I. Default Under Article 9

A. Typical Payment Terms

   1. **Installment Loan:** Debtor repays in a series of payments, typically of equal amount, over fixed period of time.
      ♦ This provides the debtor with maximum “protection” because she knows the payment amount and when payment is due; so, as long as the debtor otherwise complies with the security agreement, she is not at risk of default.

   2. **Single Payment (“Lump Sum”) Loan:** Debtor repays on a date certain or “on demand.”
      ♦ When loans are made payable on demand, the creditor can call the loan in at anytime requiring the debtor to pay or else be in default. This type of demand is referred to as “calling” the loan. However, most creditors do not wish to call in the loan until the debtor can pay.

   3. **Line of Credit:** The creditor (typically, a bank) contracts to lend the debtor up to an amount of money – either or based on some agreed formula – as the debtor needs it.
      ♦ The debtor will generally borrow the money by simply writing checks against the line of credit and the creditor will pay checks up to the line limit; as the debtor pays down credits extended, interest continues to accrue only on the unpaid amount.

B. **Default:** Any failure by the debtor to pay its debt or otherwise perform its agreement with its creditor when due.

C. **Acceleration:** In the event of default on an installment obligation, the creditor may demand payment of the entire outstanding debt immediately or within a fairly short time.
D. **Grounds for Default (and Acceleration):** Typically a security agreement spells out what constitutes “default”– and, therefore, justifies acceleration.

E. **Insecurity Clause:** A common “event of default” occurs when the creditor “deems itself insecure.”
   1. If the security agreement includes such a provision, the creditor may only exercise it in good faith. § 1-309.
   2. In the absence of an objective basis upon which a reasonable person would have accelerated the note, the creditor may be deemed to have accelerated in bad faith.
   3. Whether the creditor acts in good faith is a fact question based on the creditor’s knowledge at the time of the decision to accelerate.

F. **Gun Jumping:** A secured creditor who accelerates or exercises any other post-default remedy under the security agreement before the debtor actually defaults is liable for any damages caused to the debtor due to the creditor’s premature acts.

G. **Right to Cure After Default Under Article 9:**
   1. **After Default:** A debtor may cure after default by paying all amounts in arrears.
   2. **After Acceleration:** A debtor may “cure” after acceleration only by paying the entire debt remaining, § 9-623 cmt. 2, unless the acceleration is subject to a non-UCC reinstatement statute.

II. **Repossession**

A. **Foreclosure vs. Repossession**
   1. **Foreclosure:** Transferring ownership from the debtor to the purchaser.
      - A debtor loses the right to redeem once the debt is foreclosed (again, unless there is a non-UCC reinstatement statute).
   2. **Repossession:** Exercising physical control over the collateral.
      a. Can occur before, during, or after foreclosure.
      b. Does not (independently) affect debtor’s right to redeem.
      c. If you are the secured creditor, you want possession of the collateral before foreclosure.
B. **Secured Creditor’s Interest in Pre-Foreclosure Possession**

1. The debtor has no incentive to maintain the value of the collateral it is going to eventually lose. The debtor may waste/damage the collateral.

2. The use of the collateral may have significant value in of itself. Most collateral has inherent value and use value.

3. It is easier for potential buyers to evaluate and view the collateral if it is in the creditor’s possession before foreclosure.

   ♦ A credible threat of repossession may give the secured creditor leverage over the debtor, as long as the debtor still values collateral; but, if the debtor is able to retain possession, it may gain leverage over the secured creditor if the secured creditor values collateral more than outstanding debt.

C. **Personal Property Repossession**

1. The secured creditor has the right to repossess upon default. § 9-609(a).

2. The secured creditor may repossess by judicial process *(writ of replevin)*. § 9-609(b)(1).

3. The secured creditor may also repossess by self-help as long as it does not breach the peace. § 9-609(b)(2).

4. **Breach of the Peace**

   a. Two common factors:

      i. Potential for immediate violence

         ♦ If an actual confrontation occurs, the secured creditor must cease self-help. However, the lack of actual confrontation does not mean the secured creditor has not, nonetheless, breached the peace.

      ii. Nature of the premises intruded upon

         a). Residence vs. non-residential property

         b). Debtor’s property vs. third party’s property

         ♦ The fact that the third-party property owner is unaware of the repossession doesn’t necessarily avoid a breach of the peace.
c). \textit{Restatement (Second) of Torts} § 198: If there was no confrontation and the timing and manner, including notice or lack of notice, are found reasonable, the entry is privileged. (Just says it must be reasonable, but doesn’t define reasonable)

♦ Interestingly, \textit{Restatement (Second) of Torts} § 198 does not, according to its own comments, apply to actions by a lienholder against liened collateral. Such actions are the subject of \textit{Restatement (Second)} § 183.

b. Compare White & Summers’s factors, discussed in \textit{Giles}.

c. Generally speaking, the secured creditor need not give prior notice as long as the collateral is in the debtor’s possession.

5. \textbf{Self-Help Repossession of Accounts}

a. Four common accounts receivable lending arrangements:

(1) The secured creditor may give the debtor virtually complete freedom to collect the accounts and to use the proceeds in its business.

(2) The secured creditor may agree to let the debtor collect the accounts, but require that the debtor immediately apply a specified portion to the loan.

(3) The secured creditor may arrange with the debtor that the account debtors will pay directly to the secured creditor.

(4) The secured creditor may require the debtor to direct its account debtors to make their payments to a P.O. box that is under the secured creditor’s control.

b. The secured creditor may notify debtor’s account debtors directly and demand payment. § 9-607(a)(1).

b. An account debtor who fails to follow the secured creditor’s instructions may be liable to the secured creditor, even if the account debtor is not in default to the secured creditor’s debtor (the account creditor). § 9-406(c).
III. Disposition of Foreclosed Personal Property

A. Types of Foreclosure

1. Judicial: Creditor sues debtor. Debtor and any subordinate lien holders have opportunity to assert defenses. Court issues an order and sets the date for the foreclosure sale. Court must “confirm” sale.

   a. If collateral sells for less than outstanding debt, creditor may seek a deficiency judgment.

      ♦ “Antideficiency Statute”: In some states, a creditor is barred from seeking a deficiency judgment for any debt left unsatisfied by the foreclosure sale.

   b. If collateral sells for more than outstanding debt, “surplus” goes first to junior lien holders, if any, and then to debtor.

   c. Debtor typically remains in possession of collateral until sale has been confirmed by the court.

   d. Debtor has right to redeem until sale is final; therefore, debtor has incentive to delay the proceedings by asserting defenses at the outset and by objecting to the sale prior to confirmation.

   e. Some states impose statutory delays on the foreclosing creditor – most often these “waiting periods” apply to real property, rather than personal property, foreclosures.

2. Article 9: After default, the secured creditor is allowed to sell, lease, or otherwise dispose of the collateral and apply the proceeds of the disposition to the outstanding debt. The purchaser takes free of any unpaid balance on the debt, and the secured creditor may then pursue a deficiency judgment against the debtor for what’s left.

B. UCC Foreclosure-by-Sale: The foreclosing secured creditor may sell by auction, by private sale at stated price, or by negotiated sale between two or more parties. § 9-610.

   1. No court intervention is required; but, a secured creditor who elects to proceed by writ of replevin must still sell in accordance with Article 9

   2. The sale must be “commercially reasonable.” § 9-610(b).
3. **Required Notice**: The secured creditor must give the debtor notice prior to the time of sale unless the collateral

a. is perishable,

b. threatens to decline rapidly in value, or

c. is the kind of good customarily sold on a recognized market.

§ 9-611(c). Notice enables the debtor to both observe and participate in the sale but also to inform other potential buyers in hopes of getting the best price – and, therefore, the smallest deficiency judgment

♦ In the case of non-consumer goods, secured creditor must also give prior notice of sale to any other secured creditor from whom she has received written notice of a claim against the collateral

♦ Any party entitled to notice of a sale or other disposition under § 9-611 may waive that right after default. See § 9-624(a).

4. **Redemption**: Debtor may redeem at any time prior to sale, by paying the entire outstanding debt, plus attorneys’ fees and expenses of sale, § 9-623; but Article 9 does not recognize post-sale redemption.

♦ Except where the collateral is consumer goods, any party granted a redemption right by § 9-623 may waive that right after default. See § 9-624(c).

5. **Distribution of Sale Proceeds**

a. Reasonable expenses of retaking, holding, preparing for sale, and selling the collateral and, to the extent provided for in the security agreement, attorneys’ fees and costs, then

b. Satisfaction of the debt to the foreclosing secured creditor, then

c. Satisfaction of subordinate liens, subject to notice and demand requirements, then

d. Surplus to the debtor. See § 9-615(a).

6. **Deficiency**: The secured creditor may get a deficiency judgment against debtor for the amount of debt left unpaid after sale, unless the collateral is accounts or chattel paper for which the security agreement does not specifically entitle the secured creditor to a deficiency. § 9-615(d)-(e).
7. **Discharge of Liens:** In addition to discharging the foreclosing secured creditor’s lien, foreclosure by sale also discharges all liens subordinate to that of the foreclosing secured creditor. § 9-617(a)(2)-(3).

♦ **No Discharge of Senior Liens:** If the foreclosing secured creditor is not the senior lienholder, the buyer will take the collateral subject to any senior liens. § 9-617(a)(3).

8. **Challenging the Disposition:** Debtor (or any secured creditor entitled to notice under § 9-611(c)) may challenge sale as “commercially unreasonable”; however,

a. The court’s review will focus on whether the sale was conducted in a commercially reasonable manner not whether the sale fetched a commercially reasonable price.

b. A sale or other disposition is presumed to be commercially reasonable if

i. The secured creditor sells or otherwise disposes of the collateral in the usual manner in a recognized market for goods of that type;

ii. The secured creditor sells or otherwise disposes of the good at the prevailing price in the market for goods of that type; or

iii. The disposition has been approved in a judicial proceeding – including, but not limited to, an action for a writ of replevin – or by a bona fide creditors’ committee.

§ 9-627(b)-(c).

c. **Failure to (Timely) Sell Collateral:** Subject to § 9-602(e) & (f), Article 9 permits, but does not require, sale, and does not set a specific time for sale. § 9-610(a). A debtor may challenge the commercial reasonableness of the foreclosure if

i. the secured creditor decides to keep the collateral, rather than sell it, without obtaining a waiver of the debtor’s right to sale, or

ii. the secured creditor delays in selling the collateral, and it devalues significantly during the interim.
d. **Other Recognized Objections:** A foreclosure sale may be set aside for one or more of the following reasons:

i. the sale was not advertised in accordance with applicable statutes (and/or the judgment, if the sale follows a judgment of foreclosure);

ii. the sale was not held in precisely the location advertised;

iii. the debtor and/or other interested parties did not receive proper notice prior to the sale;

iv. some arrangement between interested parties “chilled” the bidding;

v. the sale was not otherwise “commercially reasonable”;  

vi. the creditor did not act in good faith;

vii. the highest bid was “grossly inadequate;” or

9. **Remedies:** If a debtor or other secured creditor successfully challenges a sale as not commercially reasonable, the remedies are set forth in § 9-625, including

a. Rescission of the sale – *i.e.*, having it set aside

b. Damages in the amount of the loss caused by the foreclosing secured creditor’s failure to comply with the procedural requirements of Article 9

   ♦ In the case of consumer goods, the debtor (only) may recover an additional penalty, as set forth in § 9-625(c)

10. A **“good faith” purchaser** takes free of

a. any right of redemption, and

b. claims of commercial unreasonableness.

   ♦ So, if the secured creditor sells to a good faith purchaser at a commercially unreasonable sale, the secured creditor may have to answer to the debtor, but the good faith purchaser gets to keep the purchased collateral.
C. **Strict Foreclosure**

1. **No Judicial Action Required:** Under the common law, if the security agreement waived the right of sale, the secured creditor could strictly foreclose – provided it got court approval. *Article 9 does not require court approval.*

2. **Waiver of Sale**
   
a. *After default* (and, in the case of consumer goods, *after repossession*), the debtor may waive its right to sale of the collateral.

b. The debtor must waive its right to sale *after default* (and, in the case of consumer goods, after repossession) – a pre-default waiver is unenforceable. §§ 9-620(a)(1) & (c) & 9-624; see also § 9-602(10).

3. **Notice Requirement**
   
a. Before strictly foreclosing, the SC must send notice to the parties identified in § 9-621.

   ♦ Neither § 9-620(d) nor § 9-621 require that the intended recipient receive the notice, only that the SC send it.

   b. The secured creditor’s intent to retain can be defeated by a written objection from the debtor or any other party entitled to notice within 20 days. If there is a valid objection, the creditor must proceed by sale according to § 9-610.

   c. **Implied Waiver:** If the secured creditor does not receive a written objection from the debtor or any party entitled to notice under § 9-621 within 20 days to its proposal of intent to retain the collateral, the secured creditor may strictly foreclose. If there is a valid objection, the secured creditor must proceed by sale.

4. **Special Case: The “60% Rule”:** Once a debtor has paid 60% or more of the debt owed *on a consumer good*, the secured creditor must sell the collateral, § 9-620(a) & (e), unless the debtor waives its right to sale in accordance with § 9-624(b).

   a. **No Implied Waiver:** The debtor cannot waive its right to sale by simply not responding to the secured creditor’s proposal to retain the collateral; rather, the debtor must affirmatively waive its right to sale in accordance with § 9-624(b).
b. **Time to Sell:** In the absence of an explicit waiver, the SC must sell within 90 days. § 9-620(f).

5. **No Right to Deficiency:** A secured creditor who elects to retain the debtor’s collateral in full satisfaction of the debt, rather than sell it, forfeits the right to seek a deficiency judgment against the debtor for any portion of the debt not “satisfied” by the foreclosure.

6. **Partial Satisfaction**
   
a. **Limited Availability:** In non-consumer transactions, the secured creditor may, with the debtor’s post-default agreement, take the collateral in partial satisfaction of the debt. This option is unavailable if the collateral is consumer goods. § 9-620(g).

b. **Actual Consent:** If the SC proposes to retain the collateral in partial satisfaction, the debtor must affirmatively consent, see § 9-620(c)(1). There is no implied waiver when the debt survives.

c. **Right to Deficiency:** A secured creditor who elects to retain the collateral in partial satisfaction of the debt, and whose debtor consents, may seek a deficiency from a non-consumer debtor.

7. **Discharge of Liens:** The principal rationale for requiring notice to other lienholders is that, in addition to discharging the strictly foreclosing secured creditor’s lien in whole or in part, full or partial strict foreclosure also discharges all liens subordinate to that of the strictly foreclosing secured creditor. § 9-622(a)(3), (a)(4) & (b).

   ♦ **Nondischarge of Senior Liens:** If the strictly foreclosing secured creditor is not the senior lienholder, it will take the collateral subject to any senior liens. § 9-622(a)(3).