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presents

UCC Foreclosures: Protecting Creditors' and Borrowers' Interests

When is Article 9 Foreclosure the Best Option?

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Tuesday, August 10, 2010

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1 pm Eastern

12 pm Central

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**UCC Foreclosures:
Protecting Creditors'
and Borrowers' Interests:**

**William Schoenholz, Buchalter Nemer
Peter S. Burke, Paul Hastings**

Overview: Article 9 Foreclosure

■ Default

- Article 9 Remedies can only proceed after a default by the debtor.
- A “default” is typically determined by the contractual agreement in place, so long as that definition is not manifestly unreasonable.
- The UCC does not define a default.

■ Remedies

- Collection *UCC §9607*
- Dispositions *UCC §9610*
- Strict Foreclosure *UCC §9620*

Article 9 Foreclosure: General Considerations

- **Interested Parties**
- **Notice**
- **Rights and Duties**
 - Rights that can not be waived
 - Post-default Waivers
- **Commercial Reasonableness and Failure to Comply**
 - When Deficiency or Surplus an Issue

Article 9 Foreclosure: Interested Parties

■ Interested Parties

- **Debtor:** Those who have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest in the collateral.
- **Obligor:** Those who, with respect to an obligation secured by a security interest, (1) owe payment or performance of the obligation (2) have provided property other than the collateral to secure such payment or performance or (3) are otherwise accountable for payment or performance of the obligation.

Article 9 Foreclosure: Interested Parties

- **Interested Parties**

- **Secondary Obligor:** Those who have a stake in the proper enforcement of the security interest because either (1) they have a secondary obligation to pay the secured debt or (2) they have a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral.
 - Secondary Obligor under the law of suretyship. A “Guarantor” is a secondary obligor.
- **Secured Parties:** Those who have a security interest in the collateral.

Article 9 Foreclosure: Notice

- **Who Receives Notice**
 - Debtor
 - Secondary Obligors
 - Other Secured Parties and Lienholders
 - **A Secured Party does not owe a duty to provide notice to:**
 - A debtor or obligor unless the secured party knows that the person is a debtor or obligor, knows the identity of such person and how to communicate with such person.
 - Another secured party or lien holder that has filed a financing statement against a person unless the secured party knows the person is a debtor and the identity of such person.
- UCC §9605*

Article 9 Foreclosure: Rights and Duties

- **Rights and Duties Generally**
 - Rights that can not be waived *UCC §9602*
 - Collection and enforcement of collateral *UCC §9602(3)-(4)*
 - Disposition of collateral *UCC §9602(7)*
 - Secured Party's liability for failure to comply with Article 9 *UCC §9602(13)*
 - Agreement on Standards Concerning Rights and Duties. *UCC §9603*
 - The parties may determine by agreement the standards measuring the fulfillment of rights and duties, even if they cannot be waived. *UCC §9603(a)*
 - The standards must not be manifestly unreasonable. *UCC §9603(a)*
 - Post-default Waivers *UCC §9624*
 - Notice of Disposition *UCC §9620*
 - Redemption of Collateral *UCC §9623*

Article 9 Foreclosure: Commercial Reasonableness

- **Commercial Reasonableness**
 - Commercially reasonable collection, disposition and application of proceeds. *UCC §§ 9607(c), 9608(a)(3), 9610, 9615(c) and 9627*
 - Every aspect of a disposition must be commercially reasonable. *UCC §9610(a)-(b)*
 - Method/Manner; Time; Place; “Other Terms”
 - Any collection and enforcement by a secured party must be commercially reasonable.
 - Potential application to strict foreclosure
 - Failure to Comply may result in damages and loss or reduction of deficiency
 - *UCC §§ 9625 and 9626*

Article 9 Foreclosure: Commercial Reasonableness

- **Safe Harbor (§9627(b)(c)):**
 - Usual manner in “recognized market”
 - Current price in “recognized market”
 - Conform with reasonable commercial practices among dealers in this type of collateral
 - Judicial approval

- **“Recognized Market” is very narrow**

Article 9 Foreclosure: Commercial Reasonableness

- **Commercially Reasonable Sale of Limited Liability Membership Interests: *Vornado PS, LLC v. Primestone Inv. Partners, L.P.*, 821 A.2d 296 (Del. Ch. 2002)**
 - Holding: nondisclosure of potentially unreliable information is not commercially unreasonable.

Article 9 Foreclosure: Failure to Comply

- **Basic Obligations of a Secured Party**
 - Act in good faith *UCC §§ 1203 and 9102*
 - Proceed in commercially reasonable manner
- **Consequences: A person aggrieved by a secured party's failure to comply may seek injunctive relief or recover damages for losses caused by non-compliance**
 - A Secured Party may suffer from a loss or reduction of deficiency

Article 9 Foreclosure: Failure to Comply

- **Persons entitled to recover damages for Secured Party's non-compliance:**
 - Debtor
 - Damages include loss from the debtor's inability to obtain alternative financing. §9625(b)
 - No consequential, special nor penal damages. *UCC §1305*
 - NOTE: this rule is not consistently applied
 - Obligor
 - Holder of security interest in or lien against the collateral

Article 9 Foreclosure: Failure to Comply

- **Minimum statutory damages of \$500 for Secured Party's failure to comply with specified provisions in which recovery may be had by the debtor. This includes:**
 - Failure to comply with the duties of a Secured Party who has control and receives an authenticated demand by the debtor. *UCC §9208*
 - Failure to comply with the duties of a Secured Party (assignee) when an account debtor has been notified of assignment and there is no outstanding secured obligation and the Secured Party (assignee) is not committed to incur obligations. *UCC §9209*
 - Failure to comply with the duties of a Secured Party who receives a request for accounting or list of collateral by the debtor. *UCC §9210*

Article 9 Foreclosure: Failure to Comply

- **Loss or Reduction of Deficiency**
 - If the secured party's compliance is placed in issue, secured party must prove compliance.
 - If the secured party cannot prove compliance, the deficiency is presumed to be eliminated.
§9626, cmt. 3
 - The secured party may rebut this presumption
 - Dispositions vs. Acceptance in Satisfaction

Article 9 Foreclosure: Failure to Comply

- **Potential for Multiple Recovery for a single disposition**
- **Potential that every party may be affected by non-compliance**
 - Secured Party – lose deficiency
 - Second secured party – sue for losses
 - Debtor – sue for loss of surplus

Article 9 Foreclosure: Specific Remedies - Redemption

- **Right to Redeem Collateral** *UCC §9623*
 - Who may redeem?
 - Debtor; secondary obligor; any other secured party or lienholder
 - Requirements: a person must tender (1) fulfillment of all obligations secured by the collateral and (2) reasonable expenses and attorney's fees
 - Redemption may occur before collection of the collateral, disposition of the collateral, or acceptance of the collateral in full or partial satisfaction of the obligation

Article 9 Foreclosure: Specific Remedies

- **Dispositions *UCC §9610***
 - Notification *UCC §§ 9611, 9612*
 - Content *UCC §9613*
 - Application of Proceeds *UCC §9615*
 - Transfers *UCC §§9617, 9619*
- **Collection. *UCC §9607***
 - Application of Proceeds *UCC §9608*
- **Strict Foreclosure *UCC §9620***
 - Proposal to Accept Collateral *UCC §9621*

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Public Dispositions** *UCC §9610*
 - Requirements for Public Sale:
 - Meaningful opportunity for the public to competitively bid.
 - Meaningful opportunity = **access** and **publicity**
 - Types of Public Dispositions:
 - Simple public auction
 - Collection of bids: investment bank or broker
 - May involve a stalking horse bidder

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Public Dispositions *UCC §9610***

- Access: A public disposition must take place on accessible property, during normal business hours and provide a meaningful opportunity for the public to bid.
- Collateral available for inspection: A public disposition should usually be held where the collateral is located, so that the public has an opportunity to inspect the collateral

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Public Dispositions** *UCC §9610*
 - Publicity
 - Notice: time, place, terms of sale, collateral
 - Debtor is entitled to time and place of public disposition
 - Intangible Collateral:
 - Publicizing intangible collateral, such as membership interests and partnership interests, poses different issues because such collateral lacks a specific location
 - If the interest is in an entity that owns real estate in a single jurisdiction, local newspaper advertising may suffice
 - For collateral of significant value, wider advertising (including regional or national advertising) may be necessary, including advertising where the actual sale is to take place

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Private Dispositions:**
 - A private sale is any sale that does not provide a meaningful opportunity for the public to competitively bid
 - Fewer Publicity Requirements
- **Secured Party's ability to bid**
- **Private Sales are encouraged by Article 9. *UCC §9610, comment 2***

Article 9 Foreclosure: Specific Remedies - Dispositions

- Key differences between public/private
 - Notification
 - Notice to Debtor:
 - Public – day, date, time, place.
 - Private – selling sometime after day/date.
 - Commercially Reasonable
 - Public sales require more publicity

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Notification *UCC §9611***
 - Authenticated
 - Parties Entitled to Receive Notice: Debtor, Secondary Obligors and Other Secured Parties and Lienholders
- **Adequate Lien Search**
 - Secured Parties or Lienholders that Notify Foreclosing Secured Party
 - Any Other Secured Party or Lienholder Perfected by Filing of a Financing Statement Properly Filed
 - *Safe Harbor*: Request information 20-30 days prior to the notification date. §9611(e)
 - *Federal Tax Lien*: must consider Internal Revenue Code regulations.
- **Appropriate Office**
 - Certify results if possible

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Timeliness of Notification** *UCC §9612*
 - Reasonable time before the date of disposition
 - *Safe Harbor*. 10 days or more before disposition.
§9612(a)

- **Notification Date**
 - The earlier of date secured party sends notification to debtor and any secondary obligor or the date the debtor or any secondary obligor waives right to notification

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Content of Notification *UCC §9613***
 - Notification Must:
 - Describe debtor and secured party
 - Describe the collateral
 - Provide the method of disposition
 - Describe the time and place of disposition
 - Private Disposition: Debtor is entitled to notification of “time after which” a private disposition is to be made. *UCC §9613(1)(E)*
 - State debtor entitled to an accounting of unpaid debt
 - *Safe Harbor. UCC Form §9613*
 - Exceptions

Article 9 Foreclosure: Specific Remedies - Collection

- **Collection and Enforcement by Secured Party *UCC §9607***
 - In General: This gives secured parties the right to collect collateral and to exercise the rights of the debtor against others.
 - Example: the right to collect accounts receivable and the right to require an account debtor to perform under its contract with the debtor.
 - A secured party is now entitled to notify an account debtor or “other person obligated on collateral” to make payment or “otherwise render performance.”

Article 9 Foreclosure: Specific Remedies - Collection

- **Application of Proceeds** *UCC §§ 9608; 9615*
 - Cash proceeds are applied
 - FIRST, to expenses;
 - SECOND, to attorneys' fees incurred (but only if provided by the agreement and not prohibited by law);
 - THIRD, to the obligations secured; and
 - FOURTH, to obligations secured by a junior security interest if the secured party has received an authenticated demand from the junior before distribution of the proceeds.
 - In general, a secured party must pay a debtor for any surplus and the obligor will be liable for any deficiency.
 - Exception: debtor is not entitled to any surplus and obligor is not entitled to any deficiency if the underlying transaction is a sale of accounts, chattel paper, payment intangibles or promissory notes.
 - A secured party need not apply non-cash proceeds for collection and enforcement unless failure to do so is commercially unreasonable.
UCC §§ 9608(a)(3) and 9615(c)

Article 9: Specific Remedies – Strict Foreclosure

- **Strict Foreclosure: Acceptance in Full or Partial Satisfaction** *UCC §9620*
- **Notification of Proposal: Recipients**
 - Debtor (debtor generally must consent)
 - Any party that sends secured party notice of security interest prior to debtor's consent
 - If a partial satisfaction, any secondary obligor
 - Any party that held a security interest perfected by the filing of a financing statement 10 days before debtor consented
 - (no lien search *safe harbor*)

Article 9: Specific Remedies – Strict Foreclosure

- **Notification of Proposal: Content *UCC §9621***

- Amount (or calculation) of the secured obligations to be satisfied
 - Conditions (if any) under which the proposal may be revoked

 - Any other applicable conditions

Article 9: Specific Remedies – Strict Foreclosure

- **Strict Foreclosure: Full Satisfaction**
 - Notification of proposal
 - No objection to notification within 20 days of sending notification
 - Generally, Debtor must consent to acceptance
 - Deemed consent after 20 days and unconditional proposal
 - Possession is not required. *UCC §9620, cmt. 7*

Article 9: Specific Remedies – Strict Foreclosure

- **Strict Foreclosure: Partial Satisfaction**
 - Notification of proposal parties
 - Secured party must receive no objection within 20 days of sending notification
 - Debtor must consent to acceptance
 - Possession is not required. *UCC §9620, cmt. 7*

Article 9: Specific Remedies – Strict Foreclosure

- **Strict Foreclosure: Effect**
 - Discharge the secured obligation under which the acceptance occurs
 - Transfer to the secured party the debtor's rights in the subject collateral
 - Discharge subordinate security interests and subordinate liens *UCC §9622*

Article 9 Foreclosure: Specific Remedies - Dispositions

- **Rights of Transferee. UCC §9617**
 - General Rule: A good faith transferee (buyer) at a foreclosure sale acquires the collateral: (i) free of the debtor's rights; (ii) free of the foreclosing secured party's security interest; and (iii) free of any subordinate security interests or subordinate liens *even if the secured party had failed to comply with article 9 or the requirements of any judicial proceeding.*

- **Transfers of Record or Legal Title. UCC §9619**
 - A secured party may proceed under this section if (1) the collateral is subject to a certificate of title, (2) the debtor is the owner of record and (3) the secured party needs to become the owner of record to transfer the collateral at a foreclosure
 - Note: A transfer of record or legal title to the collateral to the secured party in accordance with this section is NOT a disposition of the collateral under Article 9

Article 9 Foreclosure: Specific Remedies - Possession

- **Secured Parties' Right to Take Possession. *UCC §9609***
 - After default, a secured party may take possession of the collateral and may dispose of the collateral on the debtor's premises.
 - A secured party may proceed without judicial process so long as there is no breach of the peace.

Article 9 Foreclosure: Specific Remedies – Secondary Obligors

- **Rights and Duties of Secondary Obligors. *UCC §9618***
 - A secondary obligor acquires the rights and is obligated to perform the duties of the secured party if:
 - The secured party assigns the secured obligation,
 - The secured party transfers the collateral and the secondary obligor agrees to accept the rights and assume the duties of the secured party, or
 - The secondary obligor is subrogated to the rights of a secured party with respect to the collateral.
 - An assignment, transfer or subrogation is not a disposition of collateral.
 - An assignment, transfer or subrogation relieves the secured party of further duties under Article 9.

Article 9 Foreclosure: Practical Considerations

- Which Remedies to Use?
 - Conforming Asset Based Loan: Collect Accounts Receivable and Sell Inventory
 - Friendly Foreclosure: Use Strict Foreclosure to Obtain Title to Assets Quickly
 - Third Party Foreclosure Sale: Public/ Private Sale

Article 9 Foreclosure: Practical Considerations

- **Special Collateral Issues: Foreclosure on Stock**
 - Both federal and state securities laws usually prohibit the public sale of unregistered securities.
 - Generally, membership interests in a LLC and LP are viewed as “securities”
 - Concern: public sale of stock
 - Foreclosing Secured Party must:
 - publicize the sale sufficiently to satisfy the requirements of a public sale.
 - not take actions that may constitute a public offering of unregistered securities
 - Code recommends limiting the scope of advertising and publicity to those parties who satisfy an “accredited investor” standard. *UCC §9610, comment 8*

Article 9 Foreclosure: Practical Considerations

- **Special Collateral Issues: Foreclosure on Stock**
 - The SEC has issued certain no-action letters generally setting forth the following requirements:
 - Selling the pledged securities as a block to a single purchaser (no splitting up)
 - The purchaser represents that the securities will be taken with investment intent (and not with a view toward sale or distribution)
 - The securities will be subject to transfer restrictions, by bearing a legend that the securities may not be sold or transferred without registration
 - Seller will provide on request to any prospective purchaser information that the seller has concerning the issuer of the securities
 - The public auction will be conducted as prescribed under the UCC

Article 9 Foreclosure: Practical Considerations

- **Special Collateral Issues: Membership Interests in Delaware LLC**
 - Del. Code Ann. Title 6, Section 18-702 – Assignment of an interest does not allow an assignee to become a member
 - An assignee of LLC units has no right to participate in the management of the company or exercise any rights or powers of the members, unless expressly provided by the operating agreement or all members approve
 - Even if the operating agreement allows the assignee to exercise rights and powers of a member, the assignee cannot manage the LLC until either (1) all non-assigning members approve of the transfer of management power or (2) the procedure for complying with the transfer of management responsibilities, as stated in the operating agreement, is followed



MECHANISMS FOR DISPOSING OF DISTRESSED ASSETS: A COMPARISON OF BANKRUPTCY SALES, ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, RECEIVERSHIPS AND UCC FORECLOSURES

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Issues For Secured Party, Debtor and Buyer

- Speed to Close – to preserve enterprise value
- Sale "Free and Clear"
- No Representations and Warranties
- Successor Liability
- Cost
- Lease and Contract Assumption
- Employee Issues
- Fiduciary Duties of Debtor's Board
- Which Vehicle/Mechanism to Use

Different Constituencies/Different Interests

- Debtor/Management/Board
 - Maximize price
 - Minimize liability for breach of fiduciary duty claims arising out of decisions made while the company is insolvent or in the zone of insolvency
 - Avoid liability under guaranties
 - Avoid tax liability
- Buyer
 - Minimize price paid and transaction costs
 - Minimize successor liability
 - Avoid competitive bidding
 - Access to management and documents for due diligence
 - Close sale quickly
 - Acquire assets free and clear

Different Constituencies/Different Interests

- Secured Party
 - Maximize price
 - Get out quickly – get bad loan off the books
 - Avoid liability for Debtor's employee obligations and other obligations of Debtor
 - Minimize the risk of being accused of not acting in a commercially reasonable manner

363 Sale

- How it works
 - Debtor files bankruptcy, typically Chapter 11
 - Debtor brings motion to approve bid procedures and sell under Bankruptcy Code Section 363
 - Court holds two hearings – bid procedure hearing and sale hearing
 - Stalking horse bidder and an opportunity to overbid through auction process
 - Court issues sale order

363 Sale

- Pros
 - Because Court approval is required and results in a sale order, objections and challenges raised before closing – by the time buyer closes, buyer and secured party have comfort level
 - Sale free and clear of liens, claims, encumbrances
 - Exception for junior liens not paid in full from sales proceeds – Clear Channel v. Knupfer (In Re PW, LLC), 391 B.R. 25 (9th Cir BAP 2008)
 - Distinguishing Clear Channel – e.g., In Re Jolan, Inc., 403 B.R. 866 (Bankr. W.D. Wash 2009) (state legal and equitable proceedings exist where junior lienholder can be compelled to accept money satisfaction)
 - Risk of successor liability virtually eliminated
 - With some exceptions (e.g., personal service and certain IP contracts), contracts and leases can be assumed and assigned over objections of third parties
 - Debtor's management protected from breach of fiduciary duty claims by Court order
 - Cap on lease rejection damages
 - Risk of secured party not acting in commercially reasonable manner does not exist

363 Sale

- Cons
 - Expensive – buyer, secured party, or both often have to contribute
 - Creditors Committee may have to be "compensated"
 - Slowest – 45-60 or more days
 - Risk of being outbid
 - Every term of sale is public record
 - Loss of control to the bankruptcy court

Assignment for the Benefit of Creditors

- How it works
 - Debtor assigns all of its assets to a third party assignee
 - Third party assignee liquidates assets for Debtor's creditors
 - Proceeds of liquidation are distributed according to priority
 - Assignee may be able to pursue preferences
 - ABCs commonly used to effectuate distressed asset sales

Assignment for the Benefit of Creditors

- Pros
 - Faster than 363 Sale – as soon as 1-10 days after assignment
 - Cheaper than 363 Sale
 - In California, Assignee can occupy leased premises for up to 90 days following the assignment by paying rent at the lease rate, even if the lease allows the lessor to evict the lessee upon making an assignment for the benefit of creditors (Cal. Civ. Code § 1954.1)
 - Best when secured party is vastly undersecured and cooperative
 - Assignee might not require marketing and auction (if valuation and pre-assignment marketing)

Assignment for the Benefit of Creditors

- Cons
 - Less protection from successor liability
 - Assets cannot be sold free and clear of liens without consent of lienholders, including secured party
 - Buyer closes before knowing whether there will be challenges to structure
 - Contracts and leases cannot be assumed without consent of third parties
 - Board can be accused of making ABC = breach of fiduciary duty (mitigate risk by D&O policy)
 - Involuntary Bankruptcy
 - Assets cannot be transferred free and clear of liens without consent of secured party
 - May not be available if Debtor is in multiple states

Receivership

- How it works
 - Typically, secured party files lawsuit seeking appointment of receiver - Court appoints neutral third party as receiver
 - Receiver's duties are subject to statute and court order – can include operating the business, selling property
 - Receivers can be appointed in federal or state court
 - Receiver must account to the Court

Receivership

- Pros
 - Receiver is appointed at instance of secured party; helpful if Debtor consents
 - Receivership allows business to operate to preserve enterprise value
 - Successor liability risk is reduced
 - Neutral court-appointed officer makes decisions, which protects secured party and Debtor
 - In California, receiver can sell personal property (California Code of Civil Procedure §568.5)
 - In California, secured party can credit bid (California Code of Civil Procedure §701.590(b))
 - In California, liens junior to secured party and all state tax liens (irrespective of priority) may be extinguished upon sale (California Code of Civil Procedure §701.630) [does 701.630 apply to receivership sales under 568.5?]
 - Unlike ABCs, national remedy under federal receiverships

Receivership

- Cons
 - Same cons as 363 sale – expensive, slow, risk of being outbid, terms of sale public record, loss of control to court and receiver
 - Operational issues – receiver may not be able to operate Debtor efficiently
 - Cannot force non-Debtor parties to assume contracts
 - Secured party (or another creditor) must be willing to seek appointment of receiver
 - Involuntary bankruptcy

UCC Sale

- How it works – discussed by Peter & Bill
- Pros
 - Faster than 363 Sale
 - Cheaper than 363 Sale, ABC and Receivership
 - Junior creditors are foreclosed out (except those not subject to foreclosure)
 - Secured party can credit bid at public sale
 - If done as private sale, no risk of being outbid
 - In private sale, terms are not disclosed

UCC Sale

- Cons
 - Risk to buyer of being outbid in public sale
 - Least protection from successor liability
 - Board can be accused of not filing bankruptcy to stop foreclosure = breach of fiduciary duty
 - Can do it only if the secured party is willing to cooperate
 - Buyer's title only as good as Debtor's title and foreclosing secured party's lien
 - Need foreclosing secured party to be senior because liens senior to foreclosing secured party survive
 - Contracts and leases cannot be assumed without consent of third parties

Control Under Each Vehicle/Mechanism

- In any situation, ideally the secured party, Debtor and buyer will determine the mechanism and structure cooperatively, prior to anyone making a decision.

Control Under Each Vehicle/Mechanism

- 363
 - Debtor determines whether to file bankruptcy
 - Parties have less control because Court must approve everything
 - Creditors Committee and US Trustee can weigh in
 - Management maintains operational control in Chapter 11 so long as no Chapter 11 trustee is appointed
- ABC
 - Debtor determines whether to make ABC
 - Secured party's consent is required because assignee cannot sell assets free and clear of secured party's lien without secured party's consent
 - Once ABC is made, control shifts to assignee
 - No Court oversight, so parties can act without risk of Court disapproval before the fact

Control Under Each Vehicle/Mechanism

- Receivership
 - Secured party (or even unsecured creditors) can seek the appointment of a receiver
 - Having the consent and cooperation of the Debtor is helpful, but not required
 - Parties have less control because receiver maintains operational control and the court must approve everything
- UCC
 - Secured party determines whether to foreclose
 - Cooperation of Debtor practically (though not legally) required if Debtor is in possession of its tangible assets; otherwise, secured party and/or buyer must seek judicial relief since parties cannot exercise self help if doing so will breach the peace
 - No Court oversight, so parties can act without risk of Court disapproval before the fact