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DEBUNKING THE MYTH ENGULFING ARTICLE 9 COLLATERAL DISPOSITIONS

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A myth of sorts has developed, obscuring the essence of a secured party's duties upon default under Article 9 of the Uniform Commercial Code ("UCC"). [2] Present Article 9 rhetoric breathes life into the myth, nurturing a school of misunderstanding. The rhetoric suggests that a lawful disposition of collateral under Article 9 is a matter of process and not results. [3] Thus, according to the prevailing view, courts address the propriety of Article 9 collateral dispositions by focusing on a multitude of facts and circumstances, carefully noting that no single fact or circumstance is necessarily dispositive. [4] Consequently, a court will assess such things as adequate notice, advertisements, collateral condition and preparation for sale, type of sale (that is, public or private sale), number of bidders, etc., [5] in an effort to determine whether a disposition by a secured party was commercially reasonable. [6] In fact, the list of factors itself can easily consume several pages. [7] Table 1 identifies those factors courts have considered in determining whether a given disposition was commercially reasonable under Article 9 of the UCC. At bottom, all aspects of the disposition of collateral under section 9−504(3), including the method, manner, time, place, and terms must be commercially reasonable. [8]

Reality, however, deflects the rhetoric and slays the myth. Not all factors are equal. In fact, certain factors are significant [9] in identifying when a court will conclude that an Article 9 disposition is commercially reasonable. For example, authorities have identified certain factors, such as notice, bid price, and whether the secured party was the only bidder at the sale, as important factors in assessing whether a disposition was commercially reasonable. [10] The statistical study reported in this article finds that the outcome of eight out of every ten contested collateral disposition cases may be predicted simply by considering four statistically significant factors. [11] First, did the secured party engage in self−dealing? Second, if the parties had agreed to what procedures constitute a commercially reasonable disposition, did the secured party follow those procedures? Third, did the secured party provide the notice required under Article 9? Fourth, did the bid price equal or exceed 63% of the fair value of the collateral? This particular predictive model accounts for the outcome in 84% of all cases in the sample employed in this article. Although the statistical results provide no guarantee, the results do provide important insights into the Article 9 collateral disposition process.

In Part I of this article, I unpack the conventional wisdom on Article 9 collateral dispositions. Here, I release the myth that Article 9 collateral dispositions are largely matters of process and not results. The notion that courts employ standard−like approaches to the issue of commercial reasonableness, engaging in a balancing of numerous factors, is the central thrust of the myth. [12] In Part II, I report my empirical findings from a review of Article 9 disposition cases. I also explicate the methodology employed in an effort to introduce the reader to a statistical method most conducive to empirical work in the law: classification and regression tree analysis or CART. In this Part, I construct a CART decision tree that may be used to both understand the collateral disposition process and to predict future disposition orders. In Part III, I provide my observations based on a review of the empirical findings. Central to these findings is a better understanding of the role that notice and bid price play in the disposition process. Contrary to many assertions by authorities [13] and the UCC itself, [14] bid price is the thing! I then compare the inferential results from the statistical model to the Supreme Court's pronouncements in a related field to determine whether the law on the disposition of collateral has fragmented based on nothing more than the nature of the property serving as collateral.

I. Conventional Wisdom on Article 9 Collateral Dispositions

Article 9 of the UCC contains both a blessing and a curse. The blessing is that a number of divergent laws on taking liens in personal property were eliminated and replaced with one specific law on the creation, enforcement, and priority of security interests in personal property, that permits, among other things, repossession and disposition of collateral without resort to the courts. [15] The curse is that any disposition of collateral is tested by the wonderfully vague standard of commercially reasonableness, a standard potentially limited only by the imagination of counsel and the sensibilities of the court. In fact, all aspects of the disposition of collateral under section 9−504(3), [16] including the method, manner, time, place, and terms must be commercially reasonable. [17] No more guidance, however, is provided a secured party seeking to dispose of its collateral.

Section 9−504(3) of the UCC gives the secured party considerable flexibility in the disposition of collateral. It provides that the secured party may dispose of the collateral by public or private sale and that the disposition may be by way of one or more contracts. [18] In addition, the sale or other disposition of collateral may be as a unit or in parcels and at any time and place and on any terms. The drafters of the UCC hoped that the flexibility given the secured party in the disposition of collateral would result in a higher realization on collateral for the benefit of both parties. The only limitation placed on the secured party's handling of the disposition is that every aspect of the disposition, including the method, manner, time, place and terms must be commercially reasonable. [19] Although courts do disagree, commercial reasonableness is generally a question of fact for the jury and not of law for the court. [20]

The term "commercial reasonableness" is not defined in the UCC. One commentator has noted that the obligation on the secured party to act in a commercially reasonable manner means that the secured party should "use his best efforts to see that the highest possible price is received for the collateral." [21] As suggested by the Official Code Comment, section 1−203's provision for a general obligation of good faith may also inform the meaning of commercial reasonableness. [22] Unfortunately, attempting to define one vague standard ("commercially reasonable") with another vague standard ("good faith") fails to advance any true appreciation of the meaning of the phrase.

Although the UCC does not define commercial reasonableness, it does provide several rules that are helpful in determining commercial reasonableness. These rules are found in section 9−507(2). [23] The first rule in section 9−507(2) relates to the price obtained from the collateral sale and sets out what is sometimes known as the *proceeds test of commercial reasonableness*. It provides that the fact that 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. [24] One must be careful not to read too much into this admonition. Both the statistical analysis undertaken here and influential authorities strongly suggest that the price obtained at the disposition is one of the most important factors in determining whether a disposition passes muster under Article 9. [25]

The remaining rules of subsection 9−507(2) relate to what is sometimes known as the *process test of commercial reasonableness*. If the secured party either sells the collateral in the usual manner in any recognized market or if it sells at the price current in that market at the time of sale or if it otherwise sells in conformity with reasonable commercial practice among dealers in the type of property sold, the creditor has disposed of the collateral in a commercially reasonable manner. [26]

Finally, if the disposition has been approved in a judicial proceeding or by any bona fide creditor's committee or representative of creditors, the disposition will conclusively be deemed to be commercially reasonable. [27] One must be cautious when relying on this final rule. It is not enough that a sale of collateral has been pre−approved by a court; rather, for the prophylactic rule to apply, thus immunizing the disposition from attack by the debtor, the actual sale procedures must be pre−approved by the court. [28] This particular option may be appropriate where, because of the cyclical nature of certain types of collateral, a considerable delay before disposition is necessary, thus giving the secured party ample time to commence and prosecute a declaratory judgment action. [29]

To the extent that acting in a commercially reasonable manner is a duty imposed on the secured party under section 9−504(3), it may not, according to section 9−501(3)(b), be waived. [30] Of course, as 9−501(3) further provides, the standards by which fulfillment of his duty is to be measured may be determined by agreement as long as those standards are not manifestly unreasonable. [31]

In sum, because the duty of commercial reasonableness imposed on the secured party in a disposition under section 9−504(3) is a vague standard, most authorities observe that the standard is fact specific. [32] Thus, authorities suggest that the area of the law is not susceptible to bright−line rules and is largely indeterminate. [33] Nonetheless, a careful review of the cases on the subject coupled with the statistical review reported in this article permits one to construct a disposition model that may provide valuable insight in the disposition process. What emerges from a statistical analysis of the cases is that Article 9 disposition cases are less fact−intensive than conventional wisdom would have us believe; in fact, eight out of every ten cases follow clearly defined decisional paths.

II. Empirical Findings

Recognizing the utility and the inherent limits of standard regression techniques as a classification model, one may want to consider other classification models that may better fit the data, help one better understand the decision process, rank the disposition factors as to predictive capabilities, and measure the relationships among the predictive disposition factors. Without being seriously misleading, one can divide the relevant classification models into two groups.

The first group of classification models consists of parametric techniques such as multiple (linear or quadratic) discriminate analysis (MDA) and logistic regression (Logit). Parametric models like MDA contain certain assumptions about the population and the sample. The first assumption is that the population has a normal distribution. [34] The second assumption is that the group co−variances are equal. [35] The third assumption is that the *a priori* groups are discrete, non−overlapping, and identifiable. [36] Violations of any of these assumptions can bias parametric classification rules and tests of significance.

The second group of classification models consists of nonparametric techniques such as Classification and Regression Tree ("CART"), developed by Professors Breiman, Friedman, Olshen, and Stone. [37] Unlike parametric techniques, nonparametric techniques make no assumptions concerning the population distribution. Additionally, algorithms like CART are powerful techniques in that they not only perform ordinary regression, but also learn regression surfaces by extracting the knowledge that governs the input−output behavior of the model under consideration in the form of regression trees. To date, nonparametric models have not been applied to the prediction of a court's decision regarding the commercial reasonableness of Article 9 collateral dispositions. This study uses CART analysis to develop a classification model to predict when a court will conclude a disposition is commercially reasonable and what factors or combination of factors are key predictors of the disposition determination. [38]

Like other nonparametric techniques, CART analysis only requires the groups to be discrete, non−overlapping, and identifiable. Because CART analysis rests on a less restrictive set of assumptions about the data, it should be less prone to violating assumptions than parametric techniques like MDA and Logit. Additionally, classification results from a CART study can be depicted in the form of a decision tree that makes the classification model particularly attractive to lawyers and judges because it is "user−friendly." [39]

A claim of indeterminacy may be recast as an empirical claim. [40] For example, one may ask whether clear decisional lines may be identified from a statistical analysis of reported collateral disposition cases. An affirmative answer may suggest that incoherence or indeterminacy are not present or are not present to the extent one contemplated before undertaking a statistical analysis. In assessing whether clear decisional lines may be drawn from a data set, the article employed CART, a recursive statistical techniques well suited for use in legal analysis. The purpose of a CART study is to identify significant factors or combinations of factors that lead a decision maker to rule one way or another on the issue before it. For example, a CART study should help us both understand Article 9 collateral disposition decisions and aid in the prediction of those decisions. Thus, a CART study provides us with a different method of legal analysis, another arrow in the quiver of a legal scholar. A typical CART methodology is identified in summary form in Table 2.

A. Sample of Cases

The statistical sample in this study is comprised of 184 collateral disposition cases and designated as Sample S. These cases typically involved a secured party seeking a money judgment against a debtor for any remaining deficiency after an Article 9 collateral disposition had taken place. The issue of whether the collateral was disposed of in a

commercially reasonable disposition was typically the sole contested issue. To obtain the cases, the WESTLAW and LEXIS computer databases were used. WESTLAW and LEXIS record not only the reported cases, but also many (but far from all) unreported cases. The disadvantage in using these two databases is that not all disposition cases are provided to the computer services. However, for purposes of this study, I assumed that Sample S is a fair representation of the population of all Article 9 collateral disposition cases. [41]

A random sample (designated "S_L") of 92 cases was drawn from the 184 cases comprising Sample S. Random simply means that each case in Sample S had an equal chance of being selected for inclusion in Sample S_L. Sample S_L will serve as the Learning Sample from which I shall construct the CART decision tree. Sample S_L was further divided into Subsamples S_1 and S_2. Subsample S_1 included all cases within S_L where a court concluded that an Article 9 disposition was not commercially reasonable. Subsample S_2 included all cases within S_L where a court concluded that an Article 9 disposition was commercially reasonable.

The mean [42] and median [43] bid price−to−fair value ratio [44] for those cases in S_1 is 37% and 34%, respectively. [45] The mean and median for those cases in S_2 is 58% and 63%, respectively. [46] Figure 1 depicts the ratios of bid price to fair value for sample S_L.

B. Methodology Employed

In this study, the methodology employed to help predict a court's collateral disposition decision is CART analysis. CART analysis provides an interesting way of looking at data in classification or regression problems. This recursive statistical regression method finds its roots in the tree analysis used by social scientists motivated by the need to address actual problems with easily understood decisional models. By using CART analysis, one can grow a decision tree diagram reasonably successful in predicting when a court will conclude that an Article 9 disposition is commercially reasonable. Although CART analysis requires an understanding of statistical thought to construct the decision tree, [47] the decision tree itself is easy to use and provides reliable and accurate results. [48]

Before actually growing the CART decision tree, several preliminary steps must be undertaken. First, by a careful analysis of existing cases, law review articles, UCC comments, trade journal articles, judicial and practitioner interviews, and my own judgment, a list of factors believed to be relevant in determining whether a collateral disposition was commercially reasonable was compiled. The factors are listed in Table 1. With these factors in mind, a statistical analysis of Sample S was conducted.

Each case in Sample S was carefully analyzed and scored based on the presence or absence of each variable identified in Table 1. Scoring takes the decision maker at his or her word. If, for example, a judge finds that a factor is not met or otherwise present, then the score sheet reflects that fact, notwithstanding that the scorer may have disagreed with a judge's conclusion. All factors that were met in a case were recorded on the appropriate score sheet. The data was then entered into a spreadsheet.

After all 184 cases were scored, each case was randomly assigned to either the Learning Sample S_L (92 cases) or the Testing Sample S_T (92 cases). Again, random simply means that the process of assignment to S_L or S_T was a matter of chance, with each case having an equal likelihood of being assigned either to S_L or S_T. The Learning Sample S_L is used to create and grow the CART decision tree. The Testing Sample S_T is used to test the reliability and validity of the CART decision tree. Separating Sample S into two samples S_L and S_T eliminates the classic problem inherent in many statistical models; a model is generally a better predictor of the cases from which it was created than it is of any other data set.

C. Predicting the Disposition Order by CART Analysis

The objective of CART analysis as a classifier and predictor is to classify sample data as accurately and reliably as possible. CART methodology employs a binary decision tree to accomplish the goal of accuracy. The methodology envisions a learning sample (we have labeled it S_L in this article) with subsets consisting of known, discrete, and non−overlapping groups. Calculating probabilities of group membership and the costs of misclassification is required. Once the root system is in place, construction of the decision tree requires two steps: (1) growing the trees [49] and (2)

pruning the trees. [50]

1. Growing a CART Decision Tree

Let each case in the learning sample (S_L) used to construct the CART tree be denoted by a vector of ratios represented by X. One then grows CART trees by repeatedly splitting X using conditions placed on X. The unclassified data in S_L begin at the top of the tree, which is called the root. Depending on the conditions at the first split, some cases will go left to the nonterminal node (X_1) while the rest will go right to the terminal node (X_2). Those cases that are directed to nonterminal node X_1 will be further split into terminal nodes X_3 and X_4 while those cases that are directed to terminal node X_2 will require no further splitting. From this description, a hypothetical CART decision tree may be constructed. Figure 2 is an illustration of the growing of a hypothetical CART decision tree.

The impurity of the data is at its highest at the root of the tree or X. A condition in the form of a univariate splitting rule is placed on X. Each explanatory variable is analyzed with the goal of selecting the variable measure that best decreases sample impurity. This process can be expressed in algebraic fashion. Let the sample impurity be a function of the node proportions [p[subscript 1](t), p[subscript 2](t), where p[subscript 1](t) and p[subscript 2](t) are the proportion of commercially reasonable and unreasonable cases at a node *t*. Thus, the impurity of a node is represented by the following:

$$i(t) = [p_1(t), p_2(t)]$$

The impurity function is thus maximized when a node contains equal proportions of reasonable and unreasonable cases and minimized when a node contains only one group (*i.e.,* all commercially reasonable dispositions or all not commercially reasonable disposition cases.) The algebraic expression further shows that the impurity function is a symmetric function of $p_1(t)$ and $p_2(t)$.

In growing a tree, the objective is to split *t* to maximize the decrease in impurity. This relationship can also be shown by the following expression wherein *t* is split with *p(r)* of the cases going to the right and *p(l)* of the cases going to the left:

$$\_I(t) = i(t) - p(r)i(tr) - p(l)i(tl)$$

In the above expression, i(tr) and i(tl) denote the impurity of the subsets i(t) with p(r) and p(l) serving as weights.

The next step in growing trees is to define the best split of the data. One continues to split nodes until further splitting results in no further reduction in impurity. At this point, it is necessary to develop an efficient splitting rule. Breiman *et al.* recommend the misclassification costs in assessing the goodness of split, {s,t}, which requires a determination of costs as a result of true positives and negatives. In the CART model here, the odds ratio, an objective function, is used to test the goodness of split. Splits in the data continue until the nodes can no longer be split.

2. Pruning a CART Decision Tree

Growing the CART decision tree is only the first step in constructing an accurate and reliable classification model. The next step is to prune the tree for the purposes of selecting trees of optional size (*i.e.,* to ensure that the trees do not overfit the data) and of obtaining an estimate of the true resubstitution risk, which tends to underestimate the true risk of using the tree to classify another sample drawn from the population (*i.e.,* the more complex the tree, the greater the risk of underestimation.) In other words, without a pruning technique, trees become so massive and case specific that they become difficult to use and may lead to erroneous conclusions. [51] This is, of course, a special case of the curse of dimensionality common with mathematical modeling. [52]

Constructing the CART Decision Tree Based on Learning Sample S_L

The sample employed in this study, designated Sample S, consists of 184 cases. The Sample S was divided into a Learning Sample S_L and a Testing Sample S_T. Learning and Testing Samples are used to construct (grow and prune)

the decision tree and to test the predictive capacity of the model. The Learning Sample is used to estimate the model parameters and construct the initial tree. The Testing Sample is used to estimate the accuracy of the parameters and their ability to classify reliably, *i.e.*, the testing sample answers the question whether the initial decision tree is a good predictor of collateral disposition outcomes.

After identifying the classification system, I analyzed all the possible ways that the data could be divided into two parts by the "explanatory" factors or variables contained in Table 1. Consequently, I divided the cases by whether there was a "yes" or a "no" response to variable V_1, then to V_2, ..., then to variable V_n, then whether the cases were in or out of each jurisdiction. To be more precise, think of X as a 21 dimensional space:

$$X = \{V_1, V_2, ..., V_{21}\}$$

with V_1 through V_{21} representing the various factors courts have considered in the disposition decision. [53] As I have already noted C = {1,2} or C consists of two classes of cases, *j* representing the number of classes (two here). [54] Thus, for every measurement, there is a corresponding class:

$$A_j = \{V_j\, d(v) - j\}$$

Therefore, our Learning Sample can be represented by the following equation:

$$S_L = \{(V_1J_1),..., (V_n\, J_n)\}$$ [55]

In other words, the sample consists of cases (*i.e.*, cases) identified by applicable variables (*i.e.*, collateral disposition factors) and by class (commercially reasonable or not). Each time I divided the group, I measured the homogeneity of the resulting subsets (with respect to whether they were comprised mostly of "commercially reasonable disposition" cases (CR) or "not commercially reasonable disposition" cases (nCR). Once I found the "best" two−way division, I again divided each of the resulting subsets in all possible ways, finding the "best" second cuts, etc. The results defined a fairly clear decision process that appears to describe what courts have done in addressing the Article 9 disposition issue. Breiman *et al.* recommend the misclassification cost, which requires a determination of the costs of true positives and negatives, as a method by which to test the goodness of the split. Rather than following Breiman *et al.*'s suggestion in constructing the probability table, I have used the odds ratio. I employ the odds ratio to test the goodness of split not only because it is a natural measure, but also because it is easy to work with. Therefore, the odds ratio, an objective function, provides a measure for the goodness of split −− {s,t}. From the data, I constructed a decision tree to aid in the determination whether a court will find a particular disposition commercially reasonable. After constructing the initial decision tree from the Learning Sample S_L, I applied it to the Testing Sample S_T.

The initial decision tree identified six clear decisional branches and may be found at Figure 3. Three of the six branches were predictive of cases holding that the disposition of collateral was not commercially reasonable, with two branches predictive of those cases holding that the disposition was commercially reasonable. When using Figure 3 to predict the cases in the Testing Sample S_T, I found the decision tree to be a very good predictor and classifier of those cases in S_T. [56]

Based on the CART decision tree at Figure 3, one can easily identify six clear decisional branches or paths that are highly predictive of collateral disposition outcomes. These branches are depicted in Table 3 and account for 84% of the disposition cases S_L.

D. Application of the CART Decision Tree to the Data Set

Based on the decision tree at Figure 3, a court first considered variable V_1, whether a secured party has engaged in self−dealing in the disposition of the collateral. If the answer is yes, a court *always* concluded that the disposition was not commercially reasonable.

If the answer to V_1 is no, then a court considered V_2, whether a debtor had input in the disposition procedures, [57] and whether a secured party followed those debtor−suggested procedures. If the answer is yes to V_2, then a court *always*

concluded that the disposition was commercially reasonable.

If the answer to V_1 and V_2 is no, then a court considered V_3, whether the secured party provided adequate notice to the debtor in accordance with Article 9 of the UCC. If the answer is no, then a court found the disposition not commercially reasonable 84% of the time.

If the answer to V_1, V_2, and V_3 is yes, then the CART decision tree asked whether a court determined the fair value of the collateral or V_4. If the answer to V_4 is no, then the results are labeled equivocal. Equivocal here means nothing more than that this particular branch of the decision tree becomes uniquely case−specific, thus losing its predictive capability.

If the answer to V_1, V_2, V_3, and V_4 is yes, then a court considered V_5, whether the bid price equaled or exceeded 63% of the fair value of the collateral as found by the court. If the answer to V_5 is no, then a court found the disposition was not commercially reasonable 81% of the time. However, if the answer to V_5 is yes, then a court found the disposition was commercially reasonable 86% of the time. [58] Consequently, in most contested collateral disposition scenarios, the most telling factor is the bid price−to−fair value ratio.

The CART decision tree aids in understanding and applying the vast amount of data presented at a trial on whether a collateral disposition under Article 9 was commercially reasonable. It has identified five clear decisional branches, two of which predict an outcome that the collateral disposition was commercially reasonable, and three of which predict that the collateral disposition was not commercially reasonable. The CART decision tree is also useful in that its five clear decisional branches account for 84% of the cases in the sample S_L.

The CART study goes a long way in debunking the myth espoused by conventional wisdom that Article 9's requirement of a commercially reasonable disposition is a legal standard that requires a careful sifting of the facts and circumstances of each case and a balancing of competing factors and policies. Conventional wisdom simply drops the ball here. If courts are engaging in a balancing approach, it is *surface balancing* only. This is a disingenuous technique that employs the rhetoric of balancing when in reality outcomes are driven by fact clusters and rules obscured in a deceptive rhetorical device. The CART study clearly shows that, controlling for the unusual cases of self−dealing, predetermined consensual procedures for disposition, and inadequate notice, the only statistically significant factor is the winning bid price. If a bid price is equal to or exceeds 63% of the fair value of the collateral, then the secured party wins almost nine out of every ten cases. If a bid price is lower than 63% of the fair value of the collateral, then the secured party loses about eight out of every ten cases.

III. Observations

The CART decision tree is a very good predictor of the outcomes of collateral disposition cases. The decision tree is also useful in that it applies in eight out of ten cases in which the issue arises. The decision tree may also be used by secured parties and debtors to develop a collateral disposition strategy and provide a presumptive bid price floor. The statistical results could also help focus a court's attention on what prior cases have considered significant in determining the issue. But the utility of a CART decision tree need not end here. The decision tree may also be useful in exploring the doctrines and policies that may influence a court's decision on whether a disposition of collateral meets the requirements under Article 9 of the UCC. This Part of the article explores that very question by probing the five clear decisional paths identified by the CART analysis in an effort to mine what jewels may be present.

A. Playing by the Rules

Both the first [V_1 (100% NCR)] and second [V_1 V_2 (100% CR)] decisional branches offer an interesting glimpse of not only American jurisprudence, but American culture as well. Both branches reflect a strong American preoccupation with the rules of the game. Branch 1 is a strong endorsement of the view that if a secured party does not play by the rules, that secured party should not be able to invoke the rules to recover a deficiency. A secured party that has engaged in self−dealing in the disposition of collateral has not performed in accordance with the requirements of Article 9 even where the bid price was a fair price for the collateral sold. [59] This approach is similar to the unclean hands maxim in equity.

Branch 2 is a strong endorsement of the proposition that if a debtor helped develop rules of the game, that debtor should not be heard to complain of the rules if actually followed. [60] This approach actually shifts some of the responsibility and accountability for a commercially reasonable collateral disposition from the secured party to the debtor. Courts, however, have had little pause in permitting the disposition duty shift, notwithstanding clear language in Article 9 that places responsibility for a commercially reasonable disposition on a secured party. [61] For example, a secured party and debtor might agree in the security agreement that a sale by public auction will occur after ten days' notice to the debtor and within 60 days of repossession of the collateral; that advertisement in a local newspaper once a week for two successive weeks will occur, and that the foregoing shall be commercially reasonable. Courts generally uphold these terms, or others, as long as they are not manifestly unreasonable. [62]

B. Role of Notice

Branch 3 [V_1 V_2 V_3 (84% NCR)] also speaks to the collective psyche of the American judiciary and its preoccupation with the illusive and misunderstood concept of "notice." According to Branch 3, the failure to give proper and adequate notice of the proposed disposition of collateral results in a finding that the disposition of collateral was not commercially reasonable in over eight out of ten cases, [63] even in some cases where a court nevertheless concluded that a fair bid price may have been achieved. [64] Lack of adequate notice is problematic throughout the law. In many instances, the law requires notice even if the law has to make it up. For example, constructive notice, which is often good notice and is a form of notice embodied in Article 9's filing system, serves important functions in the law; but as a form of notice in the common meaning of that word, constructive notice is nothing more than nonsense on stilts.

Notice may serve two distinct purposes in the collateral disposition process. These purposes include (1) accuracy in the disposition process, that is, a process that results in a bid price that more closely approximates a fair value of the collateral, and (2) participation of the debtor in a process that deprives him or her of property. Interestingly, many of the cases in Branch 3 contain due process themes in situations where courts routinely hold that the Due Process Clause of the Constitution does not apply. In contrast, accuracy, at least to the extent that that concept means a process that results in a fair bid price, is often discounted by the courts where adequate notice is lacking. Rather, courts appear to be preoccupied with a process that involves the debtor for a reason other than accuracy. [65] These two, often times, competing purposes of notice are discussed below. In analyzing the two purposes that notice may serve in the Article 9 context, I draw, in large part, on the rich commentary on notice in the context of procedural due process jurisprudence.

The contemporary procedural due process paradigm recognizes a tension between what commentators have dubbed the intrinsic value theory and the instrumentality or process−sensitive theory. [66] The intrinsic value theory recognizes the dignity of the individual, and demands that the individual receive appropriate notice and a right to be heard before the government deprives the individual of life, liberty, or property. [67] The essence of the intrinsic value theory is an individual's participation in the deprivation process and a decision maker's explanation of that deprivation decision. [68] The intrinsic value theory emphasizes fairness and individual dignity. [69] Thus, for our purposes here, notice ensures that a debtor is a part of the process by which his property is taken and sold by even private action without cognizable government involvement. Thus, even where a court would otherwise find that the bid price was fair, it could nonetheless conclude that the disposition of the collateral was not commercially reasonable because the process was not fair.

In contrast, the instrumentality or process−sensitive theory views procedural due process as a mechanism to ensure the accuracy of applying general substantive rules to the individual. [70] The process−sensitive theory does not recognize the utility of participation of the individual per se; rather, it latches onto participation of the individual as a means to ensure accuracy. [71] The quest for accuracy in the decisional process thus becomes the essence of procedural due process. [72] Accuracy becomes a thing in itself. [73] This view elevates accuracy above the individual's ability to participate in the deprivation process. Thus, for our purpose here, notice is important because it helps to ensure a fair bid price for the collateral. Consequently, under the process−sensitive theory, a court could easily find a commercially reasonable sale if it determines that the bid price was fair, even where notice to the debtor was inadequate. [74]

The present dichotomized procedural due process paradigm is seriously misleading. In theory, and more importantly in application, the two models of procedural due process are not divisible. Accuracy in the deprivation decision, the touchstone of the process−sensitive theory, is one of several values that the intrinsic value theory embodies. Although heralded as the darling of the process−sensitive theory, the Court's pronouncement in *Mathews v. Eldridge* [75] rests on a firm intrinsic value theory foundation. In *Mathews*, the Court upheld the Social Security Administration's procedures for terminating social security benefits without an evidentiary hearing. [76] In its famous "balancing" test, the *Mathews* Court required consideration of the following interests: [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [77] Thus, although accuracy may be the primary factor in the *Mathews* calculus, the Court's balancing test reveals that the term has no meaning standing alone. [78] Accuracy cannot be a thing in itself. The Court has stressed that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," [79] because the answer to what process is due turns on the individual's and the government's interests. [80] A process−sensitive approach to procedural due process cannot define what accuracy is sufficient. A court can fairly answer the question of accuracy only by resort to the interests at stake.

The paradigmatic due process model conceals the need to look outside the norm of accuracy for the substantive rights at stake to give the goal of accuracy content and context. Once a court isolates these external values, the principles and utility of a process−sensitive model become secondary. [81] Professor Laurence Tribe argues that "[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values −− the very sort of theory the process−perfecters are at such pains to avoid." [82] He identifies numerous "superficially procedural" provisions of the Constitution "such as the rights to counsel, confrontation, bail, and jury trial" that draw their essence from some substantive value or norm. [83] According to Tribe, these rights "function, often at some cost to the efficiency and accuracy of fact−finding, to prevent the government from treating individuals in the criminal process as though they were objects." [84] Individual rights may thus trump a model's goal of accuracy.

Employing a value−based model of due process assessing the individual's and the government's respective interests, provides insight into the accuracy determination. [85] The value−based model recognizes that accuracy is an important goal, but one set by reference to the conflicting substantive rights at stake, and not one set in the abstract. It also recognizes that accuracy is important, but not all important.

In the context of Article 9 collateral dispositions, one must be careful to frame properly the fabric in which the issue of commercial reasonableness arises. A secured party has already repossessed its collateral from a debtor. The secured party has also disposed of the collateral, generally through either a public or private sale. It is not unusual for the secured party also to be the winning bidder, in many instances the only bidder, at the Article 9 sale. After crediting the outstanding indebtedness owed by the debtor by the winning bid price, the secured party seeks to recover a deficiency from the debtor. Generally, as part of it prima facie case, the secured party must also show that the collateral was disposed of in a commercially reasonable manner. The debtor objects, often times arguing that the winning bid or sale price is too low and, thus, the deficiency is too high. Adequate notice, then, accomplishes both the intrinsic value and the accuracy functions. Proper notice elevates a debtor and makes her part of the deprivation process, a badge of intrinsic value and human dignity. Adequate notice also conscripts a debtor in the collective effort in achieving a fair price for the collateral at sale because, among other things, the owner of the property –the debtor– has a financial incentive to see to it that the highest price practicable is achieved. Cases suggest that both policies are at play in the collateral disposition process with primacy, if need be, favoring the intrinsic human value theory of notice.

C. Price is the Thing!

Branch 4 [V_1 V_2 V_3 V_4 V_5 (85% NCR)] and Branch 5 [V_1 V_2 V_3 V_4 V_5 (83% NCR)] appear to be where the action is. If a court determined that a secured party received a bid price greater than or equal to 63% of the fair

value of the collateral, then the court found the disposition to be commercially reasonable 85% of the time. If, however, a court determined that a secured party received a bid price less than 63% of the fair value of the collateral, then the court found the disposition to be commercially unreasonable 83% of the time. These branches account for about 50% of the cases.

Why the focus on the reasonableness of the bid price? After all, the UCC is careful to point out that the bid price should not color our assessment of the collateral disposition. The answer is quite simple. Price is the thing! The cautionary note in the UCC simply reminds us that price is not the only thing! But, in fact, in most cases, the bid price is the only statistically significant factor among many other factors courts ostensibly consider.

A careful understanding of the role bid price plays in the Article 9 collateral disposition process may explain a court's preoccupation with what the UCC protests should be just one of a multitude of factors. In a typical Article 9 default situation, repossession and collateral disposition are the initial steps in the collection of the ultimate deficiency from the debtor. Thus, bid price is the single most important factor in setting a debtor's deficiency. Courts are aware of the role a bid price plays in the overall Article 9 debt collection process. Thus, courts bent on protecting debtors from unreasonable debt collection practices by secured parties carefully consider the bid price. To allow an unreasonably low bid price to stand, even where the process was fair, is a difficult result because of the direct effect the bid price has on the ultimate deficiency personally owed by the debtor.

D. A Dichotomy Between Personal Property and Real Property Collateral Dispositions

As previously mentioned, the bid price derived from the Article 9 collateral disposition process plays a direct role in calculating the deficiency owed by a debtor. Consequently, courts are interpreting the UCC in such a fashion as to ensure a reasonable bid price, separate from the requirements of reasonable collateral disposition procedures. Thus, the central crux, the UCC cautionary note notwithstanding, is value as a claim of fairness.

In contrast, courts treat the real property foreclosure scenario dramatically differently than the personal property equivalent. [86] Courts are not preoccupied with the bid price resulting from a disposition of real property. [87] In fact, if the real property foreclosure procedures are strictly followed, the inadequacy of the bid price will not condemn the disposition. [88] Real property collateral dispositions, we call them foreclosures, are not about fair value like their UCC counterpart; they are about good title. [89] *BFP v. Resolution Trust Corp.* [90] reflects this reality.

Prior to the Supreme Court's opinion in *BFP*, the federal courts of appeals disagreed on the proper role of a court in assessing the bid price of a real property foreclosure sale under bankruptcy law. [91] Although state law generally held that the mere inadequacy of a bid price would not render the sale invalid, federal courts, exercising their jurisdiction in bankruptcy, routinely struck down foreclosure sales where the bid price was found to be inadequate. [92] The courts developed several approaches to the issue. For example, in *Durrett v. Washington Nat'l Ins. Co.*, [93] the Fifth Circuit avoided a real property foreclosure under section 548 of the Bankruptcy Code**,** [94] holding that the foreclosure sale was a constructive fraudulent transfer. [95] In support of its holding, the Fifth Circuit observed, in dicta, that a foreclosure bid price of less than 70% of the fair value of the property would render the sale voidable in bankruptcy. [96] In contrast, the Seventh Circuit in *Bundles v. Baker (In re Bundles)*, [97] held that to determine whether a foreclosure sale should be subject to avoidance under the Bankruptcy Code, a court should assess all the facts and circumstances surrounding the foreclosure sale and that bid price is but one factor to consider in a panoply of factors. [98]

In *BFP v. Resolution Trust Corp.*, [99] the Supreme Court held that the bid price resulting from a noncollusive, regularly conducted foreclosure sale constituted fair value as a matter of law. [100] Thus, the Supreme Court, in interpreting the Bankruptcy Code, focused judicial attention on compliance with a state−mandated process and not on the results received from invoking the process. [101] The Supreme Court's pronouncement in *BFP* presents shades of the UCC commentary on Article 9 collateral dispositions. [102] Recall that the commentators to Article 9 rejected an approach akin to *Durrett*, stating that inadequate bid price alone should not color a collateral disposition as unreasonable. [103] Rather, the commentators placed themselves squarely in the *Bundles* camp, a process and not results approach to the issue. [104] *BFP* simply states that a state−mandated process, like the laws on real property foreclosures, are reasonable

per se. [105]

An understanding of *BFP* explains why the Supreme Court ruled the way it did, and why state courts under Article 9 rule the way they do. When federal courts address real property foreclosures, they do so through the lens of fraudulent transfer law. [106] They are not asked to consider what the remaining liability of the debtor may be once the bid price from the foreclosure sale is credited against the outstanding indebtedness. [107] Federal bankruptcy courts, like their state law counterparts, instead are preoccupied with title and not with deficiencies. In contrast, where a court is addressing the validity of an Article 9 collateral disposition, it does so because the secured party seeks a deficiency from the debtor. The procedural posture of the case thus requires a court to confront the issue of bid price adequacy head on; it cannot simply defer to the legislature as it does in the fraudulent transfer context or under real property foreclosure law.

IV. Conclusion

Any good myth contains within its core wisps of truth. The contemporary myth surrounding Article 9 collateral dispositions does not disappoint us. The statistical results identify three significant factors in determining whether a collateral disposition was commercially reasonable. The first factor is that a secured party has not engaged in self−dealing. The second factor is that a secured party has provided notice as required under Article 9. Both these factors could be characterized as matters of process, inquiries that suggest a court engage in a fact−intensive investigation, a role consistent with the modern myth. But that position reads too much into what the courts are actually doing. Both the questions of self−dealing and notice are actually specific inquiries bounded by a rules−based approach to the issue.

Controlling for lack of self−dealing and notice, the statistical results strip the remaining factors from the inquiry. Here the process myth evaporates before our eyes. Results are the thing. Bid price alone may account for the outcome in over eight of every ten cases in which the issue is raised. Simply, if the bid price exceeds 63% of the fair value of the collateral, the disposition is commercially reasonable. If the bid price falls below 63% of the fair value of the collateral, the disposition is not commercially reasonable. Thus, notwithstanding the admonition contained in the UCC itself, bid price is king!

TABLES & FIGURES

TABLE 1

Commercially Reasonable Disposition Factors

- Self Dealing
- Adequate Notice
- Bid Price to Fair Value Ratio
- Retention of expert (other than auctioneer) in specific collateral disposition
- Retention of auctioneer
- Disposition must comply with own documents
- Documents identify what steps constitute a commercially reasonable disposition
- Existence of a postdefault written agreement from the debtor either setting out terms of commercially reasonable disposition or waiving the right to a commercially reasonable disposition
- Debtor involvement in the disposition
- Written request to debtor sent, seeking debtor input in the disposition of collateral
- Did creditor document debtor's failure to cooperate with the disposition
- Initial inspection of collateral, including written description and picture of collateral
- Inspect collateral to identify any special features that would increase sale's price
- Proper storage of collateral
- Maintain insurance

on collateral

- Make and document reasonable repairs
- Wash, paint, and prep collateral for sale
- Notice requirement in the particular state of disposition
- Conduct UCC lien search by debtor name in the appropriate jurisdiction
- Send notice of commercially reasonable disposition to debtor, guarantors, sureties, other creditors known to have an interest in the collateral to last known address
- Did notice to debtor and guarantors should state the amount of indebtedness as of a particular date (and possibly have attached to the notice a copy of the payment ledger) and that the creditor intends to seek a deficiency, if one exists, after the commercially reasonable disposition of the collateral
- Notice of Public Sale identify the time and place of sale
- Notice of Private Sale identify the time after which the sale may be conducted
- Was notice sent to known potential bidders, dealers, those entities potentially interested in the collateral (even if they have not shown interest at this point in the disposition)
- Did notice comply with time of sale requirements and be specific as to the collateral, including the identification of special options on the collateral
- Was specific notice provided to known potential bidders of disposition
- Employ bid list
- Maintain written log of purchase offers received by Case
- Make and document in written log contacts regarding the disposition
- Send formal invitations to those potential bidders that may be interested in the collateral
- Newspaper advertisement of disposition (both potentially local and national newspapers of general circulation)
- Ads placed in trade journals
- Post information on Website on the World Wide Web
- Maintain record of advertisements and tear−sheets of ads
- Presumptively disposition should be by Public Sale
- Time and place of sale should be calculated to maximize price by taking into consideration a reasonable time for debtor and potential purchasers to act, deterioration of collateral, and market conditions
- Auctioneer should appraise the collateral based on the fair value of the collateral and prepare a report stating the basis of the opinion on value
- Location of sale must be commercially reasonable
- Public access to inspect the collateral
- Public access to sale site
- Compare bid price at Public Sale to any private purchase offers received
- Take pictures of disposition site
- Resales of collateral for higher price
- Charges reasonable
- Wholesale v. Retail price as guide
- Self−dealing
- Sweetheart deals to favored customers, dealers, etc.
- Accepting Public Sale bid where Private Sale purchase offer was higher and better offer
- Disparity in bid price and collateral value of greater than 50%
- Sale price substantially lower than resale price for collateral obtained by creditor
- Small ads in national newspaper
- One ad only
- Ads in legal newspapers only
- Use of equipment extensively before the sale
- Excess delay between repossession and sale
- Any deviation from normal commercial practice and procedure absent documented good cause
- Disposition by unit or parcels
- Consumer v. Business debtor
- National v. Local secured party
- State court
- Federal court

- Manner and method of payment of bid price
- Procedural posture of case (summary judgment v. trial)
- Maintain record of those bidders present and any bids made

TABLE 2

CART Methodology

1. Identify Relevant Factors
2. Prepare Random Sample
3. Score Cases
4. Construct a Decision Tree From a Learning Sample
5. Validate the Decision Tree by Applying it to the Testing Sample
6. Modify Tree by Extension or Pruning
7. Assess Meaning of Results

TABLE 3

Decisional Path Chart

V1(Yes) = nCR, 100% (4/4 Cases)

V1(No), V2(Yes) = CR, 100% (4/4 Cases)

V1(No), V2(No), V3(No) = nCR, 84% (21/25 Cases)

V_1(No), V_2(No), V_3(Yes), V_4(No) = Equivocal (15 Cases)

V1(No), V2(No), V3(Yes), V4(Yes), V5(No) = nCR, 81% (25/31 Cases)

V1(No), V2(No), V3(Yes), V4(Yes), V5(Yes) = CR, 86% (12/14 Cases)

V_1: Self−Dealing by Secured Party

V_2: Debtor Input in Sale

V_3: Adequate Notice

V_4: Court Determined Fair Value of Collateral

V_5: Bid−Price−to−Fair−Value Ratio Greater Than or Equal to 63%

FIGURE 1

Bid−to−Fair Value Ratios

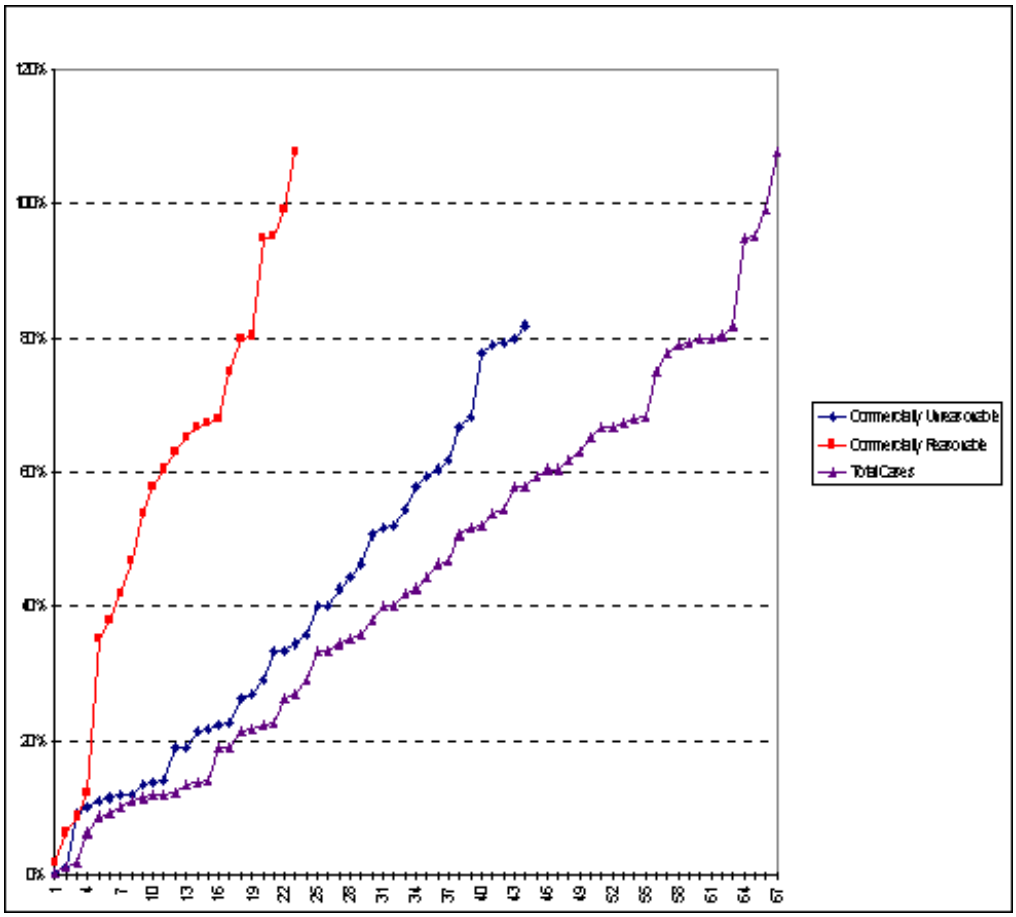

120%
100%
80%
60%
40%
20%
0%
1
4
7
10
13
16
19
22
25
28
31
34
37
40
43
46
49
52
55
58
61
64
67
Commercially Unreasonable
Commercially Reasonable
Total Cases

FIGURE 2
Hypothetical Cart Decision Tree

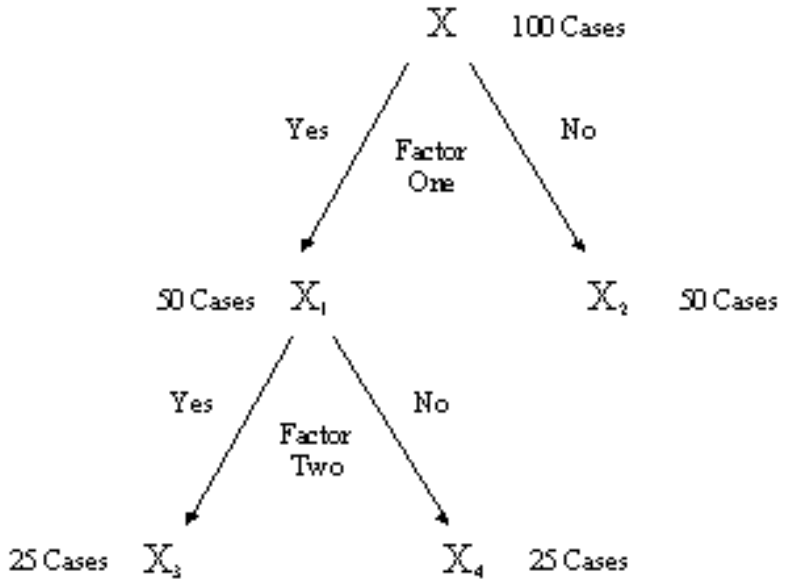
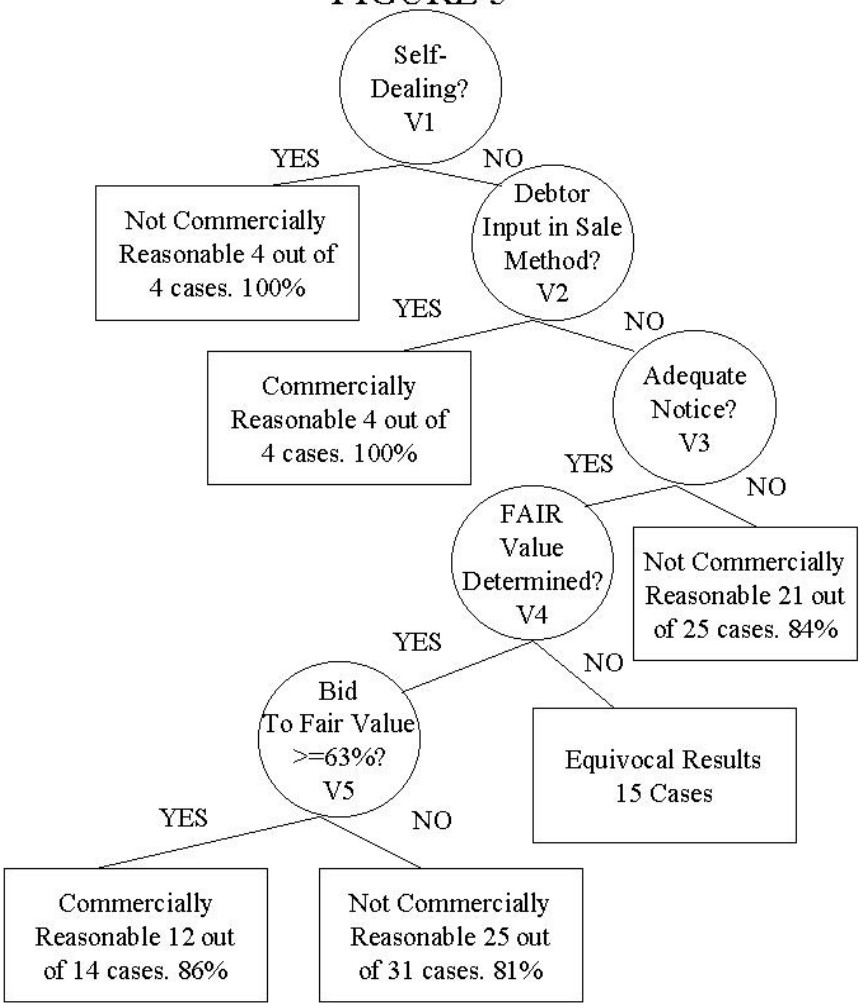


FIGURE 3



FOOTNOTES:

[1] Inaugural American Bankruptcy Institute, Robert M. Zinman Scholar in Residence; Professor, Georgia State University College of Law. Professor Williams wishes to thank Dr. David S. Salsburg, Fellow, American Statistical Association, for his review of the statistical methodology and Professor David Gray Carlson for his review of the manuscript. Professor Williams would also like to thank his former research assistants Susan H. Seabury, Graham Stieglitz and Paige Randolph for their help. Finally, he extends a special thanks to the American Bankruptcy Institute for funding the research. Any questions regarding the article or the database may be directed to Jack F. Williams at jwilliams@gsu.edu. Back To Text

[2] Uniform Commercial Code, Article 9 (1972) [hereinafter interchangeably Article 9, UCC, or Code]. Primarily, I will refer to the 1972 version of Article 9 with the appropriate references to the 1999 version, and I will also highlight any differences between the two versions where appropriate and relevant to this article. Back To Text

[3] See, e.g., Lilly v. Terwilliger, 976 P.2d 199, 203 (Mont. 1990) (finding that reading together requirements of "method, manner, time, place and terms" provision of § 9−504(3) and "fact that a better price could have been obtained by a sale at a different time or in a different method" rule of § 9−507(2) strongly suggests reasonableness of sale is not determined by price but by process employed by secured party); Dulan v. Mont. Nat'l Bank, 661 P.2d 28,

32 (Mont. 1983) (stating reasonableness of transaction is assessed by manner in which it was conducted and not by price of collateral sold); James Talcott, Inc. v. Reynolds, 529 P.2d 352, 354−55 (Mont. 1974) (holding manner in which sale is conducted is better indicator of reasonableness than price ultimately received). Back To Text

[4] See In re Excello Press, Inc., 890 F.2d 896, 905 (7th Cir. 1989) (concluding whether sale was commercially reasonable is fact−intensive inquiry); Fed. Deposit Ins. Corp. v. Forte, 144 A.D.2d 627 (N.Y. App. Div. 2d Dep't 1988) (illustrating several factors should be taken into consideration when determining commercial reasonableness); First Nat'l Bank v. G.F. Clear, Inc., 93 A.D.2d 925, 926 (N.Y. App. Div. 3d Dep't 1983) (holding commercial reasonableness of every aspect of disposition of collateral must be proven). Back To Text

[5] Accord In re Frazier, 93 B.R. 366, 368 (Bankr. M.D. Tenn. 1988) (identifying factors by which compliance with prevailing commercially reasonable practices may be measured), aff'd, 110 B.R. 827 (M.D. Tenn. 1989); see Pippin Way, Inc. v. Four Star Music Co., 2 B.R. 454, 461 (Bankr. M.D. Tenn. 1979) (listing factors commonly considered when determining commercial reasonableness); Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797, 801 (E.D. Pa. 1968) (defining factors involved in establishing commercial reasonableness). Back To Text

[6] Accord Sec. Fed. Sav. & Loan v. Pendergast, 775 P.2d 1289, 1292 (N.M. 1989) (considering various factors in assessing commercial reasonableness); see Pippin Way, Inc., 2 B.R. at 461 (discussing some factors involved in confirming commercial reasonableness); Clark Leasing Corp. v. White Sands Forest Prods., 87 N.M. 535 P.2d 1077, 1079−80 (N.M. 1975) (finding every aspect of sale must be weighed in finding commercial reasonableness). Back To Text

[7] See Conn. Bank & Trust Co., N.A. v. Incendy, 207 Conn. 15, 28 (Conn. 1988) (recognizing, in general, that commercial reasonableness requires evidence of such things as amount of advertising done, number of people contacted, normal commercial practices in disposing of particular collateral, length of time between repossession and sale, whether any deterioration in collateral has occurred, number of bids received, and price obtained); Garden Nat'l Bank of Garden City v. Cada, 241 Kan. 494, 495 (Kan. 1987) (determining eight factors which, together with any other relevant circumstances, are to be considered when deciding whether sale was commercially reasonable, including: (1) duty to clean up, fix up, and paint collateral; (2) public or private disposition; (3) wholesale or retail disposition; (4) disposition by unit or in parcels; (5) duty to publicize sale; (6) length of time collateral was held prior to sale; (7) duty to give notice of sale; and (8) actual price received at sale); Westgate State Bank v. Clark, 231 Kan 81, 92−95 (Kan. 1982) (listing and defining eight factors to be examined in determining commercial reasonableness). Back To Text

[8] The newly revised Article 9 does not change the basic collateral disposition process central to the discussion in this article. Back To Text

[9] Statistical significance has a precise meaning. It means that an observed difference cannot be attributed to chance alone, that something besides random error is afoot. See David H. Kaye & David A. Freedman, Reference Guide on Statistics, Reference Manual on Scientific Evidence 331, 380 (Fed. Judicial Ctr. ed., 1994). Statistically significant differences may or may not be practically or legally significant. Id. at 380−81. Practical significance is generally of substantive importance to the law. It is generally understood to mean that the magnitude of the effect of interest is "sufficiently important substantively for the court to be concerned." See Daniel L. Rubinfeld, Reference Guide on Multiple Regression, Reference Manual on Scientific Evidence 415, 429 (Fed. Judicial Ctr. ed., 1994). However, results that are statistically significant may not be practically significant because with large samples, even small differences (that we would not think much of) may be statistically significant. Id. at 429−30. Back To Text

[10] See text accompanying footnotes 4−6 (identifying and discussing variety of factors which may be considered when assessing commercial reasonableness of disposition of collateral). Back To Text

[11] See text accompanying footnote 55. Back To Text

[12] See Kathleen M. Sullivan, Post−Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L. Rev. 293, 295 (1992) (contrasting two judicial techniques of categorization and balancing). Balancing tests are one of five

rhetorical techniques used by courts. See Jeffery Blum et al., Cases that Shock the Conscience: Reflections on Criticism of the Burger Court, 15 Harv. C.R.− C.L. L. Rev., 713, 715 (1980) (noting court techniques include balancing tests, evasion of precedent, viewing facts as dichotomies, privatization of governmental disputes, and idiosyncratic rule extension). All five techniques allow a court to manipulate legal doctrine in accordance with its own biases while paying lip−service to objectivity and fidelity to past precedents. See id. at 727. The role and significance of rules and standards has aroused substantial interest among legal scholars. See, e.g., Andrew Altman, Critical Legal Studies 104−48 (1990) (arguing claims of inconsistency between liberal theory of law and liberal theory of politics are unpersuasive); Mark Kelman, A Guide To Critical Legal Studies 15−63 (1987) (characterizing relationship between norm and substance as aesthetic); Frederick Schauer, Playing By The Rules: A Philosophical Examination Of Rule−Based Decisionmaking In Law And In Life 104 (1991) (contending "ruleness" encompasses more than specificity); Louis Kaplow, Rules v. Standards: An Economic Analysis, 42 Duke L.J. 557, 582 (1992) (analyzing rules and standards from cost−benefit perspective); Margaret J. Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 813 (1989) (arguing rule−of−law ideal must be reinterpreted); Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 592−93 (1988) (discussing various perspectives on dichotomy between rules and standards). See generally Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 122 (1992) (discussing 1991 Supreme Court term and casting Supreme Court debate between liberals and conservatives in terms of rules and standards). Back To Text

[13] See infra notes 41−45 and accompanying text (detailing statistical analysis of significance of bid price to finding of commercial reasonableness). Back To Text

[14] See U.C.C. § 9−507(2) (1995) (noting price alone is not determinative of commercial reasonableness); see also In re Estate of Sagmiller, 615 N.W. 2d. 567, 571 (N.D. 2000) (stating "it may not be presumed, without evidence, a retail disposition is superior to a wholesale dealers−only disposition."); Id. (stating "[s]peculation on whether a different mode of sale may have brought a better price does not support a finding of commercial reasonableness."); Bank One Texas, N.A. v. Stewart, 967 S.W.2d. 419, 450 (Tex. App. 1998) (discussing six factors for determining whether secured party was within bounds of commercial reasonableness). Back To Text

[15] See generally David Gray Carlson and Grant Gilmore, Gilmore and Carlson on Secured Lending (2d. ed. 2000) [hereinafter Carlson & gilmore]. Although Louisiana has enacted Article 9, it does not permit self−help repossession. See, e.g., Rev. U.C.C. § 9−607(a)(4)−(5) (1999) (discussing secured party's remedy of self−help when deposit account is its collateral); Rev. U.C.C. § 9−205(a)(1)(c) (1999) (providing security interest is not invalid or fraudulent against creditors solely because . . . "the debtor has the right or ability to . . . accept the return of collateral or make repossessions . . .."). Back To Text

[16] U.C.C. § 9−504(3) (1995); see also Rev. U.C.C. § 9−610 (1999) (requiring every aspect of disposition of collateral must be conducted in commercially reasonable manner); Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 715 (E.D. Pa. 1968) (asserting commercial reasonableness relates to all aspects of disposition of collateral, notwithstanding non−exhaustive nature of list of factors in § 9−504(3)), aff'd 398 F.2d 310 (3d. Cir. 1968). Back To Text

[17] Revised (1999) Article 9 continues in substance the procedural requirements of the 1972 version of Article 9. See Rev. U.C.C. § 9−627(b) (1999) (providing disposition of property has been conducted in commercially reasonable fashion if it is made: "(1) in the usual manner on 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 that was subject to the disposition."); see also Fedders Corp. v. Taylor, 473 F. Supp. 961, 977 (D. Minn. 1979) (describing "tenor" of Uniform Commercial Code as requiring commercial reasonableness requirements to be applied to entire disposition of collateral, and for such disposition to be taken as single transaction); In re Zsa Zsa Ltd., 352 F. Supp. 665, 670 (S.D.N.Y. 1972) (finding "aggregate of circumstances" must be considered in assessing commercial reasonableness of disposition), aff'd, 475 F.2d 1393. Back To Text

[18] U.C.C. § 9−504(3) (1995); see Beard v. Ford Motor Co., 850 S.W.2d 23, 27−28 (Ark. Ct. App. 1993) (discussing differences in notice requirements for public and private sales); First Nat'l Bank & Trust Co. of Enid v. Holston, 559 P.2d 440, 443−44 (Okla. 1976) (noting "[t]he policy of the Uniform Commercial Code . . . is to provide flexibility in

the disposition of collateral"). Back To Text

[19] See Lilly v. Terwilliger, 796 P.2d 199, 203 (Mont. 1990) (finding "method, manner, time, place and terms" provision of § 9−504(3) and "fact that a better price could have been obtained by a sale at a different time or in a different method" rule of § 9−507(2) have together been interpreted to mean reasonableness of sale is not determined by price, but rather by manner in which sale is conducted; in other words, if sale is considered commercially reasonable, then price is reasonable); see also IFG Leasing Co. v. Gordon, 776 P.2d 607, 615 (Utah 1989) (holding record supported trial court's determination that method, manner, time and place of sale was in compliance with requirements of UCC); Allied Bank of Texas v. Eshaghian, 700 F. Supp. 206, 207(S.D.N.Y. 1988) (determining concept of commercial reasonableness applies to disposition of collateral, and, therefore, that claim that debtor should have been allowed to continue effort to sell stores on its own was legally irrelevant to issue of whether collateral had been liquidated in commercially reasonable manner). Back To Text

[20] See Chadron Energy Corp. v. First Nat'l Bank of Omaha, 459 N.W.2d 718, 727 (Neb. 1990) (finding issue of whether sale was commercially reasonable is question of fact for jury to decide); Cottam v. Heppner, 777 P.2d 468, 473 (Utah 1989) (determining evidence taken as whole was sufficient to support jury finding that disposition of collateral was handled in all its aspects in commercially reasonable manner); cf. Central & Southern Bank of Georgia v. Craft, 379 S.E.2d 432, 433 (Georgia Ct. App. 1989) (refusing to hold as matter of law that bank's disposition was commercially reasonable); Lindberg v. Williston Industrial Supply Corp., 411 N.W.2d 368, 374 (N.D. 1987) (observing although there may be situations where court may determine that disposition of collateral was commercially unreasonable as matter of law, determination of commercial reasonableness is essentially question of fact); Garden Nat'l Bank of Garden City v. Cada, 738 P.2d 429, 430 (Kansas 1987) (stating commercially reasonable sale is question of fact to be determined by trier of fact). Back To Text

[21] See Grant Gilmore, Security Interests in Personal Property § 44.5, at 1234 (1965). See generally Carlson and Gilmore, supra note 14; see also General Motors Acceptance Corp. v. Johnson, 746 A.2d 122, 124 (RI 2000) (discussing need to test commercial reasonableness according to procedures of sale rather than proceeds received). Back To Text

[22] U.C.C. § 9−504, cmt. 6 (1995) (citing to U.C.C. § 1−203 for discussion of obligation of good faith); see also Rev.U.C.C. § 9−610 (1999) (providing "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable"); id.at § 9−627(b) (providing "[a] disposition of collateral is . . . commercially reasonable . . . if . . . made in the usual manner on any recognized market . . . at the price current in any recognized market at the time of the disposition . . . or . . . otherwise in conformity with reasonable commercial practices among dealers in the type of property that was subject to the disposition."). Back To Text

[23] U.C.C. § 9−507(2) (1995) (discussing tests for commercial reasonableness in dispositions of property); see also Rev.U.C.C. § 9−627 (1999) (discussing more specifically than U.C.C. § 9−507 requirements for commercial reasonableness in dispositions of property); id. at § 9−610(b) (requiring "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable."). Back To Text

[24] Accord, In re Frazier, 93 B.R. 366, 368 (Bankr. M.D. Tenn. 1988) (deciding "[i]n order to make the determination of commercial reasonableness, we must look to the facts and circumstances of the sale."), aff'd, 110 B.R. 827 (M.D. Tenn. 1989); Moutray v. Perry State Bank, 748 S.W.2d 749, 752 (Mo. App. 1988) (holding "[t]he commercial reasonableness of a sale is a question of fact."); Lilly v. Terwilliger, 796 P.2d 199, 203 (Mont. 1990) (stating "fact that a better price could have been obtained by a sale was commercially unreasonable."); First Bank of South Dakota v. VonEye, 425 N.W.2d 630, 637 (S.D. 1988) (stating "fact that 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."). Back To Text

[25] See Carlson and Gilmore, supra note 14. Back To Text

[26] See U.C.C. § 9−507, cmt. 2 (providing "none of the specific methods of disposition set forth . . . is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable"); McMillian v. Bank South, N.A., 373 S.E.2d 61, 62 (Ga. Ct. App. 1988) (noting secured party used recognized automobile auction company to dispose of collateral at private auction). See generally Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985) (finding secured party's private sale of repossessed collateral was commercially reasonable). Back To Text

[27] See U.C.C. § 9−507 (2) (1995); see also Rev. U.C.C. § 9−627(1999) (describing circumstances in which disposition will be deemed commercially reasonable); cf. Dakota Bank & Trust Co. of Bismarck v. Reed, 402 N.W.2d 887, 892 (N.D. 1987) (holding commercial reasonableness provisions of § 9−504 do not apply when secured party obtains judgment and proceeds with execution levy and sheriff's sale). Back To Text

[28] See U.C.C. § 9−507 (2) (1995) (providing general rule that any disposition approved by a judicial proceeding shall conclusively be deemed to be commercially reasonable however this does not mean that any disposition that is not approved is not commercially reasonable); Federal Deposit Ins. Corp v. Forte 94 A.D.2d 59, 66 (N.Y. App. Div. 1983) (declaring judicial sale as conclusively meeting standard of commercial reasonableness only if judicial sale is judicially approved); see also U.C.C. § 9−627 (c) (1999) (stating requirement of approval in a judicial proceeding, by a bone fide creditors' committee, by a representative of creditors, or by an assignee for the benefit of creditors as necessary to meet requisite standard of commercial reasonableness in the enforcement, collection, disposition, or acceptance). Back To Text

[29] Id. at § 9−507(2) (stating fact better price could have been obtained by sale at different time or in different method than method secured party selected is not dispositive in establishing that sale was not made in commercially reasonable manner and providing further discussion on sale of collateral); see also Rev. U.C.C. § 9−627 (1999) (providing factors for determination of whether conduct was commercially reasonable). See generally In re Zsa Zsa Ltd., 352 F.Supp. 665, 670 (S.D.N.Y. 1972) (declaring aggregate of circumstances must be reviewed in each sale as opposed to an isolated view of creditor's sale of debtor's collateral for the goal of liquidating secured debts). Back To Text

[30] See U.C.C. § 9−501 (3)(b) (1995) (stating duty imposed on secured party under § 9−504 (3) may not be waived under § 9−501 (3)(b)); Rev.U.C.C. § 9−610 (b) (1999) (discussing commercial reasonableness in disposition of collateral after default). See generally United States v. Kelley, 890 F.2d 220, 224 (10th Cir. 1989) (rejecting uniform federal rule for waiver by guarantors of commercial unreasonableness defense in government SBA contract, and instead incorporating Kansas law that provides that waiver is unenforceable under §§ 9−504 (3) and 9−501 (3)); Marine Midland Bank, N.A. v. Kristin Int'l Ltd., 141 A.D.2d 259, 260 (N.Y. App. Div. 1988) (explaining guarantor may not waive defense of commercial reasonableness); Dakota Bank & Trust Co., Fargo v. Grinde, 422 N.W.2d 813, 818 (N.D. 1988) (asserting debtor is unable to waive protections of UCC § 9−504 (3) prior to default). Back To Text

[31] See Ford Motor Credit Co. v. Solway, 825 F.2d 1213, 1217 (7th Cir. 1987) (concluding where underlying contract describes particular method of disposition as commercially reasonable compliance with that provision creates strong evidence of commercial reasonableness); Weinstein v. United States, 511 F.2d 56, 58 (6th Cir. 1975) (stating parties may by agreement determine standards by which rights and duties pertaining to commercial reasonableness have been fulfilled so long as those standards are not themselves unreasonable). See generally GE Capital Corp. v. Stelmach Constr. Co., 2001 U.S. Dist. LEXIS 12987 at *19 (D. Kan. 2001) (describing determination of whether sale has been held in commercially reasonable manner is question of fact). Back To Text

[32] See UCC § 9−504 (3) (1995) (discussing factors taken into consideration in determining commercial reasonableness when secured party disposes of collateral); Allapattah Serv.. v. Exxon Corp., 61 F.Supp.2d 1308, 1323 (S.D. Fla 1999) (declaring facts of case are determinative of whether conduct is commercially reasonable because there is no precise definition of commercial reasonableness); Westgate State Bank v. Clark, 231 Kan. 81, 91 (Kan. 1982) (stating statutory definition of commercially reasonable sale is vague therefore a factual determination of whether sale was commercially reasonable depends on facts of each case). Back To Text

[33] See Wilmington Trust Co. v. Schoonmaker 1994 Del. C.P. LEXIS 9 at 3 (Ct. Com. Pl. 1994) (declaring there is no bright−line test for commercial reasonableness and as result issue of whether any particular sale is commercially reasonable is determined on case by case basis); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (observing commercial reasonableness cannot be measured with bright−line test); Haggis Mgmt. v. Turtle Mgmt., 745 P.2d 442, 445 (Utah 1985) (Hyde, J., dissenting) (citing Shcarf v. BMG Corp., 700 P.2d 1068) (noting statutory standard of commercial reasonableness cannot be measured with bright−line test therefore determination of whether any particular sale is commercially reasonable is to be determined on case−by−case basis). Back To Text

[34] See Fryelman, Altman and Kao, Introducing Reclusive Partitioning for Financial Classification: The Case of Financial Distress, XL Journal of Fin. 269, 276 (1985) [hereinafter Fryelman, Altman and Kao] (stating assumption that population has normal distribution); Discriminant Function Analysis (2001) at, http://www.statsoftinc.com/textbook/stdiscan.html#assumptions [hereinafter Discriminant Function Analysis] (stating assumption that data for variables represents normal distribution multivariate sample);G. David Garson, PA 765: Discriminate Function Analysis (2001), at http://www.2.chass.ncsu.edu/garson/pa765/pa765syl.htm (defining Multiple Discriminant Analysis (MDA) as extension of Discriminant Analysis which is used to classify categorical dependent containing more than two categories). Back To Text

[35] See Fryelman, Altman and Kao, supra note 33 at 276 (providing assumption of the equality of group co−variances); Discriminant Function Analysis supra note 33 at http://www.statsoftinc.com/textbook/stdiscan.html#assumptions (declaring co−variances are homogeneous); Data Analysis, supra note 33. http://www.ronin.com/ranalysis.htm#ANCOVA (stating analysis of covariance is useful in detecting mean differences among three or more groups while one variable is held constant). Back To Text

[36] See Fryelman, Altman and Kao, supra note 33 at 276 (declaring assumption that groups are discrete, nonoverlapping, and identifiable); Discriminant Function Analysis, supra note 33 at http://www.statsoftinc.com/textbook/stdiscan.html#assumptions. (opining post hoc predictions are better than a priori predictions because a priori predictions are future predictions and it is easier to predict what has already happened). But see http://www.fs.fed.uslrm/boise/fish/catdat/intro.htm.−12k (stating generalized logit models include statistical models which are used to relate probability of predictor event occurring to set of predictor variables). Logit has a less stringent set of assumptions. Logit as a classification model contains few distributional assumptions on the independent variable. Although Logit is operative when a variable is dichotomous, Logit−based predictions may force the data into a particular model that may not fit the data, leading to nonsensical conclusions. Moreover, Logit, like other forms of regression analysis, is a global technique whose focus is on the central tendency or average. On the other hand, CART analysis is a recursive, local technique. Thus, the advantage of CART analysis is that the underlying structural form of the prediction formula may vary, something that CART analysis accounts for. The disadvantage of CART analysis is in how detailed must one construct the tree, that is, how far back should we prune the tree. In the statistical literature, this is known as a bandwidth problem. With a greater bandwidth, CART analysis begins to look more like a global technique with the attendant criticisms. Back To Text

[37] See L. Breiman, J.H. Friedman, R.A. Olshen, & C.J. Stone, Classification and Regression Trees (1984) [hereinafter Breiman]: Classification Trees, at, http://www.statsoftinc.com/textbook/stclatre.html (describing purpose of classification trees which is to predict or explain responses on a categorical dependent variables); CATDAT Introduction, at, http://www.fs.fed.uslrm/boise/fish/catdat/intro.htm.−12k. (stating classification tree rules are different from techniques such as discriminant analysis and generalized logit models which are based on linear combination of predictors). CART is a recursive technique. It appears that all tests involving the ranks of data are nonparametric. Examples include rank correlation tests, Kruskal−Wallis One−Way Analysis of Variance, Friedman's Two−Way Analysis of Variance by Rank, and the Wilcoxon Matched−Pairs Signed−Rank Test. Back To Text

[38] CART has been successful in developing classification models to predict failure among industrial firms. See Frydman, Altmann and Kao, supra note 33 (predicting failures among certain banks). See also McIntyre, Predicting Bank Failures: Bankruptcy Theories, Classification Models, and Empirical Evidence (1992) (Unpublished manuscript, University of Ga.) (predicting survivability of heart attacks); L. Breiman, supra note 36, at 174−202 (detecting certain compounds in environmental studies); id. at 203−15 (determining when court will order defendant detained before trial under Bail Reform Act of 1984); Basil H. Mattingly, Forum Over Substance: The Empty Ritual of Balancing in

Regulatory Takings Jurisprudence, 36 Willamette L. Rev. 101, 142 (2000) [hereinafter Basil H. Mattingly, Forum over Substance]; Jack F. Williams, Classifying Pre−Trial Detention decisions Under the Bail Reform Act of 1984: A Statistical Approach, 30 Am. Crim. L. Rev. 255, 307−11 (1993) [hereinafter Williams, Classifying Pre− Trial] (determining when court will find a regulation has amounted to taking under Constitution). Back To Text

[39] Consequently, if CART is as accurate and reliable as parametric techniques, CART should be favored as a classification model because it is easier to use. See Paul Utgoff, Machine Learning Laboratory (1997) at, http://www.cs.mass.edu/lrn/iti/dtree−background.html (declaring decision tree is utilized to determine a class label to associate with an example at each node of the tree there is a test question which corresponds to each potential test outcomes). See e.g. Butler v. West 164 F.3d 634, 638 (D.C. Cir. 1999) (noting while MSPG and EEOC regulations are extremely complicated they can be reduced to a decisional tree for simplification processes); State v. Jones 605 N.W.2d 434, 438 (Neb. 2000) (declaring statute at issue utilized a decision tree to organize information in determination competency of defendant). Back To Text

[40] See, e.g., David C. Baldus, Racial Discrimination and the Death Penalty 83 Cornell L.Rev. 1638, 1666 (1997−1998) (applying CART model to study of death penalty cases); Basil H. Mattingly, Forum Over Substance, supra note 38 at 142 (providing example of CART analysis in an application to real estate); Peter J. Whitmore A Statistical Analysis of Non−Competition Clauses In Employment Contracts, 15 J.Corp.L. 483, 486 (using CART to obtain result of study involving non−competition clauses in employment contracts). Back To Text

[41] Occasionally, one encounters attacks on empirical legal research that rests, in large part, on the analysis of reported cases. These attacks are misplaced in many instances. After all, the "data" that lawyers and judges rely on are reported cases. See generally In Re Excello Press, Inc., 890 F.2d 896, 900 (7th Cir. 1989) (addressing issues raised in collateral disposition of property); Briscoe Co. v. Travelers Indem. Co., 899 F. Supp. 1304, 1315 (D.N.J. 1995) (discussing essence of collateral disposition under ADC); Manufacturers Hanover Leasing Corp. v. Ace Drilling Co., 726 F. Supp. 966, 968 (S.D.N.Y. 1989) (stating any collateral distribution must be done in commercially reasonable manner). Back To Text

[42] The "mean" is the arithmetic average of the total observations. It is the most common measure of the central tendency of a distribution. As a function of the total value of a distribution, the mean may be greatly influenced by extreme high and low values, so called "outliers." Back To Text

[43] The "median" is the precise center of the distribution so that exactly one−half of the data set lies above it and on−half lies below it; the value simply cuts the distribution in half. Along with the mean and the mode, the median is a measure of the central tendency of a distribution. Unlike the mean, the median is not influenced by outliers. Back To Text

[44] The bid−price−to−fair−value ratio is calculated by comparing the winning bid price at the collateral disposition to a hypothetical fair value of the collateral. Obviously, "fair value" is a vague standard. However, courts have developed an impressive body of precedent on the issue of fair value. See e.g. In re Trans World Airlines, 134 F.3d 188, 193(3d Cir. 1998) (deciding "going concern" valuation is appropriate where liquidation in bankruptcy is not clearly imminent); In re Shaw, 157 B.R. 151, 154 (B.A.P. 9th Cir. 1993) (distinguishing between "reasonably equivalent value" and "present fair equivalent value", and voiding pre−petition transfer where defendant, in contravention of Code policy, purchased collateral for only "reasonably equivalent value"); In re Phoenix Steel Corp., 39 B.R. 218, 216−17(Bankr. D.C. Del. 1984) (splitting difference and finding value of collateral "at mean of liquidation value and going concern value."). Back To Text

[45] I calculated both the mean and median of the data set in an effort to assess whether the data set had been skewed by outliers. Back To Text

[46] Id. Back To Text

[47] Aside from the ease of interpretation of CART results by non−statisticians, constructing the model is made easier through the use of presently available off−the−shelf computer packages. Back To Text

[48] For a detailed discussion of CART analysis in the legal context, see Williams, Classifying Pre− Trial (describing CART analysis, and noting classification results derived from this approach are "user friendly" to lawyers and judges). Back To Text

[49] See id. at 308 (explaining in detail growth process of trees). Back To Text

[50] See id. (explaining in detail pruning process of trees). Back To Text

[51] The CART method used by Breiman et al. and used here builds a large tree and then prunes the branches back to address the concern about identifying the optimal size of a decision tree. See generally Breiman, supra note 36. Much debate has surrounded the "pruning back" approach. See, e.g., Leo Breiman & Jerome H. Friedman, Comment, 83 J. Am. Stat. Ass'n. 725, 725−27 (1988); Wei−Yin Loh & Nunta Vanichsetakul, Tree−Structured Classifications Via Generalized Discriminant Analysis, 83 J. Am. Stat. Ass'n. 715, 715−25 (1988); Wei−Yin Loh & Nunta Vanichsetakul, Rejoinder, 83 J. Am. Stat. Ass'n. 728 (1988). For a creative attempt at developing an optimal splitting rule, see Sung−Ho Kim, Construction of and Interpretation from Decision−Support Trees (1989) (unpublished Ph.D. dissertation, Carnegie−Mellon University). Back To Text

[52] In growing a model, one must consider the trade off associated with greater specificity. A model too general provides no important information. A model too specific is essentially useless. Back To Text

[53] See Breiman, supra note 36, at 3. Back To Text

[54] See id. Back To Text

[55] See L. Breiman, J.H. Friedman, R.A. Olshen, & C.J. Stone, Classification and Regression Tree 5 (Wadsworth International Group,1984) Back To Text

[56] In fact, the CART decision tree at Figure 3 correctly predicted the outcomes of 87% of the cases in S_T. Moreover, Figure 3 accounted for 81% of the cases in S_T, thus demonstrating its usefulness as a predictive model. See Dan Hunter, Near Knowledge: Inductive Learning Systems in Law, 5 Va. J.L.& Tech. 9, 13 (2000) (tracking regularities in cases inducing decision tree which explains all cases tracked); see also Trotter Hardy, Project Clear's Paper Choice: A Hypertext System for Giving Advice About Legal Research, 82 L. Libr. J. 209, 211 (1990) (using "Hypertext" system in form of decision trees to respond to users legal problems and give advice on how to solve problems). Back To Text

[57] Debtor input means either a pre−default agreement as to what is meant by a "commercially reasonable disposition" or a post−default formal suggestion by the debtor as to what may constitute a "commercially reasonable disposition." Back To Text

[58] All other factors, including advertisements, solicitation of bidders, timing and place of sale, collateral preparation, choice of public or private sale, etc. were not statistically significant. This is not to mean, however, that these factors hold no practical significance. Many of these factors do shed light on a secured party's good faith. Back To Text

[59] Courts are not altogether clear as to whether the requirement of good faith is an independent requirement under Article 9 or is simply a component of a commercially reasonable disposition. Most courts appear to assess the issue independent of the commercially reasonableness requirement. See Huntington Nat'l Bank v. Elkins, 559 N.E.2d 456, 459 (Ohio 1990) (noting UCC 1−203 imposes obligation of good faith on secured party in disposition of collateral; good faith in this context requires secured party to use its best efforts to maximize price for collateral and to have reasonable regard for debtor's interests); see also In re Excello Press, Inc. 890 F.2d 896, 905 (7th Cir. 1989) (quoting Official Comment 1 to 9−507 with approval: "principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (Section 1−203) and in a commercially reasonable manner"); Security Fed. Sav. & Loan v. Prendergast, 775 P.2d 1289, 1291 (N.M. 1989) (stating 9−504 places upon creditor good−faith duty to debtor to use reasonable means to see reasonable price is received for collateral); Garden Nat'l Bank v. Cada, 738 P.2d 429, 430 (Kan. 1987) (discussing standard required of secured party to act in good faith and in commercially reasonable manner); Wilkerson Motor Co. v. Johnson, 580 P.2d 505, 508−09 (Okla. 1978) (noting standard of

commercial reasonableness is predicated on two precepts, "good faith" and resolution of commercial matters by means normally employed for handling such matters in the business involved). Back To Text

[60] See Lilly v. Terwilliger, 796 P.2d 199, 204 (Mont. 1990) (noting when debtors argued sale was commercially unreasonable because secured party held private rather than public sale, did not advertise sale or solicit bids, did not have business appraised and sale price was inadequate, debtors were appraised of private sale, including identity of buyer and purchase price, well in advance of sale and yet court made no objection to private sale after receiving notice); see also Utah Mortgage & Loan Co. v. Black, 618 P.2d 43, 45 (Utah 1980) (stating if debtor consents to disposition then they are precluded from complaining about it later). Back To Text

[61] See, e.g., Northern Commercial Co. v. Cobb, 778 P.2d 205, 210−11 (Alaska 1989) (finding creditor bears burden of proving that every aspect of sale was commercially reasonable, especially when creditor purchased collateral itself in noncompetitive atmosphere; since collateral was not customarily sold in recognized market and was not subject of widely distributed standard price quotations, private sale of tractor was prohibited and was therefore commercially unreasonable); Central & S. Bank of Ga. v. Craft, 379 S.E.2d 432, 433 (Ga. Ct. App. 1989) (establishing "terms" of sale were commercially reasonable includes burden upon secured party to show that resale price reflected fair and reasonable value of collateral); Villella Enters., Inc. v. Young, 766 P.2d 293, 295 (N.M. 1988) (stating creditor should allege and prove that disposition of collateral was commercially reasonable; evidence as to any aspect of sale, including, inter alia, amount of advertising done, and even price obtained, will be pertinent). Back To Text

[62] See Ford Motor Credit Co. v. Solway, 825 F.2d 1213,1216 (7th Cir. 1987) (stating "commercially reasonable" is not exact standard); Appeal of Copeland, 531 F.2d 1195, 1206 (3d Cir. 1976) (stating court will not interfere with "commercially reasonable dispositions"); Weinstein v. United States, 511 F.2d 56, 58 (6th Cir. 1975) (noting statute provides parties may determine standards as long as they are reasonable); Liberty Bank v. Honolulu Providoring, Inc., 650 P.2d 576, 579 (Haw. 1982) (stating although requirements of commercial reasonableness and notice are essential standards to fulfill these requirements may be determined by parties if not unreasonable). Back To Text

[63] Actually courts differ over whether the notice requirement is an independent requirement under Article 9, or whether it is a component of the requirement of commercial reasonableness. See American State Bank of Killdeer v. Hewson, 411 N.W.2d 57, 63 (N.D. 1987) (indicating because requirements of notice and commercial reasonableness are two distinct obligations, notice in itself is not sufficient to give rise to presumption of commercial reasonableness); Security State Bank v. Burk 995 P.2d 1272, 1276 (Wash. App. 2000) (stating surety entitled to notification is also entitled to commercially reasonable disposition); see also Judy L. Woods, Survey: UCC Law: Survey of Recent Developments of the Law Concerning the Uniform Commercial Code and a Brief Introduction to Revised UCC Article, 34 Ind. L. Rev. 1099, 1105 (2001) (stating "Under revised article 9, the disposition of collateral must still be conducted in a commercially reasonable manner and with advance notice to the debtor."). Back To Text

[64] See Underwood v. Coffee County Bank, 668 So.2d 10, 14 (Ala. 1994) (finding neither insufficient notice nor commercially unreasonable behavior a complete bar to recovery); see also Kimbler v. GMAC, 628 So.2d 724, 725 (Ala. 1993) (explaining reasonable notification must be sent to debtor but not require debtor to receive it); Stone v. Cloverleaf Lincoln−Mercury, Inc., 546 So.2d 388, 390 (Ala. 1989) (finding failure to transmit notice, or transmission of insufficient notice, is in and of itself commercially unreasonable behavior). Back To Text

[65] See Backes v. Village Corner, Inc., 242 Cal. Rptr. 716, 720 (Ca. Ct. App. 1987) (holding when secured party failed to give notice, it had no reason to decide whether sale was commercially reasonable; notice requirement is designed to ensure commercial reasonableness by preventing secret or collusive sales of collateral); cf. CSI Servs., Ltd. v. Hawkins Concrete Constr. Co., 516 So.2d 337, 338 (Fla. Dist. Ct. App. 1987) (stating failure to give notice of sale generally renders sale commercially unreasonable). Back To Text

[66] See Laurence H. Tribe, American Constitutional Law 666−67 (2d ed. 1988) [hereinafter Tribe, American] (finding both views require due process protection although for different reasons); see also Sarah Harding, Value, Obligation & Cultural Heritage, 31 Ariz. St. L.J. 291, 321 (1999) (stating some things have both relational and non−instrumental value); Jack F. Williams, Process & Prediction: A Return to a Fuzzy Model of Pretrial Detention, 79 Minn. L. Rev. 325, 355 (1994) [hereinafter Williams, Process and Prediction] (noting tension between intrinsic value theory and

instrumentality or process−sensitive theory). Back To Text

[67] See generally Frank Michelman, Formal and Associational Aims in Procedural Due Process, in Due Process: XVIII Nomos 126−27 (J. Roland Pennock & John W. Chapman eds., 1977) [hereinafter Michelman, Due Process] (contending due process vindicates values of participation and revelation); Tom Stacy, Reconciling Reason & Religion: On Dworkin & Religious Freedom, 63 Geo. Wash. L. Rev. 1, 6 (1994) (Describing Dworkin's theory on intrinsic, "personal value" of life). Back To Text

[68] See Joint Anti−Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171−72 (1951) (Frankfurter, J., concurring) (stating "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."); see also Risa L. Lieberwitz, Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace, 29 B.C. L. Rev. 21, 61 (1987) (suggesting shift to intrinsic value due process theory would return court focus to value of fairness in disciplinary hearings); Williams, Process and Prediction, supra note 65 at 355 (asserting "[t]he intrinsic value theory recognizes the dignity of the individual, and demands that the individual receive appropriate notice and a right to be heard."). Back To Text

[69] See Goldberg v. Kelly, 397 U.S. 254, 264−65 (1970) (emphasizing nation's basic commitment to foster dignity and well−being of all persons within our borders); Tribe, American supra note 65, § 10−7, at 666 (describing intrinsic value theory as allowing opportunity for individuals to express "their dignity as persons."); see also Richard Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection, 127 U. Pa. L. Rev. 111, 117−25 (1978) (defining due process values in terms of impact on dignity of those individuals affected by government action). Back To Text

[70] See Fuentes v. Shelvin, 407 U.S. 67 (1972) (embracing supremacy of process sensitive theory as a procedure of due process); see also Tribe, American, supra note 65, § 10−7, at 666−67 (indicating instrumental or process−sensitive approach views due process as valued less for intrinsic character than for its anticipated consequences as a means of assuring society's agreed−upon rules of conduct, and its rules for distributing various benefits are followed); Williams, Process and Prediction, supra note 65, at 356 (noting process sensitive theory embraces individual participation as means to promote accuracy). Back To Text

[71] Williams, Process and Prediction, supra note 65, at 356; see also Fuentes v. Shelvin, 407 U.S. at 97 (stating "[t]he essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property."); Snidach v. Family Finance Corp. of Bay View, 395 U.S. 337, 343 (1969) (Harlan, J., concurring) (asserting "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity…of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use."). Back To Text

[72] See Tribe, American, supra note 65, § 10−7, at 667 (asserting due process ensures challenged action accurately reflects substantive rules applicable to such action using participation to assure accuracy); see also Williams, Process and Prediction, supra note 65, at 356 (stating "accuracy becomes a thing in itself."). See generally Michelman, Due Process supra note 66 (contending due process vindicates values of participation and revelation) (emphasis in original). Back To Text

[73] The Supreme Court appears to embrace the supremacy of the process−sensitive theory of procedural due process, weighing procedural safeguards primarily in terms of their contribution to accuracy. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17−18 (1978) (balancing private interest against functional value). Back To Text

[74] See Hewitt v. Helms, 459 U.S. 460, 472 (1983) (holding hearing after suspension of license would be sufficient); see also Tribe, American, supra note 65, § 10−7, at 673 (asserting post−deprivation hearings suffice to meet due process objections where value of accuracy is paramount); Williams, Process and Prediction, supra note 65, at 356 (stating "under the process−sensitive theory, a court could deny pre−deprivation hearings as long as it conducts a post−deprivation hearing."). Back To Text

[75] 424 U.S. 319 (1976). Back To Text

[76] Id. at 349. Back To Text

[77] See id. at 335. Appended to this calculus is the presumption that "substantial weight must be given to the good faith judgment of the [agency] charged by Congress with the administration of social welfare programs." See id at 349; see also Arnett v. Kennedy, 416 U.S. 134, 202 (1974) (White, J., concurring in part, dissenting in part) (stating "Congress explicitly left it to the discretion of the agency as to whether such procedures were required."). Back To Text

[78] See Matthews v. Eldridge, 424 U.S. at 348 (stating "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."). The Court also noted the interdependence of substantive and procedural factors, observing that "[s]ignificantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." Id.; see also Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1276 (illustrating area of public housing as an example: "where the number of qualified applicants greatly exceeds the available space, so that, from an overall standpoint, the erroneous rejection or even the eviction of one family may mean only that an equally deserving one will benefit."). Back To Text

[79] Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); see also Hannah v. Larche, 363 U.S. 420, 440 (1961) (asserting requirements of due process vary with type of "proceeding involved."); Federal Communications Comm'n v. WJR, 337 U.S. 265, 275 (1949) (opining "due process of law has never been a term of fixed and invariable content."). Back To Text

[80] Confidence is directly related to the accuracy in the decisional process. There are several ways by which accuracy may be measured. See Barbara Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment, 88 Yale L.J. 1408, 1410 n.4 (1979) (discussing one method looks at number of successes and failures identified); id. (discussing another method measures total percentage of correct predictions); see also Williams, Process and Prediction, supra note 65, at 356 n.214. (stating "[i]t is thus necessary when assessing accuracy to identify the method by which the concept is to be measured."). Back To Text

[81] See Laurence H. Tribe, The Puzzling Persistence of Process−Based Constitutional Theories, 89 Yale L.J. 1063, 1067 (1980) [hereinafter Tribe, Puzzling Persistence] (stating "[e]ven the Constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state −− a theory whose derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives."). Back To Text

[82] See id. at 1064. Back To Text

[83] See id. at 1069−70; see also Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1, 6−33 (1964) (explaining due process model provides lower tolerance for error in criminal conviction process). Back To Text

[84] See Tribe, Puzzling Persistence supra note 80 at 1067. Back To Text

[85] The greater the individual right, the greater the need for confidence in the decision. This basic tenet is the cornerstone of the three customary burdens of proof generally recognized in American jurisprudence. See Addington v. Texas, 441 U.S. 418, 423−24 (1979) (outlining "reasonable doubt" standard reserved for crimes, the intermediate "clear and convincing evidence" standard applies to quasi−criminal, stigmatizing allegations, and the least−exacting "preponderance of the evidence" standard is reserved for most civil disputes); see also In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (stating purpose of standard of proof is to instruct fact finders of degree of confidence our society thinks he should have rendering judgement). In the detention context, one must also concede that the greater the confidence in the prediction of dangerousness, the greater the government's concern for community safety. See Richard Eggleston, Evidence, Proof, and Probability, 114−40 (Robert Stevens, William Twining, &

Christopher McCrudden eds., Weidenfeld and Nicolson 1983) (1978) (contesting standard of proof in criminal and civil cases based on public policy ramifications). Back To Text

[86] Many personal property dispositions are governed by Article 9 of the UCC. See e.g. Lindberg v Williston Indus. Supply Corp., 411 N.W.2d 368, 373 (N.D. 1987) (stating "[f]oreclosure of a security interest in personal property is governed by Article 9 of the Uniform Commercial Code."). Real property dispositions, in contrast, are not governed by Article 9 but by state foreclosure law. See generally Talbot v. Federal Home Loan Mortgage (In re Talbot), 254 B.R. 63, 68 (Bankr. D. Conn. 2000) (explaining "[a] fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law has been complied with."); Adwar v. Capgro Leasing Corp.(In re Adwar), 55 B.R. 111, 114 (Bankr. E.D.N.Y. 1985) (elucidating that different states offer different levels of protection with respect to state foreclosure laws). Back To Text

[87] See Greylock Glen Corp. v. Community Sav. Bank, 656 F.2d 1, 4 (1st Cir. 1981) (explaining idea that as long as bid is 75% of appraised assets, it will suffice); Sullivan Cent. Plaza I, Ltd., v. BancBoston Real Estate Capital Corp., 106 B.R. 934, 938 (N.D. Tex. 1989) (rationalizing that fair and valuable consideration of bids in bankruptcy sales are 75% of appraised value of assets); see also Community Bank v. Commissioner 62 T.C. 503, 508 (1974) (holding for tax purposes, bid price in foreclosure sale is equivalent to fair market value of property acquired). Back To Text

[88] See Tarrant Savs. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 475 (Tex. 1974) (explaining lack of adequate consideration will not by itself cause foreclosure sale to be void as long as sale was fairly made); Tankersley v. Universal Savs. Ass'n, No. 01−90−00394−CV, 1991 Tex. App. LEXIS 2557 at *4−5 (Tex. App. Oct. 17 1991) (stating "[w]hen there has been a non−judicial deed of trust foreclosure on real property securing a debt, mere inadequacy of price will not invalidate the foreclosure sale…"). See generally In re Abbotts Dairies, 788 F.2d 143, 149 (3d Cir. 1986) (indicating good faith is of utmost importance when deciding whether bid is for value). Back To Text

[89] See BFP v. Resolution Trust Corp., 511 U.S. 114, 545 (1994) (explaining lack of adequate consideration will not by itself cause foreclosure sale to be void as long as sale was fairly made); Gowen, Inc. v. F/V Quality One, No. 909122, 2000 U.S. Dist. LEXIS 8587 at 18 (D. Me. June 14, 2000) (stating given inherent circumstances of forced sale, foreclosure sale is not expected to generate price equal to market value); see also In re Dore, No. 99−10642−JMD, 1999 Bankr. LEXIS 1876 at *5−*6 (Bankr. D. N.H. Aug. 5, 1999) (explaining, in general, that fair value is value paid for sale). Back To Text

[90] 511 U.S. 531, 545. Back To Text

[91] Compare Durrett v. Washington Nat'l. Ins. Co., 621 F.2d 201, 203 (5th Cir. 1980) (holding "real estate sold at a foreclosure sale for a price which is approximately 57.7% of the fair market value of the property" is not fair value within meaning of 11 U.S.C. § 107(d)), with BFP v. Imperial Savs. & Loan Ass'n (In re BFP), 132 B.R. 748, 750 (B.A.P. 9th Cir. 1991) holding "[a] non−collusive and regularly conducted nonjudicial foreclosure sale prior to the filing of a bankruptcy case cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes "reasonably equivalent value" as a matter of law."). Back To Text

[92] See e.g., Durrett, 651 F.2d at 203 (stating bid of 57.7% of fair market value of foreclosed property is inadequate); Hernandez v. Cantu (In re Hernandez), 150 B.R. 29, 30 (Bankr. S.D. Tex. 1993) (holding foreclosure sale for 38.2% actual value is not adequate and property was given back to debtors); Jackson v. Security Fed. Savs. & Loan Ass'n (In re Jackson), 76 B.R. 597, 599−600 (Bankr. N.D. Tex. 1987) (asserting foreclosure sale for 47% value of property is void). Back To Text

[93] 621 F.2d 201 (1980) Back To Text

[94] Durrett applied § 67(d)(1) of the Bankruptcy Act, "a provision of the old Bankruptcy Act analogous to § 548(a)(2) [of the Bankruptcy Code]." BFP v. Resolution Trust Corp., 511 U.S. 531, 536 (1994). Back To Text

[95] See Durrett v. Washington Nat'l Ins. Co., 651 F.2d at 204 (declaring transfer of real property valued at $200,000, which was effectuated nine days prior to filing of petition for arrangement under chapter XI, voidable because payment of $115,400 (57.7 percent of fair market value) was not "fair equivalent" for property). See generally Jackson v. Security Fed. Sav. and Loan Ass'n (In re Jackson), 76 B.R. 597, 600 (Bankr. N.D. Tex. 1987) (holding foreclosure sale of debtor's home void as fraudulent transfer where property was sold for 47% of fair market value); Willis v. Borg−Warner Accept. Corp. (In re Willis), 48 B.R. 295, 301, 305–06 (S.D. Tex. 1985) (finding a transfer for less than reasonable value voidable under § 548 as a fraudulent conveyance). Back To Text

[96] See Durrett v. Washington Nat'l Ins. Co., 621 F.2d at 203 ("We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property…which has approved the transfer for less than 70 percent of the market value of the property."). See generally Walker v. Littleton (In re Littleton), 888 F.2d 90, 93 (11th Cir. 1989) (stating that Durrett's "70% rule" provides a useful guideline by which to evaluate the fairness of a transfer under § 548"); In re Willis, 48 B.R. at 300–01 (stating that 70% figure has been accepted in Fifth Circuit as benchmark test for setting aside transfers under section 548(a)(2)). Back To Text

[97] 856 F.2d 815, 824 (7th Cir. 1988). Back To Text

[98] See id. at 824. (indicating that interpreting the phrase "reasonably equivalent value" as applied to a foreclosure sale, a court must focus on the fair market value as affected by the fact of foreclosure). See generally Grissom v. Johnson (In re Grissom), 955 F.2d 1440, 1445 (11th Cir. 1992) (finding that in order to void a foreclosure sale pursuant to § 548, the court must be persuaded that sale price was not equivalent to value); In re Littleton, 888 F.2d at 93 (stating that while Durrett's "70% rule" provides useful guideline by which to evaluate fairness of transfer under section 548, determination of reasonable equivalence "must be based upon all the facts and circumstances of each case."). Back To Text

[99] 511 U.S. 531 (1994). Back To Text

[100] See id. at 545 (stating that "[w]e deem, as the law has always deemed, that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with."). See generally Hemstreet v. Brostmeyer (In re Hemstreet), 258 B.R. 134, 138 (Bankr. W.D. Pa. 2001) (stating that price received at tax sale, executed in compliance with State law, was reasonably equivalent value); Barr v. Allen (In re Barr), 170 B.R. 772, 776–77 (Bankr. E.D.N.Y. 1994) (holding that property was sold for reasonably equivalent value because foreclosure sale was procedurally and substantively conducted in accordance with state foreclosure law (citing BFP, 511 U.S. at 545)). Back To Text

[101] See BFP v. Resolution Trust Corp., 511 U.S. at 534, 545 (holding that foreclosure sale price of $433,000 was reasonably equivalent value for home allegedly worth $725,000 because foreclosure sale was conducted in conformance with applicable state law); see also In re Hemstreet, 258 B.R. at 138–39 (dismissing debtor's complaint to avoid tax sale of real property as fraudulent because property was sold at properly conducted, non−collusive sale auction, thus sale price of $9,000 constituted reasonably equivalent value for property valued at $50,000); In re Barr, 170 B.R. at 777 (holding that property valued at $180,400 and transferred for aggregate amount of $72,500 was sold for reasonably equivalent value because foreclosure sale was conducted in accordance with state foreclosure law). Back To Text

[102] U.C.C. § 9−615(f) (2000) provides the method for calculating a deficiency or surplus when the secured party, a person related to the third party, or a secondary obligor acquires the collateral at a foreclosure disposition. According to the official comment to § 9−615:

[Subsection (f)] recognizes that when the foreclosing secured party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price.

Subsection (f) adjusts for this lack of incentive. If the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought," then instead of calculating a deficiency (or surplus) based on the actual net proceeds, the calculation is based upon the amount that would have been received in a commercially reasonable disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor. Subsection (f) thus rejects the view that the secured party's receipt of such a price necessarily constitutes noncompliance with Part 6.

U.C.C. § 9−615 cmt. 6 (2000). See generally § 9−627(b) (defining "commercially reasonable disposition" as disposition of collateral made: "(1) in the usual manner on 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 that was the subject of the disposition."). Back To Text

[103] See supra text accompanying note 101 (quoting U.C.C. § 9−615 cmt. 6); see also U.C.C. § 9−627(a) (2000) (stating that "The fact that a greater amount could have been obtained…is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner."). Back To Text

[104] Compare U.C.C. § 9−615 cmt. 6 (stating that where proceeds of disposition of collateral to secured party are significantly below the range of proceeds that complying disposition to person other than secured party would have brought, calculation of deficiency or surplus is based on amount that would have been received in commercially reasonable disposition to person other than secured party, and not on actual net proceeds), with Bundles v. Baker (In re Bundles), 856 F.2d 815, 824 (7th Cir. 1988) (stating that bankruptcy court must examine foreclosure transaction in its totality to determine whether procedures employed were calculated to secure for mortgagee value of its interest and to secure for debtor−mortgagor his equity in the property, and that sale price obtained at foreclosure sale cannot automatically be deemed reasonably equivalent value). Back To Text

[105] See BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994) (stating that where foreclosure sale is conducted in accordance with state laws, "reasonably equivalent value" is the price in fact received at the foreclosure sale); see also Hemstreet v. Brostmeyer (In re Hemstreet), 258 B.R. 134, 138 (Bankr. W.D. Pa. 2001) (holding that price received at regularly conducted tax sale in compliance with State law was reasonably equivalent value); Barr v. Allen (In re Barr), 170 B.R. 772, 776–77 (Bankr. E.D.N.Y. 1994) (holding that property was sold for reasonably equivalent value because foreclosure sale was conducted in accordance with state foreclosure law). Back To Text

[106] See, e.g., BFP v. Resolution Trust Corp., 511 U.S. at 534 (fraudulent transfer action seeking to set aside conveyance of real property resulting from mortgage foreclosure); Chorches v. Fleet Mortgage Corp. (In re Fitzgerald), 255 B.R. 807, 807 (Bankr. D. Conn. 2000) (fraudulent transfer action against creditor who foreclosed on debtor's real estate); Barr, 170 B.R. at 772 (fraudulent transfer action to recover foreclosed real property); Jackson v. Sec. Fed. Sav. and Loan Ass'n (In re Jackson), 76 B.R. 597, 597 (Bankr. N.D. Tex. 1987) (fraudulent transfer action to set aside foreclosure sale of home). Back To Text

[107] See Wade v. Bradford, 39 F.3d 1126, 1130 (10th Cir. 1994) (stating that upon liquidation of debtor's estate, debtor's liability is discharged and creditor is not entitled to any future payments); In re Wilson, 94 B.R. 886, 889 (Bankr. E.D.Va. 1989) (same); see also In re May, 12 B.R. 618, 621 (Bankr. N.D.Fla. 1980) (stating fundamental purpose of bankruptcy is not to discharge). Back To Text