

**4.44 DEFICIENCY — SALE OF COLLATERAL AS
COMMERCIALLY REASONABLE¹ (Approved 2/92)**

There are times when a person may borrow money to be able to buy (or lease) something, such as a motor vehicle. In turn, the person borrowing the money may be required to give a security interest in the item purchased, as collateral to guaranty the debt to the lender. If the money owed is not repaid to the lender as agreed, the lender may have the right to take possession of the item and sell it as may be commercially reasonable. If the money obtained from the sale is not enough to pay off the debt, the lender may sue the borrower for the amount still owed.

The plaintiff says that is what happened in this case. The defendant, however, denies that the sale of the (item) was done in a commercially reasonable manner.

When there is a dispute as to whether the sale of the secured collateral, in this case, the (item), took place in a commercially reasonable manner, the plaintiff² — the creditor — has the burden of proving by the greater weight of the believable

¹This charge does not address the notice requirement under *N.J.S.A.* 12A:9-504(3).

²*T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 *N.J. Super.* 328 (Law Div. 1969); and *Franklin St. Bank v. Parker*, 136 *N.J. Super.* 476 (Cty. Dist. Ct. 1975). See also White and Summers, *Uniform Commercial Code* (2 ed.), Sec. 26-11.

evidence that the method, manner, time, place and terms of the sale were commercially reasonable.³

What do I mean when I say that you must measure plaintiff's conduct in selling the (item) against the standard of commercial reasonableness? Commercially reasonable would be a sale in the usual manner in any recognized market,⁴ or a sale in conformity with reasonable commercial practices among dealers in the type of property sold.⁵ If there is no recognizable public market for the item, but the plaintiff is aware of a particular buyer with a need for the item, a private sale might be commercially reasonable. However, ordinarily, the preferred method is a public sale. That would be a sale by auction⁶ where the public, particularly including the knowledgeable trade public, is invited by earlier advertisement to appear and bid for the item to be sold. The item should be available for inspection by bidders before the sale.

³N.J.S.A. 12A:9-504(3); *Block v. Diana*, 252 N.J. Super. 650, 657 (App. Div. 1992).

⁴Some cases have held that there is no recognized market for used automobiles. *Norton v. Natl. Bank of Commerce*, 398 S.W. 2d 538 (Ark. 1966); *Commun. Mgmt. Assn. v. Tousely*, 505 P.2d 1314 (Co. 1973); *Turk v. St. Petersburg Bank and T. Co.*, 281 So. 2d 534 (Fla. 1973); *Nelson v. Monarch Invest. Plan*, 452 S.W. 2d 375 (Ky. 1970); *Alliance Discount Corp. v. Shaw*, 171 A. 2d 548 (Pa. 1961).

⁵N.J.S.A. 12A:9-507(2).

⁶U.C.C. Sec. 9-504, Comment 1 refers to Sec. 2-706 as a guide for determining when a sale is commercially reasonable. Sec. 2-706, Comment 4 notes that a public sale is a sale by auction.

The notice of sale “(1) . . . must be published sufficiently in advance of the sale to allow [potential] interested bidders an opportunity to participate. (2) it must be aimed at the market reasonably expected to have an interest in purchasing collateral; (3) it must set out the exact time and place of the sale⁷; (4) it must sufficiently describe the collateral to be sold so as to allow potential bidders the opportunity to make an informed decision; and (5) it must be published in such a manner as to assure the best possible price.”⁸ Reasonable notice must also have been given to the defendant of the time and place of the proposed sale.⁹

“Factors to be considered include the probable value of the security as determined by a reputable appraisal or reliable indicia of value consistent with the nature of the collateral; the cost of notice; the specialty or general nature of the market for the kinds of goods constituting the security; and the place of notice/place of sale.”¹⁰

⁷A creditor may not hold collateral for a long time to accumulate storage charges and increase deficiency, where no reason exists not to make prompt sale. U.C.C. Sec. 9-504, Comment 6.

⁸*Security Sav. Bank v. Tranchitella*, 249 N.J. Super. 234, 241 (App. Div. 1991); Three days’ notice of private sale of repossessed car deemed not commercially reasonable. *Franklin St. Bank v. Parker*, 136 N.J. Super. 476 (Dist. Ct. 1975).

⁹*Block v. Diana* at 9 (citing *Security Sav. Bank v. Tranchitella*).

¹⁰*Security Sav. Bank v. Tranchitella*. 249 N.J. Super. 234, 240 (App. Div. 1991); N.J.S.A. 12A:9-504(3).

The item must be offered and sold for cash to the highest responsible bidder, and bidders must know of the other bids and be permitted to raise their bids.¹¹ The place of the sale must be accessible to the general public.

The fact that a better price could have been obtained by a sale at a different time or in a different method than that selected by the plaintiff is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.¹² However, the plaintiff has “the obligation to make a good faith effort to obtain the highest possible price for the item.”¹³ A substantial difference between the price received and the (item’s) fair market value is relevant in deciding whether the sale was commercially reasonable.¹⁴ In determining the fair market value, it is the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts.¹⁵

¹¹A sale on sealed bids has been held not to have been a public sale. *Offredi v. Huhla*, 60 A. 2d 779 (Conn. 1948).

¹²*N.J.S.A. 12A:9-507(2)*.

¹³*Security Sav. Bank v. Tranchitella*, 249 N.J. Super. 234, 243 (App. Div. 1991).

¹⁴*Mercantile Finan. Corp. v. Miller*, 292 F. Supp. 797 (E.D. Pa. 1968): collateral having fair market value of \$750,000 sold for \$19,000.

¹⁵*Lavene v. Lavene*, 162 N.J. Super. 187, 192 (Ch. Div. 1978).

If the secured party either sells the collateral in the usual manner in any recognized market or if he/she sells at the price current in such market at the time of his/her sale or if he/she has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he/she has sold in a commercially reasonable manner.¹⁶

The number of bidders at the sale may also be meaningful.

Judge the conduct in selling the (item) by considering how well plaintiff has succeeded in realizing the maximum resale price without creating a great expense for that sale in keeping with prevailing trade practices among reputable and reasonable businesses engaged in the same or similar enterprises.¹⁷ Decide whether plaintiff has shown by the greater weight of the evidence that it sold the (item) in a commercially reasonable manner. In calculating the amount due the plaintiff, the expenses of reparation and sale could be added to the indebtedness before crediting the fair market value of the security if there had been an appropriate sale.¹⁸ The plaintiff has “the burden of showing that a commercially

¹⁶*N.J.S.A. 12A:9-507(2).*

¹⁷*Franklin St. Bank v. Parker*, 136 *N.J. Super.* 476 (Co. Dist. Ct. 1975).

¹⁸*Midlantic National Bank v. Coyne*, 222 *N.J. Super.* 649, 655 (Law Div. 1987). While there is no appellate court decision on the issue of whether the nature of the debtor’s relief is for the court or jury, in the case of *Midlantic National Bank v. Coyne*, the Honorable Leo Yanoff presented the issue to the jury.

reasonable sale of the collateral would have yielded less than the balance due.”¹⁹

If you find that the sale was not conducted in a commercially reasonable manner, the next issue is whether the plaintiff is entitled to a deficiency.

If plaintiff has not established that the sale was commercially reasonable, there is “a presumption that the value of the collateral is equal to the amount of debt. Unless this presumption is rebutted, no debt remains.”²⁰

To “overcome the presumption that the value of the collateral at least equaled the debt it secured, . . . plaintiff may introduce independent proof of the fair and reasonable value of the collateral (plus or minus any payments or charges incurred in disposing of the collateral) and comparing it with the price achieved at the actual sale.”²¹ The defendant may also present evidence as to the proof of value.²²

If you find that plaintiff has not rebutted the presumption that the fair and reasonable value of the collateral was equal to the amount of the debt, you must find in favor of the defendant. If, on the other hand, plaintiff has satisfied its burden of showing that the fair and reasonable value of the collateral was less than

¹⁹*Block v. Diana* at 10.

²⁰*Security Sav. Bank v. Tranchitella*, 249 N.J. Super. 234, 244 (App. Div. 1991).

²¹*Id.* at 245

the amount of the debt, you must find in plaintiff's favor for the deficiency owed by the defendant.

However, defendant may be entitled to damages for "the difference between the amount actually recovered and the amount that should have been recovered had there been a commercially reasonable sale."²³ Thus, the deficiency found to be due and owing to plaintiff may be offset by defendant's damages.

²²*Id.*

²³*Midlantic National Bank v. Coyne*, 222 N.J. Super. 649, 655 (Law Div. 1987). While there is no appellate court decision on the issue of whether the nature of the debtor's relief is for the court or jury, in the case of *Midlantic National Bank v. Coyne*, the Honorable Leo Yanoff presented the issue to the jury.