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Recent Issues Regarding Enforcing Security Interests: Repossession, Foreclosure Sales, Partial and Full Strict Foreclosure

Kevin C. Driscoll, Jr. and Mark E. Leipold, with Paul Lewis as Moderator

KEVIN DRISCOLL: Our three topics today are repossession, foreclosure sales, and then partial and full strict foreclosure. So I thought I would just talk through some of the repossession issues that I have come across, and then I ran some of the recent cases, so I think there is actually some pretty good case law in these ten or fifteen cases that we cite.[1] But the important thing, as I am sure a lot of you know, if you are a secured creditor and your borrower defaults, you have the right to engage in self-help under the Uniform Commercial Code.[2] That is a great avenue because it can save you the trouble of going to court and paying for the filing fee and the motions and the hearings and all that kind of stuff.

And so you are given this right to go and get back your collateral and you can do that without a court order and you can do it without breaching the peace, or you can get a court order to do it. A lot of times when I was a young lawyer I did a lot of these cases, and the second part to getting the court order from my perspective involved going over to the Daley Center and getting a replevin order, which is basically from my perspective—the professor may have a slightly

1. Hanson v. 5K Auto Sales, Civil No. 10–3094 ADM/SER, 2011 WL 6755138 (D. Minn. Dec. 23, 2011); Johnson v. Universal Acceptance Corp. (MN), Civil No. 10–684 (JRT/LIB), 2011 WL 3625077 (D. Minn. Aug. 17, 2011); Thompson v. Gateway Fin. Servs., Inc., No. 10 C 7658, 2011 WL 1429207 (N.D. Ill. April 14, 2011); DBS Const. Inc. v. New Equip. Leasing, Inc., No. 2:10–cv–225, 2011 WL 1157531 (D. Ind. March 28, 2011); Arnold v. Midwest Recovery, No. 09–cv–10371, 2011 WL 309000 (E.D. Mich. Jan. 27, 2011); Buzzell v. Citizens Auto Fin., Inc., 802 F. Supp. 2d 1014 (D. Minn. 2011); Adobe Oilfield Servs., Ltd. v. PNC Bank N.A., M & I Business Credit, LLC (In re Adobe Trucking, Inc.), Bankr. No. 10–70353–RBK, 2011 WL 6258233 (W.D. Tex. Dec. 15, 2011); Chorches v. Ogden (In re Bolin & Co., LLC), 437 B.R. 731 (D. Conn. 2010); Minor v. Chase Auto Fin. Corp., 2010 Ark. App. 670 (2010); USA Fin. Servs., LLC v. Young's Funeral Home, Inc., C.A. No. U607-11-102, 2010 WL 3002063 (Del. Ct. Com. Pl. June 24, 2010); Wells Fargo Bus. Credit v. Environamics Corp., 934 N.E.2d 283 (Mass. Ct. App. 2010); TCF Equip. Fin., Inc. v. New Door of N.Y. Corp., No. 9024/11, 2011 WL 5041795 (N.Y. Sup. Ct. Oct. 24, 2011); Commerce Comm. Leasing, LLC v PIO Enters., Inc., 913 N.Y.S.2d 248 (Sup. Ct. 2010); Ford Motor Cred. Co. v. Ryan, 939 N.E.2d 891 (Ohio Ct. App. 2010); FirstMerit Bank v. Miller, No. 09AP-264, 2009 WL 2940199 (Ohio Ct. App. Sept. 10, 2009).

2. U.C.C. § 9-503 (2010).

more or intelligent take on it—but from my perspective, a replevin order is really the same thing as self-help except that you get the sheriff to come with you who can bust down the locks if your borrower's got the collateral locked up in the garage. And they can put more muscle into it than you can with your self-help remedy without that court order.

So and the real fun thing in these cases is when you get into this concept of what is breaching the peace, because you can go get stuff as long as you are not breaching the peace. And that is such a great term because it is so vague that it really does not mean anything because – you know, I do not know what it means. And fortunately for the lawyer, usually you are not there riding around in the truck. I think there is a TV show about that now. That would be fun. That would be a lot more fun than sitting at a desk all day.

So you are not usually there when these things go down. And admittedly, the world of repossession is not a white-shoe kind of place. It is down and dirty. You have people who are going broke or who are not going broke but not wishing to pay their creditors, who are taking steps to hide stuff, and then you have your client, who's the credit finance company, who may have a nice office with shiny desks and computer monitors and stuff like that but I can guarantee that when it gets down to the level of repossession, it is a little bit of a rougher crowd. So these are not too friendly people to deal with here.

And I will further say that this is America. We love our cars. Right? And like ninety-three percent of the written case law dealing with whether or not a secured creditor breached the peace when they repossess collateral deals with people's cars. I mean, people love their cars. People get weird about their cars and they get weird about houses, and you will have litigation that makes no financial sense whenever you mess with somebody's car or their house. But anyway, a lot of these cases, you start reading the case and it is a debtor with the secured creditor in 2009, who borrowed money to buy a 1999 Ford Taurus. So you are dealing with somebody who is already financing a car that is ten years old for a very small amount of money. But then you read the case when there is a breach of the peace case and the court opinion is like forty pages long, you are like, "oh, my god, this whole thing is such a financial mess."

But there are a lot of great cases out there with this concept of breaching the peace, and generally I would break down breaching the peace into really four categories. The classic case is, "I am going to get the guy's car. The car is parked on the street. I pull up with my tow truck. I grab it. I drive away." So when you are looking at

whether or not you did it right or wrong, you ask, where did you get the collateral? Where was it? How did you get it? Who did you bring with you? And I would say the fourth category is what did you say or what happened at the time of repossession?

So starting with that first category, where did you get it, as a secured creditor. It is open game if the thing is on the street, nobody is there, and your borrower is in default. You can grab it. That is a pretty clear-cut case. As with all things, they are not always that clear and the more you start moving into your borrower's—into your debtor's—home environment you start getting into trouble. Going into a locked garage I think would be an unequivocal no-no unless you got the replevin order from the court. But if we are in the world of self-help, I would think that moving into that locked garage is a no-no. You know, I think an unlocked garage would probably still be a negative because you are moving into somebody's private space and you are considered to be trespassing.

JASON KILBORN: Even if the debtors agreed to that in a contract ahead of time?

KEVIN DRISCOLL: Yeah, because everybody would say it. And it comes up too in the issue—that same thing comes up—there is lot of stuff in those contracts. People say it but you just cannot do it. I do not know why they put it in there.

MARK LEIPOLD: You cannot really waive those. I mean, those kinds of components, as you know, especially when you are dealing with consumers, you cannot just sort of say, "Yeah, here is a key to my front door. You can open the door and come in and get it." I mean, from a practical standpoint, standing in front of a judge and saying, "Yeah, I have that right. It was in the contract." The next thing is how big of a check I am writing as far as a sanction motion.

KEVIN DRISCOLL: It is funny you say that because one thing about this whole thing of the street to the garage—street is okay, garage is not okay—but there is a whole world that is in between there. And one thing, I have family in the South and there are these things called carports which are not garages, and are not the driveway. It is kind of like, you know, a carport; what is a carport? Is it okay to go repossess from a carport? There is a case in here that said a carport is okay because you are not opening up a door; it is outside to the world.[3] And so there is that whole area of where you were when you got it. And there is a case in here that says a carport is okay, except when you start moving into one of the second issues, which is what

3. Ford Motor Credit Co. v. Ryan, 939 N.E.2d 891 (Ohio Ct. App. 2010).

happened at the time of repossession?[4] Was there altercation? Did somebody say something? What happened? And if you are going to grab the collateral and all of sudden somebody comes out and they say, "No, no, no, no, don't take it, don't take it," is that okay?

There is a case here where there is a guy, kind of a nice polite guy from Arkansas, who comes out, tells the repossession agent, "Hey, I'm sorry. I think there is a mistake. I got a crumpled up receipt from the money order that I paid this with. I am pretty sure I am caught up on this thing. So do not take it. Let me go inside and make a phone call." The debtor goes inside to make the phone call. The repo agent hooks it up, drives away. That one was found okay.[5]

Now, this other case where the guy comes out screaming and yelling and saying, "Don't take it, don't take it!" They took it and that one was not okay.[6] So I guess the rule of thumb if you are trying to protect your collateral, you have got to scream and yell. So despite what your mom and dad told you, you do not really get anything in this life by I guess not screaming and yelling.

MARK LEIPOLD: Throw yourself on the car.

KEVIN DRISCOLL: Yeah. Throwing yourself on the car works.

PAUL LEWIS: Two of the things that I think are interesting, maybe you can comment, when you are trying to repossess from the premises of a third party and the other issue is engaging in essentially fraud as of method of deception, as a method of indicating what you were actually doing at the time you repossessed. Do you have any thoughts about either of those?

KEVIN DRISCOLL: Well, as to the fraud issue, you do not see these cases so much anymore, but that can be I guess attributed to the good old days of debt collection, before all these consumer protection statutes came into play. There are a lot of examples of where it would be a guy dressed up as a priest walking into the house wanting to talk to Grandma; lo and behold, he is there to grab the piano and they get the piano and they roll it out. Or they know he is coming, and it is like delivering flowers. He will say, "Hey, I've got this bouquet of flowers for you. By the way, where is the piano? I'm taking the piano." You do not see that so much anymore, but there is still—when you read the case law on this, and the case law is varied in the states, but the use of deception to get in the house is objectionable. And I have not really seen anything in the last three or four years on that issue. In the

4. *Id.*

5. *See* Minor v. Chase Auto Finance Corp., 2010 Ark. App. 670 (2010).

6. Ford Motor Credit Co. v. Ryan, 939 N.E.2d 891 (Ohio Ct. App. 2010).

second area, you know, I do not know frankly if it is in a third party's possession, I do not know. I would maybe ask Mark Leipold if the debtor would even have a standing to object if a secured creditor –

MARK LEIPOLD: Now you are going to put me on the spot.

KEVIN DRISCOLL: Because I do not know. I mean, when we were repo'ing trucks, it would happen all the time that these trucks would be—you know, they are semi-tractors; they are driven all over the country, so they would be other places—and they would be repossessed and nobody ever said anything. Now, every now and then, I get a phone call saying, "Hey, your guy jumped the fence, grabbed the truck, crashed it through a locked gate on his way out. What are you going to do about it?" And that is about it—I do not recall anything ever getting to the level of litigation on that.

MARK LEIPOLD: I think that is pretty true. If it is like a truck stop, the trailer or the cab, whatever, you may see that in that situation where it is sort of generally open to the public, my experience has been that is generally okay. But when you have to kind of go behind the wall, you have to jump the gate, you have to cut the locks, that is where I think you kind of have to draw the line.

So if you are a general member of the public—you know, if you have general access to that area, then I have always taken the position, "Yeah, go ahead, and just keep moving." But if you have to get the bolt cutters out to cut the lock, maybe not so much. And I would say the same is true on the broadside too. When Kevin and I were preparing—and I think I ruined my joke already, which is that there are no updates. Let's go. [Laughter]

But much of this has not really changed. I mean, I think there is a website on great repo stories. You think this is never going to happen again. We have gone through this stuff, the fake sheriff, the guy dressed as a priest. We are mature enough as an industry and as a people that those days are gone. And guess what? They happen again. I think it is fortunate that the judiciary and the judges sort of said, "Really? You cannot do this." So I do think the fraud issues are still out there. I just do not think they are maybe as prevalent yet, and what it tends to be, I think it tends to relate to kind of what the current economic situation is as well. We are sort of on the upswing I think right now, and I think you are going to see more of these. And it takes a while for these cases to work their way through the system.

JASON KILBORN: Would the result of one of these fraud cases be supporting the debtor's claim for replevin back to the thing or like some damages or something?

KEVIN DRISCOLL: Wrongful repossession.

JASON KILBORN: So replevin back?

KEVIN DRISCOLL: Yeah. Give me the thing back or more likely give me money because I do not want my 1983 Tempo back.

JASON KILBORN: What is the money for, though? Is it a replacement for the thing because it is already been sold or something? For what?

KEVIN DRISCOLL: You will see that, and then you will see the debtor will file an affidavit saying, "The repossession caused me all this undue harm. I could not sleep. I lost faith in my community because this repossession agent drove through my yard taking the car." You see various forms of it but it is usually a form of compensation back by them. I would hazard a guess that a lot of these cases are driven because recall that—to put things in perspective—five years ago if you went and borrowed $100 million and bought the Sears Towers, you would have had fifty banks lending you the money and you would have had a nonrecourse loan, meaning that if you defaulted on the loan, the only thing they could get back would be the Sears Tower and you yourself would walk free and clear, even if you had forty Rolls Royces and a pile of gold bullion in the backyard. But for the rest of us, the panel included, those rules do not apply because whenever we borrow money, they want everything back and so a lot of these people, yeah, they bought a car they paid an extraordinary amount of interest for over these years. But guess what? If the car does not sell for what the balance of the loan is, you are on the hook for the deficiency. So I would hazard a guess that a lot these cases that we see being reported, this issue of wrongful possession is raised by the borrower in an attempt to drive down deficiency, saying, "Hey, you got the car back but I am not paying you $2,300 that is left over, no way," because there is not only the secured creditor, but there are attorneys' fees on there, there are filing fees, the summons fees, all that kind of stuff, and those things add up quickly. So I think that probably a lot of these cases that we see reported come out of a situation where the secured creditor refused to acquiesce on the deficiency, therefore driving the litigation.

MARK LEIPOLD: I think, to get to your point, I have seen debtors whose counterclaim is much larger—I mean, they are looking for a number that is really pretty large relative to the collateral. But I think the reality is often that they just want the car back. Here, take the car, if we are using the car as an example. So to me, it is really just the first step of a negotiated resolution of the situation. If the actions are egregious enough, the lender just wants to move on. The lender does not want to spend the time with the lawyers—I don't know why—and

also does not want to spend the internal time at the lender's site because you have got to have a loan officer involved in that transaction. So maybe you walk away from it. Your repo guy is generally on a volume basis.

So I know this is not the law. It is just kind of the practicality aspect of it that you sort of say, "Let's cut a deal and kind of move on," especially if it is bad. If it is real bad and they have got a good lawyer, then you are probably going to be paying something above and beyond what is there. But hopefully the resolution is that you take your car, walk away and write off the remaining amount of debt; at least that is the way I see it.

KEVIN DRISCOLL: Another theme that weaved its way through these repossession cases is the use of a police officer. This is not in the court order section but this is in the self-help section. And again, if you look at the more historical cases on this, I think it was pretty common for off-duty police officers to moonlight and go along with repo agents and actually help with getting the car back and help putting pressure on the borrower to return the collateral. And that is clearly a no-no because you are acting with a state actor, they call it, and that is not authorized with the self-help remedy.

But there are several cases that I cited where there is a police officer present and it is okay.[7] And it is usually under the guise of a police officer being there to preserve the peace. For example, the *Johnson* case out of Minnesota.[8] A secured creditor asked the police officer to come with him to remove the car for the self-help repossession. The borrower said, "Hey, the cops were there. It was not an authorized self-help repossession." The court said no. In this instance the police officer was just there to maintain the peace. There is no record or testimony that the police officer actually helped the creditor get the car back.

I actually want to contrast that then. There is a great case in here, one of my favorite ones that I read, *Arnold*:[9] Debtor threatens to shoot secured creditor in repossession. So the guy is going to get the car and the debtor threatens to shoot him. So then at this point the repo agent calls the police. And at this point the car is locked in the

7. Johnson v. Universal Acceptance Corp. (MN), Civil No. 10–684 (JRT/LIB), 2011 WL 3625077 (D. Minn. Aug. 17, 2011); Arnold v. Midwest Recovery, No. 09–cv–10371, 2011 WL 309000 (E.D. Mich. Jan. 27, 2011).

8. Johnson v. Universal Acceptance Corp. (MN), Civil No. 10–684 (JRT/LIB), 2011 WL 3625077 (D. Minn. Aug. 17, 2011).

9. Arnold v. Midwest Recovery, No. 09–cv–10371, 2011 WL 309000 (E.D. Mich. Jan. 27, 2011).

garage. So right there with those facts, the repo agent could have never got the car. The guy could have come out and said, "Hey, you know what, the car is in there. It is in a locked garage. You cannot have it. Beat it." And the guy would have had to leave. But our borrower, our debtor, comes out and says, "Not only do I want you to get out of here, but I am going to shoot you." So the repo agent then calls the police and says, "Well, just so you know, this guy is threatening to shoot me." The cops check his name and they find out that he actually does have multiple guns registered in his name. So they come to the house and as part of their investigation looking for the guns, they unlock the garage. They are looking around in there. At that point, the repo agent gets in the car and drives away. That was *not* unlawful repossession because the police did not open the garage door to let the secured creditor in. The police opened up the garage to undertake their investigation. So you know, it is always darkest before dawn as they say in the world of repossession, this guy thought he was going to get shot and he ended up with the car.

PAUL LEWIS: Kevin, one of the cases I thought was very interesting that you cited was the *In re Bolin* case, and this is the one where the creditor repossessed without knowing that the debtor was in fact in default.[10] It subsequently occurred that the debtor was in default and the court said it was fine because state of mind did not matter as long as the reality was that they were in default. It was acceptable. Seen other cases like that? Does that surprise you?

KEVIN DRISCOLL: I have not actually. There is a question or comment in the back.

AUDIENCE MEMBER: You mentioned the off-duty police officer. If the secured creditor uses off-duty police, could the party which is having the property taken argue that the primary reason that those officers are there is to help rather than secure the peace because they are off duty?

KEVIN DRISCOLL: I haven't seen a case like that, but if they are in plain clothes, they do not know who they are, there would be no case, I would think, by the borrower.

But if they are there with a badge—sometimes off-duty police officers kind of badge it on there and they are not waving it around but you can see it—then maybe there starts being a case on that because then it is intimated by the secured creditor that the police are there to help them.

10. Chorches v. Ogden (In re Bolin & Co., LLC), 437 B.R. 731 (D. Conn. 2010).

AUDIENCE MEMBER: Does the fact that the officer's presence is being paid for by the secured creditor have no impact on how you look at that issue?

KEVIN DRISCOLL: I do not think who is paying for it would matter. I think it would matter from the borrower's perception of what the police officer was there for: if they were there to make them unlock doors or tell them where the thing is hidden. People hide stuff, so if he is there to kind of coerce a response, then I think that it would become objectionable.

Professor Lewis had a question about *In re Bolin*, which was in Connecticut.[11] And it struck me as a nice town kind of, with a jewelry store that had been there for years and years and years, and everybody loved this jewelry store. Well, lo and behold, this jewelry store was going down the tubes, and not only did the jewelry store have a secured creditor who had a security interest in some of the jewelry, the store was also apparently taking—people in town were dropping off their jewels to be fixed or be repaired or to consign them for sale and the jeweler was stealing them or pawning them. So this whole town is now in a panic, and this place is starting to look like the shelves at the convenience store when the hurricane is coming in. Everything is kind of scattered all over the place.

So this secured creditor does not realize that – I think it was just like a neighbor or somebody but it was not a bank. It was just a person who was the lender on this. But the lender, she realizes that her borrower is having all of this trouble, but she does not know at this point that her loan is in default. So she walks down to the store and says, "Hey, give me my stuff back. I want my stuff." And she gets it. And there is a police officer there. The record was not clear why the police officer was there. But she gets her jewels back and then leaves.

And then later the jewelry store becomes a bankruptcy petitioner, and the bankruptcy trustee sues the secured creditor for getting the stuff back saying, "Well, she did not know they were in default at the time so there is really no good-faith basis for her to come repossess." And it is actually an interesting question because the court said, "Well, we looked at the facts and once you actually looked at the facts in hindsight in the light of day, the jewelry store was in default so she had rights to go get her collateral back." The fact that she did not think or that it did not really cross her mind whether they were or were not in default did not matter.[12] So that is an interesting –

11. Chorches v. Ogden (In re Bolin & Co., LLC), 437 B.R. 731 (D. Conn. 2010).
12. *Id.*

MARK LEIPOLD: One thing that was interesting about the case was who the plaintiff was. I wonder if it would be different if the jewelry store was able to bring it back, or it was the jeweler, him or herself, rather than the trustee in bankruptcy, because I think it is one of those things, as we talked about: you have a trustee who is somewhat detested in the eyes of many courts and you are like, "I have got a consensual secured creditor here who has got collateral who is literally getting up and walking out the door, and I have got the trustee here who is attempting to sort of glom onto the innocent, trying to take his money away from a consensual creditor." And so, as Kevin talked about a little beforehand, all of these tend to be sort of fact specific. That is what makes them fun to talk about, but from a reality standpoint, it is sort of trying to develop general trends and themes.

PAUL LEWIS: I think the question is, given how fact specific this all is and given how the cases are all over the map, is there some general advice that you can give when you send out repo people in terms of how they should behave lawfully? Do you have guidelines for what you tell people when you employ them?

KEVIN DRISCOLL: Whatever you would tell, I think you would have to tell them that they cannot – you know, cannot bust locks. You cannot push people aside. You cannot use phony pretenses to grab your collateral.

MARK LEIPOLD: Well that raises an interesting point. And I do not mean to interrupt you, but what we have seen is repo'ed planes, not commercial jets but generally high-end jets. And there are a couple of guys that you hire that have eyes and ears in every airport and can track planes down. And you will get a call from the debtor that says, "The plane is in Oklahoma or Omaha, and the plane is in Miami." And you just get a bill at the end of the day, like when you are dealing with a repo guy, when you are dealing with a reputable repo guy, and you will get a bill that just says for services rendered. You do not really want to know what is in that number.

KEVIN DRISCOLL: It is kind of like here is how not to do it and I have made my peace. You are all big people. Do what you have got to do. It just may come back and bite you.

MARK LEIPOLD: Especially if you hire them, then some of that blame falls on you as a secured creditor or as counsel. In the day did you have repo guys that you dealt with on a regular basis? Was there a certified repo'ing firm or was it just some guy?

KEVIN DRISCOLL: Most of my clients do such a large scale of business across the country that they already have arrangements with the repo agents worked out. So I have had to repossess some cars

before. I forget who we used. But usually by the time it gets to me, if I am going to be involved, it is going to be a court-ordered replevin, which is a little bit of a different environment. It is more of a controlled environment where the sheriff calls you and the sheriff says, "We are going to go out at 3:00 o'clock." They ask you who your ride-along person is. That means who is going to come from your client to sit there and tell them, because when the sheriff goes out, it is a different set of facts. It is a little less dramatic, I would hazard, if the sheriff goes out, knocks on the door, and says, "By the way, this guy is taking this car and it is okay," or, "he is going to come and get the painting you've got hanging on the wall that you are not turning over." And then the creditor goes and gets it, and that is it.

MARK LEIPOLD: What is funny, and I say this only from experience, is that for replevin in Illinois, you have to have a right to ownership or an interest in it. And if you go back to secured transactions, and depending upon who your professor was, they would often talk about the bundle of sticks and how the secured creditor got one of the sticks. And that would be sufficient for the secured creditor to go and execute or undertake a replevin under Illinois law.

KEVIN DRISCOLL: But I want that. I want that car.

MARK LEIPOLD: It is like prejudgment attachment. You have got to go back and say, "Do you really have a security interest in this collateral before we start down this path?"

JASON KILBORN: I often suggest that replevin seems to me to be sort of the smartest way to avoid all of this mess. As Paul Lewis points out, the cases are all over the place across the country, though I would think that you would get a lot of pushback from clients who do not want to pay for that extra step, not the least of which is your fee for getting the replevin. Do you not get very much pushback on a replevin?

KEVIN DRISCOLL: They do not want to pay for it?

JASON KILBORN: Yeah. The client does not want it. They say, "Just go get the thing."

KEVIN DRISCOLL: I always tell my clients, "Look we filed a replevin. Anytime this thing shows up, like if the guy drives it up to the court hearing, and it is parked out there, grab it." Just because you started a replevin does not mean you have to back off on your right to self-help.

JASON KILBORN: But the clients are willing to allow you to go forward with the replevin rather than going, "Hold off on that expense. I would rather just self-help repossess"?

MARK LEIPOLD: Well, I will go a step farther. You have clients that come to you sometimes and say, "Okay. We need to file suit." Well, you have a security interest. If you can go get the collateral, go get it. People forget and lawyers forget that you do have self-help rights. It is true. I mean, people, you know, want the default mode. I often say this about bankruptcy lawyers: they are like surgeons—not as smart as surgeons, but we try—to them all solutions are solved by bankruptcy. And sometimes I think when you deal with the agent people, to them all solutions are solved by litigation, rather than determining what are our rights to repossess using self-help remedies. So you have to reinforce that concept. What I see a lot of times is replevin—so if my choice is—I cannot really get self-help or I cannot do it really well, replevin is really not a bad alternative in Illinois law. It's quick. It's relatively painless. The only real problem with it, and I will talk a little bit in mine, is posting the bonds because it is, what, one-and-a-half or two-and-a-half percent, depending on the judge?

KEVIN DRISCOLL: Two percent of the collateral's value. And it is not so much the cost. If you have never got a bond, like I mean, if you are a one-off guy going into replevin and you have to get a bond, it is a real pain because you have to have a relationship. They have to look at your assets. They might take their own security interests. It is basically like applying for a loan because a bond is a piece of paper: when you get the replevin order, it is a piece of paper that says, "Judge, you took me at my word. I have a prima facie case. In my papers, it says that I have a right to replevy this collateral." And so there may have been or may actually not have been a hearing, but if there was a hearing, it was a very brief one. And the court is kind of trusting that we can take this thing back. And lo and behold, if I was completely wrong on it and I did not have the security in the Rolls Royce and I really had the security interest in the bicycle and I took the wrong collateral, then this bond, by this bond my hurt borrower, the defendant, can go to the bonding company and say, "Hey, make good. This guy hurt me."

MARK LEIPOLD: A number of years ago, I had a lender client who first said that she had a small list of people who were looking for bonds—a lot of people do now—but then the insurance company looked at the bank's balance sheet and said, "I am not authorizing." You essentially have to fund it with cash.

KEVIN DRISCOLL: So replevin is a great alternative, but self-help is always the way to go if you can do it.

JASON KILBORN: Have you ever heard of someone like Tom Dart refusing to help you with this? I heard maybe a year ago that he

was refusing to help with mortgage evictions or lease evictions, and I immediately thought, "I wonder if he ever refuses to help secured creditors?"

KEVIN DRISCOLL: From my personal experience, I have found that the more rural of a county I am in, the more willing the sheriff is to help me out and get the collateral. So Cook County, they've got a lot of stuff they have got going on more than this, and so it kind of depends on who you get. I mean, you get some kind of cowboy kind of guy out in the boondocks and they will really help you look for this stuff. I mean, they really will. In Cook County, sometimes they knock on the door: "Hey, is the Corvette here?" And the guy is like, "No." And the sheriff says, "Okay. Well, it is not here." And then you got to go back and get another replevin bond. It just depends. I mean, and Dart did make a statement. That was more of a political thing because people were getting evicted in foreclosures and they may have not really had any knowledge that the foreclosure was going on. And he got a lot of publicity for that because the sheriff is not really supposed to make law. They are supposed to enforce it. But anyway, it all seemed to work itself out.

MARK LEIPOLD: What is hard, I think, sometimes when you are dealing with the sheriff in that kind of a situation, is getting on the docket, on the sheriff's docket.

KEVIN DRISCOLL: I used the federal marshals once or twice too and those guys are into looking for escaped felons and whatnot. And you tell them that you need some help getting a wheel boater and they are like, "What? I am not doing this."

MARK LEIPOLD: That actually raises a real good point, what I talk to my partners about is you think, "Oh, replevin, the way it works, I can bring it in district court and I can bring it in state court," and district court you can do it but it is definitely putting a square peg in a round hole. You literally have to walk through every single point. It is not even a one-off and there is no interest in doing that. So really this is probably the one exception where I say if I have a replevin that I want to bring, I am going to state court if at all possible, because they know how to do the system. The system works in a much more collapsed manner from a creditor's viewpoint.

PAUL LEWIS: Mark, we are almost at the halfway point. Do you want to transition off and start talking about issues with –

MARK LEIPOLD: So what I was talking about the big change in revised Article 9 was perhaps clarification under one, both the notice of disposition and how you dispose of collateral. I do not think it was a sea change, but what I think the changes in Article 9 were designed

to do was to clarify many of the judge-made exceptions that had kind of crept into the system. You heard earlier people talking about how—this is my personal view—we talked about Article 9 and how it sort of developed. For a while, you had to keep these state variation books on your desk because each state had enormous variations of what the law was. And as a result, eventually they came to this whole process where they came up with revised Article 9.

We now see with the 2010 amendments that they are trying to get ahead of the curve. I get that; although candidly, I do take a bit of the small democracy experiment that each state is developing its own variation, some which work, some which do not work. I think in many ways if we allow the states to sort of screw up revised Article 9 over time, you will see perhaps more clarity in some of the revisions. So when we are talking about foreclosure, basically notice of disposition, and how you do that disposition, revised Article 9 makes it really clear what that notice is supposed to contain and how that notice is supposed to be structured.

I cited a couple cases in the materials. One case I thought was particularly interesting for good and bad reasons is this *Adobe Trucking* case.[13] What it talks about is sort of these three tests that were often applied when you did—I am actually getting ahead of myself. I am actually talking about the disposition process, but I will finish the thought—is that how do you determine whether the disposition was appropriate? It is a proceeds test, a totality of the circumstances test. And that is sort of this grouping that has come to be. But candidly I have always viewed those as old Article 9 issues that I really think the purpose of revised Article 9 was to create more of this—except for the third one, the procedures test. Are the procedures that you set up in this process reasonable?

Judge Easterbrook has an opinion out of the 7th Circuit, *Excello Press*, which we often rely on in the bankruptcy world.[14] It is an older case. But I really think in my view it is the process. What does my notice say? Is the notice reasonably close? And you see it in Easterbrook's opinion. He comes to the conclusion that even if you are off a little bit, if you still have done sort of substantial justice and you have given reasonable notice of that process that the notice itself is good.[15]

13. Adobe Oilfield Services, Ltd. v. PNC Bank N.A., M & I Business Credit, LLC (In re Adobe Trucking, Inc.), Bankr. No. 10–70353–RBK, 2011 WL 6258233 (W.D. Tex. Dec. 15, 2011).

14. *In re* Excello Press, Inc., 890 F.2d 896 (7th Cir. 1989).

15. *Id.*

And I think you see that in Article 9. For example, section 9-603 is a good example.[16] If there are minor problems with it, we are not going to just pull the rug out from underneath you. So when you are looking at this, you are looking at what the notice actually says, and Article 9, revised Article 9, does a really nice job of saying things that need to be included in that process.[17] Can you include more? Sure, but you have got to make certain that you have the bare minimum in that notice so that people get a real clear idea what that disposition is going to look like and how you are going to do it. So I often look at the notices with a scenario I had many years ago. Professor Livingston reminded us that we represented a lender who had security interests in Toby Jugs. I do not know if you guys are Toby collectors or not, but you have probably seen them in like Old English taverns. They generally have a face on the mug itself. The guy on the mug is called Toby. It is like Old English. But there are variations. There are pictures of Churchill, etc., etc.

But one of the issues was: how are we going to dispose of this collateral in a reasonable fashion? So what we did in that process, which sort of survived some challenges, was to notice up a public sale. We hired an auction house and undertook a sale of these Toby Jugs in the marketplace. Surprisingly, the debtor was not real happy with that conclusion. The debtor said, "One, you should have done the sale in New York where there is a market; and two, you should not have flooded the market with them" (I think we had like 300 of these jugs.) And it was big collateral at the time. I am sure it is still in that market—collectibles are not quite what they used to be.

So they complained about who we selected. We used a local Chicago auction house, and they did not like that. They thought, "Well, you need to go to Christie's or Sotheby's in New York because that is where the real market is. And you did it all in one auction. You should have done this in various lots over a period of months so that you are not flooding the market. You are not driving the price down." Well, fortunately people sort of came to the conclusion that this disposition was a reasonable disposition. It does not have to be a perfect disposition. That is sort of par when you are dealing with a debtor, having been on the debtor's side but not personally because I do not have a Toby Jug collection, you always end up in that fight of where you draw it on the spectrum. Where does it fit in that spectrum of the perfect sale and the not-so-perfect sale?

16. U.C.C. § 9-603 (2010).
17. *Id.*

So for us in many ways when we are looking at this disposition notice and how we are going to dispose of that, when we send out our notices we go through it with a fine-tooth comb and it is sort of like when in doubt, you err on the side of providing more documents than less. There is actually an interesting point in some of these cases too, when they talk about what is reasonable notification, what does that look like as well as what the process is. Many of the cases in these agreements often say, "Well, if you do this type of sale or you do this type of process, that is reasonable." Now, personally, I have always taken the position that this is akin to almost waiving pre-default rights or in a pre-default mode you are just sort of waiving how you are disposing of the collateral.

I think that from a secured creditor's side, we start at square one. I do not care what the document says. If it says that this type of sale is sufficient, we look at that. We reexamine that from the get-go because to me, it is somewhat of a public policy argument because I think that the notice of disposition and how it is disposed of is actually a broader issue than simply the debtor and the secured creditor, because I view it almost as if there is a larger creditor body that needs to be served or addressed in that concept and that when I undertake a disposition, I want to make sure that I can go to anybody who comes to me later and challenges it and say, "Here is how we did it and here is how we put it together." I am sure you do the same when you do a UCC sale. You've got a transcript. You've got a court reporter. You show the notices.

KEVIN DRISCOLL: I have had a court reporter many times so there is one person in the room like my client. We are here for the public sale of the assets of XYZ Company. Let the record reflect there is nobody here. But we are going to conduct the sale anyway. My client needs a credit bid.

MARK LEIPOLD: Everything you are doing, you are doing with a thought that someone is going to challenge you down the road.

KEVIN DRISCOLL: I have had that before, especially when it comes to the point when you are going after the guarantor. You have gone through it. You have sold the company's assets. And now you have perhaps a fairly well-heeled guarantor who invested in this company or owned it, and now you have got somebody looking at every notice you sent out, every sale you did, every piece of paper you generated, and their sole purpose is to tell the judge you did it wrong. And that is pretty collar-loosening. So like Mark pointed out with notices, even though your thing may not say that you do not have to give this notice out, maybe you send it out just because some stuff you

can waive. Some stuff you cannot waive in your loan documents, but the more you get out there, the more it says, "Hey, I tried to let the whole world know. We tried to do this thing fair and square. Yeah, my Toby Jugs only got two bucks apiece but that is the breaks."

MARK LEIPOLD: When you are talking about who you send the notice to, there are a couple of components to that. Of course you send it to the debtor. You send it to the other secured parties. You do a lien search, and you see who is current. I think it is a twenty or thirty day window that you have as to how current your UCC search is. But as to the debtor, if the debtor says, "You can send it to me at this address," I will send it to that address. I will send it to you by mail and FedEx. I may send it to you by e-mail. I will also, by the way, send it to the three other addresses you gave me in previous situations. Okay. It is overkill, but I do not want anybody ever to say, "You sent it to the wrong notice," or "It was an incomplete notice." So when I show up, a lot of times what you have to do is show the green cards from registered mail. You would think by now we get into the twentieth century, but I think registered mail may actually keeps the post office alive. But you have to show that they actually received the green cards.

Now, guess what? Debtors will sometimes get a notice of registered mail and they do not go to the post office to pick it up. I know that is hard to believe. So we do FedEx. We do everything we can to do to make sure that the debtors and the other secured parties and other parties entitled to notice get that notice in that concept.

KEVIN DRISCOLL: I am glad to see that your seasoned deadbeats do not sign the green cards as well because most of the time it is not, "I just won the lottery." When you are getting certified mail, it is almost always bad news, so it is very rare that you are getting something decent there.

MARK LEIPOLD: And then the other component when you are doing a notice of disposition that you are actually disposing of collateral, we send notice to the world. I mean, I am doing a public sale. When I was sitting in the crowd, I was trying to remember: we had a company called CheapSeats. I think it might be CheapSeats.com, surprise, surprise, and it was a travel agency. And the concept was we needed to liquidate the collateral. We were a secured creditor. We had a security interest in all of the assets.

I won't get into perfection issues but assuming we are all properly perfected, I think the question is: Who do we give notice to in this

concept and how do we advertise the sale? In that *Adobe*[18] case they talk about, well, you agreed that notice in a major newspaper would be sufficient, and in Chicago, in Illinois, the one notice we always send is the Sunday and the Wednesday Business Auction section. So if you want to see what a notice is like, this Sunday when you are looking through the paper in between studying for the next exam, you can look at the back of the page and see the Business Mart section and it will say, "The Secured Creditor's Notices of Sale." But as you can imagine, a lot of time I am convinced no one ever reads those. It is almost like running an ad in the Daily Law Bulletin. I am not sure other lawyers know what the Daily Law Bulletin is, but nonetheless, it is going to go out to the world at large. But in making a short point very long in that situation, what we did is we reached out to trade journals, and these were at that time hardcopy trade journals. And we were operating on a pretty short deadline because we wanted to make sure our notice got published in those trade journals in the travel industry so that, again, when we went to public sale—and candidly, no one was going to buy these assets except the secured creditor through a credit bid, so no one was going to really pay cash for these. But there were some well-heeled guarantors in the place—so we ended up putting those notices in those publications for the simple purpose of saying, "Hey, everybody in the world who would be interested in these assets had an opportunity to buy them." And it seems like a lot of this is CYA and often it is.

I think the next step, and I am not trying to talk out of line here, but I think the next step for many of us is then, really, how is the online side of this? At some point advertising in the newspaper may be like the worst example of an advertising forum from the perception of the creditor, so you see some online kinds of components but the question is getting that advertisement out, getting that to people who would be interested and at least have the potential of being interested in the sale.

JASON KILBORN: All of the costs for all of this probably under the contract are attributable to the debtor, just add to –

MARK LEIPOLD: Theoretically they add. But you are correct. You are correct. But it is often a distinction without really any meaning because the secured creditor is underwriting all of this. The secured creditor, unless there is a nice guarantor in place, etc., is probably, and especially in today's market, just looking at how big

18. Adobe Oilfield Services, Ltd. v. PNC Bank N.A., M & I Business Credit, LLC (In re Adobe Trucking, Inc.), Bankr. No. 10–70353–RBK, 2011 WL 6258233 (W.D. Tex. Dec. 15, 2011).

their deficiency is because they are never going to collect. So they are putting these advertising costs out. I had, in some situations, run ads in the national edition of the Wall Street Journal, which, by the way, is not cheap.

KEVIN DRISCOLL: Stunningly expensive.

MARK LEIPOLD: Yeah, stunningly expensive. You can do regional too.

PROFESSOR LIVINGSTON: How do you deal with the issue of spruce-up and fix-up as opposed to selling collateral "as is," because that is money that the creditor is going to have to sink in to make the collateral better before you sell it? And is that worth doing if you want to make a commercially reasonable disposition?

MARK LEIPOLD: I do not think spruce-up and fix-up is a requirement for a commercially reasonable sale.

PROFESSOR LIVINGSTON: No, it is not, but it can sometimes be attacked if you are selling something and it is just a total mess and you did not do anything to make it even presentable.

MARK LEIPOLD: Yeah. In that *Adobe Trucking*[19] case, they had the similar situation where they had a bunch of equipment and the debtor complained that they did not spruce it up, and clean it up, and fix it up, and then did not get the highest price. Well, that was a nice set of facts because the debtors were not letting the secured creditor get to the collateral. But there have been situations where we have actually gone—if you have got an auction house, like if you do Ritchie Brothers for heavy equipment, they have got a whole staff that clean it up, repaint the equipment, get you sort of a spruced-up. A lot of it depends on who you are dealing with as an agent. You are looking for advice to say, "Okay. How much do I have to invest and how much is going realize an increase in the purchase price?" And it is surprising. A thousand-dollar paint job could mean six, seven, eight, ten thousand more in purchase price, and there is no correlation. I mean, they could paint it themselves. But it is sort of a human nature kind of thing in the sale process.

KEVIN DRISCOLL: And conversely, I have had a situation where my client did spruce it up and then when the final bill gets tallied and you are going after a deficiency, then you have the borrower or the guarantor complaining about the spruce-up costs. So I mean kind of like no matter what you do: If you do not spruce it up, the other side is going to be finding fault in that, and if you spruce it up, they are going

19. Adobe Oilfield Services, Ltd. v. PNC Bank N.A., M & I Business Credit, LLC (In re Adobe Trucking, Inc.), Bankr. No. 10–70353–RBK, 2011 WL 6258233 (W.D. Tex. Dec. 15, 2011).

to be finding fault with it. So it is just kind of the process. I would say that my clients do it if it makes sense. And it is all from them—like Mark pointed out, they are usually not going whole for the loans, so they are already in a losing situation. And so even if it is a little bit of money and it will pay itself back or stand to make them a little bit more money, they will do it. They are not going to put the stainless steel and the granite countertops in, but they would probably for the door to the cab that is hanging there loose, they will pay a guy with a screwdriver to fix it up.

MARK LEIPOLD: All of those things are covered under Article 9 metaphorically. Yeah, I agree with you, Kevin. I think you see those sort of components kind of come into play. It sounds kind of trite, but it is always a cost-benefit analysis. It is always a value proposition type of issue, what kind of investment do I need to put into this and where is this going to get me. And you sort of operate between the extremes of what is the bare minimum that I have to do so I do not get spanked by the secured creditor or the court or a potential guarantor or a third party or a trustee, and the high-end type stuff of that component.

So the important thing to take away in the notices and the dispositions is actually to think about the collateral, think about it in a concrete fashion, not just, "I need to send the notice out. I need to run the ad in the Sunday paper in the Tribune. I am good to go." You know, you might be good to go, but you are being paid as a lawyer and some practitioners are as well. You are being paid to bring something to the table other than to check the box. So I always try to think about the collateral. I try to think about where it is going, how I can maximize the value. We often write letters in this process with the assumption that the judge is going to read the letter. I view sales the same way. I am going to have the view that at the end of the day, I am going to have to go in front of a judge and explain to him what I did on the sale, and I want to be perceived as the good guy: "Judge, we did everything we could. This was the process. This is the notice. These are the opportunities we gave them. And they did not come through. We are a secured creditor. We have a right to recover our collateral to pay off the debt."

AUDIENCE MEMBER: I do not know if this is a good idea or a bad idea or if it ever happens, but is there a way you could negotiate with the debtor and have the debtor do the sale?

MARK LEIPOLD: Well, I have experienced that actually. A number of years ago I had a secured creditor. I was representing a secured creditor who had a chain of clothing stores. I forget the brand. There

used to be one—it might have been on Clark street in Chicago and all over the country. In that situation there was a personal guarantee in place and we negotiated a consensual liquidation of the collateral with the idea being that at certain levels, parts of the guaranteed liability would be rolling off so if we reached a million dollars in sales, your liability drops fifty percent, sort of like the Nationwide "vanishing premium" type policy on the television commercials. As you keep going along, you set incentives for the debtor or the principals to sort of work with you and maximize sales because often a lot of times those guys know the industry better than you do.

There are a bunch of people—and I am sure Kevin and I used them on the components. When you are selling under the hammer, you are always going to get a lesser price than if you at least in some sense of it show that you are selling in a going out of business sale or something that has the appearance of being—or even under a magical sale or like a forced sale that gives you the opportunity to sort of get a better value. So the answer to your question I guess is "Yes." And that is pretty common. Kevin, have you had that experience?

KEVIN DRISCOLL: That is a good question and I have done it too. Usually when I have the situation, the first thing I ask my clients: "All right. Is your borrower a good company that has fallen on hard times or are they creeps?" You kind of figure out if they are legit or if they are troublemakers. If they are troublemakers, then you do not do it. But if it is a decent company that just had a problem that businesses have, then yeah, as he pointed out, you can kind of incentivize the guarantor to cooperate with you. You reduce their exposure on the guarantee. And I will do it.

Quite often actually one of your biggest assets, at least that my lenders seem to have, is the accounts receivable (AR). It is the money that other businesses owe to your borrower. If it is Steve Smith's HVAC, I will have Steve Smith making the phone calls to collect the AR because once the people that owe Steve Smith money get the sense that it is now a bank collecting, all of a sudden nobody is getting the checkbook out. So you kind of want to have a face that they recognize, a relationship that they have, and somebody who is there that they understand because they also may feel like, "Why am I sending a check to—I got this letter from the bank saying to direct all AR to the Community Bank. Why should I be paying them because I am going to get sued by the company?" So it may give you some continuity in these third parties' minds that, "Yeah, it is okay to make this payment, and I have got Steve Smith, who I have known for years, on the phone asking me to make the payment." So of course, the payment is com-

ing to a lockbox that Steve Smith cannot get near, but the money is more likely to come in that way.

MARK LEIPOLD: I think that is really true, especially in a bankruptcy situation when there is this default and when the debtor sort of shuts down, AR goes through the floor because everyone says, "Well, come and get it." It is kind of like the Chicago way: "Well, if you want it, you can come and get it."

KEVIN DRISCOLL: A lot of people probably have not seen Caddyshack but there is a scene where Chevy Chase owes Judge Smails money—no, he owes Rodney Dangerfield money and he is like, "Hey, Moose, Rocco, help the judge find his checkbook." You need somebody to help find these people's checkbooks and get your client paid.

MARK LEIPOLD: So I think that is true. It is funny—experience says that different receivables pay differently. A classic AR is different—and it sometimes seems to be industry specific, like I know in the building trades if there is AR owed to a contractor, you never see that, at least I do not, because they say, "I have got all these offsets and this work was done."

AUDIENCE MEMBER: Are you using partial and full strict foreclosures much?

MARK LEIPOLD: We were talking about that. It is funny you said that. And we were talking about recent developments, and the answer is "no." I mean, I do not see it used. I mean, maybe at the high level where you have got a sophisticated debtor with multi components of collateral, but sort of this level, my level, which is below Kevin's, I just do not see it.

AUDIENCE MEMBER: I was told that that would take the place of a lot of foreclosure sales because the parties negotiated an agreed-upon value for the collateral.

KEVIN DRISCOLL: You do not have to do that for default. You just take it. And I have never done a partial strict because I think the classic example would be that I am owed $100 and my collateral is a painting worth $500, so of course, I am going to want to grab that collateral and be like, "That is it. I am done with it." But I rarely have collateral that I do not think –

MARK LEIPOLD: I talk about it as an option to clients.

STEVEN WEISE: We have done it a few times when there is a solvent guarantor who controls the business and we will take X dollars on the business and the balance on the guarantor. It saves you a lot of suing of guarantors.

MARK LEIPOLD: I do not necessarily know if you need to do that through a partial strict on that, depending upon what the situation is. If you have only have one lender, a secured lender in place, and a guarantor, you do not need to go through the partial strict philosophy if the guarantor is willing to sit down with you and work through it with you.

STEVEN WEISE: And if you are only worried about the possible subsequent trustee in bankruptcy who may not be so friendly.

MARK LEIPOLD: That's true. That's true.

KEVIN DRISCOLL: What is the classic set-up when you do it? You said you have a solvent guarantor—

STEVEN WEISE: And you have a borrower that owes you one hundred. The collateral is worth sixty and the guarantor can pay you forty –

KEVIN DRISCOLL: So thirty-five or something close enough to get you home?

STEVEN WEISE: Yeah. Right. You might as well rather than—you call up the guarantor and say, "Listen, you can not cooperate and we will spend a lot of attorneys' fees for which you will be personally liable under your guarantee, or we can make a deal and you can get off as cheaply as possible."

MARK LEIPOLD: I see sometimes that coming up a little bit when you have multiple guarantors where it is really a fight among the guarantors. I am the secured creditor. I just want to get paid. There may be a reason to sort of save a liability there so that the three of them who were once the best friends in the world now can fight among themselves is the way I sort of see it. So I think it is a tool out there that gives you that option.

AUDIENCE MEMBER: It is not commonplace?

MARK LEIPOLD: I do not see it as commonplace. I mean, Steve [Weise] has got a national practice. I know you have done it a few times. He might be a better indicator of how it is done across the country. But my practice, we will talk about it, but candidly I just do not see it.

STEVEN WEISE: It only works when it is a controlled situation because if you've got multiple layers of secured parties and the juniors who are entitled to object are going to object if they are coming out with nothing unless you convince them that they are going to get nothing anyway. So maybe give them a dollar and get their consent and they go away.

MARK LEIPOLD: I actually have a situation now where I have got a, long story short, but there is a buyer related to the secured party who bought assets through an APA, asset purchase agreement. And one of my partners said, "APA?" Anyway, that is what we say, and we are talking acronyms. In that situation we've got a junior lender who was sort of complaining about the asset purchase agreement primarily because there are proceeds that may have to be paid to the state. Now granted, the state is behind—for unpaid occupation, tax retailer sales tax. So in that situation the junior creditors said, "Well, it is still my collateral and my security interest continues into the hands of the buyer of that collateral." And we are like, "Okay. If you do not want to work with us, we will undo everything. We will do a private sale to the same party for less dollars and you will still end up with zero." But it is sort of like form over substance sometimes. It is that ability to sort of work through some of those concepts and at least these concepts, like when we are talking about the partial strict, at least gives the parties—it sort of puts the conversation on the table but not necessarily in the way the code envisioned it would be enacted.

AUDIENCE MEMBER: How would it change how you handle the secured creditors if the Supreme Court were to rule the right to credit-bid not absolute?

MARK LEIPOLD: A good friend of mine is actually going to be arguing for the case out here in River Road and when he filed his –

KEVIN DRISCOLL: Is that bankruptcy or state court?

MARK LEIPOLD: Bankruptcy court. And it relates more to the ability or the concept of a bankruptcy filing.

KEVIN DRISCOLL: Maybe students here don't know what a credit bid is: I am owed $100 and my collateral is this phone. I am the bank, now we are auctioning the phone and you guys are all here to bid. Someone bids a dollar and I say, "Well, I bid two dollars, because I can spend the $100 that I am owed in the bidding process." You say three. I say four. And the issue comes up when I am credit-bidding and there is nobody in the room, like we were talking about before and I have my court reporter there. I am like, I am going to bid on my asset and there is nobody else here. I am going to bid fifty cents for this. Now I have ninety-nine dollars and fifty cents left that I am going to go try stick my guarantor for. So credit bidding is an issue there. But we get to $100 and I say, "Well, I am owed all of these fees and costs—all that stuff." That is kind of how this whole thing is driven, and I think it has now come to a head in bankruptcy court where people are saying, "Well, why should the secured creditor get to

credit bid? They are not really putting cash in the bankruptcy estate." It is just a form of debt reduction.

MARK LEIPOLD: My personal view is the right to credit-bid is intrinsic to the right to be a secured creditor. And when my friend Dave Neff, who clerked before me for the same bankruptcy judge, told me he had filed a petition for asserting the issue, I started laughing. I am said, "You are done." He is going to be arguing, I think it is in May.

But I do not think it goes away. We talked about, again, going back to first day in secured transactions, and I taught secured transactions and I still use the analogy. You have got the bundle of sticks. You get one of those sticks as a secured creditor, and I think the right to credit-bid is part of that stick. And I do not think that goes away.

I would be very surprised, especially given the makeup of this Court as we heard at lunch, that the Supreme Court would adopt the *Philadelphia Newspapers* side of the argument,[20] which is that the secured creditors' rights—it is a somewhat complicated story—they do whole panels of ABA programs—but I do not think that would change it. But you never know. I do not think it changes the way we deal with—as representing secured creditors—how we deal with them. I think that it is still there. I think it will be interesting to see. I think it will be a great opportunity to really talk about it if the Supreme Court takes the opportunity to really talk about some of the intrinsic rights a secured creditor has and rights to the collateral. And I think it is one of those cases that if it is a good opinion and it is not 5-4 with three concurring opinions, you get a nice opinion and it might be one of these things that you see as one of the seminal cases from here on out.

Unfortunately my friend David is going to run into the buzzsaw. But if anybody has a ticket, I am trying to get a ticket to the Supreme Court to go see him argue it. It is hard to come by those tickets.

KEVIN DRISCOLL: Is he on the no credit bidding side or credit bidding should be allowed side?

MARK LEIPOLD: He is appealing the decision by Judge Black.[21] He is taking the *Philadelphia Newspapers* side. As an aside, I am sure the professors in the conference room know this, but I did not realize that when you have these Supreme Court oral arguments, you can reach out to Georgetown or one of the schools, and they will do a panel for you. They only take one side so you have to reach out to

20. *In re* Phila. Newspapers, LLC, 599 F.3d 298 (3d Cir. 2010).

21. River Rd. Partners, LLC, v. Amalgamated Bank (*In re* River Rd. Hotel Partners, LLC), 651 F.3d 642 (7th Cir. 2011).

them early. And they will then, essentially gratis, get leading scholars and professors to essentially take the role of the Supreme Court to prepare you for that oral argument, which I thought was my brush with greatness.

JASON KILBORN: It is easy to find a panel because every academic in the country disagrees with *Philadelphia Newspapers*.

MARK LEIPOLD: I do not want to make this a bankruptcy session. I always say what got me into where I am critiquing Article 9 has essentially has been the tangent my professor has taken, whether it be replevin, secured creditors, bankruptcies, etc. So that was the lead-in.

PAUL LEWIS: Others questions for Kevin or Mark? Closing thoughts or comments?

KEVIN DRISCOLL: It is funny, this book I am holding will tell you all these markups here when I was a young lawyer trying to learn all this stuff. And it is tough. UCC is tough. It is like how many different subsections am I going to have go back? Why can't they just define it here? Now I have got to go back to this one. I have got to go to this one. I have got to read the comments and all that kind of stuff. Once you get through it, it is fun. But then as you kind of grow in your career, you start to realize that a lot of your decisions just kind of come out of—they are driven by economics and the reality of the situation. And maybe there is an interesting split in the cases about how section 9-614, how the courts define that one word in there,[22] but for the most part, in most of my cases, that stuff does not come into play. It is getting the collateral sold, getting the loan worked out, whatever is the easiest, least theatrical, least expensive way. So a lot of times those exciting academic debates, although you are chomping at the bit to make the argument, you do not get to make them.

MARK LEIPOLD: One thing I like about this, especially Article 9 because I taught Article 9—mostly so I could really learn the revised Article 9—I taught it for a few years. So I really feel sorry for those first-generation students that I had, but they are close enough. They are just taking it for the bar anyway, so I got them enough to get to the bar. But what is interesting is how often judges get it wrong. A lot of judges get it right and a lot of judges get it wrong, and if you follow the UCC Law List or there is a law list which—I think they still call it a bulletin board. I think that is what they called it in 1982 and they want their term back.

22. U.C.C. § 9-614 (2010).

Even as I pointed out in that *Adobe*[23] case, I think the judge got to the right result, but the judge introduced concepts that were back under old Article 9, and they are sort of resuscitating them. You are like, "Wait a minute. Stop." You want to sort of yell at the judge and say, "Please stop." We have heard a lot of criticism about the statute, etc. I think revised Article 9 does a good job of what it is. Old Article 9 was brilliantly and beautifully written. The reality is, that is not the world we live in. There are a lot more of lose ends to it. I keep track of those things.

Enjoy the debate. See what you can find out. There are a number of newsletters where you can actually see how the court should have decided the opinion, if they applied the code correctly, and enjoy.

PAUL LEWIS: Thank you both.

23. Adobe Oilfield Services, Ltd. v. PNC Bank N.A., M & I Business Credit, LLC (In re Adobe Trucking, Inc.), Bankr. No. 10–70353–RBK, 2011 WL 6258233 (W.D. Tex. Dec. 15, 2011).