



Expert Witness in UCC Foreclosure Auctions

Determining Commercial Reasonableness Through Custom and Practice

Whether a UCC foreclosure auction is “commercially reasonable” is often the central issue in disputes arising from secured creditor enforcement actions. Article 9 of the Uniform Commercial Code deliberately avoids rigid rules for how a foreclosure sale must be conducted. Instead, it relies on a flexible standard—commercial reasonableness—that is evaluated in light of customary practices in the relevant marketplace.

Because of this flexibility, courts frequently rely on expert testimony to determine whether a particular UCC foreclosure auction complied with accepted commercial norms. Before addressing the mechanics of commercial reasonableness, however, it is essential to first understand the proper role and limits of expert testimony in UCC foreclosure litigation.

Understanding the Attorney’s Risk: The Commercial Reasonableness Standard

Expert testimony plays a critical role in UCC foreclosure cases—but only when properly confined to its intended purpose. Courts have repeatedly emphasized that experts assist the trier of fact in understanding evidence and industry practice; they do not interpret the law or instruct the court on legal conclusions. This distinction is not merely academic. It is foundational.

Experts Explain “What Is Done,” Not “What the Law Is”

In the context of UCC foreclosure auctions, an expert witness may properly testify regarding:

- How foreclosure auctions are customarily conducted within a specific industry
- Common methods of marketing collateral prior to sale
- Typical timelines between notice and auction
- Accepted bidding procedures
- Whether private sales, public auctions, or hybrid processes are customary for the collateral type
- How pricing is influenced by exposure, venue, and buyer access

What the expert may not do is opine that:

- The sale was or was not “commercially reasonable” as a legal conclusion
- The secured party complied with or violated the UCC
- The debtor’s legal rights were preserved or impaired
- The creditor fulfilled its statutory duties

Those determinations belong exclusively to the court or jury.

Instead, the expert’s task is to supply factual context—to explain what professionals in the relevant marketplace customarily do when enforcing security interests in similar collateral under similar conditions.

The Concept of “Commercial Reasonableness” Is Inherently Factual



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The UCC intentionally avoids defining commercial reasonableness with bright-line rules. Instead, it provides examples and guiding principles, recognizing that commercial practices evolve and vary by industry.

As a result:

- Commercial reasonableness is not determined solely by price
- A low sale price does not, by itself, establish unreasonableness
- Conversely, procedural defects may render a sale unreasonable even if the price appears strong

Expert testimony helps the court evaluate process over outcome, which is precisely what Article 9 contemplates.

An expert does not say, “This sale was commercially reasonable.”

An expert says, “Here is how similar collateral is normally sold, marketed, exposed, and bid upon in this industry—and here is how this sale compared.”

Custom and Practice as the Benchmark

Courts routinely measure commercial reasonableness by asking whether the secured party's actions were consistent with recognized commercial practices among dealers, auctioneers, lenders, and asset disposition professionals.

Expert witnesses are uniquely positioned to address questions such as:

Was the marketing period consistent with industry norms?

Were the advertising channels appropriate for the buyer universe?

Was the auction format typical for this class of assets?

Did the sale location or platform align with how buyers customarily transact?

Were inspection opportunities consistent with market expectations?

These are factual inquiries rooted in experience—not legal interpretations.



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LEADERSHIP

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Joshua Olshin is a partner at AuctionAdvisors and brings his extensive experience advising corporations, financial institutions, municipalities and individuals on the disposition of assets throughout the United States. Before entering the auction business, Mr. Olshin worked as a corporate/transactional attorney in private practice for more than 8 years, beginning his career at Skadden Arps Slate Meagher & Flom and then at Friedman Kaplan Seiler & Adelman. During his time as an attorney, he advised top Fortune 500 companies on the acquisition and disposition of corporate assets.

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Oren Klein is a restructuring and insolvency professional specializing in assignments concerning bankruptcy trustees, federal and state receiverships, special fiscal agents, special masters and assignments for the benefit of creditors. Mr. Klein has served as a Partner with AuctionAdvisors for the past 12 years. Prior to his position at AuctionAdvisors, Mr. Klein was a Partner at Integrated Property Group, LLC for over 4 years. Mr. Klein currently serves as the Chairman of the Turnaround Management Association's New Jersey Chapter with over 220 members in the insolvency and restructuring industry. He also served as a member of the Chapter Resource and Response Committee for the Global Turnaround Management Association serving 52 Chapters with over 10,000 members worldwide.

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