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Using an Online Auction to Sell Article 9 Collateral

By Michael Korybut



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I. Introduction

A. Scope

This article discusses selected issues under Article 9 of the Uniform Commercial Code (UCC) with respect

to a secured party using an online auction to sell repossessed collateral.¹

B. Online Auctions

Perhaps the best known online auction site is eBay, which opened its cyberspace doors for business over ten years ago. eBay has both a general trading platform, eBay.com,² through which dozens of categories of property are sold, and specialized trading platforms, like eBay Motors.com³ where automobiles, trucks, and parts are sold.

Besides eBay, the Internet Auction List lists under the category "Online Auctions" hypertext links to eighty-five online auctions.⁴ Additionally, there are online auctions that are not listed on the Internet Auction List.⁵

Through online auctions, sellers dispose of all kinds of distressed assets, including tax-delinquent real property,⁶

bankruptcy estate assets,⁷ and seized and forfeited assets, including automobiles,⁸ excess inventory,⁹ and surplus goods.¹⁰ eBay, for example, has been called a "liquidation machine."¹¹ Other Internet sites are more specialized. Bid4Assets, for example, "has developed into the largest seller of tax-defaulted properties on the Internet,"¹² and has "developed a specialty selling seized and surplus goods for government agencies...."¹³

C. Article 9

Under Article 9, a repossession sale must be "commercially reasonable" in "[e]very aspect...including the method, manner, time, place, and other terms."¹⁴ The largely undefined commercial reasonableness standard provides a secured party the flexibility to identify and use market-based sale channels and procedures to sell repossessed collateral.¹⁵ In this endeavor, the secured party is expected to act in good faith and with due diligence to

1. The article considers only UCC Article 9, although other laws may give rise to legal uncertainty about using an online auction to sell repossessed collateral. For example, in California, the secured party must comply with the Rees-Levering Motor Vehicle Sales & Finance Act as well as California's UCC to obtain a deficiency judgment after the sale of a repossessed vehicle. See, e.g., *Bank of Am. v. Lallana*, 960 P.2d 1133 (Cal. 1998).

2. eBay, available at <http://www.ebay.com/> (last visited June 23, 2007).

3. eBay Motors, available at <http://www.motors.ebay.com/> (last visited June 23, 2007).

4. The Internet Auction List, available at <http://www.internetauctionlist.com/Results.asp?CategoryID=13&LocationID=0> (last visited June 23, 2007).

5. See, e.g., Title Auctions, available at <http://www.titleauctions.com/> (last visited June 23, 2007).

6. See, e.g., bid4Assets, available at <http://www.bid4assets.com/> (last visited June 23, 2007); see also DAVID C. WYLD, GOVERNMENT GARAGE SALES: ONLINE AUCTIONS AS TOOLS FOR ASSET MANAGEMENT 33, 60-64 (2004), available at <http://www.businessofgovernment.org/pdfs/WyldReport3.pdf> (discussing examples of sales by governmental agencies of tax-delinquent real property through bid4Assets and other online markets).

7. See, e.g., bid4Assets, available at <http://www.bid4assets.com/> (last visited June 23, 2007).

8. See, e.g., *id.*; see also WYLD, *supra* note 6, at 60 (describing bid4Assets as having developed a "specialty selling seized and surplus goods for government agencies," including automobiles seized by the U.S. Marshals Service).

9. See WYLD, *supra* note 6, at 36.

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

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

12. *Id.* at 59.

13. *Id.* at 60.

14. UCC § 9-610(b).

15. 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*]; 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.4 (1965) [hereinafter 2 GILMORE]; see also Michael Korybut, *Searching For Commercial Reasonableness Under Revised Article 9*, 87 Iowa L. Rev. 1385, 1392-93 (2002).

identify and use the market and sale procedures best calculated to realize the highest price possible for the collateral.¹⁶

Article 9's price maximization goal "is tempered by other competing policies, such as[:] the secured party's absolution from unforeseeable or uncontrollable events adversely affecting the sale;¹⁷ the secured party's interest in conducting a quick and inexpensive sale;¹⁸ the

secured party's lack of sophistication and resources;¹⁹ constraints imposed by relatively inexpensive collateral;²⁰ and cases of few or no available markets for the particular type of collateral.²¹"

Balancing the tension between the commercial reasonableness standard's price maximization goal and these tempering policies, Article 9 holds the secured party only to those markets and attendant sale procedures that are reasonably identifiable and accessible under the circumstances.²² Further, once the

secured party has identified such a market and sale procedures and conducted a procedurally regular sale free from collusion, fraud or self-dealing,²³ if in fact the collateral's price is not maximized, the low price alone will not render the sale commercially unreasonable.²⁴ Indeed, many commentators and courts say that there is an acceptable range of fair prices within which the sale price can safely fall.²⁵

In addition to complying with the commercial reasonableness standard, Article 9 requires that a secured party give certain parties advance notification of the intended sale.²⁶ Where a sale is found to be commercially unreasonable or the sale notice is non-complying, the secured party's ability to collect a deficiency may be adversely affected under the rebuttable presumption rule,²⁷ and in certain circumstances the secured creditor also may be liable for certain damages.²⁸

D. Is Using an Online Auction Like eBay Commercially Reasonable?

A large body of published judicial opinions exists on what constitutes a commercially reasonable sale. From this Article 9 jurisprudence, doctrinal

16. See 2 GILMORE, *supra* note 15, § 44.5 (stating that the secured party must "act with due diligence...use his best efforts...[and have a] 'reasonable regard for the debtor's interest'" in obtaining the highest possible price for the collateral). For cases, see, e.g., *Commercial Credit Equip. Corp. v. Parsons*, 820 S.W.2d 315, 323 (Mo. Ct. App. 1991) (stating that in the face of a low price sale, the court needed to determine that the secured party had not neglected "the obligations of good faith, diligence, reasonableness and care. In the context of disposition of collateral, the duty to act in good faith is shown by evidence that the secured party was punctilious as to every procedure imposed by § 400.9-504(3) and was free of self-dealing. The diligent attention to the rights of the creditor at every stage of the disposition of the collateral, from declaration of default, through the notice of sale, the advertisements, the numbers of dealers invited to bid, the encouragement and responses to informal inquiries, all attest to a purpose to gain the best resale price and reduce any deficiency"); *United States v. Terrey*, 554 F.2d 685, 695 (5th Cir. 1977) (stating that "the creditor...has the fiduciary duty to make a sincere effort to obtain the full market value for the assets"); *Eagle Bank & Trust Co. v. Dixon*, 15 S.W.3d 695, 695 (Ark. Ct. App. 2000) (stating that "[u]ltimately, commercial reasonableness requires that the secured party act in good faith to maximize returns on collateral"); see also *Old Colony Trust Co. v. Penrose Indus. Corp.*, 280 F. Supp. 698, 714-15 (E.D. Pa. 1968), *aff'd*, 398 F.2d 310 (3d Cir. 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"); *Id.* at 712 (stating that "Section 2-706, dealing with a seller's rights and duties to resell, has requirements of commercial reasonableness exactly parallel to those of § 9-504(3).") and that Official Comment 4 to Section 2-706 states "that the option between the two [a public or private sale] was given to enable 'the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances'" (quoting U.C.C. § 2-706)). See Michael Korybut, *Article 9's Incorporation Strategy and Novel, New Markets for Collateral: A Theory of Non-Adoption*, 55 *Buff. L.R.* 137, 144 at n.12 (2007).

17. Professor Gilmore maintained that the good faith, diligent secured party should not be second-guessed where, in hindsight, he failed to realize the highest price for the collateral due to unforeseeable or uncontrollable events. See 2 GILMORE, *supra* note 15, § 44.5; ROBERT BRAUCHER & ROBERT A. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS* 501-02 (1977) (stating that "[i]n essence it [section 9-507(2)] provides that the secured party should not be liable merely because he failed to take advantage of an opportunity of which he had no reason to know, or which was, as a practical matter, not available to him. If, however, a substantially better price was obtainable by another disposition of which the secured party should have known, section 9-507(2) does not exculpate him"). In explaining the reason for the former Section 9-507(2)'s admission that "[t]he fact a better price could have been obtained by a sale at a different time or in a different method...is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." Professor Gilmore said that "[t]he secured party is not required to be a seer or a prophet. He is not required to anticipate the course of the market." 2 GILMORE, *supra* note 15, § 44.6; see also Korybut, *supra* note 15, at 1421-22; Korybut, *supra* note 16 at 145, n.14.

18. See Edward J. Heiser Jr. & Robert J. Flemma, Jr., *Consumer Issues in the Article 9 Revision Project: The Perspective of Consumer Lenders*, 48 *Consumer Fin. L.Q. Rep.* 488, 499 (1994); Homer Kryptke, *Law and Economics: Measuring the* (Continued in next column)

18. (Continued from previous column)

Economic Efficiency of Commercial Law in a Vacuum of Fact, 133 U. Pa. L. Rev. 929, 946 (1985); Maury B. Poscover, *A Commercially Reasonable Sale Under Article 9: Commercial, Reasonable, and Fair to All Involved*, 28 *Loy. L.A. L. Rev.* 235, 244 (1994) (stating that "[b]ecause a secured lender does not want to purchase the collateral at the sale or to store it for any longer than is necessary, the economic pressures on the lender encourage an expedited sale and, again, the optimum price. In general, with mercantile items and disposable goods, the maintenance and storage costs, plus the tendency for the value of the goods to decrease over time, makes expedited sales attractive to secured lenders"); Luiz E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 *UCLA L. Rev.* 445, 513 (1994) (arguing that "the foreclosing creditor has a legitimate interest in obtaining repayment of the antecedent obligation expeditiously; accordingly, it should not be required to 'hold out' for the very best price"). In striking a fair balance between this interest and the debtor's concern with obtaining the highest price, courts and commentators recognize (and debate the extent of) legitimate limits to the foreclosure sale efforts the secured party must make to achieve such a price. See ROBERT L. JORDAN & WILLIAM D. WARREN, *COMMERCIAL LAW* 267-68 (4th ed. 1997) (observing that "[t]he law has long struggled with the problem of how to strike a fair balance between the interest of the foreclosing creditor in being able to realize on collateral quickly and cheaply and the rights of the defaulting debtor in having a fair disposition of the property"); Korybut, *supra* note 15 at 1422, n.150; Korybut, *supra* note 16 at 145, n.15.

19. See Korybut, *supra* note 15, at 1423; Korybut, *supra* note 16 at 145, n.16.

20. See Korybut, *supra* note 15 at 1458; Korybut, *supra* note 16 at 145, n.17.

21. See Korybut, *supra* note 15 1423; Korybut, *supra* note 16 at 145, n.18.

22. See Korybut, *supra* note 15 at 1422-23 (stating that "[v]arying with the secured party's sophistication and resources, the value of the collateral, and the available markets for the collateral, even a good faith, diligent secured party intent on maximizing the collateral's price may be unable to realize a price reflecting the collateral's true value"); Robyn L. Meadows, *Warranties of Title, Foreclosure Sales, and the Proposed Revision of U.C.C. § 9-504: Has the Pendulum Swung Too Far?*, 65 *Fordham L. Rev.* 2419, 2446-47 (1997) (stating that "[w]hile the Code does not require the price to be maximized, the creditor is expected to make choices regarding the conduct of the sale with the expectation that they will result in a fair price" (footnotes omitted)); see also *Clark Equip. Co. v. Mastelotto, Inc.*, 150 *Cal. Rptr.* 797, 802 (Ct. App. 1978) (holding the sale commercially reasonable, and stating that "[w]hether a sale is conducted in a commercially reasonable manner is a question of fact and the answer depends on all of the circumstances existing at the time of the sale. Neither the most advantageous method of sale nor the highest possible price is demanded. This is made clear by [section 9-507(2)]"); *Chrysler Dodge Country, U.S.A., Inc. v. Curley*, 782 P.2d 536 (Utah Ct. App. 1989) (holding the sale commercially reasonable, and stating that "[i]t is the duty of the secured party to obtain the best possible price for the benefit (Continued in next column)

22. (Continued from previous column)

of the debtor. However, the secured party does not have to use extraordinary means"); *Appelton State Bank v. Van Dyke Ford, Inc.*, 279 N.W.2d 443, 445 (Wis. 1979) (holding the sale commercially reasonable and stating that "the secured party owed a duty to the debtor to use all fair and reasonable means in obtaining the best price for the property on sale. The secured party need not use 'extraordinary means' to accomplish this result."); 9C WILLIAM D. HAWKLAND, *HAWKLAND UNIFORM COMMERCIAL CODE SERIES* § 9-627.4 (2001); JORDAN & WARREN, *supra* note 18, at 288. Cf. *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 570 P.2d 702, 711 (Wash. App. 1977) (holding the sale commercially unreasonable, although stating that "[t]he duty of the secured party in this instance was to obtain the best possible price it could obtain for the collateral for the benefit of the debtor. The secured party does not have to use 'extraordinary means' to accomplish this result"); Korybut, *supra* note 16, at 1422-23.

23. See Korybut, *supra* note 15, at 1450-51, 1465-74.

24. See UCC § 9-627(a); see also Korybut, *supra* note 15, at 1432, 1434.

25. See Korybut, *supra* note 15, at 1432, 1434 (discussing such commentary).

26. UCC § 9-611.

27. UCC § 9-626(a)(2). For consumer transactions, courts have some discretion to apply the absolute bar rule instead. See UCC § 9-626(b).

28. UCC § 9-625(b).

factors of commercial reasonableness have been established, including: the necessary publicity (advertising of the sale); the place of sale; solicitation and receipt of bids; the secured party's familiarity with that type of property; the price realized for the collateral; and whether the sale was in accordance with reasonable commercial practices.²⁹

Because online auctions differ in form and function in important respects from conventional, traditional market channels for repossessed collateral, novel doctrinal questions arise under these commercial reasonableness factors.³⁰ Unfortunately, as of October 3, 2007 the author could not find a single published case discussing the question of whether an Article 9 secured party's use of an online auction is commercially reasonable. While there are bankruptcy court cases where the bankruptcy judge has approved the trustee's request to use an online auction to sell bankruptcy assets, with one notable exception (*In re A.W. Logging, Inc.*, discussed below)³¹ none of these cases wrestle with the question of whether using an online auction is commercially reasonable under Article 9.³²

Given the dearth of case law, a secured party planning a sale must be

particularly sensitive to the possible issues that a disgruntled debtor may raise to challenge an online auction sale. Set forth below are selected Article 9 issues raised by use of an online auction, concerning: (1) notice of the sale; and (2) the sale's commercial reasonableness.

II. Selected Notice of Sale Issues

A. Introduction

The secured party must send notification of the online auction sale to the debtor, any secondary obligor, and any other secured party or lienholder designated by Article 9.³³ Article 9 describes the contents of a reasonable notification for both non-consumer goods and consumer goods transactions,³⁴ provides respective safe harbor notification forms,³⁵ and except for consumer transactions creates a safe harbor time period of ten days before the sale date to send the notice.³⁶ While the notice's contents generally are more detailed for consumer goods transactions than for non-consumer goods transactions, for purposes of this article it is the contents of the non-consumer goods transaction notice that raise issues additional to those in a consumer goods transactions. Thus, this article focuses its discussion on the non-consumer transaction setting.

To begin, section 9-613(1) states that sufficient notice is given where it: describes the debtor and secured party; describes the collateral; states the method of sale; states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge for the accounting; and states the time and place of a public sale or the time after which a private sale is to be made.³⁷ The non-consumer

goods transaction safe harbor form solicits a variety of information, including the "name of the debtor, obligor, or other person to which notification is sent"; the "name, address, and telephone number of the secured party"; a collateral description; for a public disposition, the "Day and Date," the "Time," and the "Place" of the sale; and for a private disposition, only the "day and date" after which the secured party will sell the collateral.³⁸

Some of the information solicited in section 9-613(1) and the safe harbor form raises issues in the context of online auctions.

B. Non-Consumer Transaction Public Auction

As to the "Day and Date" and "Time" requirements, an online auction typically spans several days. EBay, for example, allows for auctions lasting one, three, five, seven or ten days.³⁹ Thus, to satisfy these requirements, the secured party must put down the auction's scheduled period. For example: "Saturday August 11, 2007, 2:30 PM PT to Saturday August 18, 2007, 2:30 PM PT."⁴⁰

As to the "Place" requirement, it is the address of the sale, which in the real world corresponds to a physical location. For online auction sales, the Internet site's Uniform Resource Locator (URL) should be considered the functional equivalent of its address.⁴¹ EBay's home page URL, for example, is <http://www.ebay.com/>. Providing a person with the online auction's URL would allow that person to find the sale's online "location" or "place" of sale.

29. See, e.g., *In re Crosby*, 176 B.R. 189, 195-96 (B.A.P. 9th Cir. 1994) (identifying 17 factors); *Marks v. Powell*, 162 B.R. 820, 829 (Bankr. E.D. Ark. 1993) (identifying five factors); *Conn. Bank & Trust Co. v. Incendy*, 540 A.2d 32, 39 (Conn. 1988) (identifying seven factors); *Westgate State Bank v. Clark*, 642 P.2d 961, 970-71 (Kan. 1982) (identifying nine factors); *Union Nat'l Bank v. Schmitz*, 853 P.2d 1180, 1186 (Kan. Ct. App. 1993) (identifying nine factors). Note that some courts listed price as a term of commercial reasonableness under the former Article 9. Under the revised Article 9, price is more clearly removed as a term of commercial reasonableness. See Korybut, *supra* note 15, at 1435-50.

30. See Michael Korybut, *Online Auctions of Repossessed Collateral*, 31 Rutgers L.J. 29, 61-63 (1999).

31. Slip Copy, 2006 WL 2860808 (Bankr. D. Idaho Oct. 4, 2006).

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

33. UCC § 9-611(c). In the case of consumer goods collateral, the secured party need only send notice to the debtor and any secondary obligor. *Id.*

34. UCC §§ 9-613 (non-consumer goods transaction), 9-614 (consumer goods transaction).

35. UCC §§ 9-613(5), 9-614(3).

36. UCC § 9-612(b).

37. UCC § 9-613(1).

38. *Id.* § 9-613(5). Of this listed information, the consumer goods transaction safe harbor form does not require the "Day" of the sale to be listed. UCC § 9-614(3).

39. eBay.com, available at <http://pages.ebay.com/help/sell/formats.html> (last visited June 23, 2007).

40. See Richard H. Nowka, *Ebay Auctions of Repossessed Vehicles-A Template for Commercial Reasonableness Under Revised Article 9*, 31 S. Ill. U. L.J. 281, 298 (2007). Ebay allows a seller to choose his auction's start date and time up to three weeks in advance. See eBay.com, available at <http://pages.ebay.com/help/sell/schedule.html> (last visited October 3, 2007).

41. See Korybut, *supra* note 30, at 118-119; Nowka, *supra* note 40, at 291.

The secured party's notice should provide a URL as specific to the collateral's designated auction page as is possible and permitted by the Internet site. An online auction site, however, may or may not be able to provide the URL of the secured party's specific auction page sufficiently in advance to allow the secured party to include it in a timely notice of sale.⁴² In this case, the secured party should provide, in the notice and advertising, the Internet site's home page URL and collateral identifying information. With that information, an interested party visiting the Internet site's home page can use the Internet site's search tool⁴³ to locate the secured party's specific auction page. So, for example, for a car sale on eBay Motors, the secured party could give the eBay Motors URL (<http://www.motors.ebay.com/>), and provide the car's Vehicle Identification Number (VIN), model, make, and year.⁴⁴ Despite these efforts, however, a picky court could find such notice non-complying for lack of designating the "place" of sale.

C. Non-Consumer Private Online Auction

If a secured party uses an online auction that is a private disposition, the secured party's notice needs in relevant part to state the "time" after which a private sale is to be made; the safe harbor form in relevant part requires the "day and date," sometime after which the sale will be held. This suggests that the notice need not contain the auction's actual start and end dates and times, in contrast to the

public sale notice as discussed above. Further, providing the "place" of the private sale is not required on the notice, which would seem to remove the need to include the online auction's URL. Nevertheless, to the extent that a private online auction is configured like eBay, it would seem a good idea to include the actual start and end dates and times and the URL.⁴⁵

III. Selected Commercial Reasonableness Issues

A. Should a Creditor Use an Online Auction Rather Than a Conventional Sale Channel, and if So, Which Online Auction?

1. Introduction

The initial decision a secured party must make is whether it is commercially reasonable to use an online auction rather than a conventional market channel and, if so, which particular online auction he should use. When faced with multiple possible markets for collateral, the commercial reasonableness standard expects that a secured creditor, in good faith and with due diligence, will try to identify, assess, and use a market calculated and reasonably available under the circumstances to maximize the collateral's price. Two touchstones here are the secured party's particular type of collateral and the relevant commercial and/or consumer community interested in buying the collateral.⁴⁶ Thus, the secured party's focus should not be the online auction market

channel as a whole, but on a proposed particular online auction through which he wants to sell the particular type of property being held as collateral.⁴⁷ With this in mind, for any online auction these three factors should be considered.

2. A Well-Recognized Market for the Collateral Type

The secured party should try to use an online auction that is considered a prevailing, commonly accepted, and/or well-recognized sale channel for the particular type of property the secured party holds as collateral. Some courts have said that a factor in determining commercial reasonableness is whether the selected sale method or manner for the particular type of collateral conformed to "prevailing trade practices," "accepted commercial practices," "well-recognized" customs and usages, or "commonly accepted commercial practices."⁴⁸ One can see these courts as signaling their belief that such markets are so because they are relatively efficient.

3. A Recent History of Selling the Collateral Type

The secured party should try and use an online auction that has a current, critical mass of interested potential bidders who will compete for such collateral at the secured party's online sale. Courts look favorably on markets that have competitive bidding among bidders interested in the type of collateral the secured party is selling, and unfavorably on those that do not.⁴⁹ If the online auction has no or little history of sellers selling the type of property the secured party has repossessed, nor any other indication that there will be a sufficient number of potential bidders to spark competitive bidding for the secured party's collateral, then the

42. For example, on bid4Assets.com, a seller can create a specific auction page for his item which can be made viewable to potential bidders during a designated preview period before the actual auction starts. The seller may select any length of preview period. When the seller creates the specific auction page, he or she receives both a unique auction ID number and the auction page's specific URL. Thus, a secured party using bid4assets.com could include this information in the notice of sale, and could send the notice well in advance of the online auction's start date. See bid4assets.com, available at <http://www.bid4assets.com/Help/index.cfm?fuseAction=sellerListing&#Preview> (last visited June 25, 2007).

43. Many online auctions have a search tool that allows a viewer to search for specific types of property being auctioned.

44. See, e.g., Nowka, *supra* note 40, at 307. Using only the VIN on eBay's search tool, your author was able to locate the specific auction page for the corresponding vehicle.

45. See Nowka, *supra* note 40 (stating that for a private sale online auction the secured party should substitute "the following provision for the public sale paragraph: [For a private disposition:] We will sell the [describe collateral] privately at an auction on eBay Motors, located at <http://www.motors.ebay.com/>, beginning on [insert date and time] [e.g., November 1, 2006, at 10:00 a.m.] and ending on [insert date and time] [e.g., November 8, 2006, at 10:00 a.m.]"). On the other hand, a picky court might entertain the argument, for example, that the inclusion of the "place" information (the URL) renders the secured party's use of the private sale safe harbor notice form defective or insufficient in some manner, but that would surely be seen as elevating the notice's form over its function and cutting against Article 9's admonition that the "contents of a notification providing substantially all the information specified in [section 9-613(1)] are sufficient, even if the notification includes: (1) information not specified by that paragraph; or (2) minor errors that are not seriously misleading." UCC § 9-613(3).

46. See Korybut, *supra* note 30, at 73, 87.

47. See Korybut, *supra* note 16, at 201.

48. See *id.* at 149-50.

49. See Korybut, *supra* note 30, at 73, 83, 87-89.

secured party puts itself at legal (and business) risk should it use that market.

4. Favorable Comparative Price Data

The secured party should try to use an online auction Internet site where sellers of property similar to the secured party's collateral have received on-average-over-time net proceeds⁵⁰ that are higher than what could be realized in a conventional, traditional market or an alternative online auction.⁵¹ While a low price alone will not render an otherwise complying sale unreasonable,⁵² it will trigger the court's careful scrutiny of the sale process.⁵³ Obtaining comparative price data indicating that a particular online auction has a history of producing reasonable prices for the secured party's type of collateral is good evidence that the choice to use it is commercially reasonable.⁵⁴

The sole case explicating the commercial reasonableness standard in the context of an online auction, *In re A.W. Logging, Inc.*,⁵⁵ illustrates the importance of these factors. The debtor, A.W. Logging, Inc., filed for Chapter 11 bankruptcy. Les Bois Leasing, a creditor, received permission from the bankruptcy court to sell certain heavy equipment leased to A.W. Logging, Inc., but the court apparently did not prescribe a method of sale. Les Bois Leasing used

the online auction site Iron Planet⁵⁶ to sell the heavy equipment. The debtor, A.W. Logging, Inc., then challenged the sale's reasonableness for a variety of reasons, including an alleged low price and use of an incorrect online auction site.⁵⁷

The bankruptcy court reviewed the sale. Because the equipment was leased, the court noted that Article 9 did not directly govern the transaction. However, the court consulted "the Idaho Uniform Commercial Code, and cases interpreting its provisions, for guidance as to what constitutes a commercially reasonable sale...."⁵⁸ In particular, the court reviewed the commercial reasonableness of Les Bois Leasing's choice to use the Iron Planet online auction site rather than another online auction, the Sawmill Exchange,⁵⁹ to sell one of the two pieces of heavy equipment, a sawmill. In condoning the sale, the court said:

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

The evidence showed that Iron Planet is a well-respected auction website that specializes in the sale of heavy equipment. While per-

haps potential purchasers would first consult the sawmill sale site, the Court is not persuaded that, by listing the equipment for sale on the Iron Planet site, the Sawmill was not exposed a to [sic] broad market. The fact that several bids were placed indicates individuals looking to purchase this type of equipment utilize the Iron Planet website. While Debtor would have preferred a different electronic auction service be utilized, under these circumstances, the Court concludes Creditor has met its burden of showing that the sale of the Sawmill on Iron Planet, a website specializing in heavy equipment auctions, was reasonable.⁶⁰

While A.W. Logging, Inc. had presented expert testimony to show that a low price was received for the equipment because the creditor had used Iron Planet, the court did not find the testimony credible.⁶¹ "Any complaints Debtor may have about the resulting sale price, in the Court's opinion, are attributable to market factors and the condition of the equipment, and not the result of Creditor's sale methods."⁶²

There are many types of online auctions from which to choose and judge using the above factors. Nevertheless for some types of collateral (*e.g.*, certain expensive, unique property), there may not be an online auction that sufficiently meets the above three factors individually or in the totality. In that case, the secured party must use another market channel.

50. 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 toward payment of the outstanding debt. UCC § 9-615(a)(1).

51. See Korybut, *supra* note 30, at 86-128; see also WARREN E. AGIN, *BANKRUPTCY AND SECURED LENDING IN CYBERSPACE* at ch.15:9 (2005).

52. See UCC § 9-627(a); Korybut, *supra* note 15, at 1432, 1436.

53. See UCC § 9-627. Official Comment 2; Korybut, *supra* note 15, at 1499.

54. For an online auction that sufficiently meets the three factors discussed above, one thing your author does not believe is necessarily important is the absence of prior Article 9 secured party use of that online auction (as opposed to other types of sellers). See Korybut, *supra* note 16, at 205-210.

55. Slip Copy, 2006 WL 2860808 (Bankr. D. Idaho Oct. 4, 2006).

56. Available at <http://www.ironplanet.com> (last visited June 23, 2007).

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

58. *Id.* at 7.

59. Available at <http://www.sawmillexchange.com/> (last visited June 23, 2007).

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

61. *Id.* at 2.

62. *Id.* at 6. "Debtor presented testimony that comparable, operable sawmills, could be expected to command a price of somewhere between \$42,000-\$54,000. However, the Court regards this opinion with some skepticism, considering that over five years ago the Sawmill was purchased by Creditor for \$52,000. The Court questions the notion that the equipment has suffered little significant depreciation in value." *Id.* at 8.

5. Obtaining the Online Auction Information

a. Introduction

Where does the secured party get information about whether an online auction is well-recognized, has a current, critical mass of interested bidders, and/or fetches better comparable prices than its alternatives? Consider the following non-exhaustive discussion of sources.

b. The Online Auction Site Itself

For a fee, eBay's "Marketplace Research" tool provides its customers with historical data for categories of items sold through eBay.⁶³ "The tool allows you to search up to 90 days of historical eBay listings in order to gauge the market or optimal price for the items you buy or sell. Marketplace Research can also help answer questions such as: How many are available? At what rate do they sell? What is the average price of the item I'm selling."⁶⁴ In addition, eBay provides a helpful "eBay Marketplace Research User Guide" to assist sellers and buyers.⁶⁵ Generally, the guide advises that "[b]efore you start selling on eBay..., you'll first want to get an idea of the demand and size of the market opportunity for your products. This includes the amount of potential business that exists for the type of item you want to sell. Marketplace Research can help you quantify this opportunity in dollars, number of units, and potential profitability."⁶⁶ In particular, the eBay Guide offers different

advice for sellers of unique items and for sellers of commodity/comparable items.⁶⁷

Further, for some types of items like computers, the secured party should be able to assemble comparative price data. By comparing eBay's historical price data with other published retail and wholesale valuations for the collateral,⁶⁸ the secured party can evaluate whether her eBay sale would be likely to fetch net proceeds higher than the average prices reflected in those published sources. Unfortunately, eBay provides historical data only for parts and accessories, not for vehicles, sold on eBayMotors.com, its specialty automotive auction,⁶⁹ and for which there would be various automotive appraisal books with which to compare prices.⁷⁰

Similarly, bid4Assets provides historical price data through its "Power Search" application, although the data is less robust than eBay's.⁷¹ Another online auction, TitleAuctions, provides limited, anecdotal comparative price data on its Internet site. TitleAuctions sells vehicles repossessed by credit unions.⁷² Its Internet site asserts that "TitleAuctions' credit union clients enjoy average sale

prices \$2,100 per vehicle higher than traditional remarketing channels, as well as new loan revenue and increased Web site traffic."⁷³ Further, the Internet site provides four case studies of sellers receiving higher prices for their automobile sales through the online auction than they had historically received through alternative, conventional markets.⁷⁴

c. Case Studies, Articles

There is an abundant literature heralding the benefits of online auctions. For example, Professor David Wyld in 2004 published a comprehensive study on online auction use and concluded that "online auctioning is proving to be the most effective method for disposing of surplus, seized, used, and lost items held by public sector" actors such as the federal and state governments.⁷⁵ From five case studies of the use of online auctions, including auctions conducted through eBay and bid4Assets, Professor Wyld identified four major benefits of online auctions. First, online auctions can "[o]pen up the surplus sales process to a much wider audience and promote greater visibility and transparency for the auction events."⁷⁶ Second, online auctions "[c]reate greater liquidity in the sales process through increased bidding activity among a wider group of interested parties, heightening the chances that the auction will culminate in the

63. eBay Marketplace Research Overview, available at http://pages.ebay.com/marketplace_%5Fresearch/ (last visited June 23, 2007).
 64. eBay.com, available at http://pages.ebay.com/marketplace_research/user_guide.pdf, at page 3 (last visited June 23, 2007).
 65. eBay.com, available at http://pages.ebay.com/marketplace_research/user_guide.pdf, (last visited June 23, 2007).
 66. eBay.com, available at http://pages.ebay.com/marketplace_research/user_guide.pdf, at page 9 (last visited June 23, 2007).

67. eBay.com, available at http://pages.ebay.com/marketplace_research/user_guide.pdf, at page 8 (last visited June 23, 2007).
 68. See, e.g., the Orion Blue Book, that publishes used good prices for various equipment, such as cameras, computers, guns, and videos. Orion Blue Book, available at <http://www.orionbluebook.com> (last visited June 23, 2007). An Orion Blue Book for each category of equipment is available online for fees ranging from \$600 to \$38. See *id.* The IRON Official Guide also lists used farm equipment values. See IRON Guides Home Page, available at <http://www.ironguides.com> (last visited June 23, 2007). See also UsedPrice.com, available at <http://usedprice.com/index.php> (last visited June 23, 2007)(for a large variety of products, the Internet site lists descriptions, specifications, suggested retail price, used buying and selling price, and years of product availability).
 69. See eBay FAQ About Marketplace Research, available at http://pages.ebay.com/marketplace_research/faq/index.html#15 (last visited June 23, 2007).
 70. See, e.g., N.A.D.A., OFFICIAL USED CAR GUIDE, available at <http://www.nadaguides.com>.
 71. See bid4Assets, available at <http://www.bid4assets.com/> (last visited June 23, 2007).
 72. See TitleAuctions, available at <http://www.titleauctions.com> (last visited June 23, 2007). TitleAuctions also provides several free Internet seminars. The first, called "Better Measurement, Better Results," is "targeted at helping credit unions earn higher sale prices for repos," and "covers three key industry benchmarks that credit unions can use to measure remarketing results." <http://www.titleauctions.com/press/story.cfm?nID=25> (last visited June 23, 2007). The second seminar is entitled "The Three "Rs" of Internet Remarketing" which helps "credit unions to understand the benefits and pitfalls of using the Internet to conduct retail sales of repos." *Id.*

73. About TitleAuctions, available at <http://www.titleauctions.com/about> (last visited June 23, 2007).
 74. See TitleAuctions Credit Union Services, available at <http://www.titleauctions.com/press/services/retail.cfm> (last visited June 23, 2007).
 75. WYLD, *supra* note 6, at 81.
 76. *Id.* at 7, 25; see also Warren E. Agin, Auctioning Repossessed Assets on the Internet, Leader's Equip. Leasing Newsl., May 2000, at 1 (stating that "Internet auctions possess a number of attributes that make them superior to traditional auctions. A traditional auction requires the participant's physical presence at the auction location at the time of the auction. Online auctions allow anyone with an Internet connection to participate. Another advantage of most online auction mechanisms is their ability to run over an extended period of time, such as a week or even longer. During the auction period, participants can continue to access the auction on the Internet and place a bid."); Korybut, *supra* note 30, at 42-59 (discussing advantages of and limitations to selling tangible goods through online auctions).

actual sale and disposal of the asset.”⁷⁷ Third, online auctions “[r]aise the final selling prices of surplus items being sold, often at price points that are considerably higher than historical returns on similar assets.”⁷⁸ Fourth, online auctions “[l]ower actual costs outlays, both in direct costs and hidden indirect costs, to agencies to carry out the sale of surplus.”⁷⁹ And Professor Richard Nowka has recently published a very helpful article on how a secured party might conduct a commercially reasonable eBay auction of a repossessed automobile.⁸⁰ Outside the context of repossession sales or sales of distressed assets, other commentators have made similar arguments about the benefits of online auctions.⁸¹

d. Experts

There are third-party intermediaries that can be hired to sell the secured party’s property online. For example, through eBay and other online actions, BKAssets sells bankruptcy assets, and touts itself as “the only full service internet auctioneer dedicated to the sale of bankruptcy related assets....”⁸² And

through eBay, a person can hire a “Trading Assistant” to help sell his or her product.⁸³

B. Public or Private Sale?

Is an online auction a public or private sale? The answer matters for a number of reasons. First, under UCC Article 9 a sale may be public or private, but the choice must be commercially reasonable.⁸⁴ Second, as discussed above at Part II., the secured party must send notice of the sale, and the contents of the notice differ depending upon the characterization of the sale as private or public. Finally, a secured party may purchase its own collateral at a public sale, but generally not at a private sale.⁸⁵ Note, however, that some online auctions like eBay prohibit sellers from bidding at their own sale.⁸⁶

Unfortunately for the secured party, the terms “public” and “private” sale are not defined in Article 9. Official Comment 7 to section 9-610 states that “a ‘public disposition’ is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. ‘Meaningful opportunity’ is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).”⁸⁷

Given this limited explication, the courts have crafted most of the law. Most fundamentally, if a sale is not public then it is private. The most salient criteria of a public sale are: (1) whether the sale offered the public the opportunity to competitively bid, a public auction being the desired, if not necessary, format for such an opportunity; (2) whether there was sufficient advertising prior to the sale notifying and inviting the relevant public of the sale and providing its time, place, and the collateral to be sold; and (3) whether the public had access to the place of sale and the collateral. All criteria must be satisfied or the sale will be deemed private.⁸⁸

Your author believes that online auctions like eBay should be characterized as public sales.⁸⁹ As to the first criteria, online auctions like eBay in both theory and practice are “auctions” as traditionally defined and provide the requisite opportunity for competitive bidding.⁹⁰ As to fulfilling the second criteria, Part III.C. below discusses types of advertising, and limitations thereto, and suggests ways that commercially reasonable advertising can be achieved for online auctions like eBay. Third, online auctions like eBay are sufficiently accessible to the general public.

Courts have applied the access requirement quite literally: no one can be excluded from a public sale; otherwise it is a private sale.⁹¹ With eBay, anyone with access to a computer and the Internet is welcome to freely peruse the online auctions taking place and the property being sold; no fee or registration is required. Even if a person does not own a computer or have access to one at work, free access

77. WYLD, *supra* note 6, at 7; *see also id.* at 25; AGIN, *supra* note 51, at ch. 15:8 (2005) (observing that “the auction websites attract significant numbers of visitors....The Internet auction provides a mechanism to efficiently match the seller of the estate asset with an interested buyer”); Korybut, *supra* note 30, at 29.

78. WYLD, *supra* note 6, at 7; *see also id.* at 25; Korybut, *supra* note 30, at 113-16.

79. WYLD, *supra* note 6, at 7; *see also id.* at 25. *See generally* AGIN, *supra* note 51, ch. 15:8 (arguing that “[o]ne advantage of the Internet auction when compared to conventional sales methods is the cost. The process is automated and, because the auction websites attract significant numbers of visitors, the auction cost does not have to be supplemented by advertising expenses”); Agin, *supra* note 76, at 1 (stating that “[o]nline auctions are also very efficient, because the web sites run software that automates the auction process through online bidding. Thus, the expense per transaction can be relatively low and auctioneers can accept fees based solely on the auction’s success”); Korybut, *supra* note 30, at 57-58.

80. Nowka, *supra* note 40, at 289-90.

81. For a list and discussion of such commentary, *see* Korybut, *supra* note 16, at 154-156. Some academics and other commentators have questioned some of the heralded benefits of online auctions. *Id.* at 210-220.

82. BKAssets.com, available at <http://www.bkassets.com/> (last visited June 23, 2007). *See* AGIN, *supra* note 51, ch. 15:8 (discussing BKAssets.com, “an online auction service that tries to simplify selling items on eBay for the bankruptcy practitioner. BKAssets provides services similar to those of any auctioneer, except that it uses eBay as its auction forum. BKAssets does all of the work of setting up the auction, running the auction (Continued in next column)

82. (Continued from previous column)

on eBay, and closing the sale transaction. BKAssets provides stock language for trustees to include in their sale motions and uses sale notices on the eBay listings to make sure that potential purchasers know that the assets are being sold subject to bankruptcy court jurisdiction and come without warranty.”). *See also* WYLD, *supra* note 6, at 76, 79.

83. eBay.com, Hiring a Trading Assistant—FAQ, available at <http://www.pages.ebay.com/tradingassistants/questions.html#1> (last visited June 23, 2007) (discussing the decision as to whether a customer conducts the online auction herself or uses a third-party service provider; eBay has a feature that allows prospective sellers to locate a trading assistant. “Trading Assistants are experienced eBay sellers from throughout the eBay user community who have indicated they are willing to sell your items for you for a fee”).

84. UCC § 9-610(b).

85. *Id.*

86. *See* eBay.com, available at <http://pages.ebay.com/help/policies/seller-rules-overview.html> (last visited June 23, 2007) (“Sellers must not bid on their own item, or have family members, roommates or employees bid on their item”).

87. UCC § 9-610(b), Official Comment 7.

88. Korybut, *supra* note 30, at note 62.

89. *See generally*, Korybut, *supra* note 30, at note 63. In this I am not alone. *See* Nowka, *supra* note 40, at 289-90.

90. Korybut, *supra* note 30, at 65-68.

91. *Id.* at 63, note 155. *See, e.g.*, John Deery Motors, Inc. v. Steinbronn, 383 N.W.2d 553, 555 (Iowa 1986) (holding that the sale of a repossessed automobile at an auction at which there was competitive bidding but was open only to licensed automobile dealers constituted a private sale, reasoning that the dictionary defines a “public” sale as one that is accessible to, or shared by, all members of the community, while “private” refers to something intended for, or restricted to, the use of a particular person or group or class, and thus the dealers-only auction was not public in character since it was not open to the general public); Garden Nat’l Bank v. Cada, 738 P.2d 429, 432 (Kan. 1987); Morrell Employees Credit Union v. Useton, 28 U.C.C. Rep. Serv. 269, 274 (Tenn. Ct. App. 1979).

to the Internet (or access at nominal cost) is available at many public libraries, and at some academic institutions (including law school libraries). To bid, a person must first register to obtain a username and password, but no fee is charged by eBay. Finally, eBay charges no fee to buy property offered at an online auction. Thus, arguably, no one is excluded from an online auction site like eBay anymore than from real-world public auctions that people typically need to drive or otherwise travel to in order to have access.

C. Advertising the Online Auction Sale

1. Introduction

Advertising for a public or private sale of repossessed collateral must be commercially reasonable.⁹² Traditional advertising is far more important for, and prevalent with, public sales than with private sales. Further, not every private sale must be advertised.⁹³ To the extent that a private sale needs traditional advertising, the following discussion of advertising for a public sale is relevant. Consequently, this article focuses on advertising for a public sale.

2. Advertising Under Article 9

As discussed above at Part III.B., to characterize a foreclosure sale as “public,” the public must be informed of the sale and invited to attend. For advertising of a public sale to be commercially reasonable, the relevant public (the subset of people in the general public reasonably

expected to have an interest in buying the particular type of collateral) must be reached with the appropriate type of advertising. The goal is increased attendance and competitive bidding.⁹⁴ The secured party has a number of traditional advertising media to choose from, including local, regional, and national newspapers, magazines, journals, billboards, television, radio, and direct mail. The secured party also has online advertising tools, including the Internet site itself.⁹⁵

Under these rules, how does the secured party wanting to use an online auction identify the relevant public, and what type of advertising media should she use? The nature and type of the collateral being sold are touchstones for identifying the relevant public and appropriate advertising media.⁹⁶

3. Common, Widely-Used, or Relatively Inexpensive Collateral

Take, for example, a repossessed car that the secured party wants to sell through an online auction. What type of advertisements must the secured party use to reach an audience likely to be interested in bidding for the car?

a. The Online Auction Itself as an Advertisement

For a real-world public sale, traditional advertising in a print or broadcast medium publicizing the time and place of the sale along with a description of the collateral is distinct from the auction itself. Yet an online auction Internet site is both the advertisement of, and the mechanism for, the auction of the goods.⁹⁷ Thus, the choice of online auction Internet site should be considered as part of the secured party’s task of

identifying the relevant public for the collateral and informing those parties of the sale. As discussed above at Part III.A., the secured party should choose an online auction through which property similar to this collateral has been sold at fair prices, which has a current critical mass of interested bidders, and/or is well-recognized. For such an Internet site, there is a good argument that the secured party’s online auction itself is reasonably calculated to reach an interested public and result in competitive bidding.

Assume the secured party has chosen eBay Motors⁹⁸ because he has evidence that it sufficiently meets the three factors discussed above at Part III.A.⁹⁹ Having chosen eBay Motors, the secured party organizes his own specific auction page describing the car, posting digital pictures, providing the sale terms,¹⁰⁰ and deciding the auction’s format and length (assume seven days as permitted by eBay).¹⁰¹ Once the secured party’s auction begins and becomes accessible to bidders, it acts as advertising for itself over the auction’s duration. Thus, the secured party should make sure that the auction page provides the notice contents discussed below at Part III.C.6.

However, considering the secured party’s Internet auction page as a means of advertising carries legal risk for two reasons. First, as discussed below in Part III.C.5., advertising must precede the sale. But on eBay at least, specific auctions do not have a preview period before opening; they do not precede themselves. In this sense, using a specific online auction on eBay as an advertisement for itself may run afoul of the requirement that advertising precede the sale.¹⁰²

92. Korybut, *supra* note 30, at 72; Nowka, *supra* note 40, at 296.

93. See, e.g., *Gaynor v. Union Trust Co.*, 582 A.2d 190 (Conn. 1990). For private sales, the secured party or its agent must make reasonable efforts to identify and inform potential purchasers of the sale. These efforts may include traditional advertising media such as newspapers, flyers or radio, but they need not. So, for example, the private sale of inexpensive and widely-used collateral may need more traditional advertising to identify and inform potential purchasers. More expensive or unique collateral may need no traditional advertising; instead, it may be sufficient for the dealer to contact known or potential bidders directly. See, e.g., *First Westside Bank v. For-Med, Inc.*, 529 N.W.2d 66 (Neb. 1995). See also Korybut, *supra* note 30, at 72, note 196.

94. Korybut, *supra* note 30, at 72-74.

95. *Id.* at 74-75.

96. *Id.* at 73, 87.

97. *Id.* at note 93-94.

98. eBay Motors, available at <http://www.motors.ebay.com/> (last visited June 23, 2007).

99. One academic has discussed such a sale through eBay. See Nowka, *supra* note 40, at 289-90.

100. See eBay.com, available at <http://pages.ebay.com/sellercentral/syioverview/index.html> (last visited June 23, 2007).

101. See eBay.com, available at <http://pages.ebay.com/help/sell/formats.html> (last visited June 23, 2007).

102. Korybut, *supra* note 30, at 94-95. Some online auction sites may offer a preview period during which potential bidders can review the secured party’s collateral’s specific online auction page before the auction’s start date. See *infra* note 118 and accompanying text.

Second, the secured party's auction page is not immediately visible to a person accessing eBay's or eBay Motors's home page; rather the visitor must typically go through several hypertext linked pages to get to any specific auction. Thus, a court might find that the secured party's auction page is too remote or buried to reach the intended audience.¹⁰³

To reduce these risks, the secured party may need to compliment an online-auction-as-Internet-ad strategy with additional promotional efforts. Within the constraint of reasonable costs relative to the collateral's value, the secured party should try to do as many of the following complementary forms of advertising as possible.

b. Conspicuous, Specific Ads on the Online Auction Site Itself

If an online auction site allows for it, the secured party should visibly distinguish its online auction page from others on the Internet site. eBay, for example, for a fee allows sellers to list their property as a "Featured Item"¹⁰⁴ that provides information about the item (even pictures) and links the viewer to the seller's Internet auction page. Varying with the fee, the Featured Item link can be placed on eBay's home page, eBay Motor's home page, or the relevant asset category within eBay or eBay Motors (e.g., "Cars & Trucks").¹⁰⁵

c. Targeted E-Mails

eBay and other online auction sites broadcast emails to registered users about new auctions for specified item types (e.g., cars) designated by the user.

eBay's email contains a link to the specific auction.¹⁰⁶ The limitation to these email ads is that users typically must opt-in to an emailing program (e.g., eBay) or opt-out. eBay does not give sellers the email addresses or other personal information of its registered users. Thus, sellers have no control over the process.

d. Traditional Advertising Media

The secured party should also consider using traditional advertising media like a newspaper of general circulation in the geographic area where the collateral is physically located, to inform members of the public likely to purchase the collateral. This local advertisement also may help satisfy the collateral inspection requirement (discussed below at Part III.D.). If the secured party is even more risk-averse, she may wish to also place an advertisement in a national newspaper like *USA Today* or similar national media since online auctions like eBay allow people geographically remote from the physical location of the collateral to bid and even buy the collateral.¹⁰⁷ The national advertisement may produce additional bidders, and it also addresses any criticism that the relevant public was not adequately reached by the local newspaper advertisement.

4. Uncommon or Expensive Collateral

"For collateral that is expensive or unique, the pool of potential buyers may become quite small, geographically dispersed, and homogeneous. Thus, the relevant public is a relatively small subset of the general public. In part because the size is small, geographically dispersed,

and homogeneous, courts place significant weight on the secured party's efforts to identify this market segment and target it with appropriate advertising."¹⁰⁸ Thus, for expensive or unique collateral, the secured party should make efforts reasonably calculated to identify people interested in such collateral and reach them with targeted advertising media.¹⁰⁹ For the secured party with expensive or unique collateral who wants to use an online auction, what type of advertisements must be used to reach an audience likely to be interested in bidding for the collateral?

The types of advertisements are largely the same as discussed above for common, widely-used, and relatively inexpensive collateral discussed above. There are, however, several importance differences.¹¹⁰

First, for unique or expensive property, there may be specialized Internet auction sites. Recall that in *In re A.W. Logging, Inc.*,¹¹¹ the court reviewed (and ultimately condoned) the commercial reasonableness of creditor Les Bois Leasing's choice to use the Iron Planet¹¹² online auction site rather than another online auction, the Sawmill Exchange,¹¹³ to sell a sawmill. The secured party carefully should consider online auctions specializing in selling the type of property the secured party holds as collateral since such Internet sites may have a good history of selling that type of property for fair prices and have a current critical mass of interested bidders.¹¹⁴

103. *Id.* at 95-96.

104. See eBay.com, available at http://pages.ebay.com/help/sell/featured_plus.html (last visited June 22, 2007) (describing its "Featured Plus! tool which will "give your listing stand-out placement in category lists and search results!").

105. See eBay, available at http://pages.ebay.com/help/sell/ia/promoting_your_item.html (discussing a variety of different promotional options). See also eBay, available at <http://pages.ebay.com/sell/listingupgrades/> (listing different promotional tools and their fees) (last visited June 23, 2007).

106. See eBay, available at <http://pages.ebay.com/help/myebay/track-favorites.html#searches> (last visited June 22, 2007) (stating that "[y]ou can save up to 100 searches for easy viewing. You can even have eBay automatically search for items you're interested in and notify you by email when new matching items are listed."). See also eBay, available at <http://pages.ebay.com/help/specialtiesites/email-marketing.html> (last visited June 22, 2007).

107. Compare Nowka, *supra* note 40, at 301.

108. Korybut, *supra* note 30, at 79.

109. *Id.*

110. Recall also that eBay's Marketplace Research User Guide offers different marketing and promotional advice for sellers of unique items versus sellers of commodity/comparable items. See eBay.com, available at http://pages.ebay.com/marketplace_research/user_guide.pdf, at page 8 (last visited June 23, 2007).

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

112. Available at <http://www.ironplanet.com> (last visited June 23, 2007).

113. Available at <http://www.sawmillexchange.com/> (last visited June 23, 2007).

114. See Agin, *supra* note 51, at ch. 15:9 (discussing specialized Internet sites like bid4assets.com to sell bankruptcy assets).

Second, as to traditional advertising media, for expensive or unique property the secured party should use (if available) private lists of potential bidders¹¹⁵ and relevant trade magazines and the like (e.g., “Trade-A-Plane”¹¹⁶), and national newspapers like *USA Today* or the *Wall Street Journal*, so as to reach a typically small, geographically dispersed, and homogeneous group of potential bidders.

Finally, the secured party should also consider placing an advertisement in a local paper in the geographic area where the collateral physically is located. This advertisement may not be particularly effective in terms of attracting potential bidders, but as discussed below in Part III.D., it helps satisfy Article 9’s collateral inspection requirement by telling people where they can physically inspect the collateral.

5. Duration of Advertisement

Advertising must precede the public repossession sale to allow potential bidders to investigate the collateral and arrange to be present at the sale. The time period between the advertising and the sale must be reasonable and accordingly varies from several days to months depending on such factors as the nature of the parties, the collateral type, and industry practice. For common, widely-used, and inexpensive collateral like computers and used cars sold in a real-world public auction, many courts find ten days prior advertising to be commercially reasonable.¹¹⁷

For the secured party using an online auction like eBay, advertising must continue to precede the sale. For traditional media like ads placed in newspapers, trade

journals and the like, the secured party must run them for an appropriate period prior to the beginning time and date of the online auction. And because an online auction remains “open” for its prescribed length (for example, seven days as permitted by eBay), caution suggests that this advertising should also continue for the online auction’s entire time period.

As for online auction ads on the Internet site itself and email target marketing to registered users, to the extent permitted by the online auction site, similarly the secured party should try to arrange for such advertising to run for the appropriate period prior to, and during, the online auction. For example, on bid4Assets.com, sellers can list their property for a preview period before the actual auction begins.¹¹⁸

6. Content of the Advertisement

For traditional media like newspapers and trade magazines, the advertisement should contain all of the information contained in the notice of sale, as discussed above in Part II., including the time and place of the sale. It should also include the physical location, time, and date at or after which the collateral can be inspected by potential buyers (see Part III.D. below). To the extent permitted by the online auction site, the same should be true for targeted emails to potential buyers. On the secured party’s Internet auction page itself, the same information at minimum should be given, although additional information like the sale terms and pictures of the collateral can be included and is recommended.

In the context of a secured party selling a car through eBay, Professor Nowka recommends the following clause, which, if run nationally, locally, and on eBay Motors, he believes would be commercially reasonable advertising of the sale:

NOTICE OF SECURED PARTY SALE

Notice is hereby given that [name of secured party] intends to sell at public sale the following vehicle: [describe collateral using year, make, model and VIN number]. The sale will be an internet auction held on eBay Motors at <http://www.motors.ebay.com/>, and will begin on [include day, date and time for beginning of auction] and end on [include day, date and time for ending of auction]. Interested buyers should access eBay Motors at <http://www.motors.ebay.com/> and search using the year, make and model of the vehicle. The vehicle will be sold to the highest bidder [with or without reserve]. Terms of the sale are [include terms of sale, e.g., cash] with a deposit of [include amount] and the balance due within [include time]. The buyer is responsible for all expenses for delivery of the vehicle from its current location at [include location of vehicle] and the vehicle can be seen prior to the sale at that location at the following time(s) [include time when vehicle can be inspected]. [include name of secured party] reserves the right to withdraw the vehicle from sale at any time prior to the completion.

[Include name of secured party] SELLS THIS VEHICLE AS IS, WHERE IS AND WITH ALL FAULTS. [Include name of secured party] MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, REGARDING THE VEHICLE, INCLUDING THE WARRANTY OF MERCHANTABILITY. [Include name of secured party] HAS REPOSSESSED THIS VEHICLE FROM ITS OWNER AND DOES NOT CLAIM OR WARRANT IT HAS TITLE TO THE VEHICLE. [Include name of secured party] MAKES NO WARRANTY RELATING TO

115. See, e.g., *Ford & Vlahos v. ITT Commercial Fin. Corp.*, 885 P.2d 877, 882 (Cal. 1994) (“A dealer in the type of property repossessed here—a valuable airplane—surely would advertise its auction in the relevant market by, for example, informing brokers, placing reasonably prominent announcements in recognized trade journals, or contacting individuals or entities known to be seeking an airplane of the type for sale.”).

116. Trade-A-Plane.com, available at <http://www.trade-a-plane.com> (last visited June 23, 2007).

117. Korybut, *supra* note 30, at note 94.

118. See bid4Assets.com, available at <http://www.bid4Assets.com/Help/index.cfm?fuseAction=sellerListing&#Preview> (last visited June 25, 2007) (“The Preview period gives buyers time to conduct research on the item before the bidding begins.”).

TITLE, POSSESSION OR QUIET ENJOYMENT OF THE VEHICLE.

If you have any questions contact [name, address, and telephone number of secured party or its representative] or visit eBay Motors at <http://www.motors.ebay.com/> and search using the year, make, and model of the vehicle.¹¹⁹

D. Inspection of the Collateral in Cyberspace

Bidders at a public sale must have the opportunity to inspect the collateral at or before its sale. In some jurisdictions, the collateral must be displayed and available for inspection at the sale site. In other jurisdictions, courts hold that, depending on industry custom, while inspection of the collateral must be available prior to the sale, the collateral need not be present at the sale site if the sale's notice provided the collateral's location and informed prospective buyers of their opportunity to inspect it. However, the location of the collateral cannot be an unreasonable distance from the sale site. The inspection requirement's main objective is to realize the highest possible price for the collateral.¹²⁰

As discussed above at Part II.B., arguably, for an online auction, the place of sale is the Internet auction page located in cyberspace. How then to satisfy the inspection requirement? Several things can be done.

First, the secured party should provide a detailed written description of the collateral on his or her specific auction page. The secured party should also post digital pictures of the collateral. For some types of property, commercial reality suggests that, with this information alone, potential buyers can reasonably inspect the collateral. Arguably, a buyer's inability to literally "kick the tires" of a car sold online has not prevented millions of cars being sold through the Internet, including

online auctions. For some types of property, however, this type of virtual inspection may not yet be sufficiently accepted for it to be commercially reasonable.

Second, for tangible collateral like a car which is physically located somewhere, the secured party should make the collateral available for physical inspection. The secured party in its advertisements should provide the address and times at which such inspection can take place.¹²¹

IV. Limiting Some Risk

A. Security Agreement Clause

In the security agreement, the secured party and debtor can craft standards to determine whether a sale is commercially reasonable and whether proper notice of the sale is given.¹²² The debtor cannot, however, waive the secured party's duty to conduct a commercially reasonable sale.¹²³

In the context of a secured party selling a car through eBay, Professor Nowka suggests the following clause:

Debtor agrees that notification of the sale of the collateral shall be reasonable, regardless whether Debtor receives the notification, if notification is mailed to Debtor at least ten (10) days before the sale begins, through the U.S. Postal Service, postage prepaid, to Debtor's address as it appears in this record or to such other address as Debtor shall have furnished in writing to the secured party. Debtor agrees that a sale of the collateral through an eBay internet auction shall be commercially reasonable if the sale is advertised prior to the sale one time in one newspaper of general circulation in the area where the vehicle is located, the time for bidding on the collateral is at

least seven (7) days, and the collateral is sold to the highest bidder.¹²⁴

Ed Smith, an attorney at Bingham McCutchen LLP, places the following language in security agreements:

To the extent that applicable law imposes duties on the Lender to exercise remedies in a commercially reasonable manner, the Company acknowledges and agrees that it is not commercially unreasonable for the Lender...(h) to dispose of Collateral by utilizing Internet sites that provide for the auction of assets of the types included in the Collateral or that have the reasonable capability of doing so, or that match buyers and sellers of assets,...¹²⁵

B. Article 9 Safe Harbor

UCC section 9-627(b)(3) states that "[a] disposition of collateral is made in a commercially reasonable manner if the disposition is made...in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."¹²⁶ Section 9-627(b)(3) thus creates a commercial reasonableness safe harbor for the secured party: If the secured party uses reasonable commercial practices as used by dealers to sell the particular type of collateral, then a repossession sale using these practices is commercially reasonable. To the extent the secured party can demonstrate that dealers of the type of property the secured party holds are using a particular online auction to sell their property, the safe harbor protection should be considered.

However, the application of the safe harbor generally, and specifically to online auctions, carries some uncertainty for

124. Nowka, *supra* note 40, at 317.

125. Permission to reproduce granted by Edwin Smith, Partner, Bingham McCutchen LLP.

126. UCC § 9-627(3). Article 9 provides two other safe harbors, but as they turn on whether the sale is a "recognized market," they are greatly limited in scope. UCC § 9-627(1). (2), and Official Comment 4.

121. See Nowka, *supra* note 40, at 298.

122. UCC § 9-603(a).

123. UCC § 9-602(7).

119. See Nowka, *supra* note 40, at 307-08.

120. Korybut, *supra* note 30, at 119-120.

several reasons. First, the dealers' commercial practices must be "reasonable." Article 9 offers no guidance on how to identify when dealer commercial practices are reasonable within the meaning of section 9-627(b)(3) and when they are not. Second, the safe harbor is expressly limited to the commercial reasonableness of the "manner" of sale, leaving open the question of whether the other aspects of commercial reasonableness, including

those enumerated in section 9-610(b) (method, time, place, and other terms), also enjoy protection under the safe harbor. Third, the safe harbor speaks of "dealers" in the plural. It is not clear how many dealers must use the particular commercial practice in order for it to enjoy protection under the safe harbor. Even if one selects a percentage, say twenty-five percent, is this twenty-five percent of all similar dealers in the United

States, the state where the collateral is located, or the county or city where the collateral is located? Further, even if one decides upon a geographical constraint, say twenty-five percent of dealers in the county where the collateral is located, does the geographical constraint make sense in the context of online auctions which have no geographic boundaries? Thus, the secured party may not find much solace in this safe harbor.¹²⁷

127. See Korybut, *supra* note 16, at 193-195.