

CORPORATE FINANCE

Post-Default Enforcement of Rights Under UCC Financing

by Leonard M. Shulman and Rika M. Kido, Shulman Hodges & Bastian LLP

During these tough economic times, as more commercial borrowers default on their loans, it is important lenders with loans secured by personal property are aware of their rights under the Uniform Commercial Code ("UCC"). In foreclosing on their security interest, the secured lender may take possession of the property and dispose of it through a "commercially reasonable" sale. It is important collateral is disposed of properly. If disposed of improperly, the secured lender may lose the opportunity to recover a deficiency judgment against the borrower or any guarantor. This article provides a quick guide to the rights of a secured lender under the UCC to dispose of its personal property collateral through a commercially reasonable foreclosure sale.

Taking Possession of the Collateral

If collateral used to secure the defaulted loan is personal property, the secured lender may take possession under UCC Article 9. The secured lender may take possession either pursuant to judicial action or without judicial action if they proceed without a "breach of peace." UCC 9-609 validates security agreements requiring the borrower to assemble the collateral in a mutually convenient place. If the borrower is uncooperative, the lender must pursue court action to obtain possession.

If the collateral is accounts, the secured lender proceeds under UCC 9-607. The secured lender may notify the account debtor to make a payment. If the account is one in which the secured lender has perfected its lien by possession, the secured lender may apply a balance of the account to it or direct the bank to make payment. The secured lender may also institute collection efforts, but must proceed in a commercially reasonable manner.

After the secured lender has taken possession of personal property collateral, they must obtain the value of the collateral and apply that value to either reduce or satisfy the amount owed. Value of the collateral will be realized through a liquidation of the property by a collateral foreclosure sale.

Liquidation by Collateral Sale

Before the collateral sale, the secured lender must provide notice as set forth in UCC 9-611. Collateral which is perishable or threatens to decline rapidly in value or is of a type customari-



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ly sold on a recognized market does not require notification. For all other collateral, the secured lender must send a "reasonable authenticated notification of disposition" to the debtor, any secondary obligor or guarantor, and three classes of specified interested persons.

UCC 9-612 requires reasonable timely advance notice. Generally, this means notification must be sent at a reasonable time before the date of the public sale or after the date of a private sale. For a non-consumer transaction, 10 days or more constitutes reasonable time. This 10-day notice period is intended only to be a "safe harbor" and not a minimum requirement. In order to qualify for the "safe harbor," notification must be sent after default and in a commercially reasonable manner. While periods shorter than 10 days may be "reasonable," if possible, one should fit within the safe harbor guidelines.

A sufficient notification will: 1) describe the debtor and secured lender; 2) describe the collateral; 3) state the method of disposition; 4) state the debtor is entitled to an accounting of the unpaid indebtedness and provide the charge for accounting; and 5) state the time and place of public disposition or the time after which any disposition is to be made. Unless the parties agree otherwise, no additional information is required. A sample form of notification may be found in UCC 9-613(5) or UCC 9-614(a)(3).

The collateral sale process is described in UCC 9-610. A secured lender must dispose of the collateral in a "commercially reasonable" manner following default. A disposition of collateral is commercially reasonable if disposition is made: 1) in the usual manner of any recognized market; 2) at the price current in any recognized market at the time of the disposition; or 3) otherwise in conformity with reasonable commercial practices among dealers in the type of property subject to the disposition.

The collateral may be disposed of in either a public or private disposition. At a public disposition, the secured lender may purchase the collateral with no restrictions. At a private disposition, the secured lender may only purchase the collateral if it is of a type sold on a recognized market. In short, the secured lender cannot have a private sale for goods not normally traded and then personally buy them.

Conclusion

The UCC provides the framework for conducting foreclosure sales on personal property col-
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Small Business is Big Business!

Small business is big business! That's the philosophy of Citizens Business Bank. Citizens Business Bank is the largest bank headquartered in the Inland Empire area of California. Citizens Business Bank is widely recognized for its commitment to its customers and communities, as well as its strong financial performance. Citizens Business Bank serves businesses, professionals and individuals through 51 conveniently located offices in the Inland Empire, Orange County, Los Angeles County and Central Valley regions of California.

Small business accounts for more than half the private workforce in the country and more than half of all sales. Small business also has the highest potential for growth of any sector of our economy, creating roughly 60 percent of all new jobs. Citizens Business Bank is geared to provide small businesses with loans designed for them to help fund growth.

Does Citizens Business Bank make commercial loans to small businesses?

Commercial banks such as Citizens Business Bank are the primary source of business financing. The bank with which you have an established banking relationship is the logical place to start your search for a business loan. Be prepared before you approach your banker. Lenders are conservative because they want to assure that their loans will be repaid. The things that lenders look for in evaluating a loan application are a business plan, equity in the business, the ability to repay the loan, good credit history, liquidity and ample collateral or secondary source of repayment to fall back on.

What are SBA "guaranteed" loans and what can you use the money for?

Commonly known as SBA loans, these loans are provided in conjunction with the Small Business Administration via the 504 and 7(a) programs. SBA loans are available for the purchase of real estate, equipment, and inventory. Refinancing of business debt and working capital are also possible eligible uses.

What are the benefits of the SBA programs?

The benefits of a small business loan include lower down payments and longer maturities with competitive rates (fixed and variable) and terms.

Is it difficult to get SBA assistance?

Citizens Business is a Preferred Lender. This is the highest designation that can be achieved by a bank that participates in SBA lending. As a Preferred Lender Participant, the Small Business Administration allows Citizens Business Bank to make credit decisions on SBA guaranteed loans. The SBA performs a minor review for eligibility which greatly reduces the processing time for an SBA loan. Citizens Business Bank received this designation because of the Bank's commitment to the SBA program, their proven success record, and because Citizens meets and exceeds the high standards met by the SBA.

What is the difference between the 7(a) and the 504 loan programs?

Citizens Business Bank offers two types of SBA loan programs. The 7(a) Loan is the primary business loan program of the SBA. It is commonly used for business expansions and to meet the varied short-term and long-term needs of established businesses. The 7(a) loan can be used for most business purposes, including machinery and equipment purchases, working capital, inventory, business acquisition, debt refinance, real estate purchases and construction.

The 504 Loan provides long-term, fixed-asset financing through Citizens Business Bank and a local Certified Development Company. A 504 loan may be used to purchase, improve or construct commercial real estate property, as well as purchase machinery and equipment. 20-year fixed rate loans are standard for the SBA's portion. Today's rate on the SBA portion is under 5%.

How do I know if the SBA program is right for my small business?

The first step in securing financing for your business is "NOT" filling out a loan application. Instead, the business owner needs to develop and refine a business strategy. Nothing improves one's chance of securing financing like a thorough business plan with informed financial projections and a well thought out business plan.

Is today the perfect time to expand your business? Buy new equipment? Purchase your facility or refinance existing debt? For more information about an SBA loan, contact Mark Richardson, the head of our Real Estate Banking Group. Mark can be reached at 626.564.6234. You can also visit our website at www.cbbank.com.



Mark Richardson

THE IMPORTANCE OF FORECASTING CASH FLOW

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statement into simple ratios to gain a better understanding of your company's financial condition. For example, if cash is critical to servicing long-term debt, then "cash flow to long-term debt" would be a useful ratio.

Using the "operating cash flow" ratio helps gauge your short-term liquidity by comparing the amount of cash generated to outstanding debt. This can help you understand how your current liabilities are covered by the cash flow generated by your company's operations, giving you a quick appraisal on whether you'll be able to manage future loans, interest payments, payroll and other expenses.

Seek our assistance

A cash flow statement provides information that is not easily extracted from an income statement or balance sheet, such as where your cash is and where it's being generated. Only by analyzing the components together along with other critical data can you understand your company's financial outlook. HMWC CPAs & Business Advisors can help your company by not only preparing financial statements but also assisting you in analyzing them so that you can more effectively manage your business.

Jeff Hipshman and Curtis Campbell, are partners at HMWC CPAs & Business Advisors (www.hmwc CPA.com) in Tustin. Contact them at (714) 505-9000 to discuss how your company or client could benefit from the firm's services.

ARE YOU GETTING THE MOST FROM YOUR BANK?

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we're truly in a position to understand and discuss regional economics, our clients' industries and their specific circumstances.

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To learn more about these and other services or for more information, please visit www.calbanktrust.com.

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lateral. Lenders beware that many "trip-wires" exist and claims for deficiencies can be lost if procedural rules are not properly followed.

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