

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT CASE NO. 20000055

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STATE OF NORTH DAKOTA

Ford Motor Credit Company,)	
Appellant,)	
)	Morton County Case 99-P-01241
v.)	
)	
Estate of Greg Sagmiller,)	
Deceased,)	
Appellee.)	

APPEAL FROM THE MEMORANDUM OPINION AND ORDER OF THE MORTON
COUNTY DISTRICT COURT ENTERED FEBRUARY 2, 2000

APPELLANT'S BRIEF

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Statement of the Issues

1. whether the court was clearly erroneous in determining that the Estate of Greg Sagmiller should have notice of an opportunity after sale of the collateral to redeem a vehicle, a 1999 Ford Ranger pickup, repossessed from the Estate of Greg Sagmiller.

2. whether the court was clearly erroneous in determining that by selling the debtor's pickup at a private auction rather than selling the vehicle at a retail outlet, Ford Motor Credit Company sold a repossessed 1999 Ford Ranger pickup, an Estate vehicle, in a commercially unreasonable manner.

Statement of the Case

On November 10, 1998, Greg Sagmiller bought a 1999 Ford Ranger pickup from Bill Barth Ford/Mercury Motors in Mandan, ND for \$19,740.48 (**Appendix-p.23, Statement of the Account-Hrng Ex.5**). Upon application by Sagmiller, Ford Motor Credit Company (Ford) financed the sale in the amount of \$18,595.45. (**Appendix-pp.19-20, Simple Interest Retail Installment Contract- Hrng Ex.1**). Mr Sagmiller passed away April 12, 1999. (**Register of Actions-#14, p. 1**). On April 22, 1999, Ford repossessed the vehicle. Id. On April 23, 1999, Ford sent Notice of Repossession and Right to Redeem to Greg Sagmiller's last know address. (**Appendix-p.21, Notice of Repossession and Right to Redeem- Hrng Ex.2**). Nineteen days later, Ford sold it at a dealer only auction at Minneapolis Auto Auction, Maple Grove, MN on May 12, 1999 for \$15,500 (**Appendix-p.24, Vehicle Report of Sale from Auto Auction-Hrng Ex.6**). After applying the proceeds of the sale to the outstanding balance, Ford claimed the Estate of Greg Sagmiller (Estate) owed Ford \$2,468.78. (**Register of Actions #8**). Ford petitioned the Estate to allow its claim and the claim was denied. (**Register of Actions #9**). Ford petitioned the court to allow the claim and asked for a hearing. (**Register of Actions #11**). A hearing was held January 31, 2000 in the Burleigh County Courthouse, the Honorable Bruce

B. Haskell presiding. The court held that the Estate was never given a chance to redeem after the sale of the pickup and that Ford did not get the best possible price for the pickup because it could have sold the pickup through an automobile retailer and thereby presumably realize a higher price for the collateral and thus reduce the deficiency.

(Appendix- pp.13-16, Memorandum and Order of the Court dated October 20, 1998).

Ford appeals from the court's Memorandum Opinion and Order dated February 2, 2000. (Appendix-p.17, Notice of Appeal and p.18 Notice of Filing of Notice of Appeal).

ARGUMENT

Ford Motor Credit Company (Ford) seeks a deficiency in the amount of \$2,468.78 plus costs and disbursements as allowed by law from the Estate of Greg Sagmiller (Sagmiller) resulting from the sale after default by Sagmiller of an orange 1998 Ford pickup (pickup). (**Appendix-p.30, Transcript of Hearing, p.14, line 3**). The rights and obligations of the secured party and the debtor in the event of default are governed generally by the Uniform Commercial Code §'s 9-501 through 9-507 and are reflected in N.D.C.C. §'s 41-09-47 through 41-09-53. A secured party after default by the debtor has the right to sell, lease, or otherwise dispose of any or all of the collateral. **N.D.C.C. §41-09-50(1) (9-504)**. A secured party seeking to recover a deficiency must conduct the sale of collateral in a commercially reasonable manner and provide "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made" **N.D.C.C. § 41-09-50(3) (9-504)**. The creditor has the burden of proving the commercial reasonableness of the disposition of collateral when a deficiency is sought. **American State Bank of Killdeer v. Hewson, 411 N.W.2d 57 (N.D. 1987)**.

I. Notice of Right to Redeem is Not Required After Sale of Collateral

The rules of notice of right to redeem change slightly when the sale of collateral is by public auction rather than by private sale. A notice of public sale requires the notice to include the time, and place of the sale. **N.D.C.C. § 41-09-50(3) (9-504)**. In the event of a private sale of collateral, as in this case, the creditor must give the debtor reasonable advance notice of a specified time after which such private sale is to be made. **Id.** In either case, actual knowledge suffices. **F.D.I.C. v. Jahner**, 506 N.W.2d 57, 63 (N.D. 1993); **Credit Alliance Corporation v. David O. Crump Sand & Fill Co.**, 470 F. Supp. 489, 494 (S.D.N.Y. 1979) (where secured creditor/assignee of a contract brought action against buyer to recover deficiency in the amount received after default and public sale, court held that notice to one defendant partner was adequate notice to second defendant partner under the notice requirements of UCC 9-5-3). Further, it appears that as long as the notice is sent to the debtor but not actually received, notice might be adequate. "As the applicable Code provision requires that notification be "sent", and since receiving is not an element of "sending", the fact that the notice is not received by the intended recipient is immaterial". **68A Am.**

Jur. 2d Secured Transactions § 676. "[A] notice sent to the actual address of the debtor at the time is sufficient although it is not the address given on the security agreement". **Id. at §677.** This principal is borne out by the provisions of the North Dakota Century Code. N.D.C.C. § 41-09-05 (9-105) contains definitions and an index of definitions which are to be applied to N.D.C.C. Chapter 41-09 and makes reference to and incorporates by such reference certain definitions in Chapter 41-01. It states in part "In addition, N.D.C.C. Chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter". **N.D.C.C. § 41-09-50(4).** N.D.C.C. §41-01-11 (1-201) states in relevant part as follows:

Subject to additional definitions contained in the subsequent chapters of this title which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this title:

25. A person has "notice" of a fact when:
- a. The person has actual knowledge of it;
 - b. The person has received a notice or notification of it; or
 - c. From all the facts and circumstances known to the person at the time in question the person has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when the person has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this title.

26. A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:

- a. It comes to the person's attention; or
- b. It is duly delivered at the place of business through which the contract was made or at any other place held out by the person as the place for receipt of such communications.

If proper notice is not provided, a presumption arises that the collateral had a fair market value equal to the amount of the debt and no deficiency judgment will be allowed unless the creditor produces evidence that the fair market value was less than the outstanding debt. Lindberg v. Williston Indus. Supply Corp. 411 N.W.2d 368, (N.D. 1987); Farmers State Bank of Leeds v. Thompson, 372 N.W.2d 862 (N.D. 1985); see also Dakota Bank & Trust Co., Fargo v. Grinde, 422 N.W.2d 813 (N.D. 1988). If the secured party has complied with the notice requirements, then the secured party has the right to a deficiency from the debtor provided that the sale was done in a reasonably commercial manner. N.D.C.C. § 41-09-50(2).

Mr Sagmiller passed away April 12, 1999. The pickup was repossessed April 22, 1999. On April 23, 1999, Ford sent notice of repossession and right to redeem to Greg Sagmiller at his last known address at 1003-3rd St NW in Mandan, ND. (Appendix-p.21, Notice of Repossession and Right to Redeem-

Hrng Ex.2). Jeanette Sagmiller lives at that address also. **Register of Actions-#s 1-5**. She is also the Personal Representative of the Estate of Greg Sagmiller. **Register of Actions-#s 1-5**. The Estate of Sagmiller objected to the introduction of the notice exhibit at the hearing but objected on the basis that notice was sent to a deceased person. (**Appendix-p.27, Transcript of Hearing, p.8**). It is evident from the exhibits and the testimony at the hearing that the Estate of Sagmiller at least had constructive notice of the right to redeem if not actual notice.

The court had some concerns about notice but was not concerned about where the notice was sent but that additional notice was not provided after the sale. The court stated in its Memorandum and Opinion that

The only notice sent to the estate was before the sale. That notice simply said the property would be sold at a private sale within ten days of the notice if the estate failed to redeem the truck. The estate was never given a chance to redeem after the auction, as § 41-09-50 seems to require.

(**Appendix-pp.13-16, Memorandum Opinion and Order**)

In addition to what the court noted, the notice states in part that "Your property won't be sold until 10 days after the date of this notice. After that, you can still get it back any time before its actually sold". (**Appendix-p.21, Notice of Repossession and Right to Redeem**- Hrng Ex.2). This

is in compliance with § 41-09-50 which requires a creditor in the event of a private sale to provide "reasonable notification of the time after which any private sale" is to be made. This means that the secured party shall give the debtor a reasonable time to redeem the collateral, but after that time elapses, the secured party can sell or dispose of the collateral. Even so, the debtor can still redeem after a reasonable time has elapsed but before the sale. The language to which the court relies does not mean that the debtor must receive notice of the right to redeem after the sale has taken place, as the court apparently believes in this case. That would not make sense because, presuming that the purchaser acts in good faith, the debtor cannot redeem after sale or other disposition since all rights of the debtor are transferred to the buyer. N.D.C.C. § 41-09-50. Ford acknowledges that a creditor must account to the debtor for any surplus but that is not what the court was addressing. N.D.C.C. § 41-09-50(2).

The court erred as to the law when it suggested that the debtor has the right to notice to redeem after the sale.

II. The Manner of the Sale of the Collateral is the Primary Concern

Every aspect of the sale of the debtor's collateral after default must be done in a reasonably commercial

manner. American State Bank of Killdeer v. Hewson, 411 N.W.2d 57 (N.D. 1987); N.D.C.C. § 41-09-50(3). At the hearing, the Estate of Greg Sagmiller complained that selling the pickup at a dealer only auto auction was not commercially reasonable because, as the attorney for the Estate asserted in his closing argument, (1) Ford could have made efforts to find a retail outlet to sell the vehicle presumably, as no witnesses were presented by the Estate, to realize a better price, and, (2) the price realized at the auction was "outrageous". (Appendix-p.34, Transcript of Hearing, p.28). The court agreed stating that

FMCC explained that it took all its repossessed vehicles to the auction. It said it could not do otherwise because it did not have a motor vehicles dealers license. This does not explain why it could not have one of its customer dealers sell vehicles on consignment at retail.

(Appendix-pp.13-16, Memorandum Opinion and Order). The court also stated that the auction price and the fair market value of the truck differed by more than \$2,000". Id at p.4.

Presuming that Ford complied with the notice requirements, the general question is whether Ford complied with the "reasonably commercial manner" requirements in the manner in which it sold the pickup at the Minneapolis Auto Auction.

Although a reasonably commercial manner is not

specifically defined in the UCC, it does identify certain aspects of the disposition of collateral which are of concern, including the method, manner, time, place, and terms. N.D.C.C. § 41-09-50(3).

A. The Price Obtained from the Sale of the Collateral Is But One Factor in Determining Reasonable Commercial Practices

Understandably, the price received from the disposition of collateral gets a great deal of attention and almost without exception is the root of litigation because who is going to complain about where the collateral is sold or who bought the collateral if no one objects to the amount obtained from the sale. However, a disparity between the price obtained and the estimated value of the collateral is not dispositive but it is one factor in determining whether or not the collateral was sold in a reasonably commercial manner. **American State Bank of Killdeer v. Hewson, supra p. xiii, at 64.** N.D.C.C. 41-09-53(2) provides that "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." "A large discrepancy between sale price and fair market value signals a need for close scrutiny of the sale's procedures". **First Bank of South Dakota v.**

VonEye, 425 N.W.2d 630 (S.D. 1988) (where debtor objected to sale of repossessed cattle at a time when the market was poor but appeals court upheld jury verdict of commercially reasonable sale); cf. Massey Ferguson Credit Corp. v. Bond, 335 S.E.2d 454 (Ga. 1985) (finding that the claim that a better price could have been obtained if the goods had been sold at retail instead of wholesale does not establish commercial unreasonableness).

B. Creditor Misbehavior Outside of Generally Accepted Commercial Practices Is the Central Issue

If price alone is not the deciding factor, it must be something else. The theme that seems to be prevalent in the cases which have addressed the issue of commercial reasonableness is the presence or suggestion of wrongdoing. One writer finds that Part 5 of Article 9 of the Uniform Commercial Code, which was adopted by the North Dakota State Legislature and embodied in N.D.C.C. Chapter 41, "attempts to chart a path in the narrow area between two policy positions- one, a desire to impede dishonest dispositions, and the other, a reluctance to strangle honest transactions with red tape". Hogan, The Secured Party and Default Proceedings Under the UCC, 47 Minn. L. Rev. 205, 220 (1962-63). The North Dakota Supreme Court centered on that point in American State Bank of Killdeer, when the trial court's

decision to grant summary judgment was reversed and remanded because the bank sold the debtor's expensive farm machinery at a public auction in the off season without any comparable machinery for sale but rather with much less expensive recreational equipment such as snowmobiles and fishing boats, which created a factual issue about the commercial reasonableness of the sale. Supra p. xiii, 411 N.W.2d at 64. One court mirrored that view when it stated that "an inadequate purchase price unaccompanied by fraud, or mistaken or illegal practices, does not render a sale commercially unreasonable". Bryant v. Am. Nat. Bank & Trust Co. of Chicago, 407 F. Supp. 360 (N.D. Ill. 1976) (where plaintiffs defaulted on loan and bank sold plaintiffs collateral, 68,000 pledged shares of stock, at a private sale at \$56/share and bank was buyer, court held that mere allegations that the stock was worth \$75/share did not support a claim that the price was commercially unreasonable).

A Georgia case is particularly interesting because the appeals court reversed a jury decision holding that as a matter of law, the court should have granted a motion for a directed verdict to the secured creditor. Massey Ferguson Credit Corp. v. Bond, 335 SE2d 454 (Ga. 1985). In Massey, the secured creditor conducted a public auction sale of

repossessed farm equipment at the equipment dealer's premises, during normal business hours, with adequate notice, within three weeks of repossession, and the price received was less than the retail appraisal of a dealer. Id. at 455-56. The court went on to say that the debtor's only defense "that had the equipment been sold at another time at retail, it might have brought a better price" was not enough to create a jury issue, id. at 456, this being so even though the sale was conducted at a time when the market for used farm equipment was "terrible". Id. at 455.

In a Missouri case, the appeals court reversed a finding of commercial unreasonableness in the sale of a tractor even though a disparity existed between the \$6,600 sale price of the tractor and the \$27,000 value assigned to the collateral by an expert witness holding that the secured party did not violate any of the provisions of [U.C.C. 9-504(3)]. Commercial Credit Equipment v. Parsons, 820 S.W.2d 315 (Mo. App. 1991). The trial court noted that the windshield and rear glass of the cab were broken after repossession and its appearance explained the "low bidder interest" but the appeals court determined that this was not enough to support a finding of commercial unreasonableness. Id. at 321.

The above cases may be compared to a federal case where

the appeals court reversed a district court's ruling in favor of the SBA. United States v. Terry, 554 F.2d 685 (5th Cir C.A. 1977). In Terry, the SBA foreclosed on a company's note and sold the company's equipment, furniture, fixtures, inventory, accounts and stock. Id. at 687. The SBA loan officer secured the collateral but did not inventory or appraise the assets, sold the inventory at a public auction when it was standard procedure of the SBA to negotiate sales of entire businesses, hired an auctioneer who had never before liquidated an electric sign manufacturing business and who valued the assets at \$15,000 when the outstanding balance on the loan exceeded \$94,000, refused to delay the sale of the assets three weeks to a prospective purchaser who discussed a sales price as high as \$100,000, and auctioned the assets two days after receiving them, garnering \$24,000. Id. at 689-70.

Here, as stated before, the pickup was sold at a dealer only auction in Maple Grove, MN, a suburb of Minneapolis, and obtained a price of \$15,500. The circumstances should be considered.

1. The Uniform Commercial Code Favors Private Sale versus Public Auction

The Estate objected to a dealer only auction, a private sale, even though the Uniform Commercial Code encourages

disposition of collateral at private auctions. "Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties."

UCC 9-504, Official Comment, paragraph 1. Besides, Ford is not in the business of selling vehicles- it is in the business of financing them. The manager of the state office of Ford Motor Credit Company appeared at the hearing and testified that "Ford Credit isn't licensed to sell them anywhere but at auction". (**Appendix-p.31, Transcript of Hearing- p.24, line 5**). He further stated that Ford Motor Credit Company is independent of any of the dealers other than it provides financing for Ford Motor products.

(**Appendix-p.26, Transcript of Hearing, p.4, lines 8-22**).

Other courts have agreed with the proposition that a seller of collateral is not obliged to sell the collateral itself or find a retail outlet to sell for them. The court in **Dischner v. United Bank Alaska, 725 P.2d 488, 490 (Alaska 1986)** said that the wholesale value for repossessed automobiles is the appropriate measure of value when the creditor does not maintain retail facilities and is not in the business of dealing, selling or renting cars. One recognized source seems to support the notion that retail

sales are not necessarily better than wholesale sales. White and Summers state:

It is axiomatic that retail sales will bring a higher price than sales in the wholesale market, but retail marketing advertising expenses will also exceed those of the wholesale market. For instance, a bank who attempts large scale resales of repossessed automobiles on the retail market may incur substantial additional expenses which it may seek to add to the deficiency under 9-504(1)(a).

J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, § 26-11 at 1118 (2d ed. 1980).

The court in this matter stated that Ford has a duty to obtain the best possible price it can for the benefit of the debtor. Ford does not have to obtain the best possible price. It is required to dispose of the collateral in a commercially reasonable manner. A New York court supported the proposition that a creditor does not have a duty to obtain the best possible price for the benefit of the debtor when it stated that "[t]he creditor is not required to make a disposition of the collateral on a credit basis in order to obtain a higher price and thus reduce the deficiency, for the reason that the creditor is not required to sacrifice his interest". **Syracuse Supply Co. v. Vogel**, 433 NYS2d 920, 923 (App. Div. 1980) (where debtor owing \$672,624 defaulted, his equipment was repossessed and sold resulting in a loss of almost \$290,000 even though outside interests offered to

purchase debtor's collateral and pay the delinquency and make monthly installments adding them to the monthly payments otherwise due).

2. Value of Assets

The only evidence about value of the pickup that the Estate presented was a document acquired from Ford through discovery stating the wholesale value of the pickup to be \$22,150. (**Appendix-p.24, Vehicle Report of Sale From Auction, Hrng Ex.6**). This document was provided to Ford by Minneapolis Auto Auction and there is no testimony to determine how the source calculated this number. Another document in evidence suggests that the wholesale value of the vehicle at the time of the sale was \$16,509. (**Appendix-p.22, Collateral Recovery and Statement of Loss- Hrng Ex.4**). Sagmiller purchased the vehicle new for \$18,499 figuring in a rebate. (**Appendix-pp.19-20, Retail Installment Contract- Hrng Ex.1**). The balance due at the time of repossession was \$17,619.08. (**Appendix-p.21, Notice of Repossession and Right to Redeem- Hrng Ex.2**). The proceeds from the sale of the pickup was \$15,500 leaving a deficiency of \$2,468.78. (**Appendix-p.22, Collateral Recovery and/or Disposition of Loss- Hrng Ex.4**). The Ford Motor Company witness, Aaron Robbins, the dealer account manager for Ford, stated that he worked for the company as a credit analyst and "would

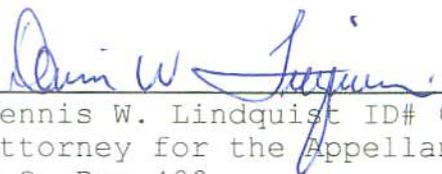
continuously book out vehicles and get an idea of the wholesale value on a number of Ford and Lincoln Mercury vehicles" and that he valued "hundreds" of vehicles and that it was his opinion that \$15,500 was what the vehicle would have been worth. (**Appendix-pp.28-29, Transcript of Hearing, pp. 12-13**). In fact, to further safeguard the interests of both parties, Ford provided a representative on site at the auction with the authority to reject a bid if appropriate. (**Appendix-p.32-33, Transcript of Hearing, pp. 25-26**).

Ford readily concedes that under certain circumstances, the price received of the sale of the collateral takes on significant importance, especially when the debtor has not received notice of the sale. Only when notice is defective does the secured party have to rebut the presumption that the value of the collateral is less than the value received at sale. **State Bank of Towner v. Hansen**, 302 N.W.2d 760, 767 (N.D. 1981); **Lindberg v. Williston Indus. Supply Corp.**, 411 N.W.2d 368, 374 (N.D. 1987). The North Dakota Supreme Court has adopted the position that where the sale is conducted according to the requirements of the code, including proper notice, "the amount received or bid at a sale of collateral is evidence of its true value in an action to recover a deficiency". **State Bank of Towner, supra**, at 767.

III. CONCLUSION

Ford provided notice of the right to redeem to the last known address of the deceased just as it was required to do and gave the Estate reasonable time, 19 days after the date of notice, to arrange financing to buy the vehicle if it wished. Ford then had the vehicle sold. There is nothing more to it than that. Ford did nothing wrong. Nowhere is there any indication of overreaching, of fraud, of deception, of collusion, of unusual circumstances surrounding the sale. Sagmiller's only grievance is that a deficiency exists and the Estate doesn't want to pay it.

The court erred when it concluded that Ford was obligated to provide additional notice of the sale of the right to redeem. The court was contrary to the U.C.C., the case law, and the evidence in concluding that Ford should have found a retailer to sell the vehicle. It was only speculative that a higher price could have been obtained. As a matter of law, the disposition of the collateral in this case was commercially reasonable, and Ford respectfully requests that the court Order denying Ford's Petition for Allowance of Claim be reversed.


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