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IN THE SUPREME COURT OF
THE STATE OF UTAH

K. J. SCHARF, dba WESTERN LEASING, Respondent, vs. BMG CORPORATION, VERNON R. ERICKSON, MICHAEL R. ERICKSON, and BRUCE V. ERICKSON, Appellant.	: : : : : : :	Case No. 18963

APPELLANT'S BRIEF

APPEAL FROM A DECISION OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE
OF UTAH, THE HONORABLE DAVID B. DEE, JUDGE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.. i

STATEMENT OF NATURE OF CASE....................................... 1

DISPOSITION IN LOWER COURT.. 1

RELIEF SOUGHT ON APPEAL... 1

STATEMENT OF MATERIAL FACTS....................................... 1

ARGUMENT:

POINT I:

WESTERN LEASING'S SALE OF THE EQUIPMENT WAS NOT COMMERCIALLY REASONABLE........................ 3

A. The U.C.C. Requires that every aspect of a private sale be commercially reasonable........ 3

B. The method and manner of Western Leasing's sale were NOT commercially reasonable.......... 6

C. The timing of Western Leasing's sale was NOT commercially reasonable........................ 9

POINT II:

WESTERN LEASING'S LETTER IS NOT A NOTICE OF SALE AND DOES NOT MEET THE REQUIREMENTS OF THE COMMERCIAL CODE.................................. 11

A. The letter failed to comply with the statutory notice requirements........................... 11

B. The alleged letter of notice was a demand letter and NOT a notice of sale................ 18

POINT III:

WESTERN LEASING IS BARRED FROM OBTAINING A DEFICIENCY JUDGMENT............................... 19

CONCLUSION.. 19

TABLE OF AUTHORITIES

Statutes

Page

Utah Code Ann. §70A-2-706(1953).................................. 4, 5

Utah Code Ann. §70A-9-504(1953).................................. 4, 5, 9, 12, 16, 17

Utah Code Ann. §70A-9-507(1953).................................. 5, 7

U.C.C. §2-706(1972).. 4, 5

U.C.C. §9-504(1972).. 4, 5, 7, 9, 17

U.C.C. §9-507(1972).. 5, 7

Cases

Associates Financial Services Co., Inc. v. DiMarco, 383 A.2d 296, 23 U.C.C.Rep. 1394 (Del. Super.Ct. 1978).................... 16

Benton-Lincoln Credit Service, Inc. v. Giffin, 48 Or.Ap. 559, 617 P.2d 662, 30 U.C.C.Rep. 396 (1980)................. 13

Citizens State Bank v. Sparks, 202 Neb. 661, 276 N.W.2d 661, 26 U.C.C.Rep. 589 (1979).................................... 14

Community Management Ass'n v. Tousely, 32 Colo.App. 33, 505 P.2d 1314, 11 U.C.C.Rep. 1101 (1973)............................ 7

Contois Motor Co. v. Saltz, 198 Neb. 455, 253 N.W.2d 290, 21 U.C.C.Rep. 1213 (1977).................................. 8

DeLay First National Bank v. Jacobson Appliance, 196 Neb. 398, 243 N.W.2d 745, 19 U.C.C.Rep. 994 (1976).................... 17

FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 (Utah, 1979).... 19

Hertz Commercial Leasing Corp. v. Dynatron, Inc., ___Conn.Supp.___, ___A.2d___, 30 U.C.C.Rep. (Conn.Super.Ct. 1980)............... 15, 17

Liberty National Bank of Fremont v. Greiner, 62 Ohio App.2d 125, 405 N.E.2d 317, 29 U.C.C.Rep. 718 (1978)............... 12

Liberty National Bank v. Acme Tool Division, 540 F.2d 1375, 19 U.C.C.Rep. 1288 (10th Cir., 1976)........................ 6

Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28 (Utah, 1982).. 12, 19

Simmons Machinery Co., Inc. v. M & M Brokerage, Inc., __ Ala. __ So.2d __, 16 ABR 138, 33 U.C.C.Rep. 419 (1981)............ 15, 18

Spillers v. First National Bank of Arenzville, 81 Ill.App.3d 199, 400 N.E.2d 1057, 28 U.C.C.Rep. 884 (1980).............. 16

Stewart v. Taylor Chevrolet, Inc. (In re Webb), 17 U.C.C.Rep. 627 (S.D. Ohio, 1975).. 17

Utah Bank & Trust v. Quinn, 622 P.2d 793 (Utah, 1980)............ 19

Weiss v. Northwest Acceptance Corp., 274 Or. 343, 546 P.2d 1065, 19 U.C.C.Rep. 348 (1976).............................. 5

Other

Bell, The Golden Rule of Collateral Disposition under Article 9 of the U.C.C., 10 Utah Bar Journal 37 (1982)...... 19

STATEMENT OF NATURE OF CASE

Western Leasing filed an action against Defendants in the Third Judicial District Court for Salt Lake County, Utah, seeking a deficiency judgment after the sale of repossessed equipment. Vernon R. Erickson was a guarantor of two leases/security agreements of BMG Corporation. Vernon R. Erickson presented evidence at the trial court and argued that the sale of the repossessed equipment was not commercially reasonable and that the notice of sale was defective. Western Leasing claimed it was entitled to a deficiency judgment since efforts were made to make the sale commercially reasonable and that their demand letter satisfied the notice requirements.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, the Honorable David B. Dee presiding, granted judgment in favor of Western Leasing. The trial court held that the sale was commercialy reasonable and that the notice given was sufficient notice as required by statute.

RELIEF SOUGHT ON APPEAL

Vernon R. Erickson, Appellant, seeks to have this Court reverse the lower court's decision and set aside the judgment entered against him on December 20, 1982.

STATEMENT OF MATERIAL FACTS

In 1979, Western Leasing, Respondent, entered into two lease/security agreements with BMG Corporation (R. 70 & 101, Plaintiff's Exhibits 1 & 2). One lease/security agreement was for a shear and the other was for a lathe (R. 70 & 101, Plaintiff's Exhibits 1 & 2) (The shear and lathe will hereinafter be referred to as "Equipment"). Appellant, Bruce V. Erickson

and Michael R. Erickson, executed the lease/security agreements as guarantors in their personal capacity (R. 71 & 102, Plaintiff's Exhibits 1 & 2). Vernon R. Erickson is the father of Bruce V. Erickson and Michael R. Erickson (R. 101-102). The sons were the principals of BMG Corporation, the corporate obligor (R. 101-102). The guarantors, by the terms of the lease/security agreements, agreed to be jointly and severally liable for the corporate obligation (R. 71 & 102).

Western Leasing claimed that the leases were in default in the summer of 1979 (R. 100-105). On April 21, 1980, Western Leasing sent a demand letter to Vernon R. Erickson. The demand letter stated:

> If a payment is not received in our office before April 30, 1980, we will be forced to sell the equipment as quickly as possible for whatever we can get and ask you to make up any dificiencies [sic] on the balance of the leases. (R. 104, Plaintiff's Exhibit 3).

Western Leasing gained peaceable possession of the equipment covered by the lease/security agreements on September 5, 1980 (R. 29, 114-115). At that time Western Leasing published an advertisement to sell the equipment (R. 71, 114 & Plaintiff's Exhibit 5). On September 11, 1980, counsel for Western Leasing sent a demand letter to Vernon R. Erickson (R. 71, 108-109 & Plaintiff's Exhibit 4). Included within this letter, counsel stated that "The equipment covered...will be sold on September 30, 1980, unless the amounts due...have been paid." (Id.)

The equipment covered under the lease/security agreements, was not sold on September 30, 1980 as stated in Western Leasing's demand letter (R. 30, 72 & Plaintiff's Exhibit 4). The equipment had only been subjected to minimal use and was in excellent condition at the time of sale (R. 120-121,

167-168 & Plaintiff's Exhibit 5). The useful life of this equipment by Western Leasing's own admission is thirty years (R. 37). Western Leasing had purchased the shear new for $33,000 in the spring of 1979, and the lathe new for $18,000 in the summer of 1979 (R. 32). A written appraisal by an independent, qualified appraiser was not obtained by Western Leasing (R. 32, 127). They accepted non-competitive bids from interested purchasers (R. 30, 71). The shear was sold on October 9, 1980 for $19,000, and the lathe on October 1, 1980 for $6,000 (R. 30, 72). The only independent evidence presented at trial as to the value of the equipment at the time of sale was that the equipment would have a minimum fair market value of at least 80% of the purchase price (R. 193-199). The letter alleged to be a notice of sale did not give notice of the time, place, manner, method and date of the sale of the equipment to Appellant (R. 31).

ARGUMENT

POINT I

WESTERN LEASING'S SALE OF THE EQUIPMENT WAS NOT COMMERCIALLY REASONABLE

Appellant contends that the sale of the equipment covered by the leases/security agreements was not performed in a commercially reasonable manner. This point will demonstate: (A) Every aspect of a private sale must be commercially reasonable; (B) The method and manner of Western Leasing's sale were not commercially reasonable; and (C) The timing of Western Leasing's sale of the equipment was not commercially reasonable.

A. The U.C.C. Requires that Every Aspect of a Private Sale Must be Commercially Reasonable.

Utah has adopted the Uniform Commercial Code (U.C.C.) with minor

modifications. Under Utah Code Ann. §70A-9-504(1953), which is identical to U.C.C. §9-504 (1972), a secured party may sell collateral by either public or private sale or other disposition. All dispositions, however, whether public or private, are subject to the standard of commercial reasonableness. Under pre-Code law, the Uniform Conditional Sales Act, a public sale was mandated. The drafters of the U.C.C., recognizing the harshness of public sales upon debtors and guarantors, chose to follow the more liberal position of the former Uniform Trust Receipts Act which permitted disposition at either public sale or private sale, thereby rejecting the provisions of the former Uniform Conditional Sales Act. By adopting this more liberal position, the drafters stated:

> It is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. U.C.C. §9-504(1972), Official Comment 1.

In adopting this more liberal position, the only restrictions placed on the sale of collateral by the drafters of the U.C.C. are those of commercial reasonableness and reasonable notification. The commercial reasonableness standard parallels the requirement of the article on sales which also reiterates the U.C.C. requirement of good faith in dispositions of property. See U.C.C. §2-706(1972); Utah Code Ann. §70A-2-706(1953). Thus, commercial reasonableness and reasonable notification are the only protections afforded the debtor to prevent abuses by the secured party in the resale of repossessed collateral.

The standard of commercial reasonableness stated in Utah Code Ann. §70A-9-504(3)(1953) requires that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." U.C.C. §9-504(3)(1972). Accord U.C.C. §2-706(2)(1972); Utah Code Ann. §70A-2-706(2)(1953). The Code has also set forth tests as to what is commercial reasonableness. Utah Code Ann. §70A-9-507(2)(1953); U.C.C. §9-507(2)(1972). The standard of commercial reasonableness was to be flexible so as to be molded to the facts, circumstances and the industry peculiarities of each specific case. The basic underlying policy, however, was to encourage sales which would result in the highest realization possible upon sale of the collateral. This conclusion concerning UCC policy was also reached by the Oregon Supreme Court in Weiss v. Northwest Acceptance Corp., 274 Or. 343, 546 P.2d 1065, 19 U.C.C.Rep. 348 (1976), which stated:

> The purpose of the statute is fairly evident from its language and the commentaries of the drafters. Grant Gilmore, one of the drafters, wrote:
>
> > "[T]he Code secured party, like his pre-Code counterparts, must 'use every effort to sell the estate [collateral] under every possible advantage of time, place and publicity.'
> >
> > "...The obligation on the secured party is to use his best efforts to see that the highest possible price is received for the collateral." 2 Gilmore, Security Interests in Personal Property, 1233-1234 (1965).
>
> Id. 546 P.2d at 1072, 19 U.C.C.Rep. at 350.

The drafters perceived this policy as being best achieved by permitting and encouraging private sales. Consequently, commercial reasonableness requires

good faith on the part of the secured party to use every effort to sell the collateral under every possible advantage of time, place, method and manner in order to obtain the highest realization possible.

B. The Method and Manner of Western Leasing's Sale Were NOT Commercially Reasonable.

The facts of this case demonstrate that Western Leasing was unaware of the market value of the collateral sold. An independent appraisal was not obtained. Western Leasing contends that a bid for purchase by a dealer indicates the fair market value of the equipment. Respondent's position is not supported by the law. Eg. Liberty National Bank v. Acme Tool Division, 540 F.2d 1375, 19 U.C.C.Rep. 1288 (10th Cir., 1976) (Failure to use professionals in resale of equipment, contrary to trade practices, rendered sale commercially unreasonable.) Western Leasing's argument is clearly erroneous since an interested purchaser cannot be considered a neutral independent appraiser of the market value of equipment.

Western Leasing obtained several bids from prospective purchasers. However, those individuals had been notified that the property had been repossessed and that it was available for sale or assumption of the leases. E.g. Plaintiff's Exhibit 5. As a result, the potential buyers knew this was a distress sale. Consequently, potential bidders concluded that a bid less than fair market value would be entertained by the lessor. Common knowledge dictates that one rarely makes a bid on equipment being sold in a distress sale which closely approximates the equipment's actual fair market value unless the bidding is competitive.

The drafter's comments state that a private sale must use regular commercial channels:

> The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this article to encourage disposition by private sale through regular commercial channels." UCC §9-504(1972), Official Comment 6 (emphasis added).

In refining the definition of commercial reasonableness, the Code specifies three circumstances in which a sale would be commercially reasonable: (1) Collateral sold "in the usual manner in any recognized market therefore;" (2) Collateral sold "at the price current in [the recognized market] at the time of sale;" and (3) Collateral sold "in conformity with reasonable commercial practices among dealers in the type of property sold." Utah Code Ann. §70A-9-507(2)(1953); U.C.C. §9-507(2)(1972).

The first two alternatives presented by the Code inherently require that a "recognized market" for the collateral exists. Investment securities have recognized markets, i.e., the New York Stock Exchange and the American Stock Exchange. No "recognized market" exists for industrial equipment of the type involved in this proceeding. Indeed, many courts have even determined that there is no recognized market for used automobiles. E.g., Community Management Ass'n. v. Tousely, 32 Colo.App. 33, 505 P.2d 1314, 11 U.C.C.Rep. 1101 (1973). Consequently, only the third alternative remains viable as applicable to the facts of this case.

The third alternative of the Code is that the collateral be "sold in conformity with reasonable commercial practices among dealers in the type of property sold..." Utah Code Ann. §70A-9-507(2)(1953), U.C.C. §9-507(2) (1972). The testimony of Western Leasing at trial was that in normal circumstances lessors sell repossessed equipment through an equipment dealer (R. at 119). Yet, Western Leasing did not sell this equipment through a

dealer. The collateral in this case was not sold through normal, regular and reasonable commercial channels and a commercially reasonable price was not obtained. Therefore, the sale was not commercially reasonable.

Equipment sold in normal, regular and commercial channels is not sold in a distress-type situation. Prospective purchasers are unaware that the equipment has been repossessed. The equipment is listed for sale at its appraised value. The seller does not indicate that immediate disposition of the equipment is required due to its repossession. It necessarily follows that Western Leasing's resale of the collateral was not a private sale as envisioned and encouraged by the drafters of the Code.

Western Leasing's sale was open to the public. The equipment was advertised. Bids were obtained. However, the bidding was not competitive. A public sale must involve competitive bidding. Contois Motor Co. v. Saltz, 198 Neb. 455, 253 N.W.2d 290, 21 U.C.C.Rep. 1213 (1977) (A sale upon sealed bids which were not competitive was held not to be a public sale). Therefore, Western Leasing also failed to meet the requirements for a public sale. Under the circumstances of Western Leasing's sale, it is not difficult to perceive that had the parties who submitted bids on the collateral been involved in competitive bidding, the price realized would have approximated the fair market value of eighty percent (80%) of the purchase price.

Having failed to sell the equipment through normal, regular and reasonable commercial channels (i.e., a dealer) and failing to obtain a commercially reasonable price, Western Leasing's sale of the collateral was not a private sale envisioned by the Code. Therefore, Western Leasing's sale of the collateral was not commercially reasonable.

C. <u>The Timing of Western Leasing's Sale Was NOT Commercially Reasonable.</u>

The standard of commercial reasonableness requires that every aspect of the disposition, including time, must be commercially reasonable. Utah Code Ann. §70A-9-504(3)(1953); U.C.C. §9-504(3)(1972). The terms of the Western Leasing lease/security agreement fixed the amount of damages to be paid in the event of default and repossession. The damages under the default provision and as calculated by Western Leasing in the lower court are the contract payments accrued to the time of repossession, plus all future contract payments under the contract which would have been paid, minus a minimal deduction as a "pre-payment credit", plus a 10% reversionary value, minus the amount realized on the resale of the collateral. However, the deduction for "pre-payment credit" is nearly negligible. A mere 2/10ths of one percent (.2%). (In other words a reduction of the product of .002 multiplied by all future rent yet to become due under the lease.) (See Plaintiff's Exhibits 1 and 2, ¶21. See, also, R. at 96). Under the "pre-payment credit" provision, the maximum amount which could be received for this credit on both leases could never exceed $170.14 (which would be the pre-payment credit if the loan defaulted immediately after the initial payment and signing of the lease/security agreements). Compared with the total rent of $95,897.88 to be paid under the lease/security agreements, this "pre-payment credit" is inconsequential.

As a result of the liquidated damages provisions of these lease/security agreements, the damages to be paid in the event of default were fixed at the time of repossession of the equipment. The value of the liquidated

damages fixed at the time of repossession could only be reduced by the net proceeds from the sale of the collateral. It therefore follows that the greater the realization on the sale of the equipment, the less the deficiency to be paid by the obligors and guarantors on the lease and vice versa. Accordingly, Western Leasing could have waited until they received a commercialy reasonable price or even until the end of the term of the lease (1984) to sell the equipment with the same damages being assessed. The damages after waiting for a commercially reasonable price which would have been assessed against the Appellant would have been the same, with the only difference being the amount realized upon sale of the collateral. By waiting to sell the equipment until a commercially reasonable price could be obtained or until the end of the lease term would have been commercially reasonable, especially in light of expert testimony which indicated that this type of equipment appreciated over time due to inflation. Western Leasing had nothing to lose by waiting an additional period of time to sell the equipment and obtain a commercially reasonable price. All parties would benefit from a higher realization from the collateral sold, which could have been obtained by selling at a more advantageous time.

Western Leasing's letter to Appellant stated that unless the default was remedied "we will be forced to sell the equipment as quickly as possible for whatever we can get and ask you to make up any dificiencies (sic)..." (Plaintiff's Exhibit 3) (Emphasis added). Western Leasing's letter set forth its intent and exemplifies Western Leasing's lack of concern for the amount to be received upon sale of the collateral. Western Leasing's sale was conducted in a manner consistent with its letter. The sale was not

commercially reasonable because Western Leasing sold the equipment as quickly as possible and for whatever they could obtain without waiting until they could obtain a commercially reasonable price.

POINT II

WESTERN LEASING'S LETTER IS NOT A NOTICE OF SALE AND DOES NOT MEET THE REQUIREMENTS OF THE COMMERCIAL CODE.

Western Leasing's letter does not meet the requirements of the Commercial Code. This point will demonstrate: (A) The letter failed to comply with the statutory notice requirements; and (B) The alleged letter of notice was in effect a demand letter and not a notice of sale.

A. The Letter Failed to Comply with the Statutory Notice Requirements.

The provision construed in the lower court as notice of sale pro ides "[t]he equipment covered by the lease is now in the possession of Western Leasing and will be sold ON September 30, 1980, unless..." Plaintiff's Exhibit 4 (emphasis added). The pertinent provision of the Code states "reasonable notification of the time after which any private sale...is to be made shall be sent by the secured party to the debtor..." Utah Code Ann. §70A-9-504(3)(1953); U.C.C. §9-504(3)(1972) (emphasis added). Western Leasing's notice stated that the equipment would be sold ON September 30, 1980. The record reveals that the equipment was not sold on September 30, 1980 but was sold after that date. Western Leasing has argued that this notice was sufficient to meet the private sale notice requirements of the Code. However, the exact language of the Code requires that reasonable notice be given of the time "after which" a private sale will be conducted. Western Leasing did not indicate that the sale would be a private sale and did not state the

time after which such a sale would occur. Therefore, Western Leasing did not satisfy the statutory requirements.

Utah's most recent decision concerning the commercial reasonableness of a sale under Article 9, is Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28, 33 U.C.C.Rep. 1588 (Utah, 1982). That case involved the commercial reasonableness of a public sale under Article 9 and the notice required for a public sale. The appellant there argued that the notice which had been given of the sale was confusing and did not specify whether the sale would be a public sale or a private sale as outlined by the Code. The Court decided that issue by stating that the appellant could not claim any benefit of the error in the notice of sale since the appellant could not show that she had been prejudiced by the erroneous notice. This case is distinguishable from the Pioneer Dodge Center case inasmuch as Western Leasing has alleged the sale to be a private sale and Vernon R. Erickson has shown that he was prejudiced by the erroneous notice. Consequently, this case is one of first impression for this Court, since other decisions of this Court have also focused upon public sales under Article 9 and not the definition, components and requirements of private sales under Article 9.

Decisions of other jurisdictions have considered the requirements of private sales. The Ohio Court of Appeals, in Liberty National Bank of Fremont v. Greiner, 62 Ohio App.2d 125, 405 N.E.2d 317, 29 U.C.C.Rep. 718 (1978), held that a notice similar to the one given by Western Leasing was inherently misleading and therefore did not constitute proper notice of a private sale pursuant to U.C.C. §9-504(3)(1972). The secured party obtained written bids on the sale of four repossessed trucks. The creditors notice

stated "[y]ou are hereby given notice that the property...will be sold on the 10th day after receipt of this letter at Fremont, Ohio, and the minimum price for which the secured property may be sold is $4,000." Id. 405 N.E.2d at 320, 29 U.C.C.Rep. at 721. The Court stated that the notice also provided a description of the property, informed the obligor that he would be liable for any deficiency and said that the sale was open to the public. The Court found that the creditor's notice had elements of both notice of a public sale as well as notice of a private sale. The Court held that "the notice was patently ambiguous as to what type of sale would be held." Id. 405 N.E.2d at 321, 29 U.C.C.Rep. at 722. The Court concluded by noting that:

> [T]he combination of the form notice for private sale with the language indicating a public sale would be held is inherently misleading and, as such, does not constitute proper notice of a private sale, pursuant to [U.C.C. §9-504(3) (1972)]. (citation omitted) Id. 405 N.E.2d at 321, 29 U.C.C.Rep. at 723.

Similarly, the notice which Western Leasing gave was inherently misleading. The notice stated that the equipment would be sold <u>on</u> September 30th, a specific date. Indication of a specific date leads one to believe that a public sale would be held. However, the equipment was not sold until after September 30, 1980. The time or place of sale was not indicated. This would lead one to believe that the sale was private. Therefore, Western Leasing's notice was not reasonable notice of a private sale due to its ambiguity.

In a recent decision from the Oregon Court of Appeals, <u>Benton-Lincoln Credit Service, Inc. v. Giffin</u>, 48 Or.App. 559, 617 P.2d 662, 30 U.C.C.Rep. 396 (1980), it was held that a notice of sale under the Uniform Commercial Code requires that the obligor be informed how a sale is to be accomplished

or the type or method by which a sale is to be effectuated. The creditor in that action contended that since the notice did not state that a public sale at a given time and place was to be performed, then it should be presumed that the sale would be a private one. The Oregon Court rejected that contention as too presumptive. The Court held:

> In order to protect his interest in the collateral, to redeem it if possible, to insure the commercial reasonableness of the disposition and to protect any excess or minimize any deficiency, <u>the debtor must be informed of what disposition the secured party intends to make of the collateral</u>. Without that basic information, the debtor is not in a position to protect his interests, and the purpose of the notice provision of [U.C.C. §9-504(3)(1972)] has not been met. This notice did not inform plaintiff of the intended disposition of the collateral and was insufficient to meet the requirements of the statute. Id. 617 P.2d at 665, 30 U.C.C.Rep. at 400 (Emphasis added).

Likewise, the notice given to Vernon R. Erickson did not meet the statutory requirement and was insufficient. The notice did not state the manner and method of the intended disposition. In a footnote, the Oregon Court in dicta stated that where a party who is not a dealer in the type of equipment to be sold intends a private sale at a known price, then it would not be unreasonable for the creditor to notify the debtor that the collateral would be sold on a certain date at a certain price in order to allow the debtor to protect his interests. Id., Fn. 5. Western Leasing knew the date of the sale but did not render notice of the price to Vernon R. Erickson.

In a decision of the Nebraska Supreme Court, <u>Citizens State Bank v. Sparks</u>, 202 Neb. 661, 276 N.W.2d 661, 26 U.C.C.Rep. 589 (1979), that Court held that notice which "did not identify the type of sale or the time after which private sale would be made" did not constitute the notice required by

the Uniform Commercial Code. Id. 276 N.W.2d at 664, 26 U.C.C.Rep. at 592. The letter from the creditor in that case stated only that the car would be repossessed and that the car would be sold and the proceeds applied to the debt owing. Although the notice in the case at bar did specify a date, the date was inherently misleading since one could conclude a public sale was taking place on September 30, 1980. The emphasis of the Nebraska Supreme Court was that an obligor is to be notified of the type of disposition of repossessed collateral. Similarly, Western Leasing did not notify Vernon R. Erickson of the manner or type of disposition of the collateral.

In Hertz Commercial Leasing Corp. v. Dynatron, Inc., __Conn.Supp.__, __A.2d__, 30 U.C.C.Rep. 770 (1980), the Court stated that the notice sent by the creditor to the debtor did not specifically refer either to a public or private sale. The Court did note that the notice itself met all the requirements for a public sale notice but that the collateral was not sold at a public sale. The Court concluded that the notice was therefore "ambiguous, misleading and confusing, since it was not made clear therein to [the debtor] whether plaintiff intended a public or private sale." 30 U.C.C. Rep. at 775. Likewise, Western Leasing's letter to Vernon R. Erickson was ambiguous and misleading and did not indicate the type of sale which was to take place.

In Simmons Machinery Co., Inc. v. M & M Brokerage, Inc., __Ala.__, __So.2d__, 16 ABR 138, 33 U.C.C.Rep 419 (1981), the Alabama Supreme Court held that the notice requirement of the U.C.C. requires that the notice clearly convey its purpose, including the type of sale which will be held. The creditors notice in this case stated that the debtor had until November 29, 1976 to satisfy the accrued indebtedness. The notice further stated that "[a]fter

this date, the drill will be eligible for resale." Id. 33 U.C.C.Rep. at 426. The Court stated that the notice was tentative as to the sale date and that it failed to identify the type of sale which would be performed. Western Leasing's letter stated a date certain on which the sale would be performed. The sale was not held on that date. Moreover, Western Leasing's letter did not state the type or manner of sale to be held.

The sale actually performed by Western Leasing was more in the nature of a public sale than a private sale. Notice of a private sale may not be given when one actually intends a public sale and disposes of collateral by public sale. In Associates Financial Services Co., Inc. v. DiMarco, 383 A.2d 296, 23 U.C.C.Rep. 1394 (Del. Super. Ct. 1978), the creditor gave notice according to the less onerous notice provisions for a private sale and then sold the collateral at a public sale. The Court held that the creditor could not circumvent the public sale notice provisions by giving notice of a private sale and then selling at a public sale. Western Leasing in this case claims to have given notice of a private sale but the collateral was sold according to public bids in the nature of a public sale. Consequently the notice which was given is once again shown to be unreasonable.

In an effort to prevent the circumvention of the public sale notice by giving notice of private sale, an Illinois Appellate Court held in Spillers v. First National Bank of Arenzville, 81 Ill.App.3d 199, 400 N.E.2d 1057, 28 U.C.C.Rep. 884 (1980), that it is the duty of a creditor to notify the debtor of "all and every proposed private sale." Id. 400 N.E.2d at 1060, 28 U.C.C.Rep. at 889. The Court in that action construed the language of U.C.C. §9-504(3)(1972) requiring that reasonable notification be given of

"any private sale" to mean that the creditor is obliged to inform a debtor of each and every private sale which is to be performed pursuant to the Code. See also, DeLay First National Bank v. Jacobson Appliance, 196 Neb. 398, 243 N.W.2d 745, 19 U.C.C.Rep. 994 (1976); Hertz Leasing Corp. v. Dynatron, Inc., supra.

Finally, in Stewart v. Taylor Chevrolet, Inc. (In re Webb), 17 U.C.C.Rep. 627 (S.D. Ohio 1975), the creditor gave notice that the collateral was to be sold at public sale. However, the collateral was not sold on the date so specified but was later sold at a private sale. Thus, the circumstances of that sale are analogous with the case at bar. The Federal District Court held that the sale was not commercially reasonable. The Court found that the subsequent private sale of the collateral after having given notice of a public sale abrogated the notice requirements of U.C.C. §9-504(3) (1972). The Court noted that: "Proper notice is the key to the disposition of property by a creditor when he takes possession after default." Stewart, supra, 17 U.C.C.Rep. at 631. A similar holding is appropriate in this case where Western Leasing failed to comply with the statutory requirements of notice.

In conclusion, the letter purported to be a notice of sale was insufficient to meet the statutory requirements of Utah Code Ann. §70A-9-504 (3)(1953). The letter failed to state the type of sale which was to be performed and did not state the date after which the sale was to occur. Therefore, the lower court erred in concluding that Western Leasing's notice constituted reasonable notification sufficient to comply with Utah Code Ann. §70A-9-504(3)(1953).

B. <u>The Alleged Letter of Notice Was a Demand Letter and NOT a Notice of Sale.</u>

Western Leasing's letter to Vernon R. Erickson which is purported to be the notice of sale, is only a demand letter. The first paragraph discusses general provisions of the leases. The second paragraph discusses the default under which the leases have been accelerated and the amount currently accrued and owing to Western Leasing. The third paragraph makes demand for payment of the full amount of the indebtedness under the lease. The fourth paragraph is phrased in terms of if and then consequences of various actions. The final paragraph again speaks in terms of if and then consequences stating if additional collection steps are required, Western Leasing will ask for payment of attorneys fees and costs.

The nature of the letter is a demand letter. The letter under the Subject heading says: "Western Leasing-BMG Corporation Leases". No mention is made that it is a notice of intended sale or disposition of the collateral. The fourth paragraph mentions the equipment might be sold. The terms of the sale are tentative and ambiguous.

In <u>Simmons Machinery Co.</u>, <u>supra</u>, the Court found that the letter was more in the nature of a demand for payment since it was tentative in nature on the matter of sale and did not identify the type of sale to take place or the time when such sale might be made. Similarly, the letter purported to constitute notice of sale by Western Leasing was in the nature of a demand letter. It too was tentative as to the date of sale since no time was specified and did not set forth the type of sale which would take place. It follows that the letter sent to Vernon R. Erickson was insufficient

to satisfy the requirements of Utah Code Ann. §70A-9-504(3)(1953), since it fails to provide "reasonable notification" of the intended disposition of the collateral.

POINT III

WESTERN LEASING IS BARRED FROM OBTAINING A DEFICIENCY JUDGMENT

Sale of collateral in a commercially reasonable manner, and reasonable notification of such a sale are prerequisites to obtaining a deficiency judgment. FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 (Utah, 1979). The failure to meet the burden of showing that reasonable notice was given to the obligors and that the sale was conducted in a commercially reasonable manner bars the creditor from obtaining a deficiency judgment. Utah Bank & Trust v. Quinn, 622 P.2d 793 (Utah, 1980); Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28 (Utah, 1982). See also, Bell, The Golden Rule of Collateral Disposition Under Article 9 of the U.C.C., 10 Utah Bar Journal 37 (1982). The result of Western Leasing's failure to sell the repossessed collateral in a commercially reasonable manner bars a deficiency judgment. Consequently, the judgment against Vernon R. Erickson should be set aside.

CONCLUSION

Western Leasing's sale of the collateral was not performed in a commercially reasonable manner. The equipment was not sold at a public sale since there was no competitive bidding. The equipment was not properly sold at a private sale since it was not sold through regular, normal commercial channels. Western Leasing did not sell the equipment in a commercially

reasonable manner to obtain the highest realization possible upon the sale of the collateral. Western Leasing merely sold the collateral as quickly as possible to an available purchaser without regard to the fair market price.

The liquidated damages provisions in the leases give Western Leasing the benefit of its bargain. Had the lessees not defaulted, Western Leasing would not have obtained the full benefit of its bargain until 1984. They should have waited to sell the collateral until they obtained a commercially reasonable price. All parties would have benefited from a sale of the collateral through regular commercial channels over a period of time which did not amount to a distress sale.

Western Leasing's letter to Vernon R. Erickson did not comply with the statutory requirements. The letter was patently ambiguous. The letter did not state the manner and method of sale of the collateral. Indeed, the letter was in the nature of a demand letter and was not a notice of sale sufficient to satisfy the Code requirements. It follows that the letter sent to Vernon R. Erickson was not proper and reasonable notification as required by the Code.

The failure of Western Leasing to comply with the statutory requirements of reasonable notification and commercial reasonableness in the sale of collateral bars the deficiency judgment which was granted by the lower Court. Appellant respectfully submits that the decision of the lower Court should be reversed and the judgment against Appellant should be set aside.

DATED this 6 day of May, 1983.

RESPECTFULLY SUBMITTED,

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MAILING CERTIFICATE

I hereby certify that two (2) copies of the foregoing Appellant's Brief were mailed, postage prepaid, to Bryce E. Roe, Roe & Fowler, Attorneys for Respondent, 340 East 4th South, Salt Lake City, Utah 84111, this 6 day of May, 1983.