UCC Article 9 Sales: Florida

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A Q&A guide to Uniform Commercial Code (UCC) Article 9 Sales in Florida. Article 9 of the Model UCC is intended to create a uniform system across the country for creating, perfecting, and enforcing security interests in personal property. Although Article 9 has been adopted by many states, some states have made modifications to the law or have not adopted the most recent version of the law. This Q&A addresses the process by which secured creditors may exercise their rights to enforce their security interests in personal property under Florida's equivalent Article 9 statutes, including repossession remedies, notice requirements, disposition of proceeds, and collateral repurchase.

GENERAL

1. List the laws (statutes and regulations) by name and code number that govern secured transaction sales in your jurisdiction.

Sections 679.101 to 679.808 of the Florida Statutes govern secured transactions sales in Florida.

2. Has your jurisdiction adopted the model Uniform Commercial Code (UCC)? If no, please:

- Identify which among the statutes listed in Question 1 is your jurisdiction's adopted version of Article 9.
- Describe any significant differences between your jurisdiction's adopted version and the model UCC.

Florida has adopted the model Uniform Commercial Code for secured transactions.

INITIAL STEPS

3. If a debtor defaults on its obligations to a secured party, please explain what initial steps the secured party must take to properly effectuate a repossession or sale of collateral in your jurisdiction. Please list all applicable statutes.

In Florida, the secured party must act to enforce its security interest after default, as defined by Article 9 of the Uniform Commercial Code (UCC). Following a debtor's default, a secured party may:

- Take possession of collateral, either with or without judicial process.
- Disable the collateral leaving it on the debtor's premises.
- Forego repossession altogether.

(§ 679.609, Fla. Stat.)

The specific methods allowed by Article 9 for repossession of collateral after default, depend on:

- The nature of the collateral.
- How the secured party obtained and perfected its lien.

For detail concerning methods of repossession and the related obligations of a secured party, see Question 4.

Following repossession, the secured party may arrange for a sale of the repossessed collateral.

REPOSSESSION REMEDIES

4. What remedies may a secured creditor take to repossess collateral in your jurisdiction. Please address all applicable options, including:

- Self-help repossession.
- Right to make the debtor assemble collateral.
- Notifying account debtors.
- Any other available remedies.

Article 9 of the Uniform Commercial Code (UCC) provides various methods for a secured creditor to repossess collateral after default. The method for obtaining possession depends on the nature of the collateral and, to some extent, how the security interest was perfected.

In Florida, the most common methods of repossession are:

- Self-help repossession (see Self-Help Repossession).
- Right to make the debtor assemble collateral (see Right to Make the Debtor Assemble Collateral).
- Notifying account debtors (see Notifying Account Debtors).
- Deposit accounts tri-party control agreements (see Deposit Accounts Tri-Party Control Agreements).

SELF-HELP REPOSSESSION

Self-help repossession and disabling equipment is the fastest and most cost-effective form of repossession of collateral because the secured party does not need to retain a lawyer to act.

Under the Florida Statutes, a secured creditor may use self-help to take possession of collateral or disable equipment on the debtor's premises so that it may later be sold, provided its efforts do not breach the peace (§ 679.609(2)(b), Fla. Stat.; see *Northside Motors of Florida, Inc. v. Brinkley*, 282 So.2d 617 (Fla. 1973)).

A breach of the peace is not defined in the UCC. Case law provides some guidance but does provide a clear definition of what constitutes a breach of the peace. Therefore, a creditor employing self-help repossession takes the risk that:

- Its conduct may constitute a breach of the peace requiring the creditor to give back the repossessed collateral.
- It becomes liable to the debtor for any damages caused by the repossession attempt.

(See *S. Indus. Sav. Bank v. Greene*, 224 So.2d 416 (Fla. 3d DCA 1969).)

While there is a limited privilege to enter the debtor's land for purposes of repossession, Florida case law holds that:

- A breach of the peace occurs if the debtor refuses permission for the creditor to enter the debtor' s property to recover the collateral (see *Northside Motors*, 282 So2d. at 624).
- If the debtor does not object, the secured creditor did not breach the peace when entering the debtor's property, for example a driveway, unless the creditor enters a home or other closed structure (see *Raffa v. Dania Bank*, 321 So.2d 83, 85 (Fla. 4th DCA 1975)).

There is also some authority to suggest that entry into a structure on the debtor's property may be lawful if the debtor consents or if consent can be implied from past custom usage or conduct (see *Quest v. Barnett Bank of Pensacola*, 397 So.2d 1020 (Fla. 1st DCA 1981)). Otherwise, entry into a structure is construed as a trespass and the creditor or its agents are also held liable under the theory of negligence for any damage done to the debtor or its premises during the unauthorized entry (see *S. Indus. Sav. Bank*, 224 So.2d at 418).

As a general proposition, under Florida law:

- Provided the debtor does not object, lawful self-help repossession is limited to unenclosed parts of the debtor's property.
- Entry into a structure may be lawful if the debtor consents to the repossession of the collateral located inside.

RIGHT TO MAKE THE DEBTOR ASSEMBLE COLLATERAL

The secured creditor may request that the debtor assemble the collateral and make it available to the secured creditor at a place reasonably convenient to both parties (§ 679.609(3), Fla. Stat). This method of repossession is effective only if the debtor is cooperative because the request to assemble the collateral may instead cause the debtor to dissipate the collateral.

NOTIFYING ACCOUNT DEBTORS

When a creditor has a security interest in the debtor's accounts receivable, it may enforce the obligation of the debtor's account debtor and instruct it to pay the creditor directly (§ 679.607(1)(c), Fla. Stat.).

After the secured creditor provides notice to the account debtor, payment must be made to the secured creditor. If the account debtor ignores the notice and pays the debtor directly instead, the account debtor remains liable to the secured creditor.

A secured creditor that uses this means of security should ensure that it has a current list of contact information for the debtor's account debtors.

A right to payment, like an account receivable, is a reliable form of collateral because:

- Accounts are often liquid and generally collectable without the need for judicial intervention.
- Reasonable and measured collection of the debtor's accounts may not threaten the viability of the debtor's business in the same way as seizure of equipment or inventory.

However, to guard against the possibility that the account debtors ignore demands made by the secured creditor, secured creditors should consider arranging a lock box payment agreement, under which the account debtors are instructed at the time of the loan to the debtor, to send payments directly to a certain bank account under the control of the secured creditor. Under this approach:

- The secured creditor may take installment payments from the account and remit the balance to the debtor.
- If the debtor defaults, there is no need to notify the account debtor that is already making payments to the lock box account.

DEPOSIT ACCOUNTS TRI-PARTY CONTROL AGREEMENTS

Under Section 679.607(1)(e) of the Florida Statutes, after a debtor defaults, a secured creditor may instruct the bank or other custodian to pay the account over to the secured creditor when holding a security interest in:

- A deposit account or securities account under Section 679.1041(b) or (c) of the Florida Statutes.
- Investment property under Section 679.1061 of the Florida Statutes.
- A letter of credit under Section 679.1071 of the Florida Statutes.

NOTICE

5. What are the notice requirements and applicable statutes for a secured creditor to sell collateral in your jurisdiction? Please identify:

- Who must receive notice and any exceptions.
- The form of notice, including timing requirements.

WHO MUST RECEIVE NOTICE

In Florida, the secured party must notify the debtor and any secondary obligor, for example a guarantor, when selling the collateral. If the collateral is anything other than consumer goods, the secured party must also provide notice to any other:

- Person that provided notice of a claim to the collateral.
- Secured party or lienholder that has a perfected security interest in the same collateral.

(§ 679.611(3), Fla. Stat.)

Exceptions

A secured creditor is not required to provide notice to other secured creditors if the collateral:

- Is perishable.
- Declines in value at a rapid rate.
- Is customarily sold in a recognized market.

(§ 679.611(4), Fla. Stat.)

The secured creditor is also not required to provide notice to unknown creditors. For example, when a debtor has transferred ownership of the collateral without disclosing the transfer to the secured creditor, the new owner of the collateral is unknown to the secured creditor. In that case, it is not possible for the secured creditor to provide notice. (§ 679.605(1), Fla. Stat.)

Waiver

While notice may be waived, the waiver must occur post default (§ 679.611, Fla. Stat.). Waivers built into security agreements are not effective.

Search for Other Creditors

A secured creditor has an obligation to notify other secured creditors (§ 679.611(3)(c)(2), Fla. Stat.).

Therefore, the secured creditor organizing the sale should:

- Check the lien records to identify whether there are other secured creditors.
- Obtain the addresses of other secured creditors to ensure they receive notice.

The secured creditor complies with the requirement of notifying other secured creditors if it:

- Conducts a search using commercially reasonable methods between 20 and 30 days before the sale.
- Sends notice to those secured creditors identified in the search.

(§ 679.611(5), Fla. Stat.)

FORM AND CONTENTS OF NOTICE

The Florida Statutes require that a notice of sale must:

- Identify the debtor and the secured creditor.
- Describe the collateral.
- State the method of intended disposition of the collateral.
- State that the debtor is entitled to an accounting of the unpaid indebtedness and the cost of the accounting.
- Provide the date, time, and location of a public sale, or the time after which any other type of disposition will be made.

(§ 679.613(1), Fla. Stat.)

A notice that contains this information is satisfactory as a matter of law. However, certain minor errors and deviations from the required form of the notice do not make it deficient (§ 679.613(3), Fla. Stat.). Examples of minor errors include:

- The inclusion of information not required by Section 679.613(1) of the Florida Statutes (§ 679.613(3)(a), Fla. Stat.).
- Minor errors that are not misleading (§ 679.613(3)(b), Fla. Stat.).

While specific phrasing in the notice is not required (§ 679.613(4), Fla. Stat.), Section 679.613(5) provides a form of notice that is deemed a legally satisfactory notice of sale when properly completed.

If the notice lacks any of the information required under Section 679.613(1), the sufficiency of the notice becomes an issue of fact and it may be considered enough depending on the circumstances (§ 679.613, Fla. Stat., cmt. 2).

Notice of Sale of Consumer Goods

The Florida Statues require that a notice of sale of consumer goods must include:

- All the information required by Section 679.613(1) of the Florida Statutes.
- A description of any liability for a deficiency owed to the notice recipient.
- A telephone number for the secured party.
- A telephone number or mailing address where additional information concerning the sale may be obtained.

(§ 679.614(1), Fla. Stat.)

Section 679.614(1) of the Florida Statutes provides a form of notice that is deemed a legally satisfactory notice of sale of consumer goods when properly completed.

A secured creditor must strictly comply with notice for consumer goods and a deviation is not a question of fact considered by the court.

TIMING REQUIREMENTS

Notice is considered timely if it is sent after default and at least ten days before the sale (§ 679.612, Fla. Stat.). If notice is sent less than ten days before the sale, the timeliness becomes an issue of fact and it may be considered timely depending on the circumstances (§ 679.-612, Fla. Stat., cmt. 2 and 3).

COMMERCIAL REASONABLENESS

6. Does your jurisdiction follow a definition of "commercial reasonableness"?

- If no, then please explain.
- If yes, what is the applicable statute or relevant case law?

Florida law follows the model Uniform Commercial Code and the disposition of collateral is considered commercially reasonable if the disposition is made:

- In the usual manner on any recognized market.
- At the current price in any recognized market at the time of the disposition.
- In conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(§ 679.627(2), Fla. Stat.)

A collection, enforcement, disposition, or acceptance of collateral is commercially reasonable if it has been approved:

- In a judicial proceeding.
- By a bona fide creditors' committee.
- By a representative of creditors.
- By an assignee for the benefit of creditors.

(§ 679.627(3), Fla. Stat.)

However, in many situations the question of whether a sale was commercially reasonable is an issue of fact, dependent on the circumstances. The Florida Statutes recognize this and provide that:

- A transaction may still be considered commercially reasonable even if the secured party could have obtained a greater amount when collecting, enforcing, disposing, or accepting the collateral at a different time or in a different method from that selected by the secured party (§ 679.627(1), Fla. Stat.).
- Lack of approval of a sale under Section 679.627(3) does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable (§ 679.627(4), Fla. Stat.).

7. What factors are typically considered when determining whether a sale is commercially reasonable in your jurisdiction?

GENERAL STANDARD

Under the Florida Statutes, every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable (§ 679.610(2), Fla. Stat.).

If commercially reasonable, a secured party may dispose of collateral:

- By public or private proceedings.
- By one or more contracts.
- As a unit or in parcels.
- At any time and place and on any terms.

(§ 679.610(2), Fla. Stat.)

Florida case law indicates that disposition of collateral is considered commercially reasonable if is:

- In the usual manner in a recognized market.
- At the current price in any recognized market at the time of the disposition.
- In conformity with reasonable practices among dealers in the type of property being disposed.

(See *Ford Motor Credit Co. v. Arwine*, 2019 WL 3806899 (Fla. 1st DCA 2019); see also Question 6.)

However, the question of commercial reasonableness is an issue of fact (see *Burley v. Gelco Corp.*, 976 So.2d 97, 100 (Fla. 5th DCA 2008)).

DUTY OF CARE

The secured creditor has a duty of care to:

- Preserve the value of collateral while it is in the secured creditor's custody.
- Ensure that the collateral remains in good or better condition at the time of sale than it was when repossessed.

(See, for example, *Fla. First Nat'l Bank at Pensacola v. Martin*, 449 So.2d 861 (Fla. 1st DCA 1984).)

BURDEN OF PROOF

The rules governing commercial reasonableness are in place "to protect the debtor, because they help prevent the creditor from acquiring the collateral at less than its true value or unfairly understating its value so as to obtain an excessive deficiency judgment" (*Burley*, 976 So.2d at 100).

The question of whether a sale is commercially reasonable, therefore, generally arises when the debtor opposes the creditor's claim for a deficiency. In that case, the secured party has the burden of establishing that every aspect of the disposition was commercially reasonable (*S. Developers Earthmoving v. Caterpillar Fin. Servs., Corp.*, 56 So.3d 56, 60 (Fla. 2nd DCA 2011)).

NOTICE

The secured creditor must give satisfactory advance notice of the sale.

A notice given ten days in advance of a sale is considered satisfactory and commercially reasonable as a matter of law (§ 679.611, Fla. Stat.). If a debtor demonstrates that the creditor gave insufficient notice, a presumption arises that the sale of the collateral was commercially unreasonable and the question of commercial reasonableness becomes an issue of fact (see *Burley*, 976 So.2d at 100).

CONDUCT OF SALE

The sale must be conducted in a commercially reasonable manner. If adequate notice of the sale is not given, or if the price received at the sale is unreasonably low, there is typically a rebuttable presumption that the sale was not conducted in a commercially reasonable manner.

TIMING OF SALE

A secured creditor cannot delay a sale when it causes the value of the collateral to decline. A prompt sale is necessary if the collateral is perishable or if economic conditions change, reducing the value of the collateral. If these conditions exist, the ten-day period of advance notice required by Section 679.611 of the Florida Statues does not apply and the secured creditor must provide shorter notice (§ 679.611(4), Fla. Stat.).

DISPOSITION AND PRIORITY OF PROCEEDS

8. What is the priority scheme for distribution of proceeds of a collateral sale in your jurisdiction?

Under the Florida Statutes, proceeds of the sale of collateral must be distributed in the following order of priority:

- First, to pay:
  - the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral; and
  - if provided by agreement and not prohibited by law, the secured party's reasonable attorneys' fees and legal expenses.
- Second, to satisfy the obligations secured by the security interest or agricultural lien.
- Any remaining proceeds must then be paid to satisfy obligations secured by any subordinate security interest or lien on the collateral if the secured party receives an authenticated demand for the proceeds from a subordinate security interest or lien holder before completing the distribution of proceeds. However, a secured party may:
  - demand reasonable proof of the subordinate interest; and
  - insist that the subordinate creditor indemnify the secured creditor for any loss, including attorney's fees and costs incurred by the secured party if the subordinate holder did not have the right to receive funds.
- If the subordinate holder does not comply, the secured party does not need to remit proceeds.
- Last, the secured party must account to and pay the debtor any surplus.

(§ 679.615(1), Fla. Stat.)

9. What is the process and procedures for addressing any deficiency claim or surplus of proceeds?

Under the Florida Statutes, the obligor is liable for any deficiency (§ 679.615(4)(b), Fla. Stat.).

To obtain a deficiency, the secured creditor must provide the debtor with a statement including the information required by Section 679.616(3) of the Florida Statutes. The statement must include:

- A statement with the amount of the deficiency.
- An explanation of how the secured creditor calculated the deficiency.

If the debtor does not pay voluntarily, the secured party may seek a deficiency judgment from a court of competent jurisdiction. The debtor may defend itself by asserting that the secured creditor had failed to comply with the provisions relating to collection, enforcement, disposition, or acceptance. If the debtor objects to the secured creditor's compliance, the burden shifts to the secured creditor to prove compliance (see Question 7). If the secured creditor fails to prove that it conducted a commercially reasonable sale, the proceeds of the collateral are considered equal to the debt and the creditor is denied a right to a deficiency. (§ 679.626, Fla. Stat.)

A debtor may be entitled to a surplus if the creditor or a related party acquires the collateral. A surplus or deficiency is calculated based on the amount of proceeds that would have been realized in a sale to a third party or secondary obligor that complies with Section 679.615 of the Florida Statute if:

- The transferee in the sale is:
  - the secured party;
  - a person related to the secured party; or
  - a secondary obligor.
- The amount of proceeds from the sale is significantly below the range of proceeds that would have been realized from a complying sale to:
  - a person other than the secured party;
  - a person related to the secured party; or
  - a secondary obligor.

(§ 679.615(6), Fla. Stat.; see Question 12.)

10. Does your jurisdiction permit a junior creditor to foreclose or sell collateral without participation from a senior security interest?

- If no, then please state so.
- If yes, then please explain the priority for disposition of the proceeds.

In Florida, under certain circumstances, a junior creditor may foreclose or sell collateral without participation from a senior security interest. If a junior secured creditor receives cash proceeds from a sale in good faith and without knowledge that the receipt violates the rights of any security, lien, or agriculture lien holder's interest, the junior creditor:

- Takes the cash proceeds free of the security interest or other lien.
- Is not obligated to apply the proceeds of the sale to satisfy obligations secured by the security interest or other lien.
- Is not obligated to account to, or pay, a security interest or lien holder for any surplus.

(§ 679.615(7), Fla. Stat.)

However, the buyer of the collateral takes the collateral subject to the senior secured creditors lien (§ 679.617, Fla. Stat.).

COLLATERAL REPURCHASE BY A SECURED CREDITOR

11. May a secured creditor repurchase the collateral securing a loan transaction in your jurisdiction?

- If no, then please state so.
- If yes, what are the limitations and applicable statutes?

In Florida, a secured creditor may purchase its own collateral under certain conditions.

A secured party may purchase collateral at either:

- A public disposition.
- A private disposition if the collateral is:
  - of a kind that is customarily sold on a recognized market; or
  - the subject of widely distributed standard price quotations.

(§ 679.610(3), Fla. Stat.)

Unless the collateral is of a kind sold on a recognized market, the secured creditor must purchase the collateral at a public sale which:

- Is properly noticed and publicized.
- Is accessible to the public.
- Fixes a price through competitive bidding.

12. If a secured creditor purchases the collateral at a significantly lower price than would have been produced at a third-party sale, must the secured creditor calculate a deficiency or surplus?

- If no, then please state so.
- If yes, please explain.

In Florida, a secured creditor must ensure that it pays a fair price when purchasing its own collateral. Otherwise, the secured creditor runs the risk that the debtor seeks a surplus based on the difference between a fair price for the collateral and the price actually paid (or credited) by the secured creditor (§ 679.615, Fla. Stat.).

A surplus or deficiency is calculated based on the amount of proceeds that would have been realized in a sale to a third party or secondary obligor that complies with Section 679.615 if:

- The transferee in the sale is:
  - the secured party;
  - a person related to the secured party; or
  - a secondary obligor.
- The amount of proceeds from the sale is significantly below the range of proceeds that would have been realized from a complying sale to:
  - a person other than the secured party;
  - a person related to the secured party; or
  - a secondary obligor.

(§ 679.615(6), Fla. Stat.)

13. Does your jurisdiction permit a secured creditor to accept collateral in full or partial satisfaction of its debt, otherwise known as strict foreclosure?

- If no, then please state so.
- If yes, please explain the requirements, including debtor consent and notice to parties.

In Florida, a secured creditor may accept collateral in full or partial satisfaction of its debt, which is known as strict foreclosure, if:

- The debtor consents to the acceptance of collateral under Section 679.620(3) of the Florida Statutes.
- Within the time specified by Section 679.620(4) of the Florida Statues, the secured party does not receive an authenticated notification of objection to the proposal by:
  - secured creditors with perfected security interests; or
  - any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the foreclosure.

The collateral is consumer goods and is not in the debtor's possession when the debtor consents.

The secured party is not required to dispose of the collateral under Section 679.620(5) of the Florida Statutes or the debtor waives the requirement under Section 679.624 of the Florida Statutes.

(§ 679.620(1), Fla. Stat.)

A debtor consents even if it did not send the secured creditor an authenticated notice if:

- The creditor offered to accept the collateral in full satisfaction of the debt.
- The debtor did not respond within 30 days of the date of the notice.

(§ 679.620(3)(b), Fla. Stat.)

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