UCC Article 9 Sales: Virginia

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A Q&A guide to Uniform Commercial Code (UCC) Article 9 Sales in Virginia. Article 9 of the Model UCC is intended to create a uniform system across the country for creating, perfecting, and enforcing security interests in personal property. Although Article 9 has been adopted by many states, some states have made modifications to the law or have not adopted the most recent version of the law. This Q&A addresses the process by which secured creditors may exercise their rights to enforce their security interests in personal property under Virginia's equivalent Article 9 statutes, including repossession remedies, notice requirements, disposition of proceeds, and collateral repurchase. Answers to questions can be compared across a number of jurisdictions (see UCC Article 9 Sales: State Q&A Tool).

General

1. List the laws (statutes and regulations) by name and code number that govern secured transaction sales in your jurisdiction.

Title 8.9A of the Virginia Code, titled Commercial Code - Secured Transactions, governs secured transaction sales in Virginia (Va. Code Ann. §§ 8.9A-101 to 8.9A-809).

2. Has your jurisdiction adopted the model Uniform Commercial Code (UCC)? If no, please:

- Identify which among the statutes listed in Question 1 is your jurisdiction's adopted version of Article 9.
- Describe any significant differences between your jurisdiction's adopted version and the model UCC.

Virginia has adopted the model Uniform Commercial Code for secured transactions.

Initial Steps

3. If a debtor defaults on its obligations to a secured party, please explain what initial steps the secured party must take to properly effectuate a repossession or sale of collateral in your jurisdiction. Please list all applicable statutes.

In Virginia, the secured party must act to enforce its security interest after default, as defined by Article 9 of the Uniform Commercial Code (UCC). Following a debtor's default, a secured creditor must first determine the requirements contained in the loan documents regarding:

- Terms of notice.
- Opportunity to cure.
- Limitations on remedies.

Following the proper procedure for enforcing the default is important because failure to follow the procedure:

- Enables a court to prevent a secured creditor from enforcing the obligation.

- May expose the secured creditor to liability under the Virginia Commercial Code (Va. Code Ann. § 8.9A-625).

The Virginia Commercial Code does not define a default; however, a default typically arises under a security agreement when the debtor fails to pay the secured debt when due. In practice, a secured party should consider:

- Defining events of default in the security agreement.
- Providing for events of default, other than nonpayment, in the security agreement, including failure to:
  - adequately insure collateral;
  - maintain the collateral at a certain location or in a certain condition; and
  - maintain certain financial covenants.

While a loan document typically waives the requirement that the secured creditor provide notice of default, a secured creditor may send a notice of default together with a demand that the debtor:

- Surrender the collateral.
- Assemble collateral for repossession.

(Va. Code Ann. § 8.9A-609(c).)

After a default, the debtor may:

- Take possession of the collateral.
- Without removal, render equipment unusable and dispose of it on a debtor's premises.

(Va. Code Ann. § 8.9A-609(a).)

While a secured creditor typically repossesses collateral before disposition, it is not required before selling the collateral. However, electing not to secure possession of or otherwise assert control over collateral often has a significant negative impact on the sale of the collateral.

A secured creditor generally has several options for repossessing the collateral, including:

- Surrender by the debtor.
- Peaceful self-help.
- Claim and delivery (replevin) and receivership.

Certain types of collateral require the creditor to employ specific methods of repossession (see Repossession Remedies).

The secured creditor must give reasonable notice to the debtor, any secondary obligor, and other parties with interest in the collateral of its intent to sell the collateral (Va. Code Ann. § 8.9A-611(b), (c)). Determining if the notice is reasonable varies depending on the:

- Type of collateral.
- Circumstances surrounding the sale of the collateral.

Notice is considered reasonable in a non-consumer transaction if the notice is sent ten days or more in advance of the sale to the debtor and other interested parties (Va. Code Ann. § 8.9A-612).

Repossession Remedies

4. What remedies may a secured creditor take to repossess collateral in your jurisdiction. Please address all applicable options, including:

- Self-help repossession.
- Right to make the debtor assemble collateral.
- Notifying account debtors.
- Any other available remedies.

Article 9 of the Uniform Commercial Code (UCC) provides various methods for a secured creditor to repossess collateral after default. The method for obtaining possession depends on the nature of the collateral and, to some extent, how the security interest was perfected.

In Virginia, the most common methods of repossession are:

- Self-help repossession (see Self-Help Repossession).
- The right to make the debtor assemble collateral (see Right to Make the Debtor Assemble Collateral).
- Notifying account debtors (see Notifying Account Debtors).
- Judicial remedies (see Judicial Remedies).

Self-Help Repossession

In Virginia, the two categories of collateral that may be subject to repossession using self-help are:

- Inventory and equipment (see Inventory and Equipment).
- Accounts (see Notifying Account Debtors).

Inventory and Equipment

Under the Virginia Commercial Code, a secured creditor may exercise self-help without judicial process to:

- Repossess a piece of inventory or equipment.
- Render a piece of equipment unusable on the debtor's premises.

(Va. Code Ann. § 8.9A-609.)

Self-help repossession is the fastest and most cost-effective means of repossessing inventory and equipment because it does not require the time and expense of obtaining a court order. However, self-help repossession typically poses risks because the creditor must ensure that it does not breach the peace when acting (Va. Code Ann. § 8.9A-609(b)(2)). If the creditor or its agent causes a breach of the peace or wrongly repossesses the collateral, the creditor may be liable for conversion damages and possibly punitive damages (Va. Code Ann. § 8.9A-625(b)).

A breach of the peace is not defined in the UCC or another Virginia statute. The prohibition also cannot be waived by agreement between the parties and the parties may not determine by agreement what constitutes a breach of the peace (Va. Code Ann. §§ 8.9A-602(6) and 8.9A-603(b)). Therefore, the prohibition of breach of the peace has been the subject of litigation and case law is the only guidance for secured creditors. For example, while holding that a secured creditor had a right to repossess collateral under a conditional sales contract without recourse to the courts, the Virginia Supreme Court stated that "[t]he right to possession of chattels may be exercised without recourse to the courts, provided this can be done peaceably. It is only when a right of one is denied or resisted by another, that such party must resort to appropriate legal proceedings to enforce that right" (*Universal Credit Co. v. Taylor*, 180 S.E. 277, 280 (Va. 1935)).

Repossessions occurring over a debtor's oral protests have been found to be a breach of the peace (see *Alexander v. Commonwealth*, 508 S.E.2d 912, 914 (Va.), *reh'g en banc*, 515 S.E.2d 808 (Va. Ct. App. 1999) (finding that an attempted repossession of a vehicle was not lawful because the debtor objected to the repossession), *rev'd*, 531 S.E.2d 567 (Va. 2000) (reversed on other grounds)). Secured creditors must consider discontinuing a self-help repossession attempt when faced with even a small amount of resistance from a debtor or third party. However, the US District Court for the Western District of Virginia found that after a creditor gains sufficient dominion over the collateral, objection by the debtor is of no avail (see *Wallace v. Chrysler Credit Corp*., 743 F. Supp. 1228, 1233 (W.D. Va. 1990)).

Virginia courts otherwise have not expressly defined what constitutes breach of the peace and generally follow case law from other jurisdictions (see *Wallace* 743 F. Supp. at 1232). Courts in both Virginia and other states, have found that the following self-help repossession actions typically breach the peace:

- A uniformed police officer accompanying the secured creditor without a court order.
- Failing to comply with a request from the debtor or representative of the debtor to stop when:
  - involving a nearby police officer;
  - cutting a chain securing a gate;
  - breaking a window; and
  - breaking into a closed garage.

Acceptable means of repossession that generally do not breach the peace include:

- Tricking the debtor.
- Entering onto property that is not locked.
- Taking a vehicle from an open garage.

The Virginia Commercial Code and case law do not address the issue of damages for creditors found liable for breach of the peace. However, courts in other jurisdictions have found a secured creditor liable to the debtor for compensatory and punitive damages for committing a breach of the peace during self-help repossession (see *Deavers v. Standridge*, 242 S.E.2d 331, 333–34 (Ga. Ct. App. 1978) (affirming an award of $1,000 in punitive damages for breach of peace); but see *Stone Mach. Co. v. Kessler*, 463 P.2d 651, 655–56 (Wash. Ct. App. 1970) (reversing an award for punitive damages because the breach of peace was not a "particularly aggravated disregard for the rights of [the debtor]")).

In practice, a secured creditor may also exercise self-help by disabling a piece of equipment (or rendering it unusable) and then disposing of the equipment in a sale while the equipment remains on the debtor's premises (Va. Code Ann. § 8.9A-609(a)(2)). Disabling the equipment may help preserve the value of the equipment. This self-help remedy is only available to secured creditors that have a security interest in the actual piece of equipment. For example, while a secured creditor may disable and dispose of a forklift used in warehouse operations on the debtor's property, it cannot do the same with a forklift that is held for resale in a business engaged in equipment sales because that forklift is inventory.

Right to Make the Debtor Assemble Collateral

A secured creditor may require a debtor to assemble the collateral and make it available at a mutually convenient place designated by the secured creditor when:

- The security agreement signed by the debtor grants the secured creditor that right.
- The debtor defaults.

(Va. Code Ann. § 8.9A-609(c).)

If a debtor is willing to assemble equipment, it is the preferred method of repossession under Article 9. However, debtors often do not comply with this requirement and a secured creditor typically resorts to self-help or judicial intervention.

Counsel and creditors should be aware that demanding a debtor assemble collateral may:

- Risk giving the debtor the opportunity and time to secrete or transfer collateral, which makes other repossession methods more difficult.
- Result in an expedited avenue to obtain judicial relief.

Notifying Account Debtors

Under the Virginia Commercial Code, the secured creditor has the right to collect payment directly from accounts if a defaulting debtor pledged those accounts as collateral or the absence of default if there is agreement to that effect (Va. Code Ann. § 8.9A-607). A secured creditor that knows the identity of the debtor's account debtors (which typically comprise the debtor's customers, but generally refers to any person or entity that owes the debtor money) may provide written authenticated notice directing the account debtor to pay the secured creditor directly (Va. Code Ann. § 8.9A-607(a)(1)). After the secured creditor has provided notice to the account debtor, the secured creditor must be repaid by the account debtor. An account debtor that does not repay the secured creditor directly remains liable for its debt to the secured creditor, even if the account debtor repays the debtor (Va. Code Ann. § 8.9A-406(a)).

Any secured party seeking to engage in direct collection of accounts in Virginia should be aware that the Virginia Supreme Court upheld compensatory damages for conspiracy and tortious interference by two lien creditors engaged in conspiracy to injure a debtor's business by virtue of their agreement to seize the debtor's accounts receivable and inventory (*Tazewell Oil Co. v. United Va. Bank/Crestar Bank*, 413 S.E.2d 611 (1992)).

An account debtor may request that the secured creditor provide proof of assignment of its account by the debtor to the secured creditor (Va. Code Ann. § 8.9A-406(c)). The proof of assignment:

- Must be reasonable.
- May consist of a copy of the security agreement signed by the debtor.

If the secured creditor fails to "seasonably furnish reasonable proof that the assignment has been made," the account debtor does not remain liable to the secured creditor if it discharges its obligation to the debtor by repaying the debtor (Va. Code Ann. § 8.9A-406(c)).

While accounts may conveniently be convertible to cash and collection of accounts typically does not result in a breach of the peace, a secured creditor faces certain risks when sending out notices to account debtors, including:

- A refusal by an account obligor to make payment because of uncertainty or lack of obligation.
- An account debtor's concern that the secured creditor cannot honor warranties made by the debtor, so it may withhold payments from the secured creditor to protect itself from bearing the cost of defective goods.
- A belief that the secured creditor may not pursue payment.

A secured creditor should consider protecting itself by requiring:

- The debtor to provide the secured creditor with monthly account receivable records including:
  - the amounts, names, and contact information for each account obligor; and
  - purchase orders, invoices, signed contracts, and any other records that the debtor may keep proving the account debtor's obligation.
- A lock box arrangement, under which the account debtors are instructed at the time of the loan to the debtor, to send payments directly to a certain bank account under the control of the secured creditor. A lockbox arrangement is typically negotiated and contained in the security agreement. In a default setting, a lock box arrangement allows the secured creditor to pay itself first and then to remit the surplus to the debtor. However, the parties can agree to a split of collections to allow the debtor to continue to operate while the debt is paid down. With this arrangement, a secured creditor is relieved of:
  - the concern that the debtor is misappropriating funds; and
  - the obligation to notify account debtors to change payment locations.

Judicial Remedies

In Detinue

If possession cannot be obtained without a breach of the peace, the "secured party may proceed . . . pursuant to judicial process" (Va. Code Ann. § 8.9A-609(b)(1)). In Virginia, this judicial process is an action in detinue, which refers to a judicial procedure where a secured party may recover possession of unlawfully withheld collateral (Va. Code Ann. § 8.01-114). Replevin has been abolished in Virginia and the principal difference between replevin and detinue is that detinue focuses on the wrongful holding and detention of personal property, while replevin focuses on the wrongful taking of property.

If the balance owed on the contract secured by the collateral is less than $50,000 excluding attorney fees, a creditor may start a detinue action by filing a Warrant in Detinue in general district court (Va. Code Ann. §§ 16.1-77.1 to 16.1-79). If the balance is greater than $50,000, a creditor must start the detinue action by filing a complaint in circuit court (Va. Code Ann. §§ 16.1-77 and 17.1-513).

The detinue statutes provide for both prejudgment seizure of collateral and a determination on the merits of the secured party's claim to the collateral. To prevail in a detinue action, a secured creditor must establish that:

- It has a property interest in the recovered property.
- It has a right to immediate possession of the property.
- The property is capable of identification.
- The property holds value.
- The defendant had possession at some point before the institution of the detinue action.

(Va. Code Ann. §§ 8.01-114 to 8.01-123; *Vicars v. Atl. Disc. Co.*, 140 S.E.2d 667, 670 (Va. 1965).)

Petition for Pretrial Seizure of Property

A petition for pretrial seizure may be filed to start the detinue proceeding or during the pendency of a detinue proceeding (Va. Code Ann. § 8.01-114(A)). The petition for pretrial seizure must:

- Describe the kind, quantity, and estimated fair market value of the specific personal property.
- Describe the basis for the plaintiff's claim to recover the property with:
  - sufficient certainty to give the adversary reasonable notice of the nature and particulars of the claim; and
  - if the claim is based on a contract to secure monetary payment, the amount due on the contract.
- Allege one or more grounds for pretrial seizure according to section 8.01-534 of the Virginia Commercial Code and present specific facts in support of the allegation.

(Va. Code Ann. § 8.01-114(A).)

The grounds for pretrial levy or seizure of specific personal property include whether:

- The defendant plans to sell, remove, secrete, or otherwise dispose of the property in violation of an obligation to the plaintiff.
- The property may be destroyed, materially damaged, or injured if permitted to remain in the defendant's possession.

(Va. Code Ann. § 8.01-534(B).)

Pretrial Seizure of the Property Without Notice

In a detinue action, the secured party may recover the collateral in a prejudgment, ex parte proceeding (Va. Code Ann. § 8.01-114(B)). A court may issue an order after an ex parte review of the petition on the judge's determination that:

- The petition conforms with the requirements of section 8.01-114(A) of the Virginia Commercial Code.
- There is reasonable cause to believe that grounds exist for detinue seizure as described in the petition.

The court may issue an order directing the proper officer to seize the property and deliver it to the plaintiff when the plaintiff:

- Presents the evidence only in a verified petition filed with the papers in the case.
- Posts a bond payable to the debtor that is at least double the estimated fair market value of the claimed property claimed (Va. Code Ann. § 8.01-115; see Bond Requirement).

(Va. Code Ann. § 8.01-114(B), (C).)

In response to the US Supreme Court's decisions concerning a debtor's right to have a hearing before taking of the debtor's property, the court must conduct a hearing to review the decision to issue a seizure order either:

- Within 30 days after the issuance of any ex parte order.
- Promptly on the application of either party after reasonable notice.

(Va. Code Ann. § 8.01-119(A); see *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969).)

If the property remains in the plaintiff's possession at the conclusion of the hearing:

- The evidence must establish the facts set out in section 8.01-114(A)(1) of the Virginia Commercial Code.
- It must appear to the court that there is a substantial likelihood that the plaintiff's allegations will be sustained at trial.
- The court must be satisfied from the evidence regarding the existence of either or both of the following conditions:
  - one or more grounds contained in section 8.01-534 of the Virginia Commercial Code exist; or
  - plaintiff may suffer an irreparable harm (other than irreparable harm based on the ability to collect a money judgment by reason of the debtor's insolvency) if the court denies the plaintiff's request.

(Va. Code Ann. § 8.01-119(B).)

If the court sustains the findings in section 8.01-119(B) of the Virginia Commercial Code, the court lets the ex parte order stand. If the court finds in favor of the defendant, the ex parte order is abated, and possession of the property returned to the defendant pending trial of the detinue action (Va. Code Ann. § 8.01-119(B)).

Pretrial Seizure of the Property with Notice

The secured party may seek to obtain prejudgment possession under the detinue statute without proceeding ex parte and instead move the court for entry of a prejudgment order of possession (Va. Code Ann. § 8.01-119(A)).

When the secured party proceeds by giving reasonable notice of an intent to seek a prejudgment seizure order as opposed to proceeding ex parte, the secured party has two additional grounds for seizure:

- **The debtor's insolvency.** Insolvency may only be introduced on an initial application for possession after reasonable notice and not at a hearing held following the entry of an ex parte order of seizure.
- **Irreparable harm.** Irreparable harm is a permissible ground for sustaining an ex parte order at the due process hearing but not for issuing it in the first instance.

(Va. Code Ann. § 8.01-119(B).)

Determining Whether to Seek Pretrial Seizure with or Without Notice

In practice, the secured party should proceed ex parte in a detinue action only if it can establish one or more of the grounds set out in section 8.01-534 of the Virginia Commercial Code. However, if the secured party relies on the debtor's insolvency or other grounds of irreparable harm, the secured party should elect to proceed by requesting a prejudgment order of possession with notice to the debtor.

At the hearing, the secured party may use irreparable harm as a basis for prejudgment relief. The secured party may also introduce evidence of insolvency to establish the possibility that funds will not be available to satisfy any judgment for the value of the collateral or the amount of the secured indebtedness.

Bond Requirement

To obtain entry of an order requiring the seizure of property, the secured party must post a bond that is:

- Payable to the debtor in an amount that is at least double the estimated fair market value of the claimed property claimed.
- Conditioned on the redelivery of the property to the defendant, together with all costs and damages, if the court finds that the plaintiff has no right to possession.

(Va. Code Ann. § 8.01-115.)

The debtor may have the property returned after seizure by posting a bond:

- Payable to the plaintiff in an amount that is at least double the value of the property.
- Conditioned on the payment of all costs and damages that may accrue to any person and have the property available to answer to any judgment of the court.

(Va. Code Ann. § 8.01-116(A).)

The debtor may also apply to the court for return of the property on a lesser bond or on other terms that are just and reasonable (Va. Code Ann. § 8.01-116(B)).

Final Judgment in a Detinue Action

When the court renders a final judgment in favor of the secured party, the debtor may elect to pay the final judgment amount or surrender the collateral to the creditor. The court may grant the defendant up to 30 days to make the election (Va. Code Ann. § 8.01-121). In practice, most courts allow the debtor ten days to make the election.

If the debtor fails to make the election, the creditor should request that the court issue a writ of possession under section 8.01-470 of the Virginia Commercial Code, after which the sheriff may seize the collateral.

Judicial Action for Injunctive Relief

A secured party should also consider seeking an injunction ordering the debtor to comply with the terms of the agreement or deliver possession of the property to the secured party (Va. Code Ann. § 8.01-622). In practice, in a detinue action, a secured party should seek both a temporary and permanent injunction as an alternative if the court determines that the creditor might not qualify for prejudgment seizure or judgment in detinue. For example, if the court mandates ex parte relief and finds irreparable harm to the secured party based on the financial condition of the debtor, then detinue may not be available as a remedy to the secured party.

Injunctive relief may also be useful to prohibit the debtor from using the collateral out of state while the resolving the issue of possession in detinue. The secured party should also consider moving for injunctive relief if the debtor agreed to assemble the collateral for repossession but refuses to go ahead and take that action.

Notice

5. What are the notice requirements and applicable statutes for a secured creditor to sell collateral in your jurisdiction? Please identify:

- Who must receive notice and any exceptions.
- The form of notice, including timing requirements.

Who Must Receive Notice

In Virginia, before a sale of collateral, the secured creditor must provide notice to:

- The debtor (Va. Code Ann. § 8.9A-611(c)(1)).
- Any secondary obligor (Va. Code Ann. § 8.9A-611(c)(2)).
- If the collateral is anything other than consumer goods, any other:
  - party from which the secured party received an authenticated notification of a claim of an interest in the collateral before the notification date (Va. Code Ann. § 8.9A-611(c)(3)(A));
  - secured party or lienholder that ten days before the notification date held a security interest or other lien on the collateral perfected by a financing statement that identified the collateral, was indexed under the debtor's name, and was properly filed against the debtor (Va. Code Ann. § 8.9A-611(c)(3)(B)(i) to (iii)); and
  - secured party that ten days before the notification date held a security interest in the collateral

perfected by compliance with a statute, regulation, or treaty described in Va. Code Ann. § 8.9A-311(a) (Va. Code Ann. § 8.9A-611(c)(3)(C)).

For the purposes of section 8.9A-611(c) of the Virginia Code, the notification date is the earlier of the date on which:

- The secured party sends an authenticated notification of disposition to the debtor or any secondary obligor.
- The debtor and any secondary obligor waive the right to notification.

(Va. Code Ann. § 8.9A-611(a).)

If the collateral is consumer goods, as defined in section 8.9A-102(a)(23) of the Virginia Commercial Code, the secured party does not need to provide notice to any other party.

To ensure that a sale of collateral is a feasible option, the foreclosing creditor should take steps to identify the parties that require notice. To accomplish this, the secured creditor should conduct a thorough lien and judgment search in the debtor's state of incorporation or formation.

Safe Harbor: Search for Other Creditors

The Virginia Commercial Code contains a safe harbor for the permitted time frame within which the foreclosing creditor may conduct a lien search and satisfy the notice requirement to other creditors (Va. Code Ann. § 8.9A-611(e)). Recognizing that a creditor may want to conduct a lien search more than 10 days before sending notice, the safe harbor provides that a secured creditor complies with the notice requirements of Va. Code Ann. § 8.9A-611(c):

- Between 20 to 30 days before the notification date, the secured creditor requests information concerning financing statements indexed in the debtor's name in the office indicated in Va. Code Ann. § 8.9A-611(c)(3)(B).
- Before the notification date, the secured creditor either did not receive a response to the request for information or the secured creditor received a response and sent an authenticated notification to each secured party or lienholder named in the response.

(Va. Code Ann. § 8.9A-611(e).)

To ensure that the secured creditor benefits from this safe harbor, a secured creditor should perform a UCC lien and judgment search of the debtor as soon as practicable. The UCC search should include:

- The state where the debtor is located. For example, the state of incorporation or formation of the debtor.
- The states in which the debtor has offices or plants. For example, if a debtor is a Delaware corporation and has plants in Virginia, the secured creditor must conduct a UCC search in Delaware to obtain the safe harbor protection. However, it is also important to obtain a Virginia UCC search because it may disclose other potential lien claimants, including state and federal tax liens.

Exceptions

A secured creditor is not required to provide reasonable notice of a sale if the collateral:

- Is perishable (fruits, vegetables, and dairy products).
- Threatens to rapidly decline in value (seasonal products).
- Is sold on a recognized market (publicly traded stocks and bonds with standardized price quotations).

(Va. Code Ann. § 8.9A-611(d).)

In general, a secured creditor does not owe a duty to notify an unknown debtor or an unknown creditor of a disposition of the secured creditor's collateral. For example, if a debtor transfers its interest in collateral to another party without notifying the secured creditor, the transferee becomes the debtor under Article 9. In these circumstances, because the secured party cannot identify the new debtor, the secured creditor is not required to provide notice to the unknown transferee (Va. Code Ann. § 8.9A-605(a)(1)). Similarly, if a creditor sold or assigned its security interest without knowledge of the secured creditor, the secured creditor does not have an obligation to send notice to the unknown creditor (Va. Code Ann. § 8.9A-605(a)(2)).

However, there is an exception. A secured party owes a duty to a debtor or obligor, if at the time the secured party obtains control of collateral that is a controllable account, controllable electronic record, or controllable payment intangible, or at the time the security interest attaches to the collateral, whichever is later:

- The person is a debtor or obligor
- The secured party knows the identity of the person and how to communicate with them.

(Va. Code Ann. § 8.9A-605(b)).

Waiver

A secured creditor cannot rely on a pre-default waiver of notification made by a debtor or secondary obligor. A debtor, secondary obligor, or other party holding an interest in the collateral may instead only validly waive notice post-default (Va. Code Ann. §§ 8.9A-602(7) and 8.9A-624(a); see *Cappo Mgmt. V, Inc. v. Britt*, 711 S.E.2d 209, 212 (Va. 2011); *Woodward v. Res. Bank*, 436 S.E.2d 613, 616 (Va. 1993)).

Form and Contents of Notice

A secured creditor should fully comply with the notice requirements contained in Article 9. Notice must be reasonable, which is determined by the timing, contents, and manner of the notice.

Notice of Sale of Non-Consumer Goods

The Virginia Commercial Code requires that a notice of sale in a non-consumer goods transaction must include:

- A description of the debtor and the secured party (Va. Code Ann. § 8.9A-613(1)(A)).
- A description of the collateral (Va. Code Ann. § 8.9A-613(1)(B)).
- The method of intended disposition (Va. Code Ann. § 8.9A-613(1)(C)).
- A statement informing the debtor that it is entitled to an accounting of the unpaid debt, together with the charge, if any, for the accounting (Va. Code Ann. § 8.9A-613(1)(D)).
- The time and place of a public sale or the time at which the collateral is being sold in a private disposition (Va. Code Ann. § 8.9A-613(1)(E)).

While the Virginia Commercial Code does not require specific phrasing for a notice, Va. Code Ann. § 8.9A-613(5) provides a form of notice for the disposition of non-consumer collateral either at a public sale or a private sale and secured creditors should use this form when providing notice of a disposition of non-consumer collateral to ensure that the notice is deemed reasonable and sufficient.

If the notice lacks any of the information required under Va. Code Ann. § 8.9A-613(1), the sufficiency of the notice becomes an issue of fact and it may be considered enough depending on the circumstances (Va. Code Ann. § 8.9A-613(1), (2)). Notice is also considered sufficient if it contains minor errors that are not seriously misleading or extraneous information but substantially the information specified in Va. Code Ann. § 8.9A-613(1) (Va. Code Ann. § 8.9A-613(3)).

Compliance with the notice provisions only addresses the reasonableness of the notice of the sale. A foreclosing creditor must also ensure that the sale itself is conducted in a commercially reasonable method, manner, time, and place (Va. Code Ann. § 8.9A-610(b); see Commercial Reasonableness).

Notice of Sale of Consumer Goods

The Virginia Commercial Code requires that a notice of sale of consumer goods must include:

- All the information required in section Va. Code Ann. § 8.9A-613(1).
- A description of any liability for a deficiency owed to the notice recipient.
- A telephone number for the secured party.
- A telephone number or mailing address where additional information concerning the sale may be obtained.

(Va. Code Ann. § 8.9A-614(1).)

The Virginia Commercial Code provides a form of notice that is deemed a legally satisfactory notice of sale of consumer goods when properly completed (Va. Code Ann. § 8.9A-614(3)).

A notice for sale of consumer goods that lacks any of the information contained in Va. Code Ann. § 8.9A-614(1) is insufficient as a matter of law (Va. Code Ann. § 8.9A-614 cmt. 2).

Effect of Failure to Provide Notice

If the secured party fails to comply with the notice requirements of Va. Code Ann. § 8.9A-611 and the failure of the notice is raised as an issue, a rebuttable presumption exists under Va. Code Ann. § 8.9A-626(4) that the value of the collateral equals the total secured indebtedness. The effect of this presumption, if not rebutted, is to bar the secured party from collecting any deficiency (see *Woodward*, 436 S.E.2d at 617 (holding that a secured party can rebut this presumption by proving the sale price was fair and reasonable for the collateral)).

A secured party's failure to comply with the notice obligations may lead to liability under Va. Code Ann. § 8.9A-625 for losses suffered by a party holding a security interest or lien on the collateral.

Timing Requirements

For non-consumer transactions, notice is considered timely if it is sent after default and at least ten days before the sale (Va. Code Ann. § 8.9A-612). If notice is sent less than ten days before the sale, the timeliness becomes an issue of fact.

In practice, a secured party seeking to dispose of collateral through a private or public sale must ensure that the sale is conducted in a commercially reasonable manner, which must include a reasonable notice period for potential buyers that could require more than ten days' notice (see Question 4).

Commercial Reasonableness

6. Does your jurisdiction follow a definition of "commercial reasonableness"?

- If no, then please explain.
- If yes, what is the applicable statute or relevant case law?

Virginia law follows the model Uniform Commercial Code's (UCC) definition of commercial reasonableness.

The disposition, collection, and enforcement of collateral is considered commercially reasonable if it is made:

- In the usual manner on any recognized market.
- At the current price in any recognized market at the time of the disposition.
- In conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(Va. Code Ann. § 8.9A-627(b); see *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 466 S.E.2d 382, 386 (Va. 1996).)

A collection, enforcement, disposition, or acceptance of collateral is commercially reasonable if it has been approved:

- In a judicial proceeding.
- By a bona fide creditors' committee.
- By a representative of creditors.
- By an assignee for the benefit of creditors.

(Va. Code Ann. § 8.9A-627(c).)

However, in many situations the question of whether a sale was commercially reasonable is an issue of fact, dependent on the circumstances. The Virginia Commercial Code recognizes this and provides that:

- A transaction may still be considered commercially reasonable even if the secured party may obtain a greater amount when collecting, enforcing, disposing, or accepting the collateral at a different time or in a different method from that selected by the secured party (Va. Code Ann. § 8.9A-627(a)).
- Lack of approval of a sale under Va. Code Ann. § 8.9A-627(c) does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable (Va. Code Ann. § 8.9A-627(d)).

Parties may not waive or vary the requirement that disposition of collateral must be conducted in a commercially reasonable manner (Va. Code Ann. § 8.9A-602(7)).

7. What factors are typically considered when determining whether a sale is commercially reasonable in your jurisdiction?

General Standard

Under the Virginia Commercial Code, every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral:

- By public or private proceedings.
- By one or more contracts.
- As a unit or in parcels.
- At any time and place and on any terms.

(Va. Code Ann. § 8.9A-610(b).)

Commercial reasonableness is generally evaluated on a case-by-case basis, but courts have considered:

- Price.
- Manner of sale.
- Timing of sale.
- Conduct of sale.

If a debtor challenges the reasonableness of a sale of collateral, the burden of proof rests on the secured creditor to establish that the sale was completed in a commercially reasonable manner (see *Roanoke Indus. Loan & Thrift Corp. v. Bishop (In re Bishop)*, 482 F.2d 381 (4th Cir. 1973)). The secured creditor should, therefore, develop and maintain an evidentiary record to support commercial reasonableness so it can rely on that evidence in any proceeding challenging the collateral disposition.

If a secured creditor fails to provide comply with the Article 9 notice requirements, the sale is presumed to be commercially unreasonable (see *Woodward*, 436 S.E.2d at 617).

Price

The adequacy of the sale price of the collateral is frequently raised when questioning the commercial reasonableness of a sale.

The sale price of the collateral is indicative, but not solely determinative, of whether the secured creditor makes a commercially reasonable sale. Because most secured creditor sales result in below fair market value returns, a secured creditor should not concern itself if its sale does not meet market standards. However, a secured creditor must be aware that a low disposition price may cause the court to scrutinize the sale and the sale procedures (see *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 230 S.E.2d 43, 44 (Ga. Ct. App. 1976); *Hall v. Owen Cty. State Bank*, 370 N.E.2d 918, 930 (Ind. Ct. App. 1977); *First Nat'l Bank of Bellevue v. Rose*, 196 N.W.2d 507, 510 (Neb. 1972)).

If the debtor challenges the price of the sale, the secured creditor must be prepared to present evidence of market value through an appraisal or qualified testimony of value. However, "[t]he fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner" (Va. Code Ann. § 8.9A-627(a)).

Manner of Sale

A secured creditor may choose to dispose of its collateral in either a public or private sale if every aspect of the sale is commercially reasonable. While a secured creditor cannot typically control the price at a sale, it can control the notice of sale and often protect itself by doing the following:

- Holding a public sale.
- Providing at least ten days' notice.
- Advertising the sale in appropriate media.

A secured creditor's sale may be considered a public sale if:

- There is a meaningful opportunity for competitive bidding.
- There is some form of advertising notifying the public of the sale.
- A third-party liquidator or auctioneer is used.
- The public is granted access.

A disposition of collateral is made in a commercially reasonable manner if the disposition is either:

- Made in the usual manner on any recognized market at a price recognized in any market at the time of the disposition.
- In conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(Va. Code Ann. § 8.9A-627(b).)

When making a private sale, a secured creditor should:

- Demonstrate that it solicited multiple offers for the collateral before making a sale.
- Consider whether to retain a broker to assist with the sale process.
- Consider obtaining approval from the court or other creditors before completing the disposition, especially when the secured creditor anticipates potential challenges to the sale.

A secured creditor may only purchase the collateral at a private sale if the collateral is customarily sold on a recognized market or the subject of widely distributed standard price quotations (Va. Code Ann. § 8.9A-610(c)(2)). Many forms of collateral, including most types of consumer goods, are not sold on a recognized market or the subject of widely distributed standard price quotations. Therefore, a secured creditor most often must conduct a public sale.

Recognized Market

"A recognized market is one in which the items sold are fungible and prices are not subject to individual negotiation" (*Saunders v. Equifax Info. Servs., L.L.C.*, 2006 WL 2850647, at *9 (E.D. Va. Oct. 3, 2006), *aff'd sub nom.*, *Saunders v. Branch Banking & Tr. Co. of VA*, 526 F.3d 142 (4th Cir. 2008) (citing Va. Code Ann. § 8.9A-610 cmt. 9)).

What qualifies as a recognized market is "quite limited [and] applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges" (Va. Code Ann. § 8.9A-627 cmt. 4).

If the collateral is of a type customarily sold on a recognized market, the secured creditor:

- Does not need to provide notice of the sale (Va. Code Ann. § 8.9A-611(d); see Question 5).
- May sell the collateral to itself (Va. Code Ann. § 8.9A-610(c)(2)).

Not a Recognized Market

A market where "prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions" (Va. Code Ann. § 8.9A-610 cmt. 9). If collateral, like consumer goods, is not sold on a recognized market, the disposition collateral must conform "with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (Va. Code Ann. § 8.9A-627(b)(3)). This is a question of fact that relies on the facts and circumstances of each case and the specific collateral.

In Virginia, when a secured creditor is repossessing and disposing of collateral that is not sold on a recognized market, the secured creditor should rely on the services of someone with knowledge concerning the reasonable commercial practices among dealers to minimize the risks associated with debtor challenges to the disposition not being commercially unreasonable.

Timing of Sale

The Virginia Code recognizes that "[Title 8.9A] does not specify a period within which a secured party must dispose of collateral. This is consistent with [Title 8.9A's] policy to encourage private dispositions through regular commercial channels" (Va. Code Ann. § 8.9A-610 cmt. 3).

In practice, when disposing of collateral, a secured creditor must ensure that it acts reasonably concerning:

- The amount of time that it holds the collateral after repossession.
- The economic conditions at the time of the sale.
- The type of collateral that it is selling.

A secured creditor should not delay a sale when the delay will cause a decline in the value of the collateral or the collateral is perishable. For example, it is not commercially reasonable for a secured creditor to let produce spoil before disposing of it. However, a secured creditor is deemed to have acted commercially reasonable when it sells seasonal products shortly before the start of the season.

Within 90 days after possession or a longer period if the debtor and secondary obligor agree, the secured party must sell, lease, or dispose of consumer goods if:

- The debtor paid 60 percent of the cash price in the case of a purchase money security interest.
- The debtor paid 60 percent of the principal amount of the loan in the case of a non-purchase money security interest.
- The debtor did not waive the right to require disposition of the collateral in a post-default agreement.

(Va. Code Ann. § 8.9A-620(e).)

A secured party may not be deemed to have acted in a commercially reasonable manner if there is not a good reason for failing to make a prompt disposition (Va. Code Ann. § 8.9A-610 cmt. 3).

Conduct of Sale

Every aspect of a collateral sale must be commercially reasonable. A secured creditor must, therefore, carefully consider whether all its choices regarding the sale are reasonable and focused toward maximizing the proceeds of the sale (Va. Code Ann. § 8.9A-610(b)). This includes deciding whether to repair the collateral or sell it as is. Although the Virginia Commercial Code does not require a secured creditor to repair collateral, a secured creditor must maximize proceeds and act in a commercially reasonable manner by, for example:

- Making inexpensive repairs that were likely to significantly increase the value of the collateral sale or attract additional buyers.
- Cleaning the collateral before an auction or inspection by a potential buyer.

(Va. Code Ann. § 8.9A-610 cmt. 4.)

Under certain circumstances, it may be beneficial to have a court involved in the sale and liquidation of collateral. For example, if the secured creditor anticipates a significant deficiency in the value, the secured creditor may be more likely to establish commercial reasonableness if the court orders, before the sale, the necessary steps to conduct a commercially reasonable sale. The court's express directives may include:

- The content of the advertising and the type of publications.
- The type of sale, whether public or private.
- The date, time, location, and terms of the sale.
- Which party should conduct the sale.

Disposition and Priority of Proceeds

8. What is the priority scheme for distribution of proceeds of a collateral sale in your jurisdiction?

Under the Virginia Commercial Code, proceeds of a sale must be distributed in the following order of priority:

- First to repay:
  - the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral; and
  - if provided by agreement and not prohibited by law, the secured party's reasonable attorneys' fees and legal expenses.

  (Va. Code Ann. § 8.9A-615(a)(1)). In practice, a secured creditor should ensure that it has a written agreement with the debtor expressly providing for payment of legal fees in the event of default.
- Second, to satisfy the obligations secured by the security interest or agricultural lien. In the absence of cross-collateralization, a secured party foreclosing under several different security agreements must apply the proceeds of each piece of collateral to the specific debt secured by the security agreement covering that collateral. A secured creditor cannot apply the proceeds of the distribution to a debt not specifically secured by a security agreement (Va. Code Ann. § 8.9A-615(a)(2)). While the Virginia Commercial Code does not require the foreclosing party to satisfy senior liens and encumbrances that remain subject to the collateral, a buyer of the collateral takes the collateral subject to the senior secured creditor's lien (Va. Code Ann. § 8.9A-617).
- Third, a secured party must then apply any remaining cash proceeds to any lower priority security interests or liens on the collateral if the secured creditor receives an authenticated demand from the holder of subordinate interests or liens before the secured creditor completes the distribution of the proceeds (Va. Code Ann. § 8.9A-615(a)(3)). However, a secured party should demand, in writing, reasonable proof of the subordinate interest. Proof should consist of:
  - the security agreement entered between the junior interest or lien holder and the debtor; or
  - some other documents evidencing the creation of a lien, such as a judgment from a court of competent jurisdiction.

  By obtaining proof, a secured creditor:
  - receives assurances of the validity of the interest; and
  - protects itself against a debtor that disputes the subordinate interest or the amount of the interest.

  If the subordinate holder does not comply or provide assurance of the interest within a reasonable amount of time, the secured party does not need to remit proceeds (Va. Code Ann. § 8.9A-615(b)). However, a secured creditor is liable for any unpaid security interest if it does not make a distribution to a subordinate interest that properly makes an authenticated demand and provides reasonable proof of its interest. There is also no requirement that the subordinate security interest be perfected if it does not hold a prior lien to another subordinate security interest because an unperfected security interest is valid against the debtor if it attaches to the collateral. However, the secured party conducting the sale should attempt to resolve any dispute, tender a joint check to the disputants, or interplead the excess proceeds into a court proceeding naming the claimants and the debtor as defendants.

- Fourth, if a consignor has a secured interest in the collateral, then the remaining proceeds are distributed to the consigned party that provides the secured creditor with an authenticated demand for proceeds before distribution of the proceeds is completed (Va. Code Ann. § 8.9A-615(a)(4)). In certain circumstances, a consignment may have a higher priority if the consignor complied with the applicable provisions to be a perfected secured creditor. While consigned goods arising from a true consignment may result in a different outcome.
- Last, the secured party must account to and pay the debtor any surplus, unless the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes (Va. Code Ann. § 8.9A-615(d)(1), (e)).

9. What is the process and procedures for addressing any deficiency claim or surplus of proceeds?

Under the Virginia Commercial Code, the debtor is liable for any deficiency (Va. Code Ann. § 8.9A-615(d)(2)).

Therefore, if the sale of collateral is not sufficient to cover the entire cost of the debt, the secured creditor has the right to pursue the debtor for the balance of the claim (provided the secured creditor did not elect to have a strict foreclosure extinguishing any deficiency claim). To obtain the deficiency, the secured creditor must provide the debtor with a statement including the information required by (Va. Code Ann. § 8.9A-616(c)).

If the debtor does not pay voluntarily, the secured party may seek a deficiency judgment from a court of competent jurisdiction. The Virginia Commercial Code establishes a rebuttable presumption that relieves a secured party from the need to prove compliance with Title 8.9A as part of its prima facie case (Va. Code Ann. § 8.9A-626(1), cmt. 3). However, the debtor (or secondary obligor) may defend itself by asserting that the secured creditor had failed to comply with the provisions relating to notice, collection, enforcement, disposition, or acceptance. When the debtor (or secondary obligor) places the secured creditor's compliance at issue, the burden then shifts to the secured creditor to prove compliance with Article 9 (Va. Code Ann. § 8.9A-626(1)). If a secured creditor fails to comply with the provisions relating to notice, collection, enforcement, disposition, or acceptance of Article 9, including making a commercially reasonable sale:

- The debtor's liability for a deficiency is limited to the amount that would have been realized if the sale complied with Article 9 (Va. Code Ann. § 8.9A-626(3)).
- The secured creditor may:
  - lose the ability to recover a deficiency claim; and
  - be exposed to a damage claim by a junior creditor, debtor, or guarantor.

  (Va. Code Ann. §§ 8.9A-625 and 8.9A-626.)

A secured creditor that fails to comply with the requirements of Article 9 faces a rebuttable presumption that the amount of proceeds that should have been produced by the sale is equal to the secured obligation plus costs (Va. Code Ann. § 8.9A-626(3)). To avoid spending time and money attempting to rebut presumption, a secured creditor should follow the provisions of Article 9. A secured creditor should also be aware that it may be held liable to the debtor, junior creditor, or secondary obligor for failing to comply with the requirements of Article 9 (Va. Code Ann. § 8.9A-625(b) (providing that a secured party may be liable for damages for failing to comply with Title 8.9A of the Virginia Commercial Code)).

A debtor may also be entitled to a surplus if the creditor or a related party acquires the collateral at its own foreclosure. In that case, a surplus or deficiency is calculated based on the amount of proceeds that may be realized in a sale to a third-party or secondary obligor that complies with Va. Code Ann. § 8.9A-615 if:

- The transferee in the sale is:
  - the secured party;
  - a person related to the secured party; or
  - a secondary obligor.
- The amount of proceeds from the sale is significantly below the range of proceeds that may be realized from a complying sale to:
  - a person other than the secured party;
  - a person related to the secured party; or
  - a secondary obligor.

(Va. Code Ann. § 8.9A-615(f); see Question 12.)

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus and the obligor is not liable for any deficiency (Va. Code Ann. § 8.9A-615(e)).

10. Does your jurisdiction permit a junior creditor to foreclose or sell collateral without participation from a senior security interest?

- If no, then please state so.
- If yes, then please explain the priority for disposition of the proceeds.

Under the Virginia Commercial Code, a secured creditor with an interest that is subordinate to another interest in the collateral may foreclose on a piece of collateral without participation from the senior creditor (Va. Code Ann. § 8.9A-610 cmt. 5). While Article 9 does not require a secured creditor to make a distribution to a senior security interest, it only has effect of discharging an interest junior to the foreclosing creditor. Therefore, the buyer of the collateral takes the collateral subject to the senior secured creditor's lien (Va. Code Ann. § 8.9A-617).

Similarly, if a junior secured creditor erroneously receives cash proceeds from a sale in good faith and without knowledge that the receipt violates the rights of any security, lien, or agriculture lien holder's interest, the junior creditor:

- Takes the cash proceeds free of the security interest or other lien.
- Is not obligated to apply the proceeds of the sale to satisfy obligations secured by the security interest or other lien.
- Is not obligated to account to or pay a secured creditor any surplus.

(Va. Code Ann. § 8.9A-610 cmt. 5.)

Junior secured creditors should be comforted that cash distributions received from collateral sales conducted without knowledge of violations of a senior creditor's rights cannot be disgorged.

Collateral Repurchase by a Secured Creditor

11. May a secured creditor repurchase the collateral securing a loan transaction in your jurisdiction?

- If no, then please state so.
- If yes, what are the limitations and applicable statutes?

In Virginia, a secured creditor may purchase its own collateral under certain conditions. However, a secured creditor does not have the same flexibility in selling the collateral to itself as it does in a disposition to a third party.

Instead, a secured party may purchase collateral at either:

- A public sale.
- A private sale if the collateral is:
  - of a kind that is customarily sold on a recognized market; or
  - the subject of widely distributed standard price quotations.

(Va. Code Ann. § 8.9A-610(c).)

Unless the collateral is of a kind sold on a recognized market, the secured creditor must purchase the collateral at a public sale which:

- Is properly noticed and publicized.
- Is accessible to the public. Dealers-only sales are not generally considered public sales.
- Fixes a price in competitive bidding.

12. If a secured creditor purchases the collateral at a significantly lower price than would have been produced at a third-party sale, must the secured creditor calculate a deficiency or surplus?

- If no, then please state so.
- If yes, please explain.

In Virginia, a secured creditor must ensure that it pays a fair price when purchasing its own collateral. Otherwise, the secured creditor runs the risk that the debtor seeks to asset a claim against the secured creditor to recover the difference between a fair price for the collateral and the price actually paid (or credited) by the secured creditor (Va. Code Ann. § 8.9A-615). A disposition of the collateral for significantly less than fair value may also cause a court to closely scrutinize the commercial reasonableness of the sale (see Commercial Reasonableness).

When a secured creditor (or a party related to the secured creditor) purchases the collateral at a price that is significantly below the range of proceeds that would have been produced at a sale to a third party, a surplus or deficiency is calculated based on the amount of proceeds that may have been realized in a sale to a third-party or secondary obligor that complies with Va. Code Ann. § 8.9A-615 if:

- The transferee in the sale is:
  - the secured party;
  - a person related to the secured party; or
  - a secondary obligor.
- The amount of proceeds from the sale is significantly below the range of proceeds that can be realized from a complying sale to:
  - a person other than the secured party;
  - a person related to the secured party; or
  - a secondary obligor.

(Va. Code Ann. § 8.9A-615(f).)

This rule protects the debtor from excessive deficiency claims resulting from artificially low-priced sales.

13. Does your jurisdiction permit a secured creditor to accept collateral in full or partial satisfaction of its debt, otherwise known as strict foreclosure?

- If no, then please state so.
- If yes, please explain the requirements, including debtor consent and notice to parties.

In Virginia, in non-consumer transactions, a secured creditor may accept collateral in full or partial satisfaction of its debt, which is known as strict foreclosure if:

- The debtor consents to the acceptance of collateral under Va. Code Ann. § 8.9A-620(c).
- Within the time specified in Va. Code Ann. § 8.9A-620(d), the secured party does not receive an authenticated notification of objection to the proposal by:
  - secured creditors with perfected security interests under Va. Code Ann. § 8.9A-621; or
  - any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the foreclosure.

(Va. Code Ann. § 8.9A-620(a).)

In a non-consumer transaction, the debtor typically must provide consent in an authenticated record accepting the secured creditor's proposal (Va. Code Ann. § 8.9A-620(c)(1)). However, a debtor may be deemed to have accepted a secured creditor's offer to accept its collateral in full satisfaction of its debt if the secured creditor:

- Sends the debtor a post-default proposal that is unconditional or only subject to the condition that collateral not in the possession of the secured creditor be preserved on maintained.
- After default, proposes to accept the offer in full satisfaction of the debt.
- Does not receive an authenticated notice of objection from the debtor within 20 days after sending the proposal.

(Va. Code Ann. § 8.9A-620(c)).

Parties entitled to notification of a secured creditor's proposal to accept the collateral in full or partial satisfaction of its debt include:

- A person from whom the secured creditor received authenticated notice of a claim of interest in the collateral before the debtor consented to the acceptance (Va. Code Ann. § 8.9A-621(a)(1)).
- A secured party or lienholder that, ten days before the debtor consented to acceptance, has perfected by filing a financing statement (Va. Code Ann. § 8.9A-621(a)(2)).
- A secured party or lienholder that, ten days before the debtor consented to acceptance, has perfected under Va. Code Ann. § 8.9A-311 (Va. Code Ann. § 8.9A-621(a)(3)).
- Any secondary obligor (Va. Code Ann. § 8.9A-621(b)).

A secured creditor can generally ensure that it noticed these four groups of parties by performing a UCC financing statement search after the debtor consents and then sending the proposal to any party perfected within ten days.

In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures (Va. Code Ann. § 8.9A-621).

14. Has your state enacted or introduced/considered enacting the 2022 amendments to the UCC?

In 2024, Virginia House Bill 1286 enacted the 2022 Amendments to the UCC. The bill has a delayed effective date of July 1, 2025.

Virginia enacted the 2022 Amendments to the UCC under Title 8.12 of the Virginia Code, titled Commercial Code – Controllable Electronic Records, whichgoverns the legal treatment of digital assets in Virginia (Va. Code Ann. §§ 8.12-101 to 8.12-107).

Title 8.12 introduces the following definitions.

- Controllable electronic record, which means a record stored in an electronic medium that can be subjected to control under § 8.12-105. The term does not include a controllable account, a controllable payment intangible, a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, electronic money, investment property, or a transferable record. (Va. Code Ann. § 8.12-102(a)(1)).
- Qualifying purchaser, which means a purchaser of a controllable electronic record or an interest in a controllable electronic record that obtains control of the controllable electronic record for value, in good faith, and without notice of a claim of a property right in the controllable electronic record. (Va. Code Ann. § 8.12-102(a)(2)).
- Transferable record, which has the meaning provided for that term in:
  - § 201(a)(1) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7021(a)(1), as amended; or
  - § 59.1-494 of the Uniform Electronic Transactions Act (§§ 59.1-479 et seq.). (Va. Code Ann. § 8.12-102(a)(3))

In Virginia, perfection of a security interest in digital assets can occur through the following methods:

- Filing. A security interest in controllable electronic records may be perfected by filing. (Va. Code Ann. § 8.9A-312).
- Control. A security interest in controllable electronic records may be perfected by control of the collateral. (Va. Code Ann. § 8.9A-314(a)). Whether a person has control of a controllable electronic record is governed by Va. Code. Ann.§ 8.12-105. To have control, a person must have:
  - The power to avail itself of substantially all the benefit from the electronic record;
  - the exclusive power to prevent others from availing themselves of substantially all the benefit of the electronic record and the exclusive power to transfer control of the electronic record; and
  - the ability to readily identify itself in any way as the person having the above listed powers.

  Relatedly, a security interest in electronic money may be perfected only by control. (Va. Code Ann. § 8.9A-312(b)(4)).
  - electronic money means money in an electronic form (Va. Code Ann. § 8.9A-102); and
  - control of electronic money is governed by Va. Code Ann. § 8.9A-105.1.

A security interest in a controllable electronic record held by a secured party having control of the electronic record has priority over a conflicting security interest held by a secured party that does not have control. (Va. Code Ann. § 8.9A-326.1).

If there is a conflict between Article 12 and Article 9, Article 9 governs. (Va. Code Ann. § 8.12-103(a)).