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## Pitfalls in Seeking Deficiencies

By: Howard Toland

at liberty to dispose of the repossessed collateral in any manner it wishes. Instead, every aspect of the disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable. 679.610(2). The purpose of the rule is to protect the debtor, because it helps prevent the creditor from acquiring the collateral at less than its true value or unfairly understating its value to obtain an excessive deficiency judgment. *Burley v. Gelco Corp.* 976 So 2d 97, 100 (Fla 5th DCA 2008).



So just what is commercial reasonableness and who has the burden of establishing it? This is defined in Florida statute 679.627(2) as follows: Disposition of collateral is made in a commercially reasonable manner if the disposition is made; (a) in the usual manner on any recognized market, (b) at the current price in any recognized market at the time of the disposition, or (c) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. The term "recognized market" applies in markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges. *Textron Financial Corporation v Lentive Marine, Inc.* 630 F Supp. 2d 1352, 1358 (SD Fla 2009).

If the debtor places the commercial reasonableness of the disposition of collateral "in issue," the secured party has the burden to establish that every aspect of that disposition was commercially reasonable. *Weiner v American Petrofina Mktg., Inc* 482 S02d 1362 (Fla 1986).

Modern day disposition often involves the use of internet advertising, as opposed to more traditional advertising in trade journals, newspapers and other means. In *Southern Developers & Earthmoving, Inc. v Caterpillar Financial Services*, 56 So3d 56 (Fla 2nd DCA 2011), the court entered a summary judgment in favor of the creditor seeking a deficiency on its promissory note after sale of the industrial earthmoving equipment. The appellate court evaluated the use of the internet advertising in a private sale and the lack of backup for proof of the results introduced at the trial court level. Caterpillar failed to submit any proposed purchase contracts for any of the pieces of repossessed collateral or any information to establish the sale price it obtained for any single piece of the equipment. Caterpillar asserted that the prices it obtained through the private sale and internet auctions were higher than those it could have obtained by selling the repossessed equipment through other means. The appellate court noted that there was no evidence presented concerning how contracts for the sale of the used industrial earthmoving equipment are customarily reached within the industry and whether private sales and internet are commercially used. Thus, there was simply no evidentiary basis upon which the trial court could have found the sales of the repossessed equipment were commercially reasonable, and because the plaintiff failed to carry its burden to establish commercial reasonableness, it was not entitled to summary judgment in its favor.

If the court determines the secured party has not disposed of the property in a commercially reasonable manner, there will arise a presumption that the fair market value of the collateral at the time of repossession was equal to the amount of the total debt it secured. In *Re Darling*, 207 BR 253, 255 (MD Fla 1997). Therefore, it is essential the creditor can support that every aspect of the disposition was done

properly. In summary, when liquidating collateral, be certain to send out all the proper notices to the borrower and the guarantors in the form recommended in the statute. In particular, if disposition is being held by internet based sale, keep accurate, detailed records as to all offers so they can be documented and submitted in court in affidavit form to support the end result. Moreover, if the type of collateral is the type typically sold in this manner (i.e., over the internet), be certain to address that. The final recovery does not have to be the highest possible amount, but it must have been done in a commercially reasonable fashion to be sustained and a deficiency imposed.

*Mr. Toland's practice focuses upon commercial litigation matters, with an emphasis on banking and security related issues, and creditors' rights. In addition to his practice in the Florida state courts, he is currently admitted to practice before the United States Court for the Southern District of Florida, the United States Bankruptcy Court, the United States Tax Court and the United States Supreme Court. He is a member of the Commercial Law League, the Equipment Lease and Finance Association, where he served on several legal committees, the Steering Committee of the Lease Enforcement Attorney Network (LEAN) and the Broward County Bar Association.*

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