

Question 12 – July 2015 – Selected Answer 1

1. Herman can sue Capitol to either discharge his debt and keep the statue, or accept his timely tender under his presale right of negotiation. Additionally, he is entitled to damages for Capitol's misconduct in the "sale" and keeping of the statue.

A secured creditor has a right to foreclose on collateral after debtor has defaulted. For non-real property, a creditor has the right of self help repossession. A creditor is required at the time to either sell the collateral in a commercially reasonable manner, or enter into an agreement with the debtor to retain the collateral in full or partial satisfaction of their debt (after the debtor defaults, not before).

As sale is made in a commercially reasonable manner if after giving 10 days notice to the buyer, the seller sells the collateral at public auction, or private sale for goods of that kind (i.e., dealers auction for cars). The seller must also advertise the sale, and the sale proceeds must go to paying all sale expenses and the debtors debt. Until the sale goes thorough, the debtor has a right to redeem the collateral by making full payment to the creditor of both principle and interest. There is no after sale right of redemption in Texas.

If the creditor and debtor agree after the debtor defaults (not before), the creditor may keep the collateral in full or partial satisfaction of the debt. If the debtor and buyer so agree, all or part of the debtors debt is discharged, and the debtor forfeits their right of redemption.

If a secured creditor does not follow these rules, especially when dealing with consumers, they may be liable for penalties and damages for their misconduct.

Here, Capitol did not advertise their sale in a commercially reasonable manner (although the foreclosure and repossession were fine). It failed to give Herman due notice, and failed to properly advertise the sale (although a private auction was likely fine for a high-end sculpture). Additionally Capitol did not enter into an agreement w/Herman to keep the statue in satisfaction of his debt – in fact, Herman objected, and his debt was not discharged even though Capitol kept the statue.

Furthermore, Capitol denied Herman his right to redeem the collateral by paying his entire debt in full (including costs of repossession which were \$0) because it refused his timely tender of repayment.

Therefore, Herman may sue Capitol to recover a) the statue in exchange for Herman's tender, b) discharge of Herman's debt, in the alternative, and c) penalties and damages for Capitol's failure to conduct a commercially reasonable sale, get Herman's content to relinquish collateral in discharge of his debt, and accepting his tender for full repayment under his right of redemption.

Question 12 – July 2015 – Selected Answer 2

1. Herman may recover the sculpture and any damages that he incurs as a result of the improper procedures followed by Capitol with violate resale and strict foreclosure requirements of the UCC. Upon a repossession of the collateral, a creditor is authorized to either resell the property or do a strict foreclosure. For a valid resale, the sale must take place in a commercially reasonable manner and the debtor must receive the proper and timely notice prior to the sale. A proper notice of the sale of consumer goods collateral (small sculpture), must contain a description of the creditor and the debtor, a description of the collateral, the time and place of the sale (whether private or public), and information about how and who to talk to redeem the collateral. The notice of the sale must also be given after the debtor has defaulted on the payments and no notice may be included in the security agreement. If it is, it is not valid. The notice must be timely. The code requires that notice be given within a reasonable time but does not indicate how much time although 10 days is generally a reasonable time.

Here the facts indicate that Capitol has repossessed the property because Capitol has defaulted on the loan and that a notice only stated that Capitol was going to sell the collateral at a private auction to be held on June 3rd at Capitol's office. There is no indication that they provide a description of the collateral. In addition, they do not give Herman a

timely notice. He received the notice on June 1st and the sale was to take place on June 3rd. This is a violation of the requirements as well.

The facts also state that Capitol held a public auction and no one attended so they decided to keep the collateral and made no further attempts to sell the collateral. Here, Capitol was required to attempt to sell the collateral at private sale or by another means rather just keeping the collateral. This was inappropriate as well.

The fact that Capitol decides to keep the collateral presents another issue because generally as mentioned above, the creditor has the option of reselling or doing a strict foreclosure where the creditor keeps the collateral in satisfaction of the debt. When the creditor plans to keep the collateral, they must give the debtor authenticated notice of this intention and the debtor has 20 days to respond. The debtor may accept or impliedly accept by failing to reject within the 20 days. Or, the seller may reject within the days and the creditor is forced to sell the property. Here, Herman was notified of Capitol's intent to keep the property on June 8th and on June 9th he delivered a note to Capitol objecting to Capitol's decision to keep the sculpture. Capitol ignored him and has placed it on display in their lobby. This act is also inconsistent with the requirements of the UCC.

Here, Herman has tendered the appropriate amount owed (principal and interest for the collateral) to redeem the collateral. A redemption is possible anytime before the goods have been sold or the creditor has properly acquired the collateral in satisfaction of the debt. Here, the sculpture has not been sold and Capitol cannot claim that they rightfully possess the goods since the strict foreclosure was not appropriate. For these reasons, Herman is entitled to the return of the sculpture.

He may also acquire any damages incurred as a result of Capitol's failure to properly follow the required procedures under the UCC.