

**FUNDAMENTALS OF UCC FORECLOSURES**  
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Presented by  
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This outline describes the process required under Alaska's Uniform Commercial Code (UCC), and other statutes, for repossession and foreclosure of collateral subject to properly perfected security interests under UCC Article 9 (dealing with secured transactions).

Typically, upon default, Secured Party will send a demand letter on the loan. The amount of time to satisfy the Demand is typically 15 days, but the amount of time required, if any, is determined by the terms of the Promissory Note and/or the Security Agreement. The Demand should be addressed to the borrower and the party who granted Secured Party the lien, with copies to all other parties obligated on the loan, including guarantors.

After the decision is made that the only option left for the Secured Party is to take recourse to the collateral, the typical process is as follows:

I. **Analyze Secured Party's lien coverage, perfection and priority.**

1. Order a **UCC Lien Search** from State of Alaska UCC Central Filing Office (unless the collateral is fixtures, in which case order from the district in which the real property is located), to determine all relevant liens and perfection positions. It is best to include in the lien search request a request for copies of the filings reported in the search return.
2. Assess the **priority of Secured Party's lien** against the collateral. The basic rule (with exceptions) is the first in time to file the UCC lien has priority. See UCC 9-322.
3. If Secured Party has **accounts receivable** or **inventory** as collateral, it is important to move very quickly to get current information about the accounts or the inventory on hand, and to get debtor's cooperation or to take action to control the collateral. This is because debtor may be collecting and spending the accounts or may be selling and spending the cash realized from sale of the inventory, and you have to take control of the collateral away from debtor. At a minimum, Secured Party should examine the last statement of accounts receivable or the last inventory list it has. (This is one of the reasons it is

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important to maintain regular contact with the borrower, even before default, so Secured Creditor maintains current information about the collateral.)

4. Review accounts payable list or a credit report if either is available to determine if there are potential **Purchase Money Security Interest liens (PMSI)**. (These are liens in favor of creditors who provided debtor with financing used to purchase the collateral, typically the manufacturer or dealer who provides “floor financing”. UCC 9-103.) PMSI creditors take priority over other previously perfected security interests in the same collateral regardless of when filed. (UCC 9-324.) If the collateral is inventory, the PMSI lender must have previously sent a notice to holders of conflicting security interests that it was going to take a PMSI in order to get priority over conflicting security interests. UCC 9-324.

## II. Let Debtor Liquidate Collateral to maximize return.

1. This will require **diligent monitoring of debtor and the collateral** to ensure that Secured Party learns of and approves any sale and that Secured Party receives all proceeds from the sale, net of reasonable and customary costs of sale.
2. If the collateral is **accounts receivable**, Secured Party can require debtor to tell those who owe debtor money (they are called “account debtors”) to pay what is owed to debtor to Secured Party. If Secured Party doesn’t trust debtor, don’t let debtor send the notice; debtor could later change those instructions to pay Secured Party. Secured Party has the right to send the notice to account debtors telling them to pay Secured Party instead of paying debtor. UCC 9-607. If Account Debtor disregards the demand and pays Debtor instead of Secured Party, the Account Debtor can be liable twice because payment to the Debtor does not discharge the debt owed. UCC 9-406(a). Consider impact of Bankruptcy Code 552(a) which cuts lien off against post-petition, after-acquired accounts but continues the lien against proceeds of prepetition accounts; quickly need to get **cash collateral agreement**.
3. The basic rule for most collateral (but **not** for inventory, **not** for goods sold in the ordinary course of debtor’s business and **not** goods held by debtor as consumer goods; UCC 9-320) is that **Secured Party’s lien continues** against collateral sold by debtor in the hands of the buyer, unless Secured Party consents to the sale free of its lien. But there is always the risk that the collateral will not be found after debtor has sold it, so diligence is important.

4. If the collateral is **inventory**, Secured Party's lien does not continue against the inventory in the hands of the buyer if the inventory is sold in the ordinary course of business to a buyer in the ordinary course. UCC §9-320. This is another reason to move very quickly if the collateral is inventory. Consider impact of Bankruptcy Code 552(a) which cuts lien off against post-petition after-acquired inventory but continues lien against proceeds of prepetition inventory; quickly need to get cash collateral agreement.
5. To ensure no one mistakes Secured Party's intention about consent to a sale free of Secured Party's lien, if Secured Party mistrusts debtor or if debtor is not cooperating, Secured Party can send a letter to debtor and to others with an interest in the collateral stating that **Secured Party does not consent** to any sale but will consent only if it separately approves the sale and separately approves the sales price and only if Secured Party receives all net proceeds from the sale.
6. **If Secured Party trusts debtor** enough to let debtor sell the collateral, Secured Party should stay in touch regularly and inspect the collateral regularly to be sure trust is justified.

### III. **Take Possession of the Collateral.**

1. If debtor allows **access to the collateral**, first get an inventory of the collateral so Secured Party knows what collateral it has. If debtor does not allow access, Secured Party must take action quickly or its collateral may be lost.
2. Make a determination about whether Secured Party can **leave the collateral where it is presently located** or if Secured Party must take possession and move the collateral. This will turn on whether debtor can be trusted and whether debtor has the right to remain at the premises.
3. **If debtor owns the real property**, the mortgagee may have possession of the premises and Secured Party may have to make a deal with the mortgagee to leave the collateral on site. If Secured Party holds the mortgage, it can take possession of the premises and become mortgagee-in-possession and this will allow Secured Party to keep the personal property collateral on site.
4. **If debtor is a tenant at the site**, the landlord may be evicting debtor. If the landlord takes possession of the premises (because debtor surrenders possession or the landlord ousts the debtor), Secured Party may have to make a deal with the landlord to leave the collateral on site.

5. Check the security agreement to see if Secured Party reached an **agreement with the landlord or the mortgagee**, at the time of the loan, to allow Secured Party to leave its collateral on site while it liquidates the collateral. If not, Secured Party should try to negotiate week-to-week or month-to-month agreement with the landlord or the mortgagee depending on how long you believe it will take to liquidate and dispose of the collateral. Secured Party will have to pay rent at the negotiated rate.
6. Once Secured Party has possession of the collateral, if debtor is cooperating, have debtor sign a letter acknowledging a **voluntary surrender of the collateral**. If debtor is not cooperating, send a letter telling debtor Secured Party has exercised its right to take possession of the collateral. If Secured Party holds the mortgage against the premises, get Debtor's acknowledgement or send a letter describing Secured Party as "mortgagee-in-possession" of both the real property and the UCC personal property collateral.
7. **If debtor is not cooperating**, Secured Party has the right to require debtor to assemble the collateral at a place designated by Secured Party or Secured Party may take possession of the collateral regardless of debtor's cooperation ("self-help repossession") (or can disable the collateral on site), if this can be done "without breach of the peace". UCC 9-609.
8. If Secured Party fears the debtor will try to sell the collateral and divert the proceeds, you can **post the collateral** with a notice of Secured Party's UCC Lien to alert the universe of potential buyers that Secured Party holds the lien. This is technically not required under the UCC if Secured Party has a properly perfected UCC lien because the buyer is charged with knowledge of Secured Party's lien anyway (the buyer should protect itself by doing a UCC search before it buys the collateral). And if debtor is not cooperative, debtor will likely remove the posted notices anyway.
9. **Secure the property location** to prevent theft or removal by changing the locks and heating and winterizing the premises.
10. **Place insurance on the collateral**. Insurer will need collateral description, location, and estimated value.
11. If Secured Party can not take control over the collateral it must **sue to enforce its rights** against the collateral. UCC 9-609. Typically, Secured Party will also sue on the promissory note and guarantees in the same lawsuit. Secured Party can also seek an expedited hearing to force debtor to surrender possession and control over the collateral. "Claim and Delivery", Civil Rule 88.

12. If the collateral is **consumer goods** (goods used or bought for use primarily for personal, family or household purposes, UCC 9-102(23)), many of the rules are different.

IV. **Dispose of the Collateral.**

1. Secured Party has the right to dispose of (sell or lease) the collateral in its present condition or after **commercially reasonable preparation** or processing (for example, painting or repairing the collateral before sale). UCC 9-610.
2. Make a determination whether Secured Party will sell the collateral by **public auction** or by a **negotiated private sale**. UCC 9-610.
3. If Secured Party will sell the collateral through a **negotiated private sale**, send a notice to debtor, to others obligated on the loan, and to others with an interest in the collateral that Secured Party will dispose of the collateral in one or more private sales at any time on or after a date certain that is not less than 10 days (UCC 9-612) from the date of the notice. UCC 9-610. The **purpose of this notice** is to afford debtor, other obligors, and others with an interest in the collateral an opportunity to take action to cure defaults and preserve its interest in the collateral before the noticed date of the sale.
4. If Secured Party will sell the collateral through a **public auction**, the requirement for **notice serves two distinct purposes**. Secured Party must notify debtor, others obligated on the loan, and others with an interest in the collateral of the date, time and place of the sale so they can take action to cure defaults and preserve their interests in the collateral. But Secured Party must also ensure **meaningful public notice to generate interest** and participation in the auction. UCC 9-610. Secured Party or its auctioneer (for example, Grubstake Auction Company) will have to run advertisements in the newspaper or other locations and take reasonable steps to ensure participation in the sale by parties who might be interested in the type of collateral involved. For example, if your collateral is equipment, Secured Party should consider mailing notice of the type of collateral and the date, time and place of sale to all used equipment sellers listed in the yellow pages. Auction companies have established means of getting notice out to the public and some guarantee their public notice will meet the commercially reasonable sale requirement. The minimum required time for notice of public auction is 10 days (UCC 9-612) but Secured Party may want to allow more time.

5. If the collateral is **consumer goods** (goods used or bought for use primarily for personal, family or household purposes; UCC 9-102(23)), many of the rules are different. The notification of Secured Party's intent to sell the collateral required to be sent is different. UCC 9-613. The consumer debtor must be told that he or she has a right to redeem the property and must be given a number to call to find out what it will cost to redeem.
6. If the collateral is **accounts receivable**, a **deposit account**, an **investment account**, or a **letter of credit**, Secured Party may collect those items after notice to debtor, to others obligated on the loan, and to others with an interest in the collateral. UCC 9-607. Secured Party may enforce debtor's rights against parties obligated on debtor's accounts receivable (the "account debtors"), including suing account debtors to collect the accounts. See UCC 9-607. Secured Party is subject to any defenses account debtors have available against debtor.
7. The notice of any kind of sale (private sale or public auction) **must be sent to the following parties**: to debtor, to others obligated on the loan and to others with an interest in the collateral at all available addresses. UCC 9-611. To determine who has an interest in the collateral, Secured Party can rely on a UCC lien search accomplished not later than 20 days and not earlier than 30 days before the sale. UCC 9-611.
8. All aspects of the sale must be accomplished in a **commercially reasonable manner**. UCC 9-610.
9. Secured Party can **disclaim warranties** of title and of condition (UCC 9-610). Secured Party should announce at the public sale or state to a private sale buyer, preferably in writing, "THE SALE IS MADE WITHOUT WARRANTIES OF TITLE OR CONDITION; THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE; AND THE PROPERTY IS SOLD "AS IS," "WHERE IS," "WITH ALL FUALTS". Secured Party may consider warranting title, if there are no uncertainties about UCC liens because buyers may refuse to buy the property or may pay significantly less for property they can not be sure they will own free and clear. Secured Party should rarely, if ever, grant warranties regarding condition of the property.
10. Secured Party should **convey the property** to the buyer by a Transfer Statement. UCC 9-619. Any warranties by Secured Party should be stated specifically in this document.
11. If Secured Party has **both real property and personal property collateral**, both may be sold using real property foreclosure procedures. UCC 9-604. But if Secured Party pursues summary non-judicial foreclosure, the real property anti-deficiency statute (AS 34.20.100) will apply and Secured Party will not be

able to pursue debtor for any deficiency. Secured Party should be able to take recourse to all collateral notwithstanding the anti-deficiency statute. *Hull v Alaska Federal Savings & Loan* 658 P2d 122 (Alaska 1983)

12. Within 30 days of the sale, the debtor must be provided with complete **accounting of the proceeds of sale** describing the collateral sold, the amount received, and Secured Party's application of funds to the loan or loans as to principal, interest, costs, fees, expenses, etc. UCC 9-616.
13. Upon completion of the sale, if **proceeds from the sale** are greater than the payoff of the loan, refund any proceeds to any junior lien-holders who have sent Secured Party a demand for excess proceeds, in order of their priority, or, if no such junior lien-holders, to the Borrower. UCC 9-615. However, if the proceeds are less than the payoff, a demand for balance will need to be sent to the Borrower. The matter can be handled as an unsecured loan collection for the deficiency balance.
14. With non-consumer goods, **Secured Party may retain the collateral** in full or partial satisfaction of the debt if debtor consents or, following notice, if Secured Party does not receive written objection from debtor, the party that granted the lien, other parties obligated on the loan, or other parties with an interest in the collateral. UCC 9-620, 9-621. With consumer goods, Secured Party may not retain the collateral if 60% of the cash price has been paid on a PMSI loan or 60% of the principal of the loan has been paid on a non-PMSI loan and, under those circumstances, Secured Party must dispose of the consumer goods collateral within 90 days after taking possession.