App. Div. 1991); Gen. Elec. Credit Corp. v. Durante Bros. & Sons, Inc., 433 N.Y.S.2d 574, 577 (N.Y. App. Div. 1980); Int'l Paper Credit Corp. v. Columbia Wax Prods. Co., 424 N.Y.S.2d 827, 828–31 (N.Y. Sup. Ct. 1980); Fed. Fin. Co. v. Papadopoulos, 721 A.2d 501, 503–04 (Vt. 1998).

281. So, for example, a secured party may be simply lazy or ignorant in the conduct of the sale even though he sells to a disinterested purchaser.

282. This argument is undertaken in Part III, Section C in the opposite context of cases where a presumptively maximizing secured creditor has conducted a commercially *reasonable* sale that nevertheless yields a seemingly low price. The considerations there discussed are relevant here as well, but for lack of space they are confined to Section C.

283. Professor Gilmore, in the context of an Article 2-314 warranty of merchantability, states that a financier would not be a merchant, while a car dealer would be a merchant. 2 GILMORE, *supra* note 29, § 44.6, at 1239.

284. *Id.*

285. Poscover, *supra* note 150, at 247 ("If 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

Indeed, some commentators and courts acknowledge this handicap by allowing the nonmerchant secured party more leeway in selecting proper sale procedures.[286] But 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 or an attorney,[287] although even here the secured party may stumble in its selection.[288] Where the collateral's value is small relative to the expenses required to conduct a foreclosure sale, the secured party's ability to identify and use what it perceives as the best means of selling the collateral is constrained.[289]

---

collateral for the optimum price."); Schwartz, *supra* note 97, at 131 ("Dealers, 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."); White, *supra* note 101, at 391 (stating that "it is reasonable to suppose that a dealer will do a better job selling the collateral than will a financier").

286. *See* 2 GILMORE, *supra* note 29, § 43.2, 1184 (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"); *see also* Connex Press, Inc. v. Int'l Airmotive, Inc., 436 F. Supp. 51, 56–57 (D.D.C. 1977), *aff'd without op.*, 574 F.2d 636 (holding a secured party with expertise in selling collateral type to a higher standard). Reconsider, for example, the problems discussed in Part I with respect to the proceeds test and selecting a proper legal standard of valuation and fair price and the ongoing litigation about the propriety of "retail price" versus "wholesale price." The procedures test raises a similar question: should the secured party use a wholesale market or a retail market to sell the collateral? In answering the question, courts look to whether the secured party is a merchant dealing in the type of repossessed goods (or otherwise having retail capability) or a non-merchant. *See supra* notes 97–102 and accompanying text.

287. Neither the Code nor courts mandate that a professional auctioneer be used for a public or private auction of repossessed collateral. An otherwise commercially reasonable sale will not necessarily be unreasonable for lack of a professional auctioneer. However, employing an experienced, professional auctioneer can be an important factor in determining the commercial reasonableness of the sale. *See, e.g.*, United States v. Conrad Publ'g Co., 589 F.2d 949, 952 (8th Cir. 1978) (finding commercial unreasonableness in part due to inexperience of auctioneer); Auer v. Equibank (*In re* Auer), 103 B.R. 700, 703 (Bankr. W.D. Pa. 1989) (critiquing the arrangements for the auction); Am. State Bank v. Hewson, 411 N.W.2d 57, 64 (N.D. 1987) (mentioning a licensed auctioneer); Huntington Nat'l Bank v. Elkins, 559 N.E.2d 456, 458 (Ohio 1990) (noting that Huntington used a commercially recognized auction company); *cf.* Wainwright Bank & Trust Co. v. Railroadmens Fed. Sav. & Loan Ass'n, 806 F.2d 146, 152–53 (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. Callihan, 624 F.2d 562, 568 (5th Cir. 1980).

288. *See Conrad Publ'g*, 589 F.2d at 952.

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

Second, identifying actual sale practices used by businesses selling the collateral type presents difficulties where no consensus pertains as to what constitutes "regular" practices in the relevant merchant community. Indeed, the growing body of literature on Article 2's incorporation strategy and its incorporation of business norms (through such standards as "usage of trade" and "reasonableness") questions whether these norms exist or can be identified, even by the merchants governed by these norms.[290] Similarly, the premise that for Article 9 sales there are universally recognized "regular" business practices to be discovered and employed by the secured party may not be correct in all cases.[291]

Third, secured parties for a number of reasons may have difficulty identifying commercial practices best suited to maximize the collateral's price in the opposite context: where there are a variety of possible regularly used markets and attendant sale procedures available for the particular type of collateral.

Multiple possible market channels pose difficulties because, where such markets are all regularly used to sell the collateral, the secured party must try to identify and access the one calculated to maximize the collateral's price. Recall that under the efficient market hypothesis, the more efficient a market, the more its price results reflect the collateral's true value. In terms of relative efficiency, a secured party, especially an unsophisticated non-merchant, may experience trouble determining which market is the most efficient for the particular collateral type absent some reliable and relatively cheap data about such markets' comparative efficiencies. For example, consider the secured party's choice of a public sale or a private sale for the collateral. Comment 2 to section 9-610(b) states that the section "encourages private dispositions on the assumption that they frequently will

---

(1999). But given this formula, the value of the collateral (and thus the anticipated sale proceeds) influences the amount of expenses that a secured party should be able to recover out of the sale proceeds. This in turn constrains secured parties legally and practically in repossessing and selling inexpensive collateral. *See* Korybut, *supra* note 76, at 83–84 (arguing that it would be unreasonable for a secured party to incur $10,000 in expenses to sell collateral worth $1000); Letsou, *supra* note 117, at 600 n.32 ("In some cases, the transaction costs of locating the highest valued user of the property seized are so high that the lender elects to sell the seized property to a retailer who can locate the ultimate buyer at a lower cost.").

290. *See* Bernstein, *supra* note 272, at 715 (1999); Richard Craswell, *Do Trade Customs Exist?*, *in* THE JURISPRUDENTIAL FOUNDATION OF CORPORATE AND COMMERCIAL LAW 118 (Kraus & Walt eds., 2000).

291. *See, e.g.*, Primavera Familienstifung 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))); *see also* Korybut, *supra* note 76, at 122–28 (discussing absence of well-founded online business practices, and conflicts between real-world and online practices).

result in higher realization on collateral . . . ."[292] But the secured party cannot rest on this assumption; it must in good faith try to determine which manner of disposal is best suited to maximize the collateral's price.[293] The task is further complicated where there are multiple public sale channels and private sale channels for the particular collateral, such as automobiles.[294]

One retort might be that the absence of data (or affordable access thereto) about the relative efficiencies of multiple possible markets is irrelevant since, if several regularly used markets for repossessed collateral exist, that fact alone indicates that these markets survived evolutionary forces that over time weed out less efficient markets. Thus, either market will do.[295]

---

292. U.C.C. § 9-610 cmt. 2 (1999).

293. FERRIS & GOLDSTEIN, *supra* note 39, § 6.5, at 159–62. *See generally* Zubrow, *supra* note 55, at 471 (discussing the uncertainty of resale given that different property requires different marketing approaches).

294. The following cases catalogue a variety of auto market channels that may be available to a secured party. For cars that are sold at public auction, 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) (finding sale commercially reasonable); Wilkerson Motor Co. v. Johnson, 580 P.2d 505 (Okla. 1978) (finding sale commercially unreasonable).

For cars that are sold at private sales, 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 (1973) (Wis. 1973) (finding sale commercially unreasonable).

For cars that are sold at private dealer-only auctions, 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).

For cars that are sold at retail and wholesale on a dealer's lots, see generally *In re* Britt, 78 B.R. 514 (Bankr. S.D. Ohio 1987) (finding sale from storage facility commercially reasonable); Commercial Credit Corp. v. Lane, 466 F. Supp. 1326 (M.D. Fla. 1979) (finding sale commercially reasonable); *Teeter*, 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).

295. *See* Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 382–83 (1997)

> [I]t 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.

Id.; *see also* Bankers Trust Co. v. J.V. Dowler, 390 N.E.2d 766, 769 (N.Y. 1979) (stating that

But this may not be true. Jody Kraus, for example, argues that although evolutionary market forces can produce more efficient commercial practices, such evolution may not occur and commercial practices may remain less than optimal where it costs less for commercial actors to use existing sub-optimal practices than to individually develop more efficient ones.[296] Extrapolating on this argument, perhaps Professor Gilmore's hope for improvement in traditional marketing channels like public sales may not yet be realized because market evolutionary forces have failed to produce (more) efficient markets for repossessed collateral.[297] Thus, the secured party herself, or in consultation with an expert (assuming one is affordable), *ex ante* must try to determine which of these multiple market channels maximizes the collateral's price. Absent reliable and relatively cheap data on each market, judging their relative efficiencies may be difficult.[298]

Multiple markets also may pose difficulties where imprecise court opinions make it difficult for the secured party (and courts) to determine the appropriate market sale practices to be used. Consider, for example, that the incorporation strategy directs secured parties to use regular business practices to sell the collateral. A central question for every secured party and court should be whether the secured party should use the sale practices of businesses selling repossessed collateral versus those selling the same, non-repossessed collateral. Some courts find fault with a secured party's use of a distress sale market where a non-distress market was available, such as where the collateral is expensive and thus will support the time and cost of selling it in a non-distress market.[299] But generally, courts use sweeping language that makes it difficult to decipher when a secured party may permissibly look to repossession sale practices.[300] For lack of space, the Article does not seek

---

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").

296. Kraus, *supra* note 295, at 383, 405–08.

297. Gail Hillebrand has mused 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 by non-dealers is due not to improper sale procedures but custom. Hillebrand, *supra* note 120, at 207. *But see* White, *supra* note 101, at 410 (arguing for the assumption that some car repossession sales are efficient); *cf.* Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1697–98 (1996) (discussing the evolution of efficient norms).

298. Pre-sale appraisals by experts provide some data that is useful for monitoring sale-specific performances. *See infra* notes 336, 381-86 and accompanying text. But use of secondary source evidence of value and fair price is subject to the doctrinal, valuation techniques and competing policy problems discussed in Part I. Thus, the data may not be accurate.

299. *See, e.g.*, Chavers v. Frazier (*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. 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 (N.Y. App. Div. 1983); Sumner v. Extebank, 452 N.Y.S.2d 873, 875 (N.Y. App. Div. 1982).

300. For opinions supporting the view that the secured party may use the accepted

to synthesize these cases or articulate the doctrinal and normative reasons to favor one set of practices over the other. The point here is that poorly articulated cases on such a fundamental question create ambiguity about whether and when it is commercially reasonable to use repossession sale practices versus non-repossession sale practices. This makes planning a sale more uncertain and more costly for the secured party.

Fourth, even where a merchant or non-merchant secured party identifies the proper market channel for the collateral, complexity and numerosity of attendant sale procedures may also prove barriers to conducting a commercially reasonable sale. This is especially true for nonmerchant secured parties, or for merchant and nonmerchant parties where the collateral is unique and expensive and thus typically requires

---

commercial practices of a business or dealer not necessarily engaged in the sale of repossessed collateral, see Pioneer Bank and Trust Co. v. Mitchell, 467 N.E.2d 1011, 1014 (Ill. App. Ct. 1984) (noting, 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 auto dealers"). For cases suggesting that repossession sale practices are sufficient, see United States v. Terrey, 554 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 practices and usages practice 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); *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"); Jackson County Bank v. Ford Motor Credit Co., 488 F. Supp. 1001, 1011 (M.D. Tenn. 1980) (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), *vacated*, 698 F.2d 1220 (6th Cir. 1982); 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 nonrepossesed 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 supra* notes 162-64 & 171-73 and accompanying texts. *See generally* SHELDON & SABLE, *supra* note 77, at 244 (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").

more extensive efforts to market and sell it.[301] The more complex the sale process and numerous the relevant sale procedures, the more opportunity there is for the secured party to stumble.[302]

Fifth, even assuming regular practices exist at any moment of time that the secured party can afford to identify, possible changes of sale procedures in different jurisdictions and variability over time in the same jurisdiction are issues that need to be considered. Secured parties will have to incur reoccurring costs of discovering the regular practices if one takes seriously the incorporation strategy.

One might argue that precedent and practitioner guidebooks synthesizing the precedent on foreclosure sales ameliorate some of these difficulties. Since Article 9's adoption by the states over 40 years ago, courts have created an ever-growing number of factors that, given the particular sale's circumstances, are relevant to assessing whether "every aspect" of a sale was commercially reasonable. The *Crosby v. Reed* court, for example, derived 17 factors from the case law, including the choice of public or private sale; sale at wholesale or retail price; price realized on foreclosure sale; time of sale; place of sale; solicitation and receipt of bids; publicity for the sale; collateral appraisal; sale with or without repair; familiarity with type of property; secured party's purchase of collateral; and whether the sale was in accordance with reasonable commercial practices.[303]

It is debatable whether the development through case law of judicially recognized factors of commercial reasonableness reduces the difficulties and costs of identifying regular procedures and implementing procedures that realize the maximizing secured party's goal of obtaining a high price. On the one hand, precedentially based sale guidelines can lower the secured party's costs of identifying proper sale procedures by allowing him to forego a sale-by-sale market assessment (or confirmation) of current and existing sale practices. Further, such guidelines based on precedential factors may offer some predictive value as to how a court will react to a sale's procedures, which in turn reduces the possibility of litigation.[304] On the other hand,

---

301. *See, e.g.*, Ford & Vlahos v. ITT Commercial Fin. Corp., 885 P.2d 877, 882 (Cal. 1994) (dealing with foreclosed aircraft).

302. The secured party is typically required, for example, to conduct a high degree of due diligence and take greater efforts to sell a repossessed airplane. *Id.* at 883–86.

303. *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 (E.D. Ark. 1993) (identifying 5 factors); Conn. Bank & Trust Co. v. Incendy, 540 A.2d 32, 39 (Conn. 1988) (identifying 7 factors); Westgate State Bank v. Clark, 642 P.2d 961, 970–71 (Kan. 1982) (identifying 9 factors); Union Nat'l Bank v. Schmitz, 853 P.2d 1180, 1186 (Kan. Ct. App. 1993) (identifying 9 factors).

304. *See* Karesh, *supra* note 145, at 13 ("Because 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."); *cf.* Jack F. Williams, *Debunking the Myth Engulfing Article 9 Collateral Dispositions*, 9 AM. BANKR. INST. L. REV.

unless she has ready access to cheap and understandable sale guidebooks, the secured party may need to incur the costs of an expert to navigate the precedent (e.g., a lawyer) and plan the sale. Where the secured party (or expert) uses precedentially derived sale practices rather than current merchant reality, precedent can lock-in antiquated or inefficient practices. Conversely, if a secured creditor (or expert) relies on precedent to plan a sale, but the reviewing court instead considers *ex post* expert testimony about merchant reality that contradicts the precedent's suggested sale procedures, precedent's predictive value is undermined and the secured creditor's costs are raised. Finally, precedent in some areas (e.g., distress market versus non-distress market choice) is not clear, even for an expert. Precedent then becomes not an aid but an obstacle to a maximizing secured party's ability to conduct a procedurally regular sale that fetches a high price.[305]

A final "barrier" to the secured party identifying, accessing, and implementing the optimal market and its sale procedures is not a true barrier but rather a competing consideration. The secured party's recognized interest in quickly and cheaply selling the collateral to pay down the debtor's debt may limit the lengths to which the good faith secured party must go in conducting a sale.[306] Under a fair balance between this interest and the debtor's concern with obtaining the highest price through maximizing sale procedures, the secured party will not have to take extraordinary steps to identify, access, and implement the optimal sale procedures.

Many of the secured party's difficulties identifying the proper market and its attendant regular and reasonable sale practices also beset the debtor who wants to challenge a sale in the face of a seemingly low price. The debtor must also figure out whether the sale was procedurally regular, and similar barriers will present themselves. Indeed, they may be more difficult since the debtor may have less knowledge than the secured party about the sale process. The debtor, however, may profit from the uncertainty of regular sale procedures since the secured party has the burden of proving procedural regularity and reasonableness. Where the evidence is in equipoise, the secured party will lose.[307] Further, a debtor whose property has been resold may challenge the sale as a means of gaining leverage for negotiating down a deficiency payment or avoiding a deficiency suit altogether even though the debtor has scant evidence of procedural irregularity.[308]

703, 705, 720–31 (2001) (arguing that only four factors are statistically significant in courts' decisions about a sale's commercial reasonableness).

305. These and other arguments are more fully developed in Part III, Section C.

306. *See supra* notes 150–52 and accompanying text.

307. *Cf.* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 455.

308. LOPUCKI & WARREN, *supra* note 161, at 94 (stating that "important disincentives to suing for deficiencies exist, especially against debtors who resist. The U.C.C. standard of a

C. FACT FINDER IDENTIFICATION OF REGULAR AND REASONABLE SALE PROCEDURES

Recall the charges that the non-maximizing secured party may choose the quickest, cheapest, or safest manner of disposition, may act collusively with buyers, may select less efficient sale practices than it would if selling its own inventory, or will take advantage of a poorly attended public sale to self-deal. For the debtor to profit from this behavior, *the reviewing court must find the sale commercially reasonable.* In a procedures test jurisdiction, this means that the court must find such non-maximizing secured creditor's behavior non-collusive, procedurally regular and reasonable. Otherwise, the sale will be relegated to the rebuttable presumption rule where the secured party must prove the proceeds' reasonableness through secondary sources of value and fair price or, where applicable, he will be barred from a deficiency altogether under the absolute bar rule. Secured parties not interested in collecting a deficiency or not worried about the debtor suing them for failure to comply with the default rules under Article 9 will not care. But a secured party who hopes not only to engage in non-maximizing behavior but also avoid such liability and collect a deficiency wants to conduct a sale that, predictably, a reviewing court will find procedurally regular, reasonable, and non-collusive.

The normative force of the commercial reasonableness standard *cum* procedures test thus also rests on the assumption that the trier of fact will be able to identify collusive, irregular, and unreasonable sale procedures. But these tasks may prove difficult. That courts encounter problems identifying irregular and unreasonable business procedures is suggested by cases where a presumptively maximizing secured party (one selling to a disinterested purchaser) conducted a non-collusive, procedurally regular sale; then the debtor asserted that the price was unreasonably low, and yet the sale was found to be commercially reasonable.[309] A possible explanation for some of these cases is that they were decided correctly; the sales were procedurally regular and reasonable, but the debtor's low price evidence was inaccurate for the reasons discussed in Part I. Alternatively, some of these cases might be explained by arguing that they were decided wrongly—that in fact the sale was procedurally irregular but the court did not catch the flaw. One might also argue that the trier of fact was correct as to procedural regularity, but incorrectly found (or overlooked) that the market process was

---

'commercially reasonable sale' is so vague that such a debtor can nearly always find something to complain about"); Gilmore, *Article 9*, *supra* note 31, at 8 (warning of the danger of debtor "strike suits alleging unfairness where there has been none"); Karesh, *supra* note 145, at 13.

309. *See generally* Credit Alliance Corp. v. Cornelius & Rush Coal Co., 508 F. Supp. 63, 66 (N.D. Ala. 1980); United States v. Gore, 437 F. Supp. 344, 348 (E.D. Pa. 1977); *In re* Nellis, 22 UCC Rep. Serv. (CBC) 1318 (Bankr. E.D. Pa. 1977); Ryder v. Bank of Hickory Hills, 612 N.E.2d 19, 23 (Ill. App. Ct. 1993); Hall v. Owen County State Bank, 370 N.E.2d 918, 930–33 (Ind. Ct. App. 1977); Jefferson Bank & Trust Co. v. Horst, 599 S.W.2d 201, 203–04 (Mo. Ct. App. 1980); Bus. Fin. Co. v. Red Barn, Inc. 517 P.2d 383, 386 (Mont. 1973).

unreasonable which resulted in the low price. From the perspective of the incorporation strategy and its directive to the trier of fact to explore merchant reality to find the law of commercial reasonableness, Section C discusses reasons why triers of fact may face difficulties identifying both irregular and unreasonable markets and attendant sale practices.

1. Difficulty Identifying Irregular Sale Procedures

Judges or juries can erroneously conclude that the secured party's sale procedures were regular (commercially reasonable)[310] for a variety of reasons. First, although many courts do follow the incorporation strategy's directive to inquire about, and require evidence of, regular sale practices,[311] some courts do not consult expert testimony or even precedent and instead substitute their own judgments about the regularity of such practices.[312]

---

310. Coles-Bjerre, *supra* note 216, at 359 (observing in passing that with respect to assessing a sale's commercial reasonableness, "courts' fact-finding is, of course, subject to human error. The debtor may fail to detect a flaw that exists in the secured party's showing, or the court may simply make a wrong judgment about whether the secured party's showing satisfies the burden."). *But see* Heiser & Flemma, *supra* note 53, at 496 ("A review of existing case law demonstrates that judicial interpretations of the commercial reasonableness standard address and remedy the types of improper sales practices complained of by the Consumer Debtor Advocates.").

311. *See, e.g.*, Walls v. Gen. Motors Acceptance Corp., 602 So. 2d 414, 417 (Ala. Civ. App. 1992) (finding sale of truck was not commercially unreasonable in part because no evidence of what constituted reasonable commercial practices or the usual manner of sale for repossessed vehicles was presented); Farmers Equip. Co. v. Miller, 482 S.W.2d 805, 810 (Ark. 1972) (finding sale of bulldozer commercially unreasonable in part because of total absence of evidence about normal commercial practices in sale of such collateral); Sec. Sav. Bank v. Tranchitella, 592 A.2d 284, 287–89 (N.J. Super. Ct. App. Div. 1991) (finding sale of flatbed tow truck commercially unreasonable in part because of total absence of evidence about normal commercial practices in sale of such collateral).

312. *See, e.g.*, C.I.T. Corp v. Lee Pontiac, Inc., 513 F.2d 207, 209–10 (9th Cir. 1975) (affirming the lower court's finding of commercial reasonableness of a public sale of airplane, the appellate court did not discuss any expert testimony concerning actual business practices used to sell similar airplanes); Credit Alliance Corp. v. Cornelius & Rush Coal Co., 508 F. Supp. 63, 66–68 (D. Ala. 1980) (stating that primary focus of commercial reasonableness were procedures employed, appellate court held that a public sale of an oil rig to the highest bidder for $25,000 was commercially reasonable, and upheld a deficiency of $44,008.31, yet apparently omitted any inquiry or expert testimony about actual business practices of selling this type of equipment); *Gore*, 437 F. Supp. at 348 (finding public sale's advertising, notification, and manner were commercially reasonable without any apparent reference to expert testimony or judicial precedent); *Bank of Hickory Hills*, 612 N.E.2d at 23 (finding public sale of collateral that realized 46% of "actual market value" was commercially reasonable yet not questioning any of the sale's procedures); *Owen County State Bank*, 370 N.E.2d at 930–33 (finding sale of tractor and trailers to third-party dealer for $25,000 was non-collusive, in good faith, and procedurally regular, that the price reflected the value of the collateral, and that the debtor was liable for the deficiency, yet the court apparently found persuasive testimony as to collateral's value while apparently not questioning whether the sale by the creditor to a dealer who happened to come across the collateral was a normal business manner for disposing of the collateral); *Jefferson Bank & Trust Co*, 599 S.W.2d at 204 (finding private sale of mobile home was commercially reasonable without any apparent inquiry or expert testimony about actual business practices of

Others call conformity with commercial practices a "factor" of commercial reasonableness.[313] But this misconstrues the incorporation strategy. It is not a factor like advertising or place of sale. Rather, those factors' regularity is measured against the merchant reality of the relevant industry. The incorporation strategy requires this comparison; it is a "procedural directive" to the assessment of, not a factor of, commercial reasonableness.[314]

This underemployment of the incorporation strategy can lead to poor decision-making.[315] Judges or juries may possess some personal expertise in

---

selling this type of equipment and with a single citation to one case); Wirth v. Heavey, 508 S.W.2d 263, 269 (Mo. Ct. App. 1974) (omitting any apparent inquiry or expert testimony about actual business practices of selling the type of equipment); *Bus. Fin. Co.*, 517 P.2d at 386 (finding private sale of equipment to disinterested third party purchaser was commercially reasonable without any apparent discussion about actual business practices of selling this type of equipment or use of expert testimony or judicial precedent). Many of these cases are from appellate courts. It is possible that these courts, in their respective opinions, did not review expert testimony or precedent concerning regular sale procedures that had been introduced as evidence at trial.

313. *See, e.g., In re* Crosby, 176 B.R. 189, 195–96 (B.A.P. 9th Cir. 1994); Marks v. Powell, 162 B.R. 820, 829 (E.D. Ark. 1993); Conn. Bank & Trust Co. v. Incendy, 540 A.2d 32, 39 (Conn. 1988); Westgate State Bank v. Clark, 642 P.2d 961, 969–70 (Kan. 1982); Gen. Motors Acceptance Corp. v. Middleton, 16 U.C.C. Rep. Serv. 2d (CBC) 258, 263 (Tenn. Ct. App. 1991).

314. *See* Allan R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275, 318 (1998) ("'Custom,' the 'law merchant,' 'good faith,' and 'reasonableness' were not terms of substantive law, but procedural directives, indications to a court that it should refer its decision to lay specialists with a feel for commercial law." (internal citations omitted)). A recent empirical study of 184 repossession cases concluded that although courts ostensibly review all of a sale's aspects, courts statistically give four factors—secured party self-dealing, conformity with sale procedures agreed upon ex ante by the secured party and the debtor, notice of the sale, and the price—the greatest weight in deciding a sale's commercial reasonableness. *See* Williams, *supra* note 304, at 705, 720–31.

315. *In re* Nellis, 22 U.C.C. Rep. Serv. (CBC) 1318, 1318 (Bankr. E.D. Pa. 1977). At a private foreclosure sale, the secured party sold to a third-party purchaser the debtor's inventory of marine goods and hardware. The sale price was $15,000 for collateral that the debtor argued was worth $97,000 at wholesale. *Id.* at 1321. Although the court found the private sale commercially reasonable, *Id.*, the opinion is riddled with problems stemming from the lack of inquiry into reasonable business practices for disposing of the subject collateral.

The court first correctly stated that the sale's commercial reasonableness primarily should be judged by the procedures employed rather than the amount of proceeds. *Id.* It then rejected the argument that using a private rather than public sale was commercially unreasonable. *Id.* The court correctly observed that section 9-504(3) permitted both types of sales, but that the choice between the two must be commercially reasonable. *Id.* at 1322. Yet in deciding that the secured party's choice of a private bulk sale was reasonable, the court cited no expert testimony or precedent. Rather, the court summarily concluded on its own that given the nature of the collateral, a bulk sale was reasonable. *Id.* This may have been true, but it might not have been. Did this bankruptcy judge have the requisite background in selling marine goods and hardware to draw this conclusion absent any expert testimony or precedent? The court concluded that because the bulk sale was reasonable given the collateral type, it would only be attractive to the limited class of potential buyers consisting of "other marine hardware distributors in the Delaware Valley area." *Id.* Again, the court cited no expert testimony or precedent to support this conclusion. Further, even if a bulk sale to such a limited group was reasonable, the court provided no explanation why a private rather than public sale format was

selling the subject type of collateral or are otherwise perfectly capable decision makers,[316] and thus may not need to rely on either expert testimony or precedent to guide their "exploration" of merchant reality. But especially where sale procedures are non-existent, vague, multiple, complex, or generally unfamiliar to non-merchants, it is likely that even competent judges or jurors will make mistakes absent some help from experts. Without a "merchant jury" envisioned by Karl Llewellyn comprised of experienced merchants with real world knowledge of the relevant sale practices,[317] there is heightened risk of the trier of fact misjudging the regularity of the sale's procedures. Absent expert testimony or consultation of precedent, the trier

---

reasonable. Is this how businesses actually sell repossessed marine goods? The court did state that the sale was a "matter of general knowledge" because of a "fairly efficient network of informal communication among this class of buyers," but this speaks more about the adequacy of advertising the private sale than the question of whether the sale should have been public or not. *Id.* Even here, though, acknowledging this advertising's deficiency, and stating the "the availability of the collateral could have been better advertised," *id.* at 1323, the court did not find this procedural irregularity problematic and concluded that the secured party's decision to use a private sale was commercially reasonable.

The *Nellis* court's shallow opinion then turned to "the commercial reasonableness of the . . . sale itself." *Id.* Here, it noted that price was a "relevant factor" in assessing commercial reasonableness, and that the secured party and the receiver protesting the sale had offered expert testimony as to the price's reasonableness. *Id.* Yet the court said nothing further about this testimony or why (presumably given its holding) it chose to believe the secured party's (presumably) lower valuation. The court then stumbled along with the observation that Miller, the purchaser, was a marine hardware distributor in the region for 33 years, a fact that "is not insignificant to a determination of the commercial reasonableness of the sale." *Id.* Yet the court offered no explanation for why this was significant, or how its significance affected its finding of commercial reasonableness.

Finally, the court noted that although one other local marine dealer had expressed interest in the collateral, Miller made the only offer. *Id.* The court seemed to think that because this other dealer was informed about the collateral's availability and Miller's offer, this was further evidence of the sale's commercial reasonableness. *Id.* Yet the court did not question whether the absence of any other offer was occasioned by unreasonable sale procedures such as lack of adequate advertising. The court then concluded that the sale of the inventory for $15,000 was commercially reasonable. *Id.* at 1325.

316. *See generally* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 593 (2001) (citing a variety of sources for the proposition that "in large measure, criticisms of the jury's performance [e.g. unpredictability, difficulty with complex issues] are not supported by empirical studies of jury performance"); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 422 n.74 (1999) (discussing Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT ASSESSING THE CIVIL JURY SYSTEM 181, 234–35 (Robert E. Litan ed., 1993)). Gergen states that Lempert summarizes "a dozen case studies and conclud[es] that juries did a defensible job in fact-finding in complex cases and that errors were usually attributable to difficulty in understanding instructions or in evaluating conflicting expert testimony." *Id.*

317. *See* Kamp, *supra* note 314, at 318 (describing how the lack of a merchant jury to determine such terms as "commercially reasonable" has left the task to judges and juries who have had difficulty in this endeavor); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 173 (1987).

of fact's exploration of merchant reality is difficult.[318]

Second, even if judges or juries follow the incorporation's strategy's directive to explore merchant reality as to procedural regularity, the trier of fact must rely on expert testimony or precedent about what the proper sale procedures should have been followed and compare those against the procedures used in the challenged sale. Like secondary source evidence of value and fair price, these sources of information are secondary and present their own doctrinal and evidentiary problems with respect to identifying irregular sale procedures by which to judge the sale's commercial reasonableness.

With respect to experts, the secured party or his expert in court will argue that the sale's practices conformed to those used normally to sell the collateral. The debtor will trot out his own expert who unfailingly will opine

---

318. *See* Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 447 (1997) stating in the context of Article 2 that:

> [c]ommercial reasonableness . . . depends on the juror's ability to place herself in the position of a "man-in-the-trade" . . . . That requires the use of expert witnesses who would testify as to the standards of conduct in the relevant trade, thus equipping the juror with the knowledge that would enable her to pretend to be a "man-in-the-trade" in that trade.

Id.; *see also id.* at 450 (stating in the context of Article 2 that "the drafters' use of commercial reasonableness signals to the courts that both the courts and the juries lack the expertise to handle certain mercantile facts, that resolution of disputes arising from those provisions which contain the commercial reasonableness standard requires 'special merchants' knowledge rather than general knowledge"). Although Abyad argues that courts hearing Article 2 cases should follow the lead of courts hearing Article 9 cases, which she claims more frequently use expert testimony, she offers no empirical data by which to judge the frequency with which these latter courts do consult expert testimony.

For another case where errors may have occurred due to lack of expert testimony about proper sale procedures, see United States v. Champion Sprayer Co., 500 F. Supp. 708, 710 (E.D. Mich. 1980). At a public sale of spraying equipment, the collateral fetched $25,245.65, resulting in a large deficiency. *Id.* The debtor alleged that the market price for the collateral was $43,835 more than the sale amount and that a private sale or a public sale among people in the sprayer business would have yielded a higher price. *Id.* In holding that that the sale was commercially reasonable, the court made several errors. First, it concluded that the sale was made in a recognized market, thus evoking the language of section 9-507(2). *Id.* But an overwhelming quantity of precedent contradicts the court's analysis in *Champion Sprayer*, albeit even here precedent should not be followed blindly. *See* FERRIS & GOLDSTEIN, *supra* note 39, § 8.2, at 204–06. The court, however, may have meant only that the sale conformed to actual business practices in selling the subject type collateral, but no testimony from any expert nor any precedent was cited in the court's opinion to support this conclusion. Thus, the court did not address such rudimentary questions as whether businesses normally sold sprayers using private rather than public sales, and whether advertising typically would include not only the 500 circulars and two local newspapers as used by the secured party, but also trade magazines targeting prospective purchasers of sprayers. *Champion Sprayer*, 500 F. Supp. at 710. Indeed, media with a geographically broad exposure such as newspapers with national circulation, and media with defined audiences such as trade journals and mailing lists, are appropriate for less common, unique, or more expensive goods for which there is a distinct, limited, and perhaps geographically dispersed audience. FERRIS & GOLDSTEIN, *supra* note 39, § 6.10, at 172–73.

that the secured party's expert is wrong, and instead these other, better practices should have been used to maximize the proceeds. Thus the familiar battle of the experts.[319] Besides the obvious bias that each expert may have towards his client, these differences of opinion may be due to non-existent, vague, multiple, or complex sales procedures and the problems of identifying "regular" business practices discussed above in Section B.[320]

Several problems inhere in the fact finder's reliance on precedent to identify regular sale procedures. First, precedent works effectively only when it reflects actual merchant practices. Yet, merchant sale practices captured in the precedent may be superceded and become obsolete.[321] Where the precedent does not reflect current merchant practices, and the reviewing court does not consult expert testimony, a sale that in fact does comply with current practices will be judged unreasonable according to the precedent. If that opinion is published, the erroneous market practice is perpetuated as a standard of commercial reasonableness. This problem diminishes for sales of collateral whose market practices do not vary greatly over time. But for developing or rapidly changing markets, such as technology-driven markets like Internet auctions, this problem may occur. Recall that the vague commercial reasonableness standard is meant to allow the incorporation of new business practices. This policy may be undermined by precedent's straight-jacketing effect.

---

319. *See, e.g.*, Chrysler Credit Corp. v. B.J.M. Jr., Inc., 834 F. Supp. 813, 835 (E.D. Pa. 1993); Farmers & Merchs. Bank v. Dyersburg Prod. Credit Ass'n, 728 S.W.2d 10, 17–18 (Tenn. Ct. App. 1986); ITT Commercial Fin. Corp. v. Riehn, 796 S.W.2d 248, 250 (Tex. App. 1990).

320. Speaking of Hiram Thomas's involvement in the original Article 9 drafting process, Professor Kamp has said that Thomas:

> [Q]uestioned the basis of Llewellyn's faith in the impartial expert, stating that in real life one could get an expert to testify as to anything . . . .
>
> . . . Thomas said, "[y]ou come to cross-examine a witness who testifies to a [trade] usage and very often there is no usage. He believes there is because in his particular firm they follow it, but when the evidence is all in, there isn't any usage." Here Thomas was striking at the core belief of the Realist faith; the belief that there was an objective reality that could be readily ascertained. If experts could be found to testify to anything, then the use of merchants tribunals to fix trade custom would be futile.

Kamp, *supra* note 314, at 317.

321. *See* Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 817 (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); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 413 (1985); David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 630 (2001). *But see* Wiseman, *supra* note 272, at 513–15 (reporting that Llewellyn's merchant tribunal's "decisions would have 'no precedent building character,' . . . It is true that by depriving the panel's decisions of precedential value, the starkest conflicts of interest may be eliminated, but they are eliminated at the cost of diminishing the positive use of merchant tribunal decisions as a basis for planning, for certainty, and for friendly law.").

Second, precedent may not reflect actual merchant practices for another reason. The previous example assumed that the practices captured in the original precedent were at one time correct. But even at the time of the precedent's creation, the business practices blessed by a court may not reflect the actual business practices used by reasonable business persons selling the subject collateral. As discussed, in identifying regular market practices, some courts rely solely on their lay understanding of the proper business practices; they consult neither expert testimony nor precedent. Because courts and juries may not (and probably do not in most cases) have the requisite business background to make such judgments, this approach seems ripe for mistake. When that mistake is published as precedent, it perpetuates itself.

Finally, there is a double-filter problem. In search of a predictably safe sale process, a secured party may use precedential guidelines. Yet, where new sale procedures supercede those reflected in precedent, and the reviewing court consults expert testimony which reveals these new sale practices, the court may find the sale commercially unreasonable. To the extent the commercial reasonableness standard is supposed to allow foreclosure sale procedures to keep pace with developing commercial practices, this outcome seems correct.

2. Difficulty Identifying Unreasonable Sale Procedures

Under Article 9, it is not enough that procedures are regular; they must also be reasonable. The central difficulty here is deciding the criteria for judging sale practices reasonable and unreasonable. Article 9 provides no guidance. Indeed, Professor Danzig criticized the incorporation strategy under Article 2 for abandoning itself to the morality of the marketplace.[322] Professor Gilmore, however, provides the example of fraudulent or collusive dealer practices that, even if regularly used in the market place, would be commercially unreasonable.[323] Thus, under the procedures test, the sale must not only be procedurally regular, but also non-collusive, and courts (in all jurisdictions) will strike down secured party fraud, collusion, and self-dealing.[324]

---

322. Danzig, *supra* note 276, at 627–30.

323. 2 GILMORE, *supra* note 29, § 44.5, at 1237 (using the example of a fraudulent car dealer auction, stating that "[s]ale through such an auction would not be commercially reasonable even if every dealer in town participated in the fraud. The ultimate decision as to the reasonableness of the 'practice among dealers' is, of necessity, left to the courts.").

324. *See* Hoch v. Ellis, 627 P.2d 1060, 1065–66 (Alaska 1981) (using close scrutiny, finding self-dealing in sale to an ostensible independent third party); Caterpillar Fin. Servs. Corp. v. Wells, 651 A.2d 507, 521–22 (N.J. Super. Ct. Law Div. 1994) (finding sale commercially unreasonable in part because secured party had sold collateral to a sister company which triggered the court's close scrutiny); *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.5, at 185 (discussing secured party's purchase of the collateral); Williams, *supra* note 304, at 718, 720

The trier of fact, however, may encounter difficulty identifying collusive or fraudulent behavior.[325] For example, a purchaser may be related to the secured party but this relationship is not disclosed or apparent. Even if discovered, the affiliation may not be prohibited under revised Article 9's definition of a "party related to" the secured party.[326] Even if these dealers regularly conduct business dealings with the secured party, these dealers are not "related to" the secured party unless there is common ownership or family relationship.[327] Where the court fails to inquire into the secured party's relationship with the buyer, or is unable to detect collusion or fraud, courts under the procedures test may find sales commercially reasonable even where the price appears to be low.[328]

(stating that self-dealing is one of four statistically significant indicia of commercial unreasonableness).

325. *See generally* McMahon, *supra* note 159, at 65 (describing cozy business practices between dealers and financiers); Shuchman, *Archival Study*, *supra* note 101, at 39 (describing "favors" that dealers trade amongst themselves with respect to repossessed cars and their resale). *But see* Schwartz, *supra* note 97, at 132–39 (arguing against the existence of cartels). Although Professor Schwartz argues against the existence of cartels, he does concede that their existence is an empirical question, and that "[s]uccessful cartels seldom are revealed by academic inquiry . . . . [H]ard evidence of the existence of cartels [would be] unusual even if the cartels themselves were common." *Id.* at 133–34. *See also* Heiser & Flemma, *supra* note 53, at 498:

> The FTC also addressed this issue and concluded as follows: When the creditor sells the car to itself or in a "sweetheart" deal, there is an incentive to undervalue it to the extent that recovery on a deficiency is possible. However, the evidence does not indicate that such undervaluations are prevalent, and they frequently violate existing state law.

Id. (citation omitted).

326. U.C.C. § 9-102(62) (1995).

327. *Id.* This issue was discussed during the drafting process. *Report of the Consumer Issues Subcommittee of the UCC Article 9 Drafting Committee*, 50 CONSUMER FIN. L.Q. REP. 332, 334–35 (1996); *see also* Whitford, *supra* note 117, at 995 (discussing problems with buyers who are affiliated with the secured party or who have continuing business relationships, and stating that "many of these below-market sales [studied by Professor Schwartz] may reflect sales to favored buyers").

328. *See, e.g.*, C.I.T. Corp. v. Lee Pontiac, Inc., 513 F.2d 207, 209–10 (9th Cir. 1975) (finding public sale of repossessed airplanes commercially reasonable). In upholding a large deficiency judgment, the court noted that the purchaser was the dealer who the secured party used to conduct the sale, but made no further apparent inquiry into self-dealing. In fact, the court relied on the dealer's own testimony that the valuation of the airplanes was less than the purchase price and rejected a higher valuation made by other witnesses. *Id.*; *see also* Cantrade Private Bank Lausanne Ltd. v. Torresy, 876 F. Supp. 564, 569 (S.D.N.Y. 1995) (finding that the sale was commercially reasonable in part because there were seventeen attendees and active bidding among at least four bidders despite debtor's allegation that the collateral was sold at a public sale to an "affiliate" of the secured party); Lincoln First Bank v. Rhoades, 399 N.Y.S.2d 802, 803 (N.Y. App. Div. 1977) (stating that the debtor should be allowed to submit interrogatories as to method, time, place, and terms of sale, and also to information as to whether there had been any improper relationship between plaintiff and purchaser of home that might have affected the commercial reasonableness of the sale).

Furthermore, multiple public and private market channels may circulate a particular type of collateral regularly and simultaneously (such as automobiles).[329] Where multiple markets and their attendant sale practices are regularly used, courts should examine whether the secured party in good faith tried to identify and select the market best calculated to fetch the highest price. Some courts make an attempt to see if the secured party tried to identify and use the most efficient market reasonably available.[330] Others do not.[331] Some courts simply inquire whether the secured party used a regularly used market channel, but do not consider further whether an alternative, more efficient regularly used market channel was reasonably available and whether the secured party ever considered, or unreasonably rejected, the better market channel.[332] Even where courts do question the

---

329. *See supra* note 294.

330. As discussed *supra*, note 299 and accompanying text, some courts will inquire about the secured party's choice to use a distress market. Similarly, because the secured party can use either a public or private sale, some courts have required the secured party to prove that its choice was commercially reasonable. FERRIS & GOLDSTEIN, *supra* note 39, § 6.5, at 159–60. Finally, *see supra*, notes 97–102 and accompanying text, noting that some courts have inquired about the secured party's choice to use a retail versus a wholesale market. In essence, these courts are asking the secured party facing multiple, regularly used sale fora to prove that it selected the reasonably available forum best calculated to maximize the sale price, which in economic terms means selecting the most efficient market reasonably available to the secured party. *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).

331. *See, e.g.*, In re *Nellis*, discussed *supra* note 315, and *United States v. Champion Sprayer Co.*, discussed *supra* note 318. Courts may not question the manner of the sale where neither party challenged that aspect of the sale. Apart from the possibility that this aspect was not flawed, the debtor might not challenge the market channel because she does not recognize or is unable to determine that it is irregular or unreasonable.

332. *See, e.g., In re* Galligan, 10 B.R. 841, 845 (Bankr. Me. 1981) (holding public sale of 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 sale of 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).

For a court uncomfortable with its own reliance on the incorporation strategy's prevailing trade practices directive, see *In re* Britt, 78 B.R. 514 (Bankr. S.D. Ohio 1987). The secured creditor, a bank, sold a car through its own bidding and sale procedure. The bank advertised the car in the classified section of two local newspapers on the Friday, Saturday, and Sunday prior to the sale. The ad described the car, indicated it would go to the highest bidder, and that potential bidders could inspect the car at a local storage facility and phone their bids into the bank. Testimony indicated that the car had a NADA Blue Book value of $1900 and the highest accepted bid was for $650. Citing precedent, the court found the sale was commercially reasonable because it was made "in keeping with the prevailing trade practices among respectable and responsible business and commercial enterprises engaged in the same or similar business." *Id.* at 515 (citation omitted). But the court then added:

market channels' relative efficiencies, just as with secured parties, one can question courts' ability to differentiate among markets on efficiency grounds absent readily available data about such markets.[333] Thus, courts face the difficult task of identifying regularly used but relatively less efficient markets, and assessing the circumstances under which a secured party who used a less efficient market should be held accountable.

The procedures test and the fair-price determining function undoubtedly entail additional demerits. But those discussed in Part III are certainly ones that affect the validity of the assumption that the secured party can identify, access, and implement regular and reasonable sale procedures to obtain her goal of maximizing the collateral's proceeds, and the assumption that the trier of fact can identify irregular and unreasonable sale procedures.[334]

> [D]espite a finding that the Bank's procedure may technically be within the standard established in *Leasing Service Corporation*, the Court does not wish to endorse the Bank's procedures as an acceptable way of disposing of individual debtors' collateral. The Court believes that the creditor has a duty to establish a reasonable minimum bid requirement for sale of repossessed vehicles, since the current procedure does not have an inherent guarantee of an active bidding market.

Id.

333. 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.

> Car dealers typically sell the majority of their used cars to consumers at retail. Nevertheless, many dealers sell a smaller percentage of their used cars at wholesale auctions. So it is difficult to say in any individual case whether a dealer who sells a repossessed car at wholesale auction has made the same effort in disposing of that car as it makes in selling comparable used cars.
>
> Consequently, debtor 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 pattern holds for other used cars sold by that dealer.

SHELDON & SABLE, *supra* note 77, at 245.

334. With respect to section 548 of the Bankruptcy Code, many commentators critiquing *BFD's*, *Durrett's*, *Madrid's* and *Bundles'* reliance on inefficient state real estate foreclosure laws recommend that courts review such sales under a commercial reasonableness standard. These commentators, however, pay little or no attention to the problems discussed in this Article with respect to both Article 9's procedures test that incorporates market-based sale procedures and Article 9's proceeds test that relies on secondary sources of value and fair price. Yet analyzing these problems under Article 9's commercial reasonableness standard cannot be overlooked

IV. CAREFUL SCRUTINY OF LOW PRICE SALES

For the commercial reasonableness standard *cum* procedures test and the fair-price determining function under the revised Article 9 to have normative force, the problems discussed in Part III should be addressed. Towards this end, Part IV proposes that through careful scrutiny review of low price sales, courts engage in a robust incorporation strategy review of

---

before making such a recommendation. Thus, this Article should be a useful addition to the Bankruptcy literature concerning section 548.

See Ehrlich, *supra* note 68, at 960–61 (arguing that under the *Madrid* test in the real estate foreclosure context the bankruptcy trustee should examine the "state-mandated procedure" to see if it is "intrinsically defective and has caused imperfect market results," but not discussing Article 9 or the problems with the procedures test); Gover & West, *supra* note 68, at 1078–79 (describing case that called for inquiry into whether real estate foreclosure rules were commercially reasonable, but proposing changes only to real estate foreclosure procedures); Henning, *supra* note 180, at 277–78 (discussing application of *Durrett's* seventy percent rule under Article 9 foreclosure procedures which are designed to protect the debtor's interest more than real estate foreclosure rules and criticizing low price sales under Article 9's commercial reasonableness standard, but not explicitly analyzing Article 9's procedures test's reliance on market-based sale procedures); Lam, *supra* note 88, at 689–692 (advocating a commercial reasonableness standard be used under section 548(a)(2), but failing to recognize any of the standard's shortcomings discussed in this Article); Mattingly, *supra* note 80, at 121–24 (proposing the commercial reasonableness standard's use in the context of real estate foreclosure sales; only briefly acknowledging that the secured creditor may face problems identifying selling procedures but not describing the nature of these problems; and also not recognizing that under Article 9, a secured party may purchase the collateral at a public sale and sometimes is permitted to resell the collateral for a profit); Scott Todd Salmonson, *Avoiding a Landmine: A Practitioner's Guide to Disarming The Reasonably Equivalent Value Requirement of Section 548 of the Bankruptcy Code,* 67 ST. JOHN'S L. REV. 959, 969 (1993) (recommending commercial reasonableness standard but not criticizing its flaws reflected in Article 9's conflicting approaches); Sewell, *supra* note 96, at 1030–31 (criticizing the commercial reasonableness standard on other grounds); Sharp, *supra* note 96, at 233 (only criticizing commercial reasonableness standard's application to real estate foreclosure because mortgage holder cannot repossess the real property thus reducing its marketing opportunities); Stark, *supra* note 270, at 683 (arguing for a commercial reasonableness standard to govern judicial real estate foreclosure sales under the assumption that "general procedures can be established that would provide sales to third parties at the fair market value of the property," but only briefly discussing the efficiency of independent auctions forms' sale practices); Catherine M. Stites, *A Palace For a Peppercorn: A Post-*BFP *Proposal to Resurrect Section 548(A)(2)(A),* 73 WASH. U. L.Q. 1747, 1769 (1995) (advocating the commercial reasonableness standard, but not recognizing the problems of its incorporation of business practices); Zinman, *supra* note 68, at 602 (advocating commercial reasonableness standard but providing no criticism of such).

Coming the closest to properly analyzing the limitations of recommending an Article 9 commercial reasonableness standard for section 548 of the Bankruptcy Code review is Professor Coles-Bjerre. But even her criticism of the commercial reasonableness standard *cum* procedures test's problems is qualified and brief. Coles-Bjerre, *supra* note 216, at 368, 380 (arguing that section 9-615(f) of the revised Article 9, like section 548, "implicitly recognizes that the [sale] processes . . . are themselves flawed," but stating that low prices have resulted not from "any shortcoming of process-based approaches generally, but rather the shortcoming of standards as opposed to rules generally . . . "). Coles-Bjerre recommends a rule requiring the use of online auctions to improve the markets for collateral.

merchant reality using expert testimony and appropriate precedent rather than leaving such exploration to their own sensibilities and talents. Yet to counter-act some of the doctrinal and evidentiary problems associated with the incorporation strategy and its reliance on secondary source evidence of merchant reality, low price evidenced through secondary sources of value and fair price should play an important, but limited, role under the courts' careful scrutiny review. Thus, although the specific procedures test problems discussed in Part III might be addressed individually, Part IV takes a different tact and analyzes how price should play a global role in counteracting these problems through careful scrutiny review.

Courts, however, need to be careful about how far they extend price's role in careful scrutiny review. The more vigorous its role in commercial reasonableness review (careful scrutiny review) of a low price sale, the more low price and secondary source evidence of such will encroach upon the primacy of the procedures test, the fair-price determining function, and their reliance on merchant reality to define commercially reasonable sales, and give increasing potency to the doctrinal, valuation technique, and competing policy problems associated with the proceeds test discussed in Part I. Within the constraints of the procedures test's ascendancy under revised Article 9, a proper balance should be the normative goal.

A word of caution before embarking on the analysis: it is in the nature of the loosely defined commercial reasonableness standard to defy precise definition; indeed, to do so would convert the standard into a set of hidebound rules. Rather, based both on the analysis done in Parts I, II, and III of the Article and with guidance (albeit murky) from the careful scrutiny cases discussed below, the balance of Part IV seeks only to establish some general principles to guide courts' careful scrutiny review and their use of low price and secondary source evidence of such therein.[335]

A. *USE OF SECONDARY SOURCE EVIDENCE OF VALUE AND FAIR PRICE*

As a threshold matter, does the ascendancy of the procedures test and the fair-price determining function under the revised Article 9 mean that courts should never consider secondary source evidence of value and fair price in commercial reasonableness review? As much as Judge Easterbrook would like to keep out such evidence from commercial reasonableness review, that is impossible under the revised Article 9 for two reasons. First, the two Official Comments require that there be a determination of a "low price." Until the court determines the collateral's fair price and compares it to the sale price, it cannot say whether or not the sale price is "low" and whether or not its review of the sale should be the stricter "careful scrutiny"

335. As Professor Lloyd has stated, although "[i]t is hard to state abstractly what constitutes a commercially reasonable sale," one can identify "general principles" in the case law. Lloyd, *supra* note 16, at 710.

rather than the presumably less rigorous regular scrutiny. How then does the court determine the collateral's fair price and concomitantly whether there is a "low price?" The questions seem to return one back to the old debate: measure the collateral's value and fair price either through an evaluation only of the sale's procedural regularity and reasonableness or also by evaluating the sale price through secondary sources of value and fair price.

Under the two Official Comments, the former approach does not make sense under the following two-step analysis. As discussed in Part II, Section B, "aspects" cannot include the sale's price, and instead the court must focus its inquiry on the propriety of the sale's statutory requirements (*e.g.*, notice) and incorporated, real-world sale practices. This initial premise leads to the final conclusion that, to determine whether the price is "low," the court must also use secondary sources of value and fair price rather than examine only the sale's procedural regularity and reasonableness. To conclude otherwise creates a tautology. It would be circular to say that in order to determine whether the price is "low" for purposes of triggering careful scrutiny of the sale's procedural regularity and reasonableness, the court must examine only the sale's procedural regularity and reasonableness. Instead, to escape the tautology and the rendering superfluous of the two Official Comment's reference to price, the court must consider secondary sources of value and fair price to determine if the price is "low."

To this argument can be added the argument that secondary source evidence of value and fair price should be allowed to show a low price because through the careful scrutiny review it ushers in, the secondary source evidence will help counteract some of the procedure test's shortcomings discussed in Part III. There are simply too many doctrinal and evidentiary problems associated with the procedures test, the fair-price determining function, and their reliance on the incorporation of merchant reality not to use secondary source evidence of a low price as a counterweight to these problems. Price's role in this endeavor is discussed in Section B.

Finally, despite the doctrinal and valuation technique problems discussed in Part I, *ex ante* secured parties should continue to use presale appraisals to set "let-go" prices for the collateral below which a secured party will not accept offers. Given the procedure test's problems discussed in Part III, pre-sale appraisals should continue to be a tool for the secured party in setting a minimum bid and monitoring the regularity and reasonableness of the sale. That is, in the face of what appears a low price offer for the collateral (or its own bid at a public sale) the secured party should be alerted to a possible procedural flaw and thus carefully scrutinize the sale's procedures.[336] Further, under the incorporation strategy directive, secured

336. *See generally* Fed. Fin. Co. v. Papadopoulos, 721 A.2d 501, 503 (Vt. 1998) (inferring that

parties should conduct presale appraisals and set "let-go" prices where that is the industry custom and practice.[337] In litigation, pre-sale appraisals will be relevant secondary source evidence of value and fair price under both the Official Comments' "low price" determination, and the fair price inquiry under section 9-615(f) and section 9-626(a)'s rebuttable presumption rule.[338]

B. CAREFUL SCRUTINY REVIEW AND LOW PRICE

Section B discusses careful scrutiny review of the sale process and price's role therein. At minimum, the two Official Comments mean that a price proved low through secondary source evidence should alert the court of the possibility of collusive behavior or unreasonable sale process, and thus the court should carefully scrutinize all of the sale's aspects. But once the low price has fulfilled this signaling function, what exactly is the careful scrutiny review it ushers in? Further, should evidence of the low price play a role beyond a mere signaling function in determining whether any aspect(s) of the sale process was unreasonably flawed?

To understand what careful scrutiny of the sale process and price's role therein might look like under the revised Article 9, one could, of course, turn to cases under the former Article 9 using the careful scrutiny approach. In both procedure test jurisdictions and proceeds test jurisdictions some courts employed a careful scrutiny review of a sale triggered by the seemingly low price.[339] As a whole, these cases are remarkably unhelpful in

---

the secured party's reliance on one bid "and its failure to obtain any other independent appraisals, valuations, or bids to establish the market value of the collateral" should trigger careful scrutiny of the sale (citing Hall v. Owen County State Bank, 370 N.E.2d 918, 932 (Ind. Ct. App. 1977))).

337. *See, e.g., In re* Four Star Music Co., 2 B.R. 454, 462–63 (Bankr. M.D. Tenn. 1979) (finding sale commercially unreasonable in part due to absence of an appraisal); Sec. Sav. Bank, SLA v. Tranchitella, 592 A.2d 284, 289 (N.J. Super. Ct. App. Div. 1991) (holding sale commercially unreasonable in part because the secured party "failed to produce reliable evidence that its use of a non-applicable manual to determine the range of market values for a truck of this nature was in conformity with trade practice. A more commercially reasonable approach would have been to obtain an appraisal of the tow truck."); Caterpillar Fin. Servs. Corp. v. Wells, 651 A.2d 507, 520 & 522 (N.J. Super. Ct. Law Div. 1994) (finding sale commercially unreasonable in part due to absence of an appraisal); *see* Shuchman, *Condition and Value, supra* note 101, at 31–32 n.45 (stating that "in practice virtually everyone involved in automobile sales—dealers, financers, and insurance carriers—uses one or more of the guidebooks in day-to-day business").

338. *See* Hoch v. Ellis, 627 P.2d 1060, 1063–64 (Alaska 1981); *cf.* Weise, *supra* note 207, at 11 (stating with respect to section 9-615(f), "[a] secured party should be able to protect itself from this problem (reduction of the deficiency claim under Section 9-615(f)) by bidding in the amount that is at least the 'strike price' that the secured party would credit bid if there were competitive bidding").

339. *See supra* note 61. In a subset of these cases, some courts employing the procedures test and careful scrutiny of a seemingly low price sale stated that the low price alone would not render the sale unreasonable, suggesting that they would hold a low price but procedurally

understanding the nature of careful scrutiny review. They reveal no coherent, consistent articulation or application of careful scrutiny review, how it differs from regular scrutiny review, or what role price plays. Nevertheless, several general observations can be reported about careful scrutiny review under the former Article 9. First, careful scrutiny influenced the scope of judicial review of the sale in some jurisdictions. For some courts, careful scrutiny involved looking broadly at the entire sale process and requiring the secured party to have been especially careful at every stage.[340] For other courts, careful scrutiny meant looking at the sale process broadly, but judging the sale's circumstances in the aggregate rather than in isolation.[341] Some courts said that careful scrutiny involved looking at the sale's procedures.[342] For still other courts, careful scrutiny meant that the secured party had not only to provide evidence that the sale procedures were regular, but also provide an explanation or legitimate reasons for the low price.[343] Second, careful scrutiny review for some courts affected the

---

regular sale commercially reasonable. *See supra* note 62. In contrast, some courts employing a proceeds test and careful scrutiny of the sale stated that a low price alone could render a sale commercially unreasonable. *See supra* note 63. Under the revised Article 9, the latter cases are no longer good law.

340. *See* Commercial Credit Equip. Corp. v. Parsons, 820 S.W.2d 315, 322–23 (Mo. Ct. App. 1991). The court stated:

> The disparity between the $6600 sale price of the Parsons tractor and the $27,000 value assigned to the collateral by the expert opinion is evident. It is a factor important, but not decisive, to commercial reasonableness. The manifest contrast invites scrutiny nevertheless to confirm that the secured party did not neglect the obligations of good faith, diligence, reasonableness and care. § 400.1-102(3). 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.

Id. (citations omitted); *cf.* Voutiritas v. Intercompany Title Co., 664 N.E.2d 170, 179–80 (Ill. App. Ct. 1996) (calling for careful scrutiny of "the sale"); Lincoln First Bank, N.A. v. Salvaterra, 431 N.Y.S.2d 302, 304 (N.Y. City Ct. 1980) (calling for strict scrutiny of "the facts").

341. *See* Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 545 (S.D.N.Y. 2001) (calling for close scrutiny of the aggregate of the circumstances); Assocs. Capital Servs. Corp. v. Riccardi, 454 F. Supp. 832, 834 (D.R.I. 1978) (same).

342. *See* Eagle Bank and Trust Co. v. Dixon, 15 S.W.3d 695, 698 (Ark. Ct. App. 2000) (indicating that "a large discrepancy between the sale price and the fair market value of the collateral signals a need for close scrutiny of the sales procedures"); *accord Primavera Familienstifungn*, 130 F. Supp. 2d at 545; Connex Press, Inc. v. Int'l Airmotive, Inc. 436 F. Supp. 51, 56 (D.D.C. 1977).

343. Walker v. McTague, 737 N.E.2d 404, 410 (Ind. Ct. App. 2000); *cf.* FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 954 (N.Y. App. Div. 1981) (stating that the procedures test has a "narrow exception" that "even where procedural propriety has been observed, a '*wide* discrepancy between the sale price and the value of the collateral signals a need for close

quality or amount of evidence of commercial reasonableness the secured party needed to produce to prevail in trial court or to survive appellate review.[344] Given the analysis in Parts I, II, and III, and these careful scrutiny cases, what should careful scrutiny of the sale process and price's role therein entail under the constraints of the revised Article 9 where procedures are primary, price is not a term of commercial reasonableness, and a low price alone will not upset a procedurally complying sale?

1. Careful Scrutiny as a Robust Incorporation Strategy Inquiry

Careful scrutiny of the sale's aspects should involve a robust adherence to the incorporation strategy. A robust adherence to the incorporation strategy means consulting expert testimony and appropriate precedent to ascertain the relevant market and attendant procedures for disposing of the collateral and carefully comparing them to the market and sale procedures of the contested sale. As discussed, courts at times do not explore merchant reality and rely instead on their own experience. Others, like *Crosby v. Reed,* call conformity with commercial practice a "factor" when instead it is a procedural directive to compare the sale's aspects with the relevant merchant community's.[345] Courts should implement this directive to the fullest extent possible within the cost limitations the litigants may experience with employing an expert.

Careful scrutiny of the sale's procedures should not be limited to a rigid or defined number of court-approved "factors."[346] As the In re *Excello Press, Inc.* court stated, "no magic set of procedures will immunize a sale from scrutiny."[347] Recall that through precedent, courts identified factors that they deem relevant to the sale's commercial reasonableness. The *Crosby v. Reed* court, for example, identified 17 factors.[348] The incorporation strategy's robust inquiry should on a case-by-case basis determine what the relevant market and attendant sale process should have been given the collateral type. From this inquiry the relevant aspects of the sale should emerge. Slavish devotion to precedential factors upsets the incorporation strategy of looking to merchant reality, gives precedent an overly intrusive role, and relegates the procedures test to a formalistic rather than functional application.

Robust incorporation strategy review also demands that courts ask whether, despite the regularity of a market and its sale practices, the secured party tried to use the most efficient reasonably available market. This may be

---

scrutiny'" (quoting *In re* Zsa Zsa, Ltd. 352 F. Supp. 665, 671)). *See infra* notes 408–12 and accompanying text.

344. *See infra* notes 351–55 and accompanying text.

345. *In re* Crosby, 176 B.R. 189, 195–96 (B.A.P. 9th Cir. 1994); see *supra* note 303.

346. Lloyd, *supra* note 238, at 365.

347. *In re* Excello Press, Inc., 890 F.2d 896, 905 (7th Cir. 1989).

348. In re *Crosby,* 176 B.R. at 195–96.

a difficult task.[349] Certainly a court should examine whether the secured party had better alternatives available and should examine his efforts to identify and use them. To the extent that the debtor or her expert can show that the secured party used a business practice that, while regular and not fraudulent, was not the most efficient one reasonably available, the court should at a minimum inquire why the inefficient practice was used.[350] 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 inefficient market. Further, as discussed below, courts should provide the secured party a permissible range of procedural error under a "no harm, no foul" rule where certain procedural errors, even the use of a less efficient market, will not necessarily spell commercial unreasonableness. Finally, of course, in the face of a low price, courts should be keenly sensitive to possible collusive secured party behavior.

2. Sufficient Evidence of Procedural Compliance in Face of Low Price

Not only should the courts engage in a robust exploration of merchant reality under careful scrutiny review where secondary sources of value and fair price suggest a low price, but careful scrutiny should also mean that courts become increasingly vigilant in their scrutiny of the sufficiency of the secured party's evidence of procedural compliance. This careful scrutiny should be inversely proportional to the sale price: the lower the price, the more intense the scrutiny of the sale's procedures and thus the greater the demand for sufficient evidence of procedural compliance.[351]

This approach accords with the path taken by some courts under the former Article 9 where, in the face of an apparently reasonable price, the court would overlook insufficient or scant evidence of procedural irregularity. But where a low price appeared, many courts were increasingly vigilant in requiring the secured party to produce evidence of commercial reasonableness for every aspect of the sale.[352] Thus, for example, in *Havins v.*

---

349. *See supra* notes 329–33 and accompanying text.

350. *See* Goldstein, *supra* note 144, at 181 (advising that the secured party should consult an expert in deciding whether to use a public or private sale).

351. BRAUCHER & RIEGERT, *supra* note 43, at 501.

352. *See* Youngblood Auto. Fin. Servs. v. Youngblood (*In re* Youngblood), 167 B.R. 870, 875 (Bankr. W.D. Tenn. 1994) (involving a secured creditor who attempted to explain a very low price due to vehicles' states of disrepair and the fact that many had been vandalized, the court said that beyond "general sweeping statements," the secured party offered no evidence of the vehicles' conditions such as inspection or condition reports or photos "to give the Court a description of the vehicles prior to the sale"); Marine Midland Bank v. Watkins, 392 N.Y.S.2d 819, 821 (N.Y. Sup. Ct. 1977), stating that:

> When the sale . . . is subjected to close scrutiny, it appears that the sale report indicates that the automobile was in good condition, yet the proceeds obtained less than six months after the initial purchase were only about 55% of the amount

First National Bank of Paducah, the trial court failed to insist that the secured party provide evidence of procedural regularity for important aspects of the low price sale. The appellate court reversed the lower court's finding of commercial reasonableness.[353] "[A]t the very least, and irrespective of what factors [of commercial reasonableness] are considered, the evidence presented at trial must describe the method, manner, time, place and terms of the sale.... In effect, the testimony and documentation presented constitutes *some evidence* of commercial reasonableness, but it is too weak to survive scrutiny under the microscope of factual sufficiency."[354]

Careful scrutiny should mean that with an increasingly low price convincingly evidenced through secondary sources, the court should take an increasingly harder look at whether the secured party produced sufficient evidence of procedural regularity and reasonableness for every aspect of the sale.[355] The aspects for which evidence must be produced will vary from sale to sale, but in each case experts and appropriate precedent about what market and attendant sale procedures should have been used to sell the particular collateral will inform the court about the relevant aspects and the type and sufficiency of evidence needed to prove commercial reasonableness under revised Article 9.

The court's heightened sensitivity to the "factual sufficiency" of the secured party's evidence of procedural regularity should not, however, be pushed too far by what appears to be a low price. The likelihood of certain problems increases the lower the price appears and the more intensified the court's careful scrutiny becomes. These problems are very similar to those more fully discussed below in Sections B.3 and C with respect to an

---

> originally financed. Under these circumstances, the court requires some affirmative showing that the method, manner, time, place and terms of the sale were in fact commercially reasonable.

Id.; *see also* Bank of Okla., N.A. v. Little Judy Indus., Inc., 387 So. 2d 1002, 1004 (Fla. Dist. Ct. App. 1980) ("The fact that the [secured party] made repairs to the plane and listed it for sale and sold it through a broker is not sufficient proof, without more, that the broker in fact sold the plane in a commercially reasonable manner."); Parks Chevrolet, Inc. v. Watkins, 329 S.E.2d 728, 730 (N.C. Ct. App. 1985) (vacating a summary judgment granted because "[t]he burden of proof was on the plaintiff to bring forth evidence in support of every element of its claim. Plaintiff presented little evidence as to the manner of the resale other than its statement that plaintiff sold the automobile to a wholesaler for $1,330.00."); Investors Acceptance Co. v. James Talcott, Inc., 454 S.W.2d 130, 138 (Tenn. Ct. App. 1969) (stating that "[t]he record in this case is astonishingly devoid of details of the steps, if any, taken by the complainant to conduct in good faith, commercially reasonable sales.").

353. Havins v. First Nat'l Bank, 919 S.W.2d 177, 182 (Tex. App. 1996).

354. *Id.* at 181–82 (emphasis in original).

355. *See* Int'l Paper Credit Corp. v. Columbia Wax Products Co., 424 N.Y.S.2d 827, 829 (N.Y. Sup. Ct. 1980) (suggesting that careful scrutiny affects the secured party's burden to affirmatively show that the terms of the sale were "commercially reasonable"); Banker's Trust Co. v. Steenburn, 409 N.Y.S.2d 51, 60–61 (N.Y. Sup. Ct. 1978) (same).

enhanced role for price, and those discussions are thus relevant here.[356] First, given the proceeds test's doctrinal, valuation technique, and competing policy problems,[357] the secondary source evidence of low price may be inaccurate, and the collateral's true value and fair price may in fact be lower than this evidence suggests. Thus, by pushing for increasing "factual sufficiency," courts are tilting at a windmill. Second, pushing the "factual sufficiency" threshold too far because of a very low price risks making price a *de facto* term of commercial reasonableness. At some point, the secured party will have provided sufficient evidence to prove procedural regularity and reasonableness for every sale aspect.[358] What that point is will differ for every sale, but courts should be sensitive to the potential problem.

---

356. See *infra* notes 359-418 and accompanying text.

357. *See supra* notes 86–158 and accompanying text.

358. The question of sufficient evidence of procedural regularity can affect whether the secured party meets its burden of production and its burden of persuasion by a preponderance of the evidence. With respect to the burden of producing sufficient evidence, where the secured party sues the debtor for a deficiency, as the plaintiff he:

> is responsible for "producing" a certain threshold amount of evidence to raise a claim. That threshold is defined as the minimum amount of evidence needed to satisfy the standard or proof and, thus, win the case. Put another way, one has met the burden of production if he has produced enough evidence for a reasonable jury to decide in his favor. Therefore, one can meet the burden of production even if all the evidence produced is refuted by the opposing party.
>
> Meeting the burden of production does not ensure victory—one must still "persuade" the fact finder—but failing to meet it will ensure defeat. If the party charged with the burden of production has failed to adduce enough evidence, a summary judgment motion (prior to trial) or a directed verdict motion (at trial) will be granted. The burden of production must be met for the case to get to the trier of fact.

COUND ET AL., *supra* note 235, at 992.

As to meeting the burden of persuasion, where the secured party brings a deficiency suit, he has the burden of persuading the trier of fact by a preponderance of the evidence that the sale complied. *See supra* note 236.

> If the burden of production is met, the case can move forward to the stage of persuasion. Once there is enough evidence for the plaintiff to win, the defendant will try to cast doubt on the credibility or reliability of that evidence, in addition to bringing forth evidence of his own. Each party will try to persuade the trier of fact that its evidence is more weighty than the other's. If the plaintiff has the burden of persuasion, and does not convince the jury (or judge, in a bench trial) by the standard of proof required, the jury must rule for the defendant. Even if the plaintiff has satisfied the burden of production and the defendant brings forth no evidence of his own, if the jury is not persuaded that the plaintiff's evidence is sufficiently reliable or credible, the defendant must prevail.

COUND ET AL., *supra* note 235, at 992. Increasing the "factual sufficiency" threshold too far may *de facto* increase the secured party's standard of persuasion beyond preponderance of the evidence. *See*, Allen & Hillman, *supra* note 235, at 103. The revised Article 9 Drafting Committee considered and dropped a proposal to elevate the secured party's burden of persuasion to "clear and convincing" for sales to interested purchasers. Rapson, *supra* note 32, at 547 app.

3. Weighing the Effect of an Identified Procedural Error, or the No-Harm, No-Foul Rule

Under the former Article 9 there emerged in the case law and literature a sort of no harm, no foul rule for procedural errors. Generally expressed, the no harm, no foul rule said that there existed an acceptable range of prices that collateral could fetch, and the good faith and diligent secured party's sale should not be rendered commercially unreasonable where the price fell within that range, even if there was a procedural sale flaw. That is, if there was no harm (a fair price), there was no foul (forgiven procedural error). At work here was a mix of polices: Article 9's flexible commercial reasonableness standard which allowed the secured party to chose the sale procedures he in good faith believed would maximize the collateral's price but which also recognized (and thus reflected) his interest in disposing the collateral quickly and cheaply in order to generate proceeds to satisfy the debtor's outstanding debt;[359] the courts' legitimate need to police secured party abuse, fraud and collusive behavior in the sale process;[360] and the idea embodied in former section 9-507(2) that Article 9 asked that the secured party act in good faith and due diligence to maximize the proceeds, not that he actually maximize them.[361] This Subsection considers whether the no harm, no foul rule as articulated and applied under the former Article 9 carries forward into the revised Article 9 and the courts' careful scrutiny review of a low price sale.

To ground the analysis, consider several respected commentators' articulation of the former Article 9's no harm, no foul rule. Professor Lloyd described the "practical effect" of the totality of the circumstances test[362] as allowing the secured party to make a "*minor* error in some aspect of the sale's conduct without necessarily losing his right to a deficiency judgment."[363] Professor Lloyd also stated that "most courts" resolved the tension between sections 9-504(3) and 9-507(2) by holding that, although a

---

(reprinting Memorandum to the Article 9 Drafting Committee, Advisers, and Observers from Steven L. Harris and Charles W. Mooney, Jr., Reporters (October 10, 1996)).

359. *See supra* notes 146–52 and accompanying text.

360. *See supra* notes 35–36 and accompanying text.

361. *See supra* notes 154–55 and accompanying text.

362. *See supra* note 58; *see also, e.g., In re* Zsa Zsa Ltd., 352 F. Supp. 665, 670 (Bankr. S.D.N.Y. 1972):

> It is the aggregate circumstances in each case—rather than specific details of the sale taken in isolation—that should be emphasized in a review of the sale. The facets of manner, method, time, place and terms cited by the Code are to be viewed as necessary and interrelated parts of the whole transaction.

Id., *aff'd*, 475 F.2d 1393 (2d Cir. 1973); Tinney, *supra* note 27, at 316 (stating that aggregate circumstances test is the majority practice).

363. Lloyd, *supra* note 16, at 710–11 (emphasis added).

low price alone did not render a sale commercially unreasonable, it triggered careful scrutiny:

> Consequently errors that would be overlooked in a sale where the collateral brings a fair price will not be tolerated where the price is unusually low. On the other hand, where the secured party clearly has made all reasonable efforts to obtain the best possible price and has committed no *major* errors, these courts have held the sale to be commercially reasonable in spite of a seemingly low price.[364]

Professor Lloyd's articulation generally accords with other commentators.[365]

White and Summers in essence argue that low price under the former Article 9's no harm, no foul rule played a significant role in characterizing a procedural error as minor or major. They observe,

> What if there is a low price in combination with resale procedures that are themselves only questionable or marginally in compliance? We see much evidence in the cases that this combination usually spells commercial unreasonableness, too. Indeed, we think that judges, when faced with this combination, may characterize procedures as noncomplying although they would not so characterize them if the price realized were higher. This seems especially true where the price realized was very low.[366]

---

364. *Id.* at 711 (emphasis added).

365. See BRAUCHER & RIEGERT, *supra* note 43, at 501, stating that:

> When hindsight proves that the secured party obtained a satisfactory price, courts hesitate to criticize his procedures. In such circumstances, it is difficult to prove damages.
>
> When, however, the price is inadequate, courts are likely to scrutinize the sale with care; the lower the price, the more careful the examination.

Id.; Leona M. Hudak & Roger Turnbull, *The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral Under the UCC*, 4 W. ST. U. L. REV. 22, 26–27 (1976):

> The process of evaluating commercial reasonableness initially involves an assessment of the individual elements of the disposition. These items include 'the method, manner, time, place and terms' of the resale. Disputes arise over the importance to be attached to each of these elements. While some courts demand that every aspect of the sale be performed in a commercially reasonable way, others put more emphasis on a collective evaluation. The latter, finding substantial compliance with the standard of reasonableness, will award a deficiency judgment even though one particular aspect might have been questionable.

Id.; Tinney, *supra* note 27, at 320.

366. WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 455. Other commentators have suggested that courts were afraid of the difficulties of valuing collateral and thus instead held secured parties strictly liable for procedural violations. ALAN SCHWARTZ & ROBERT E. SCOTT, COMMERCIAL TRANSACTIONS 971 (2d ed. 1991), stating that:

> [Section 9-507(2)'s better price directive] combined with the difficulty of establishing the collateral's "real" value has caused many courts to shy away from

That is, where the price was seemingly fair, the procedural error was characterized as minor (or forgiven). But, where the price was seemingly unfair, the same procedural error was characterized as major (or unforgiven).

Revised section 9-627 employs language sufficiently similar to former section 9-507(2) to argue that, as a statutory matter, the no harm, no foul rule should continue. But as articulated, the rule's reliance on determining whether the sale price is within an acceptable range of prices (no harm), and the consequent forgiving of procedural errors (no foul, at least minor errors for Professor Lloyd) is problematic for several reasons under the revised Article 9. To explore these problems, a hypothetical is useful. What happens if, after dueling expert testimony about merchant reality, the triers of fact conclude that a minor error occurred (e.g., 13 days advertising before the sale rather than the normal two weeks), but the sale price evidenced by secondary sources of value and fair price appears to be outside of the acceptable price range? Should the court grant deference to the low price evidence to recharacterize the procedural error as major, and thus the sale fails the revised Article 9's commercial reasonableness standard *cum* procedures test? The answer is no, for several reasons.

First, given the doctrinal, valuation technique and competing policy problems discussed in Part I, the secondary source evidence of low price may be inaccurate, and the collateral's true value and fair price in fact may be lower than this evidence suggests. Thus, the "major error" measured by the "low price" is in fact less major and more minor. Second, recharacterizing a minor error as a major error based on the low price evidence *de facto* makes price a term of commercial reasonableness if under a procedures test a major error equals commercial unreasonableness. This outcome certainly runs afoul of the procedures test's ascendancy under the revised Article 9. Third, the practice of recharacterizing minor errors as major errors retards judges' normative goal of writing transparent opinions. The no harm, no foul rule in which price plays this role raises the possibility that a court that followed the proceeds test under the former Article 9 and is displeased with the turn towards the procedures test may try to evade the procedures test and its prohibition that low price alone cannot render a sale commercially unreasonable. This result occurs simply by recharacterizing the slimmest of procedural irregularities as a major procedural error in the face of a low price. If published, such a case would work mischief both on secured parties and debtors planning foreclosure sales and courts reviewing them. Fourth,

---

finding a violation of section 9-507 from too low a price alone. Rather, where plausible evidence of too low a price exists, courts apparently respond to this evidence by holding the creditor to strict compliance with Article 9's procedural requirements.

Id.

the no harm, no foul rule driven by a low price can work against the debtor. What happens when the price appears fair, but there is a major procedural error identified through expert testimony about merchant reality? If price characterizes what constitutes a major or minor procedural error, this major error may be recharacterized as a minor error and the sale will be found commercially reasonable. Critics of the proceeds test focus on the possibility of unrealistic and inaccurate high valuations and fair prices upsetting procedurally regular sales, but it is also possible that valuations and estimates of fair price through secondary sources might be inaccurately low.[367] Thus, the identified major procedural error in fact may have resulted in a low price, but the fair price evidence (believed by the trier of fact) was inaccurate for the reasons discussed in Part I.[368] Further, had the major procedural error not occurred, the price might have been higher, perhaps even resulting in a surplus to which the debtor is entitled and the realization of which most commentators believe the secured party will lack incentive.[369]

Alternatively, under the revised Article 9, the no harm, no foul rule could be driven by an exploration of procedural merchant reality. In this context, no harm (minor identified procedural error) means no foul (minor error forgiven). Critics will argue that such a rule would create its own problems. First, assume, for example, a sale whose price appears fair as evidenced by secondary sources of value and fair price. Because there is no "low price" under the Official Comments, the court will not apply careful scrutiny but rather regular scrutiny of the sale's aspects, and whether the sale process was flawed may never be seriously considered by the court. This is unfair to the debtor where the price is in fact low due to flawed secondary source evidence of value and fair price. Second, continuing the example, if under regular scrutiny the trier of fact finds a major procedural error, the sale would be considered commercially unreasonable even though the

---

367. White and Summers report cases where, notwithstanding a demonstrably flawed procedure, the sale apparently yielded a high price as measured by secondary sources of value and fair price. *See* WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 454. *See, e.g.*, Knierim v. First State Bank, 488 N.W.2d 454, 458 (Iowa Ct. App. 1992). The court held that despite poor advertising and other flaws, the sale was commercially reasonable since the price through expert testimony appeared to be at or more than the collateral's fair market value. But this expert testimony might have been wrong, and the price may have been higher with proper advertising. *See also* Wirth v. Heavey, 508 S.W.2d 263, 268–69 (Mo. Ct. App. 1974) (allowing the secured party to collect a deficiency since the proceeds approximated the collateral's fair market value despite finding that the secured party should have sold the collateral at a public rather than a private sale). No empirical data was found indicating whether the incidence of inaccurately low appraisals exceeded the incidence of inaccurately high appraisals in Article 9 foreclosure sales.

368. See *supra* notes 86–158 and accompanying text.

369. Surpluses, while rare, do occur in repossession sales more frequently than imagined. White, *supra* note 101, at 409. One theoretical reason for their rarity is that secured parties, even if selling to disinterested purchasers, have little incentive to get a price above the outstanding debt. Schwartz, *supra* note 97, at 125; Zubrow, *supra* note 55, at 470.

secondary source evidence appears to suggest a fair price was realized. One might argue that this outcome is unfair to the secured party where the secondary source evidence is accurate. On the other hand, had the major procedural error not occurred, the price might have been higher, perhaps even resulting in a surplus. Third, assume instead that expert testimony about merchant practices identifies a minor error but the sale price appears unfair compared to secondary source evidence of fair price. Analytically, the sale should be found commercially reasonable. But given the problems the trier of fact may face in identifying and weighing the severity of a procedural flaw,[370] it is possible that the procedural error may in fact be major (and the low price evidence accurate). Therefore, the sale should be found commercially unreasonable. On the other hand, the low price secondary source evidence may be inaccurate.

How then to segregate major procedural errors from minor ones and decide whether the sale is commercially reasonable under the revised Article 9? No proposal will perfectly address the inherent tension between the two articulations of the no harm, no foul rule; indeed, at a foundational level, the more one tries to correct for one articulation's problems, the more one exacerbates the other's. Nevertheless, one must choose a beginning position. Under the revised Article 9, procedures are primary, a low price alone cannot render a sale commercially unreasonable, and price is not a term of commercial reasonableness, so the latter must prevail. Under careful scrutiny review through the robust incorporation strategy inquiry and its increasing demand for sufficient evidence of procedural regularity, where there is a "low price" within the meaning of the two Official Comments, the courts' main focus should be (1) expert testimony and appropriate precedent concerning the proper sale process and (2) whether any deviation from this process by the secured party's sale is major or minor as understood by the merchant experts and appropriate precedent. Secondary source evidence of low price should be just that—secondary.

This does not mean that price plays no role under the no harm, no foul rule. The low price alerts the court and the trier of fact to a possible procedural flaw and triggers the robust careful scrutiny review of the sale process to see if an unreasonable procedural foul occurred. This use of price helps correct for some of the problems courts and triers of fact may have in identifying procedural irregularities and collusive behavior arising from the incorporation strategy. But once price serves this signaling function and the court or trier of fact completes this careful scrutiny review and concludes from the expert testimony and appropriate precedent that a discovered procedural irregularity is minor as measured against merchant reality, then it should be forgiven even if the price is seemingly low. This not only comports with the statutory mandate that procedures are primary under the

370. *See supra* notes 309–33 and accompanying text.

revised Article 9, but also gives deference to the efficient market hypothesis in the sense that minor errors in the sale process in theory should not greatly affect the sale's efficiency (or at least not as much as a major error). Thus it is the secondary source evidence of an unfairly low price that is presumptively inaccurate. Further, this conception of the no harm, no foul rule respects Professor Gilmore's policy judgment: for the diligent secured party who, in good faith and despite best efforts, commits a minor flaw, it would be unfair to sanction his sale even though the irregularity may have adversely affected the price. In effect, the no harm, no foul rule under the revised Article 9 should mean that if the secured party acts in good faith and with due diligence in planning and conducting the sale, then there is an acceptable range for the sale's procedural compliance as measured against merchant reality.[371]

This Section articulated careful scrutiny as a robust incorporation strategy inquiry of all of the sale's aspects triggered by a low price evidenced in part through secondary sources of value and fair price. In summary, although procedures are primary, secondary sources of value and fair price should be used to counteract the difficulties under the incorporation strategy that the judge or the trier of fact may face in recognizing procedural flaws, detecting secured party collusive behavior, and recognizing regular but unreasonable markets. These problems will not be solved completely by price's signaling function and its concomitant robust careful scrutiny review. But they can help mitigate the corrosive effect that these problems have on the normative purchase of the procedures test and the fair-price determining function. And although secondary source evidence of value and fair price raise doctrinal, valuation technique and competing policy difficulties, proof that the price is low does not render the sale commercially unreasonable; it simply triggers the court's careful scrutiny of the sale's aspects. Conversely, failure to prove the price is low does not mean that the sale is commercially reasonable; rather it means that the sale will be subjected to regular scrutiny review. This formulation strikes a fair balance between the procedures test and the proceeds test while respecting the primacy of the procedures test under the revised Article 9 and the fair-price determining function of the non-collusive, procedurally regular and reasonable foreclosure sale. It also fits comfortably within the Official Comments' link between a low price and careful scrutiny of the sale's aspects.

---

371. A permissible procedures range would also help avoid the type of rigid formalism Professor Gilmore loathed about courts' formalistic application of pre-Article 9 foreclosure statutes like the USCA, which allowed disgruntled debtors to successfully litigate using the smallest and least offensive of procedural errors. 2 GILMORE, *supra* note 29, § 44.4, at 1228–29, § 43.1, at 1182–83; Gilmore, *supra* note 31, at 7. Compare this procedures range with the proceeds range under former Article 9 and revised section 9-615(f). *See supra* notes 153–55 and accompanying text.

C. ENHANCING PRICE'S ROLE UNDER CAREFUL SCRUTINY REVIEW

Some readers will argue that a low price shown through secondary sources of value and fair price should play a more vigorous role under the revised Article 9 to address procedures test problems that will linger under Section B' s articulation of careful scrutiny and price's limited role therein. In particular, critics may argue that section 9-615(f) falls short of controlling the non-maximizing secured party/procedurally regular low price sale problems, and thus low price should play a stronger role in assessing the regularity and reasonableness of the sale process such as creating an inference of unreasonable procedural irregularity or requiring the secured party to affirmatively explain away the low price. But courts should be extremely cautious of such arguments. An augmentation of price's role in these two respects will have corrosive effects on the ascendancy of the procedures test and the fair-price determining function under the revised Article 9.

1. Section 9-615(f) and Some Lingering Problems

As discussed in Part II, the revised Article 9's new provisions and Official Comments elevate procedures over proceeds under section 9-610(b)'s commercial reasonableness standard.[372] One can argue that a central justification for this elevation is section 9-615(f), which is intended to address the dual problems of the procedurally regular, low price sale by a presumptively non-maximizing secured creditor (one selling the collateral to itself, a secondary obligor, or a related party).[373] Under section 9-615(f), the

372. *See supra* notes 202–257 and accompanying text.

373. Official Comment 6 explains that section 9-615(f):

> [R]ecognizes that when the foreclosing secured party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price.
>
> Subsection (f) adjusts for this lack of incentive.

U.C.C. § 9-615 cmt. 6 (1999); *see also* U.C.C. § 9-627 cmt. 2 (1999) ("The law long has grappled with the problem of dispositions of personal and real property which comply with applicable procedural requirements (e.g., advertising, notification of interested persons, etc.) but which yield a price that seems low. This Article addresses that issue in Section 9-615(f)."). Mr. Rapson explains that:

> [T]he Drafting Committee confronted the problem of deficiency claims based upon alleged low prices and developed a compromise solution [section 9-615(f)] covering those circumstances where the problem is most likely to arise, i.e., the purchaser at the foreclosure sale is "the secured party, a person related to the secured party, or a secondary obligor." The rationale is that these persons do not have the economic incentive, in the absence of genuine competitive bidding by independent third parties, to bid for the collateral at prices that approximate the

court will carefully scrutinize the commercially reasonable sale's price itself to see what a sale to a disinterested purchaser might have fetched.[374] Section 9-615(f) thus decouples the sale price from the deficiency calculation, and asks whether a fair price was achieved as measured against secondary source evidence of value and fair price.

To the extent section 9-615(f) is the partial *quid pro quo* for the ascendancy of the procedures test under section 9-610(b), section 9-615(f)'s limited scope devalues this exchange. First, section 9-615(f)'s scrutiny of the sale proceeds applies only where the sale's proceeds are "significantly below the range of proceeds that a complying disposition to a person other than the secure party, a person related to the secured party, or a secondary obligor would have brought."[375] Thus, a self-dealing secured creditor could evade section 9-615(f)'s teeth by figuring out the minimum proceeds she must bid to clear the test.[376] Second, section 9-615(f) applies only where "the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor."[377] It may be difficult for a court to detect a prohibited related party sale (discussed in Part III). Even if identified, some sales to some related parties fall outside of the definition of "party related to" and thus may escape section 9-615(f)'s reach.[378] Third, a section 9-615(f) challenge may be too costly for the debtor to litigate.[379] Fourth, section 9-615(f) by its own terms does not address the case of the low price procedurally regular sale by a presumptively maximizing secured creditor to a disinterested purchaser. Yet these cases exist.[380] One

---

> value of the collateral. Indeed, the incentive is to the contrary: the lower the bid, the greater the deficiency claim against the debtor.

Rapson, *supra* note 17, at 918–19.

374. Rapson, *supra* note 17, at 919–20 ("[I]n order for the debtor . . . to avail itself of the statutory protection in a non-consumer transaction, it has the burden of establishing that the foreclosure sale price [is] . . . what an independent third party would have bid at a commercially reasonable sale."); *see also* Benfield, *supra* note 85, at 1282:

> [T]he deficiency or surplus will be determined by the price that would have been received in a hypothetical sale: . . . a sale complying with the Article 9 requirements to a disinterested third party, if the sale was commercially reasonable but produced a price significantly below what a sale to a disinterested third party would have brought.

Id.

375. U.C.C. § 9-615(f) (1999).

376. *See* Braucher, *Deadlock*, *supra* note 28, at 104 (stating that section 9-615(f) "seems to invite secured parties to make bid-in purchases of collateral at prices that are low, so long as they are not 'significantly below' what unrelated parties would pay at a foreclosure sale. The cute litigation game here will be how low is significantly below the range of foreclosure sale prices to others.").

377. U.C.C. § 9-615(f) (1999).

378. U.C.C. § 9-102(62) (1999).

379. Coles-Bjerre, *supra* note 216, at 370.

380. *See supra* note 309 and accompanying text.

explanation for some of these cases might be that the ostensible maximizing secured creditors in fact lacked the incentive to maximize the sale price. Finally, section 9-615(f) is not just limited in scope, but its allocation of the burden of proof for non-consumer transactions on the debtor rather than the secured party creates an added hurdle to section 9-615(f)'s reach. These limitations demonstrate why the initial inquiry into the sale's commercial reasonableness is so important. They are also arguments to have price play a larger role under the commercial reasonableness standard.

On the other hand, what would be the effect of strengthening price's role just short of making it a term of commercial reasonableness that alone could render the otherwise complying sale unreasonable? *Ex ante*, would it motivate the non-maximizing secured creditor to select the market and attendant sale procedures best suited to maximize the collateral's price or bid the fair price for the collateral at a poorly attended public sale? *Ex post*, would a stronger role for price make it easier for the trier of fact to police fraudulent, irregular, or unreasonable sale practices?

Ex ante, the awareness that a low price sale will trigger an inference or rebuttable presumption of unreasonable procedural irregularity might motivate the non-maximizing secured party to use the optimal market and attendant sale practices reasonably available. Unless the secured party could overcome the inference or presumption, the sale would be found commercially unreasonable thus subjecting the secured party to the rebuttable presumption rule (or absolute bar rule) and possible penalties. Further, it is possible that giving price a more powerful role would motivate non-maximizing secured parties to conduct more frequent pre-sale appraisals, compare the appraised amount to data (if available) about the average price results for similar collateral in the various market channels for the collateral, choose the best channel reasonably available, and then set an appropriate let-go price.[381] During the sale, the pre-sale appraisal might help alert the secured party to a flawed sale process where bids are below the let-go price, help correct the flaw if possible, or redo the sale if not prohibitively expensive. Similarly, perhaps a stronger role for low price would motivate the non-maximizing secured party to sell (or buy) the collateral at a fair "let-go" price at a poorly attended public sale.

A stronger role for price would be particularly helpful to unsophisticated and relatively poor consumer debtors who face many of the difficulties of identifying proper procedures as described in Part III. A strong role for price would increase their ability and power to use cheap and readily accessible price guidebooks like N.A.D.A. Official Used Car Guide, and thus perhaps more effectively check secured party misbehavior than would be possible in a procedures test jurisdiction where the debtor might

381. *See supra* notes 144, 336–38 and accompanying text.

have to spend more time and money getting sufficient evidence of a flawed procedure.[382]

On the other hand, the counteractive effect of price's enhanced role generally, and any increased reliance on pre-sale appraisals specifically, has various limitations. First, the motivational bite in any enhanced role for price (the rebuttable presumption rule, the absolute bar rule, or various monetary penalties) may be limited where financial or sophistication asymmetries stop the debtor from challenging a flawed, low price sale.[383] Second, enhancing price's role seems unlikely to make smarter the dim-witted non-maximizing secured party or more diligent the lazy non-maximizing secured party. And for non-maximizers who profit from non-maximizing behavior not because they can then obtain a deficiency but for other reasons like reputation enhancement, additional deterrence from an enhanced role also seems unlikely.[384] Third, pre-sale appraisals would not improve even a maximizing secured party's ability to access inaccessible markets, such as dealer-only car auctions. Pre-sale appraisals would not make clear muddy doctrine about proper procedures. And armed with accurate and inexpensive pre-sale appraisals, even the maximizing secured party need not take extraordinary efforts to identify and use the optimal sale process, a policy limitation that an enhanced role for price would not obviate. Further,

---

382. See *supra* note 138 for a discussion of the conflicting opinions regarding which test is more difficult and thus costly to implement.

383. *See, e.g.*, Heiser & Flemma, *supra* note 53, at 495 (describing 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 168, 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.

Id.; Lloyd, *supra* note 16, at 740 (describing how absolute bar rule "probably has minimal deterrent effect"); Shuchman, *Condition and Value*, *supra* note 101, at 40–41 (suggesting that, notwithstanding remedies under Article 9, debtors infrequently litigate due to lack of knowledge and financial burden); Shuchman, *Archival Study*, *supra* note 101, at 36–37 (describing empirical work that suggests that debtors infrequently litigate due to lack of knowledge and financial burden); Corenswet, *supra* note 101, at 1081 & n.3 (stating that although the commercial reasonableness standard "is intended to impose fairness limitations on the creditor's behavior in disposing of the collateral," and, "[u]nfortunately, a secured creditor may act within the strict letter of the law, while the fairness of his actions remains highly questionable"); Firmin & Simpson, *supra* note 160, at 528 ("Since 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.").

384. *See* Scott, *supra* note 136, at 773 n.143 (arguing that secured creditors may use large deficiencies to signal to other debtors the secured party's resolve to repossess and resell, and that a "more restrictive prophylactic rule" than the commercial reasonableness standard may be needed due to the difficulty in "establishing the creditor's motivations").

even maximizing secured creditors at times conduct a flawed sale process in good faith and after due diligence for a host of possible reasons.[385] Finally, pre-sale appraisals are secondary source evidence of value and fair price, and thus may not in fact be accurate.[386]

Ultimately, the effect of an enhanced role for a low price like an inference or rebuttable presumption of unreasonable procedural irregularity turns into an empirical question about how non-maximizing and maximizing secured parties would respond to universes where price has and does not have this more powerful role. As a cautionary observation, note that even in proceeds test jurisdictions under the former Article 9 where price alone evidenced by secondary sources of value and fair price would render the sale commercially unreasonable, some secured parties were not deterred from conducting sales that yielded low prices[387] and from self-dealing transactions.[388]

Ex post, enhancing price's role might more effectively counteract the effects of the non-maximizing secured party and her abuse of a procedurally regular, low price sale by rendering such sales unreasonable where the secured party cannot overcome the inference or presumption of unreasonable procedural irregularity.[389] But enhancing *ex post* price's role would levy an increasingly onerous cost. The more determinative price's role in assessing the sale process's commercial reasonableness, the more price evidenced through secondary sources of value and fair price will encroach upon the procedures test and the fair-price determining function. This creeping encroachment problem is discussed in the next two subsections.

2. Low Price Creation of an Unreasonable Procedural Irregularity Inference or Rebuttable Presumption

Perhaps for the judge deciding with respect to a summary judgment motion whether the secured party has produced sufficient evidence of procedural regularity or for the trier of fact at a trial deciding whether the secured party has proved the sale to be procedurally regular and reasonable by a preponderance of the evidence, a low price should create an inference or rebuttable presumption of unreasonable procedural irregularity.[390] With respect to an inference, in describing one of the two careful scrutiny Official

385. *See supra* notes 280–306 and accompanying text; notes 146–58 and accompanying text.

386. See *supra* notes 86–88 and accompanying text.

387. *See, e.g.*, ITT Indus. Credit Co. v. Chasse, 25 U.C.C. Rep. Serv. (CBC) 914 (Conn. Super. Ct. 1978); Farmers Bank v. Hubbard, 276 S.E.2d 622, 626–27 (Ga. 1981); FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 955 (N.Y. App. Div. 1981) .

388. *See, e.g.*, Carlton Mfg., Inc. v. Bauer, 429 S.E.2d 329, 331–32 (Ga. Ct. App. 1993); Parks v. Assocs. Commercial Corp., 351 S.E.2d 661, 663 (Ga. Ct. App. 1986).

389. Hillebrand, *supra* note 168, at 140.

390. At trial, for example, should the jury be instructed that a low price creates an inference or a rebuttable presumption of unreasonable procedural irregularity?

Comments, White and Summers assert that "[t]he Comment appears to acknowledge that a court might draw some inference from a high or low price."[391] With respect to a rebuttable presumption, several former Article 9 courts stated that a low price should create a rebuttable presumption that the sale was procedurally flawed and thus commercially unreasonable.[392]

If by inference or rebuttable presumption one means that the secured party has not only the burden of persuading the trier of fact of the sale's procedural regularity and reasonableness, but also the burden of producing evidence of procedural regularity and reasonableness, then this conforms to the typical allocation in civil litigation[393] and arguably was the drafter's intent for section 9-626.[394] If, however, a rebuttable presumption or inference means something like "from evidence A [of a low price through secondary source evidence of value], you may infer, or presume, B [a commercially unreasonable sale process],"[395] then one faces some difficulties peculiar to the revised Article 9 and the ascendancy of the procedures test in careful scrutiny review which range beyond the criticisms leveled against inferences and presumptions generally.[396] In short, this inference or

---

391. WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 904. For a case under former Article 9, see Cont'l Bank v. Meyer, 24 Pa. D. & C.3d 129, 136–37 (Pa. Com. Pl. 1982) ("When . . . a sale is challenged for failure to obtain the fair market value of the collateral, the burden of proof shifts to plaintiff to rebut the inference that the sale was commercially unreasonable."). *But see* FDIC v. Lanier, 926 F.2d 462, 467 (5th Cir. 1991):

> Under these circumstances, we decline to infer commercial unreasonableness from what might be a lower-than-expected sales price. So long as the bank took the proper procedural steps, the debtor could have protected its interests by arranging financing for its own or a 'friend's' bid or by selling the collateral itself before the bank's foreclosure sale. It did neither. We therefore hold that the bank disposed of its collateral in a commercially reasonable fashion . . . .

Id.

392. *See, e.g.*, Youngblood Automotive Fin. Servs. v. Youngblood (*In re* Youngblood), 167 B.R. 870, 875 (Bankr. W.D. Tenn 1994); Sch. Supply Co. v. First Nat'l Bank of Louisville, 658 S.W.2d 200, 204 (Ky. Ct. App. 1984); Bank Josephine v. Conn, 599 S.W.2d 773, 775 (Ky. Ct. App. 1980).

393. *See supra* note 235 and accompanying text.

394. *See generally* ZINNECKER, *supra* note 118, at 182–84. Although none of the relevant revised Article 9 default sections regarding commercial reasonableness or careful scrutiny use the term "presumption," section 1-201(31) defines "presumption" to mean "that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence." U.C.C. § 1-201(31) (1995). As Professors Allen and Hillman note, this section refers to the allocation of the burden of production. Allen & Hillman, *supra* note 235, at 98. *See also* revised U.C.C. § 1-206 (2001) (explaining the effect of presumptions under the UCC).

395. Allen & Hillman, *supra* note 235, at 96.

396. Explaining to a jury, or anyone else for that matter, exactly what the jury is to make of such an inference or a presumption is problematic.:

> If taken literally, [this] instruction[] [is] either gibberish or seriously misleading. For example, by stating that something is 'evidence' of some proposition when in

rebuttable presumption risks elevating too much the impact of A—the low price proved through secondary source evidence of value and fair price—on the commercial reasonableness calculation.[397] To develop this argument, one can begin with the "procedures are a proxy for price" doctrine employed by some courts and commentators under the former Article 9, and explore the limitations of the reverse proposition that a low price is a proxy for a flawed procedure(s).

Some courts[398] and commentators like White and Summers assert that procedures are "almost entirely proxies for price."[399] Under this doctrine, flawed sales procedures will lead to a low price.[400] Indeed, the efficient market hypothesis discussed in Part I supports this assertion in theory; one characteristic of an inefficient market would be a flawed sale process,[401] and

---

> fact it is not, such instructions allow a jury to react in any way it chooses. But, of course, these instructions are not to be taken literally. Jurors are not supposed to puzzle over the mysticism of how "presumptions" transform into "evidence;" instead they are supposed to understand that, if A is true, B is also likely to be true . . . . The effect of [this] instruction[], then, is to modify the jury's inferential process by enhancing the impact of fact A.

Id. at 97.

397. *Id.*; *cf.* FDIC v. Lanier, 926 F.2d 462, 467 (5th Cir. 1991) (declining to infer commercial unreasonableness from a low price).

398. *See, e.g.*, Commercial Disc. Corp. v. King, 545 F. Supp. 455, 457 n.2 (N.D. Ill. 1982) (the court, quoting White and Summers, stated that the "'method, manner, time, place and terms' tests are really proxies for 'insufficient price,' and their importance lies almost exclusively in the extent they protect against an unfairly low price. Thus the question is really one of fair market value."); ITT Indus. Credit Co. v. Chasse, 25 U.C.C. Rep. Serv. (CBC) 914, 918 (Conn. Super. Ct. 1978) (stating that price is "an all-encompassing aspect since the method, manner, time and place of a sale are only ingredients of securing or failing to secure an optimum price"); Hall v. Owen County State Bank, 370 N.E.2d 918, 929 (Ind. Ct. App. 1977) ("[W]here a fair sale price was not received, the other items to be considered will generally be relevant to the extent that they may have prevented a fair price or contributed to an unfair price."); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 535 P.2d 1077, 1080 (N.M. 1975) (quoting White and Summers); Bankers Trust Co. v. J.V. Dowler & Co., 390 N.E.2d 766, 769 (N.Y. 1979) ("[O]ptimizing resale price is the prime objective of the code's default mechanisms and that other factors listed are merely designed to ensure that the highest price is achieved.").

399. WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 904:

> Despite the disclaimer in section 9-627(a) ('that a greater amount could have been obtained * * * at a different time or in a different method * * * is not of itself sufficient to preclude * * *' a finding of commercial unreasonableness) price is everything. The factors we consider in determining whether a sale was commercially reasonable are almost entirely proxies for price. Comment 2 to 9-627 does an interesting waltz around this apparent inconsistency between the Code's statement and life. The Comment appears to acknowledge that a court might draw some inference from a high or low price.

Id.; *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.3, at 154–55; Corenswet, *supra* note 101, at 1092–93.

400. *See supra* note 398. But see *supra*, notes 367–68 and accompanying text.

401. *See supra* note 72.

thus the true value of the collateral would not be reflected in such sale's price. There are plenty of cases that support this proposition where the court identified a flawed sale process and a resulting low price.[402]

Given the "procedures are proxies for price" doctrine, one may be tempted to reverse the idea: if procedures are almost entirely proxies for price, then price is almost entirely a proxy for procedures, and secondary source evidence of a low price means almost entirely that there was a procedural flaw.[403] The inference of unreasonable procedural irregularity or a rebuttable presumption of unreasonable procedural irregularity rests upon the validity of this proposition. Indeed, one might try to use the efficient market hypothesis to justify the proposition's validity: assuming one can accurately estimate the collateral's true value using secondary source evidence of value, and the sale price is below that value, one can conclude that the market was not efficient.

But arguing that, under the revised Article 9, one can infer or rebuttably presume from a low price evidenced by secondary sources of value and fair price that there is a *commercially unreasonable* sale process presents serious doctrinal, evidentiary, and normative problems. White and Summers seem to acknowledge these problems, stating that under the revised Article 9 "price is not an 'aspect' of the sale and a low price does not show that any 'aspect' was commercially unreasonable. Reasoning backward from a low price to a conclusion of commercial unreasonableness is not fair to the secured creditor."[404] But they offer no explanation as to why a low price does not show that some sale aspect was commercially unreasonable,

---

402. *See, e.g.*, United States v. Conrad Publ'g Co., 589 F.2d 949, 954–55 (8th Cir. 1978); Liberty Nat'l Bank & Trust Co. v. Acme Tool, 540 F.2d 1375, 1382 (10th Cir. 1976); Miles v. N.J. Motors, Inc., 338 N.E.2d 784, 787 (Ohio Ct. App. 1975); FMA Fin. Corp. v. Pro-Printers, 590 P.2d 803, 807–08 (Utah 1979).

403. *See, e.g.*, Caterpillar Fin. Servs. Corp. v. Wells, 651 A.2d 507, 510–15 (N.J. 1994):

> Although mere inadequacy of price is insufficient itself to establish that the sale is not commercially reasonable . . . evidence that the price received for the goods sold was substantially less than their value and substantially less than that which the purchaser has resold them indicates that they were not disposed of in a commercially reasonable manner.

Id.; Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797, 801 (E.D. Pa. 1968); *see also* FERRIS & GOLDSTEIN, *supra* note 39, § 6.3, at 154–55 ("It is simply not likely that a grossly inadequate price will be the result of a disposition that was well-planned and commercially reasonable in every other respect.").

404. WHITE & SUMMERS, HORNBOOK SERIES, *supra* note 26, § 25-10, at 906. Indeed, the revised Article 9 Drafting Committee rejected at a March 7, 1997 meeting the proposal that the reporters draft a comment to section 9-504 (revised section 9-610) that in part stated "that a commercially unreasonable price is usually the result of the fact that some other aspect of the sale, time, manner, advertising, etc. is not commercially reasonable, and, similarly, that whether all the other aspects of the sale were commercially reasonable is relevant to the question whether the price was commercially reasonable." To its credit, the proposal was modified by "usually." Miller, *supra* note 158, at 226–27.

or why reasoning backwards from a low price to procedural unreasonableness is unfair to the secured creditor. The remainder of this section attempts to fill in the explanatory gap.

First, the inference and presumption is predicated on a low price proved through secondary source evidence of value and fair price. Valuation through secondary source evidence is tricky for doctrinal reasons (e.g., vague legal standards of fair price) and evidentiary problems (e.g., fallible price guidebooks and experts, subjective and idiosyncratic valuation differences, detachment from the actual sale's circumstances).[405] The risk here is that there is no low price where flawed secondary source evidence is believed. To reason backwards from a "low" price to a commercially unreasonable sale process is risky because the price may not in fact be "low." Indeed, some of the cases where presumptively maximizing secured creditors conducted sales with seemingly low prices may be explained more convincingly not by showing that the secured creditors were in fact non-maximizers or because there was an undetected procedural flaw, but rather by arguing that that the price was not low (or unfairly low).[406]

Second, there are normative reasons not to infer from a low price a commercially unreasonable sale process. Permitting the inference or presumption that a low price usually accompanies a commercially

---

405. *See supra* notes 88–143 and accompanying text.

406. *See, e.g., In re* Marshall, 219 B.R. 687 (Bankr. M.D.N.C. 1997). In *Marshall,* the secured party sold a repossessed mobile home in a private sale and sought a $13,341.38 deficiency. *Id.* at 689. The debtors objected arguing that the sale price was "unconscionably inadequate" and that the sale was commercially unreasonable. *Id.* The trial court found that the sale was to a purchaser not affiliated with the secured party. *Id.* The appellate court affirmed that the sale was commercially reasonable, noting that the secured party had provided evidence that the collateral was in poor condition, inspected and made repairs before selling it, contacted thirty dealers, determined that selling it at wholesale rather than retail would produce the highest price, and generally sold it in the manner accepted in the mobile home industry. *Id.* at 690. The sale was not upset even where the secured party's expert had appraised the mobile home at twice the value for which it had sold. *Id.* Thus, the court concluded that the "final sales price was representative of the condition of the mobile home and was relative to other prices obtained on comparable mobile homes." *Id; see also* Republic Nat'l Bank v. DLP Indus., Inc., 441 S.E.2d 827 (S.C. 1994). The court found a private sale of repossessed clothing commercially reasonable where the secured party contacted five prospective buyers and received three bids. *Id.* at 828–29. The winning bid of $11,000 was submitted by Sunshine Sales Company, *id.* at 828, presumably a disinterested third party, although the court did not discuss this question. The debtor had alleged that the collateral's fair market value was at least $82,000, but the court believed contrary testimony that the clothing was old, in poor condition, and worth only $11,000. *Id; see also* Bankers Trust Co. v. J.V. Dowler & Co., 390 N.E.2d 766, 770 (N.Y. 1979) (stating that "[w]hen the sale is conducted so as to give a sufficiently broad group of buyers the opportunity to bid, their failure to respond in any particular number may itself be an indication of the market value of the item offered for sale" and finding the sale of bonds on recognized market commercially reasonable despite a large deficiency). *See generally* Davis v. Concord Commercial Corp., 434 S.E.2d 571 (Ga. Ct. App. 1993); James Talcott, Inc. v. Reynolds, 529 P.2d 352 (Mont. 1974); Appleton State Bank v. Van Dyke Ford, Inc., 279 N.W.2d 443 (Wis. 1979).

unreasonable procedural flaw undermines the goal of courts using a robust incorporation strategy review to carefully scrutinize the sale's procedures through expert testimony and appropriate precedent. The low price triggers this careful scrutiny, but the low price does not act as a substitute for the robust review. But an inference or rebuttable presumption of procedural unreasonableness based on a low price does just that and thereby to some extent substitutes for the robust inquiry into the sale process.[407] Under the Official Comments' suggestion that a court carefully scrutinize the sale, judgments about the sale process and whether errors are major or minor should be based on sufficient evidence of procedural regularity and irregularity provided by credible expert testimony and appropriate precedent. The inference also squarely conflicts with the policy of the no harm, no foul rule suggested above where merchant reality, not low price, should determine whether a procedural error is commercially unreasonable. The revised Article 9 gives the good faith and diligent secured party a range of acceptable procedural irregularities even if they result in a low price.

Third, the revised Article 9 acknowledges that where there is low price, there exists the possibility that the secured party used commercially unreasonable sale procedures. Indeed, by triggering careful scrutiny review with a low price determination using secondary sources of value and fair price, the two Official Comments basically affect an inference of procedural irregularity from the low price. But the Official Comments stop short of instructing the court to actually infer or presume the existence of a procedural flaw. Rather, they suggest that the court look carefully for a flaw. As Professor Lloyd put it, what a low price should do is alert the court of the *possibility* that the secured party did not fully expose the collateral to the market. This use of price and its triggering of the careful scrutiny review discussed in Section B strikes a good balance between the procedures test and the proceeds test while respecting the ascendancy of the procedures test, the fair-price-determining function, and the robust careful scrutiny review discussed in Section B.

---

407. *See* Hudak & Turnbull, *supra* note 365, at 28 (stating with respect to White and Summers' statement that the "method, manner, time, place and terms tests are really proxies for 'insufficient price' and their importance lies almost *exclusively* in the extent they protect against an unfairly low price," that "implicit in [that] statement is the logical corollary that an apparently 'sufficient price' would somehow displace the importance of the other factors in determining the reasonableness of the secured party's conduct"); *see also* Poti Holding Co. v. Piggott, 444 N.E.2d 1311, 1312–14 (Mass. App. Ct. 1983) (holding a sale commercially reasonable where secured party only proved the price's reasonableness and did not carry its burden of proving the sale conformed to normal business practices, the adequacy of the advertising and other aspects). For examples of cases where the sale was procedurally flawed but the court found that it had nevertheless produced a fair price, see Vanek v. Indiana Nat'l Bank, 540 N.E.2d 81, 83 (Ind. Ct. App. 1989); Knierim v. First State Bank, 488 N.W.2d 454, 457 (Iowa Ct. App. 1992). *But see* Farmers Bank v. Hubbard, 276 S.E.2d 622, 626 n.4 (Ga. 1981) (arguing that a reasonable price alone should not render unnecessary the requirement that the secured party dispose the collateral in a commercially reasonable manner).

3. Explaining Away the Low Price

For those not satisfied with Section B's proposed construction of careful scrutiny and price's role therein, perhaps they might want careful scrutiny to mean that the secured party must affirmatively provide an explanation or legitimate reason for the low price.[408]

> Thus, even though a low price itself [which the court called the primary factor of commercial reasonableness] is insufficient to overturn a sale, closer scrutiny will generally be given sales in which there is a substantial difference between the sale price and the fair value to determine whether there were legitimate causes for the low price or whether the low price was caused by the secured party's failure to proceed in a commercially reasonable manner.[409]

Legitimate explanations have included a bad market for the collateral,[410] the collateral's depreciation or damage,[411] and other reasons why the collateral may have been unattractive to potential buyers.[412]

To the extent this explanation requirement means that a low price triggers careful scrutiny of the sale's procedures, and careful scrutiny is the robust incorporation strategy review discussed above, then the problem with continuing the explanation requirement under the revised Article 9 is largely semantic. Rather than state the explanation requirement as such, why not quote the Official Comments and say that low price means the court should carefully scrutinize the sale's aspects? Under the revised Article 9 *cum*

---

408. *See* Walker v. McTague, 737 N.E.2d 404, 410 (Ind. Ct. App. 2000); Hall v. Owen County State Bank, 370 N.E.2d 918, 930–33 (Ind. Ct. App. 1977); FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 955 (N.Y. App. Div. 1981). Although not talking about careful scrutiny cases in particular, White and Summers stated:

> Most courts taking this position [that price alone can render a procedurally regular sale commercially unreasonable] allow the secured creditor to try and explain away even a wide discrepancy by showing, for example, that special conditions, e.g., a precipitous market decline, or unusually quick depreciation, account for the discrepancy. And some courts may even recognize creditor's extra efforts—well beyond those minimally reasonable under 9-504—as offsetting low value.

WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456–57; *see also* Miller, *supra* note 158, at 225 (discussing the "relationship of price to commercial reasonableness").

409. *Walker*, 737 N.E.2d at 410.

410. Utah Bank & Trust v. Quinn, 622 P.2d 793, 797 (Utah 1980); WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456.

411. Youngblood Auto. Fin. Servs. v. Youngblood (*In re* Youngblood), 167 B.R. 870, 872 (Bankr. W.D. Tenn. 1994) (secured creditor attempted to explain very low price due to vehicles' state of disrepair and the fact that many of the vehicles had been vandalized). WHITE & SUMMERS, TREATISE SERIES, *supra* note 26, § 34-16, at 456.

412. *See* SNCB Corporate Fin. Ltd. v. Schuster, 877 F. Supp. 820, 828 (S.D.N.Y. 1994) (explaining why business sold as a going concern may not have been attractive to potential purchasers).

procedures test and the robust careful scrutiny review triggered by the low price, once the secured party has shown that he in good faith and due diligence tried to select the available market best calculated to maximize the sale's proceeds and correctly implemented its attendant sale practices, he in effect explains away the low price sufficient to pass commercial reasonableness review under section 9-610(b).

Under the court's rigorous careful scrutiny of all of the sale's aspects, market conditions, and the collateral's shape can be relevant aspects and thus can accommodate the court's inquiry into why the secured party did what it did. For example, the "time" of the sale is explicitly subject to commercial reasonableness.[413] Courts can and do require that the secure party provide evidence that the time of the sale was reasonable.[414] But the focus should then be: what is a reasonable time given merchant reality? For example, would dealers in the industry have sold the collateral at this time or would they have waited a longer period?[415] Further, the court must determine whether the sale practices are reasonable even if regularly used and non-fraudulent. Where an expert testifies credibly that the secured party used a regular and non-fraudulent business practice that was not the most efficient one available, the court should at minimum inquire as to why the secured party used the inefficient practice. But once these questions are satisfactorily answered, the secured party has in effect explained away the low price.

The risk of imposing an additional low price explanation requirement beyond the inquiry into whether the secured party has proved that it conducted a commercially reasonable sale process is that it gives undue primacy to the low price and carries with it the legacy of the proceeds test. While White and Summers do not say the explanation requirement was confined to proceeds test jurisdictions, they indicate that courts in proceeds test jurisdictions where low price alone could spell commercial unreasonableness would allow the secured party to provide legitimate causes for the low price or the sale would be found commercially unreasonable.[416] Indeed, the explanation requirement seems most appropriate for a proceeds test jurisdiction that looks primarily to the fairness of the price shown through secondary source evidence of value and fair price, as well as procedural regularity, and then allows the secured party to explain away the

---

413. U.C.C. § 9-610(b) (1999); *See, e.g., In re* Crosby, 176 B.R. 189, 193–94 (B.A.P. 9th Cir. 1994); Gen. Elec. Credit Corp. v. Bo-Mar Constr. Co., 140 Cal. Rptr. 417, 419–21 (Cal Ct. App. 1977); FERRIS & GOLDSTEIN, *supra* note 39, § 7.1, at 191.

414. *See* FERRIS & GOLDSTEIN, *supra* note 39, §7.2, at 193–96 (describing the factors in timing the repossession sale including market conditions); SHELDON & SABLE, *supra* note 77, at 219 (discussing selling collateral "out of season" and "unjustified delay").

415. *See generally* FERRIS & GOLDSTEIN, *supra* note 39, §7.3, at 196–97 (describing industry standards and selling seasons).

416. *See supra* note 408; *see also* Miller, *supra* note 158, at 225.

low price. But under the revised Article 9, procedures are primary. By making the secured party affirmatively explain away the low price beyond showing the sale was non-collusive, procedurally regular and reasonable, the explanation requirement focuses inappropriately on proceeds rather than process and proves too much. If one goes too far down the explanation requirement road, one ends up with a rule that until and unless the secured party affirmatively explains away the low price, the sale will be found unreasonable.[417] The extension of a mandatory explanation requirement to this end gives primacy to the sale price evidenced through secondary sources of value and fair price rather than the sale's procedures as intended under the revised Article 9, and thus abrogates the ascendancy of the procedures test and fair-price determining function.[418] Finally, premising the explanation requirement on the low price finding evidenced by secondary sources of value and fair price risks the possibility that the price is not low for the doctrinal, valuation technique, and competing policy problems discussed in Part I.

4. A Reality Check

As a practical concern, unless one can completely keep out secondary source evidence of the low price[419] or, alternatively, away from the trier of

417. Benfield, *supra* note 85, at 1281.

418. Although not commenting on this point, Professor Benfield, a Drafting Committee member, seems to argue that under the revised Article 9, the secured party need not justify a low price to meet is burden of proving a sale commercially reasonable section 9-615(f) "rejects the idea that an unjustifiably low price in a sale to any of those [interested] parties is necessarily a commercially unreasonable sale subjecting the secured party to the statutory damages that are imposed in favor of consumer debtors." Benfield, *supra* note 85, at 1281. Perhaps Professor Benfield means that because section 9-615(f) will snare sales to interested purchasers, only where the sale is to a *disinterested party* must the secured creditor justify the price. But as discussed in Part II, this seems an unlikely construction because it conflicts with the literature arguing that such a creditor is presumptively maximizing and it creates the bizarre incentive for the secured party to sell to interested creditors to escape having to prove price is reasonable under section 9-610(b). *See supra* notes 217–223 and accompanying text. Further, the Drafting Committee *rejected* at a March 7, 1997 meeting a proposed comment to section 9-504 (revised section 9-610) which in part stated that "the secured party does have the burden of proving that the terms [including price] were commercially reasonable, and if the secured party fails to provide commercially reasonable justification for accepting the particular price, the finder of fact would be justified in finding the sale to have been commercially unreasonable." Miller, *supra* note 158, at 226–27. Nothing, however, would prevent the secured party from voluntarily providing an explanation for a low price sale. Indeed, given the possibility that some courts will not wholly embrace the procedures test under the revised Article 9, secured creditors may choose as a prophylactic matter to provide an explanation for a seemingly low price. *See* CLARK, *supra* note 47, ¶ 4.08[8][b], at 4-257 (arguing that the Montana supreme court in *Auto Credit, Inc. v. Long*, 971 P.2d 1237 (Mont. 1998) wrongly held a sale commercially unreasonable in effect due solely to a low price, and thus the case "stands as a warning to creditors of the need to explain to the court why the collateral fetched a very low price").

419. This is not possible given the arguments in Part IV.A.

fact (judge or jury),[420] it seems likely that the judge or the trier of fact (judge or jury) either consciously or unconsciously will take it into account when carefully scrutinizing the sale's aspects beyond the limits as discussed in Section B.[421] One recent empirical study suggests that, even in procedures test jurisdictions, price played a significant role in deciding the sale's commercial reasonableness under the former Article 9.[422] Perhaps then, it would not be surprising to see price play a similarly strong role under the revised Article 9, albeit covertly under the guise of procedural review. For example, with respect to the no harm, no foul rule under the revised Article 9, the trier of fact might use price to characterize the severity of a procedural error identified through the robust incorporation strategy inquiry. Or the trier of fact might internally infer unreasonable procedural irregularity from low price evidence. The risks here, of course, are those discussed above.[423] For a court concerned about this possibility, it seems prudent to acknowledge that the price elephant is in the jury room and address it with an appropriate jury instruction(s).[424]

CONCLUSION

This Article has gone in search of commercial reasonableness—no easy task. The debate over the procedures test and the fair price-determining function theory versus the proceeds test with its emphasis on secondary sources of value and fair price raged so furiously because, at their core, these positions are incompatible: the greater the role of price, the more the fair price-determining function upon which the procedures test is grounded is eroded through the introduction of secondary source evidence of the

420. If the determination of a "low price" was a question of law rather than fact, the judge would have the responsibility of its determination and could fashion a way to keep the secondary source evidence from the trier of fact in a jury trial. This practice, however, would run against case law under the former Article 9 considering low price to be a question of fact. *See supra* note 50 and accompanying text. The Article does not analyze the issue any further.

421. *See supra* notes 339–71 and accompanying text.

422. Williams, *supra* note 304, at 705, 720–31. The empirical study involved 184 cases. The article does not discuss whether the author segregated procedures test jurisdictions from proceeds test jurisdictions. The article generally states that despite the courts' rhetoric of process review, the sale's price is one of only four statistically significant factors in commercial reasonableness review. *Id.*

423. *See supra* notes 367–69 and 404–407 (respectively) and accompanying text.

424. *See, e.g.*, Truck Center, Inc. v. Autrey, 836 S.W.2d 359, 364–65 (Ark. 1992) (quoting jury instruction that recited section 9-504(3)'s commercial reasonableness standard, and an instruction that "[g]enerally, the secured party acts in a commercially reasonable manner when [sic] 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"); LaSalle Motor Car Sales, Inc. v. Calumet Nat'l Bank, 440 N.E.2d 9, 11 (Ind. Ct. App. 1982) (setting forth requested but denied jury instruction that requires that the jury consider whether the sale price was fair in determining the sale's commercial reasonableness, and approving jury instruction that commercial reasonableness should be measured by business practices); Massey-Ferguson Credit Corp. v. Black, 764 S.W.2d 137, 144 (Mo. Ct. App. 1989).

collateral's value and fair price. Yet, the more price evidenced by secondary sources is kept out or its role minimized, the greater the risk of abuse by the non-maximizing secured creditor under the procedurally regular and reasonable sale and secured parties, debtors, and courts alike not being able to identify proper sales procedures. Given the inherent tension between these positions, it should not be surprising that the drafting process was contentious when it broached these issues. The Article attempted to forge a fair balance between them while remaining doctrinally and policy-wise faithful to the procedures test and its ascendancy under the revised Article 9's commercial reasonableness standard.