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The Right to an Article 9 Deficiency Judgment Without 9-504 Notice of Resale

THE RIGHT TO AN ARTICLE 9 DEFICIENCY JUDGMENT WITHOUT 9-504 NOTICE OF RESALE

INTRODUCTION

A continuing source of disagreement among the courts centers on the interpretation of 9-504 of the UCC.[1] Specifically, the difficult question is whether a secured party after repossessing collateral following a debtor's default may obtain a deficiency judgment[2] if the secured party resells the collateral without notifying the debtor.

The purpose of this note is to analyze this question thoroughly. In order to resolve this particular controversy, the relevant provisions of Article 9 will be mentioned and explained, the leading cases decided under the Code will be discussed, pre-Article 9 law (which has been relied upon by several courts) will be shown to be inapplicable, and finally, the merits of each argument will be presented, analyzed and weighed.

Part V of Article 9 prescribes the procedures the secured party must follow when the debtor defaults under a security agreement. Unless the parties have agreed otherwise, the secured party has the right to repossess the collateral after the debtor's default.[3] Assuming

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1. All references will be made to the 1972 official text of the Uniform Commercial Code [hereinafter cited as UCC and referred to as UCC].

2. In general, "deficiency" is that part of a secured obligation which remains after crediting the original debt with net proceeds accruing from the sale of the security by the creditor. Thus, a deficiency judgment is a judgment or decree for that part of a secured debt not realized from the sale of the collateral. *See* Odmulgee Motor Sales Co. v. Prentice, 371 P.2d 723 (Okla. 1962).

3. UCC § 9-503 provides that

> [u]nless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

Sections 9-503 and 9-504 have been under vigorous constitutional attack. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Supreme Court held the Florida and Pennsylvania prejudgment replevin statutes unconstitutional. The Court held repossession of the collateral under these statutes was a deprivation of a possessory interest in property without due process. *Id.* at 70.

In Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), a district court ruled sections 9-503 and 9-504 constitutionally defective in that the self-help provisions constituted takings without due process of law. *Id.* at 616.

This attack on prejudgment remedies, even if successful, does not diminish the importance of deciding the question presented by this note. The secured party may voluntarily receive possession of the collateral, or if a notice hearing is required, the secured party will still receive possession of the collateral. This note assumes there has been a default and that the secured party has received possession of the collateral. For a discussion of the impact of the *Fuentes* decision on the Article 9 notice provisions, see Note, *Article 9—Notice Provisions Upon Default*, 1972 WASH. U.L.Q. 535.

the debtor has not exercised his right of redemption,[4] and the secured party does not hold the collateral in lieu of the balance due, the secured party may resell the collateral.[5]

In either a voluntary or compulsory sale, the secured party may dispose of the collateral at a public or private sale.[6] The time, place and manner of the disposition are governed by "commercial reasonableness."[7] Unless the collateral is perishable, threatens to decline rapidly in value or is a type normally sold on a recognized market, the secured party must give the debtor notice of the resale.[8] If the collateral is to be sold publicly, the secured party must give reasonable notice of the time and place of the resale.[9] On the other hand, if the collateral is to be sold privately, the secured party must only give reasonable notice of the time after which the private sale is to be made.[10] In the case of consumer goods,[11] no further notification is required. In other cases, the secured party must send notification to any other secured party from whom written notice of a claim of interest in the collateral has been received.[12]

If the security interest secures an indebtedness, the debtor is

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4. UCC § 9-506 provides that

> the debtor . . . may . . . redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

5. According to UCC § 9-505, if the secured party elects to return the collateral in lieu of the balance, the indebtedness is discharged. UCC § 9-504 further provides that

> [a] secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing.

6. UCC § 9-504(3) provides that the "[d]isposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts."

7. According to UCC § 9-504(3),

> [s]ale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

8. *Id.* The purpose of the notice is to allow the debtor sufficient time to take the necessary measures to protect his interest either by taking part in the sale or by procuring others to do so. *See* UCC § 9-504, Comment 5.

9. UCC § 9-504(3).

10. *Id.* Because it is assumed that in a private sale the debtor will not repurchase the collateral, but rather that it will be sold through regular commercial channels, the debtor need not be given the same exact notice as to time and place as that required for public sales. *See* UCC § 9-504, Comment 1.

11. According to UCC § 9-109, goods are consumer goods "if they are used or bought for use primarily for personal, family or household purposes."

12. UCC § 9-504(3).

liable for any deficiency. In cases of sales of accounts or chattel paper,[13] the debtor is liable for a deficiency only if the security agreement expressly so provides.[14]

The Code provides a remedy for the failure of the secured party to comply with the resale provisions of 9-504.[15] If the disposition is completed and the secured party has not complied with the requirements, the debtor has the right to recover the resulting damages.[16] Article 9 does not, however, explicitly discuss the effect of the secured party's failure to comply with the resale provisions on his subsequent right to a deficiency judgment.[17]

CASES DECIDED UNDER THE UCC

Courts which have decided this controversy under the Code provisions are hopelessly split; four different approaches have been taken by the various courts. Some courts indicate that the failure to comply with the notice requirements of 9-504(3) does not preclude the secured party from obtaining a deficiency judgment. Other courts accept this basic position but further state that in the deficiency judgment suit the secured party has the burden of proving that the price obtained at the sale was the fair market value of the collateral. A third line of cases denies a deficiency judgment altogether. Finally, a small number of Georgia decisions deny deficiency judgments by holding that the secured party's failure to give the debtor notice resulted in an "accord and satisfaction."

Cases Allowing Deficiency Judgments

A case for the proposition that the failure to give 9-504(3) notice does not result in a forfeiture of the secured party's right to a deficiency judgment is *Grant County Tractor Co. v. Nuss*.[18] Therein the secured party brought a deficiency suit on a contract and security agreement covering the sale of farm equipment after he had repossessed and sold one piece of the collateral without notifying the

13. Article 9 applies to any sale of accounts or chattel paper. *See* UCC § 9-102(1)(b).

14. UCC § 9-504(2).

15. The remedy is found in UCC § 9-507.

16. UCC § 9-507(1). In respect to consumer goods, a penalty of at least the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price is imposed. *See* UCC § 9-507(1).

17. The question is not discussed either in the Code comments or in its unofficial commentaries. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1264 n.8 (1965).

18. 6 Wash. App. 866, 496 P.2d 966 (1972).

debtor.[19] The court concluded that the collateral was "equipment" and that the secured party was authorized to resell it under 9-504.[20] Even though the secured party failed to give the required notice, he did not forfeit his right to a deficiency judgment.[21] The court based its decision on 9-507(1), explaining that since the remedy of damages is specifically provided, the drafters of the Code did not intend the forfeiture of the secured party's right to a deficiency judgment to act as an additional penalty.[22]

In *Norton v. National Bank*[23] an automobile dealer sold a car to a purchaser who signed a promissory note and a conditional sales contract. The dealer then sold the chattel paper to a bank with recourse.[24] The purchaser ultimately defaulted and the bank repossessed the car. Without notifying either the dealer or the purchaser, the bank resold the car at a private sale.[25] Subsequently the bank sought a deficiency judgment.[26] The court reasoned that the dealer was a "debtor" within the meaning of 9-504 and was entitled to notice of the resale.[27] The bank's failure to give notice, however, did not result in the forfeiture of its right to a deficiency judgment;[28] rather, the court felt that the debtor could sufficiently recover his damages under 9-507(1).[29]

The court added that in the suit for a deficiency judgment the secured party would have the burden of showing that the actual price obtained at the resale was equal to the amount which would have been realized had the debtor been given proper notice.[30] In the absence of such proof, a presumption that the collateral was worth the amount of the outstanding indebtedness would prevail.[31]

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19. *Id.* at 869, 496 P.2d at 968.
20. *Id.*
21. *Id.* at 870, 496 P.2d at 969.
22. *Id. See also* Atlas Credit Corp. v. Dolbow, 193 Pa. Super. 649, 165 A.2d 704 (1961); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966).
23. 240 Ark. 143, 398 S.W.2d 538 (1966).
24. *Id.* at 144, 398 S.W.2d at 539.
25. *Id.*
26. *Id.*
27. *Id.* at 145, 398 S.W.2d at 540.
28. *Id.* at 147, 398 S.W.2d at 541-42.
29. *Id.* at 148, 398 S.W.2d at 542.
30. *Id.*
31. *Id. See also* Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alas. 1969); Universal C.I.T. Credit Co. v. Rone, 248 Ark. 665, 453 S.W.2d 37 (1970); Carter v. Ryburn Ford Sales Inc., 248 Ark. 236, 451 S.W.2d 199 (1970) (same theory applied to a case involving the failure to comply with a non-notice provision); Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382,

Cases Denying Deficiency Judgments

Courts denying deficiency judgments following the resale of collateral without prior notice to the debtor rely upon two different theories. In several Georgia decisions courts have relied on the theory of accord and satisfaction. For example, in *Moody v. Nides Fin. Co.*[32] the debtor purchased a car and sent the monthly payment to the finance company which had purchased the chattel paper. The finance company, alleging that a default had occurred, refused to accept the payment and repossessed the car.[33] It later resold the car without notifying the debtor.[34]

The court reasoned that the finance company's refusal of payment and its acceptance of the car amounted to an accord and satisfaction.[35] Regarding the Code, the court stated:

> We are content to rest the matter on the accord and satisfaction which these facts would authorize a jury to find though it appears that we would likely have reached the same result by applying UCC provisions.[36]

The leading case relying on the UCC to deny a deficiency judgment for failure to comply with the 9-504 notice requirements is *Skeels v. Universal C.I.T. Credit Corp.*[37] In that case, the debtor, a car dealer, sought refinancing and approached the secured party, a finance institution which had floor-planned the debtor's inventory.[38] The secured party's agent informed the debtor that a new loan had

276 A.2d 402 (1971); T. & W. Ice Cream Inc. v. Carriage Barn Inc., 107 N.J. Super. 328, 258 A.2d 162 (1969); Investors Acceptance Co. v. James Talcott Inc., 454 S.W.2d 130 (Tenn. Ct. App. 1969).

32. 115 Ga. App. 859, 156 S.E.2d 310 (1967).

33. *Id.* at 860, 156 S.E.2d at 311.

34. *Id.*

35. *Id.*

36. *Id.* at 861, 156 S.E.2d at 312. Because the accord and satisfaction argument does not rely on the UCC, it will not be considered in the remainder of this note. It seems, however, that courts rely more upon estoppel than upon an impossible unilateral accord and satisfaction. For example, in the *Moody* case, the debtor acted in good faith and was only slightly in arrears in payments. There was no real default or repossession, and the finance company left the impression that it was retaining the car in lieu of the debt.

For other cases relying on accord and satisfaction in theory, but seemingly more concerned with estoppel, see Smith v. Singleton, 124 Ga. App. 394, 184 S.E.2d 26 (1971); Trailmobile Div. of Pullman Inc. v. Jones, 118 Ga. App. 472, 164 S.E.2d 346 (1968) (concurring opinion); L.W. Johnson v. Commercial Credit Corp., 117 Ga. App. 131, 159 S.E.2d 290 (1968).

37. 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964).

38. *Id.* at 696-97.

been approved.[39] The debtor continued to deliver all security instruments to the secured party.[40] Claiming the debtor had defaulted on several individual security agreements, the secured party repossessed[41] and sold all the cars on the debtor's lot without notifying the debtor.[42] The debtor then brought an action seeking compensatory and punitive damages against the secured party for destroying his business. In a counterclaim the secured party sought a deficiency judgment.[43]

In its denial of the deficiency judgment, the court based its decision on two grounds. First, to grant a deficiency judgment when the secured party failed to give notice of the sale would be to perpetuate the evils existing under the pre-Code law.[44] Second, the failure to give notice deprived the debtor of the opportunity to redeem the collateral under 9-506.[45]

A Synopsis of the Arguments

The major arguments for allowing deficiency judgments even if the secured party fails to notify the debtor of the resale are summarized as follows:

(1) The solution to the problem lies in the Code, its comments and the cases decided under the Code. The pre-Code law is of no significance since the Code departs from the old formulas. Under the Code, a deficiency judgment is not expressly prohibited.[46]

(2) The Code explicitly authorizes damages in 9-507 if the secured party fails to give notice. The damages allowed are adequate to protect the debtor's interests.[47]

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39. *Id.* at 697.
40. *Id.*
41. *Id.* at 698.
42. *Id.* at 702.
43. *Id.* at 696.
44. *Id.* at 702.
45. *Id.* For other cases denying a deficiency judgment on the basis of the debtor's loss of the right of 9-506 redemption, see Edmondson v. Air Serv. Co., 123 Ga. App. 263, 180 S.E.2d 589 (1971); Motor Contract Co. v. Sawyer, 123 Ga. App. 207, 180 S.E.2d 282 (1971); T.J. Braswell v. American Nat'l Bank, 117 Ga. App. 699, 161 S.E.2d 420 (1968).

For another case denying a deficiency judgment, although no reasons were given, see Morris Plan Co. v. Johnson, 271 N.E.2d 404 (Ill. Ct. App. 1971).

46. White, *Representing the Low-Income Consumer in Repossession, Resales and Deficiency Judgment Cases*, 3 UCC L.J. 199, 209 (1970-71).

47. *Id.* at 220. *See also* Hogan, *Pitfalls in Default Procedure*, 86 BANKING L.J. 965, 978 (1969); Posel, *Sales and Sales Financing*, 16 RUTGERS L. REV. 329, 346 (1962).

(3) Denial of a deficiency judgment deprives the secured party of his right "to be made whole" as stated in 1-106(1).[48]

The arguments for denying deficiency judgments are as follows:

(1) The solution to the question is found in the pre-Code law where under comparable circumstances a deficiency judgment was denied.[49]

(2) Several state statutes which contain provisions governing repossession and sale deny deficiency judgments when notice of the resale is not given.[50]

(3) The forfeiture of a deficiency judgment is a deterrent to the secured party's noncompliance with the sale provisions of 9-504.[51]

(4) Failure to give notice denies the debtor his right of redemption; consequently, the secured party should lose any right to a deficiency judgment.[52]

An analysis of these arguments indicates that the conclusion allowing a deficiency judgment is more persuasive than that which denies such a judgment. The purpose of the remainder of this note is to substantiate this opinion. The argument relying on pre-Code law will be rejected, and specific UCC provisions will be discussed in order to find a solution consistent with the policy of the Code.

PRE-CODE LAW

The major argument for denial of a deficiency judgment involves repeated references to pre-Code law. Under the Uniform Conditional Sales Act,[53] the creditor could retake possession of the goods if the debtor defaulted.[54] Assuming the debtor did not redeem the

48. Russell, *The Damage Award for Improper Distribution of Collateral Under the Uniform Commercial Code*, 49 ORE. L. REV. 65, 69 (1969).

49. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964); Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971); White, *supra* note 46, at 220.

50. White, *supra* note 46, at 224.

51. Posel, *supra* note 47, at 345.

52. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964).

53. Hereinafter cited as UCSA and referred to as UCSA.

54. UCSA § 16 provides that

> [w]hen the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of

collateral,[55] the UCSA envisioned two possible resales: compulsory[56] and voluntary.[57] In either case, the creditor had to comply with elaborate notice requirements.[58]

The UCSA provided that if the creditor failed to comply with the resale provisions, the debtor could recover from the creditor his actual damages (if any), but in no case less than one quarter of the sum of all payments made under the contract, including interest.[59] The UCSA did not explicitly mention what effect the creditor's noncompliance with the resale provision might have on his subsequent right to a deficiency judgment.[60] The courts, however, ruled that if the creditor failed to comply with the resale provisions (including the notice requirements) in either a compulsory or voluntary resale, he was precluded from obtaining a deficiency judgment;[61] the resale was considered void and the indebtedness discharged.[62]

Reliance on the pre-Code UCSA[63] is the basis of a major argument for denying deficiency judgments under the UCC. According to this argument, the UCSA treated the question of the debtor's liability for a deficiency judgment and the creditor's liability for failure to comply with resale provisions in sequences of sections

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any promise the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof.

55. UCSA §§ 17, 18.

56. UCSA § 19 provides that

[i]f the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty percent of the purchase price at the time of the retaking, the seller shall sell them at public auction.

57. UCSA § 20 provides that "[t]he seller may voluntarily resell the goods for account of the buyer on compliance with the same requirements [of § 19] . . . ."

58. UCSA § 19.

59. UCSA § 25 provides that

[i]f the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.

60. The right to a deficiency judgment is stated in UCSA § 22:

If the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer.

61. Annot., 49 A.L.R.2d 15 (1956).

62. Some courts allowed an additional damage penalty. For a discussion of the two conflicting series of decisions on this added penalty, see Farmers Bank v. Odom, 246 A.2d 85, 88 (Del. Super. Ct. 1968).

63. Several states did not repeal the UCSA upon enactment of the UCC. In this sense it may technically be inaccurate to refer to the UCSA as "pre-Code" law.

basically comparable to the sequence of 9-504(3) and 9-507(1).[64] Therefore, the argument goes, the UCC did not alter this link between required notice and the right to a deficiency judgment. Finally, advocates of this argument deny that 9-507 is presently the debtor's sole remedy; they indicate that a provision similar to 9-507 existed in the UCSA and that deficiency judgments were still denied.[65]

Reliance on the pre-Code decisions is of questionable value when considering a similar problem under the UCC. The UCSA does not expressly provide a solution to the question of the effect of failure to give notice of resale on the secured party's right to a deficiency judgment, and its draftsmen apparently did not consider the problem.[66] In addition, courts under the UCSA did not discuss adequately the reasons for their decisions. The requirement of giving proper notice of resale as being a condition precedent to a deficiency judgment might have been assumed to be so obvious that it did not require an explanation.[67] However, courts deciding the question under the Code should not be governed by decisions explained inadequately under a law which, absent judicial decisions, did not explicitly resolve the question.

More importantly, the UCC was enacted because the stringent system of regulation under the UCSA had failed.[68] The UCSA had established burdensome requirements which had little practical benefit.[69] As the official comment to 9-101 indicates, the UCC was designed to supersede prior legislation such as the UCSA. The UCC's chief goal was to provide "a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."[70]

Furthermore, the purposes of the notice requirements under the UCSA and the UCC are fundamentally different. Under the UCSA two types of notice were required: notice to the buyer and notice to

64. *See* 2 G. GILMORE, *supra* note 17, at 1264.

65. Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971).

66. *See* 2 G. GILMORE, *supra* note 17, at 1264.

67. *Id.* at 1263.

68. Gilmore, *Article 9 of the Uniform Commercial Code Part V—Default*, 7 CONF. ON PERSONAL FIN. L.Q. 4, 7 (1952).

69. *Id.*

70. UCC § 9-101, Comment.

the public. The UCSA insisted on public resales and auctions.[71] If the creditor failed to give notice of the resale, the very policy of having public resales would be defeated. Obviously the public cannot attend a resale without proper notification. Under the UCSA the harshness of the penalty to the creditor matched the harshness of the consequences of his actions.

Under the UCC, however, the purposes of the notice requirements are different.[72] The Code adopts the more liberal notice provisions of the former Uniform Trusts Receipts Act.[73] Section 9-504 does not delineate exacting requirements but, instead, refers to "reasonable notice" to the debtor. Private resales, not public resales, are the goal of 9-504.[74]

Since private resales are encouraged and the only notice required to be given the debtor is notice of the time after which the private resale is to be made,[75] notice appears to assume a lesser role under the UCC than it did under the UCSA. The secured party could fail to give notice of the private resale and still sell the collateral through accepted commercial channels. In any given case the amount realized in a private resale could be the same whether or not notice was given. The debtor is protected even when notice is not given by the limited ability of the secured party to purchase at the private resale.[76] When compared with the situation under the UCSA, the consequences of failing to give notice are less harsh and the resulting penalty should be correspondingly less severe.

A final difference between the UCSA and the Code relates to the purpose of denying a deficiency judgment. Under the UCSA denial of a deficiency judgment was intended to operate as a deterrent and was consequently penal in nature. On the other hand, the Code specifically rejects the notion of penal damages in most instances:

The remedies provided by this Act shall be liberally admin-

71. UCSA § 19.
72. UCC § 9-504, Comment 1.
73. *Id.*
74. *Id.* Comments 1, 6.
75. *Id.* § 9-504(3).
76. According to UCC § 9-504(3),

[t]he secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is a type which is the subject of widely distributed standard price quotations he may buy at private sale.

> istered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.[77]

A similar reference to the law of chattel mortgages is likewise unavailing. A chattel mortgagee had to give the chattel mortgagor notice prior to the sale of the item which was the subject of a chattel mortgage.[78] If the chattel mortgagee was considered to have had a lien to secure the loan, failure to notify the chattel mortgagor prior to the sale resulted in a forfeiture of the right to a deficiency judgment.[79]

A contrary result was reached in those jurisdictions if the mortgagee had legal title to the mortgaged goods, subject only to the chattel mortgagor's equitable or statutory right of redemption.[80] A failure to follow statutory provisions with respect to sale, including notice, did not result in the loss of the deficiency judgment.[81] The measure of the chattel mortgagor's damages was the difference between the fair market value of the goods and the proceeds of the sale.[82]

These arguments are of little significance when considering the problem from the viewpoint of 9-504. Not only has the UCC superseded the law relating to chattel mortgages,[83] but under the UCC the rights and duties of the parties are treated without reference to where "title" to the collateral is located.[84] Although a lien-title dichotomy was determinative under the chattel mortgage law, it is of

77. UCC § 1-106. Professor Gilmore has argued that under the UCC both contract and tort damages can be collected and that tort damages are in effect punitive. He cites the *Skeels* decision (see notes 37-45 *supra* and accompanying text) as an indication how punitive damages may be sought under 9-507(1); he further states that 1-106 is outflanked by calling these damages "tort" damages. *See* 2 G. GILMORE, *supra* note 17, at 1256.

Professor Gilmore's argument is not inconsistent with the position taken in this note. It is one thing, as in the exceptional case of *Skeels*, to ask for tort damages. It is quite another to call forfeiture of a deficiency judgment "damages." One can seek to circumvent 1-106 by asking for tort damages and still not be allowed to deny the secured party his right to a deficiency judgment.

78. Annot., 30 A.L.R.2d 539 (1953).

79. Franklin Nat'l Bank v. Austin, 104 A.2d 742, 744 (N.H. Ct. App. 1954).

80. *Id.*

81. *Id.*

82. Veterans Loan Authority v. Wilk, 61 N.J. Super. 65, 69, 160 A.2d 138, 142 (1960).

83. UCC § 9-101, Comment.

84. UCC §§ 2-706, Comment 3; 9-202, Comment 1; 9-507, Comment.

no assistance under the UCC since the distinction between lien and title has been eliminated.

One final reference can be made to non-Code law. It has been argued that a deficiency judgment should be denied under the UCC because several state statutes specifically preclude the deficiency judgment penalty in consumer retail sales contexts.[85] One such statute is the Illinois Retail Installment Sales Act,[86] which is patterned more after the UCSA than the UCC. As a result, primary emphasis is placed on a public sale. Illinois courts have held that the failure to meet the notice requirements as to transactions under the scope of the Illinois Act results in a forfeiture of any right to a deficiency judgment.[87]

Reference to state statutes such as the Illinois Retail Installment Sales Act is of marginal value. These state statutes take precedence over the UCC[88]—Article 9 does not supersede state retail installment sales acts. This deference is necessary because consumer installment sales and loans "present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification."[89]

Application of the UCC

Assuming that pre-Code law is not controlling and therefore of little significance, the crucial analysis of the issue involves the application of appropriate rules and policies of Article 9. Analysis of a Code provision outside Article 9 substantiates the proposition that failure to give notice should not result in the loss of a right to a deficiency judgment under Part V of Article 9.

A notice provision in Article 2 (more specifically, 2-706) is simi-

85. *See* White, *supra* note 46, at 224.

86. Illinois Retail Installment Sales Act §§ 23 and 25, Ill. Rev. Stat. ch. 121½, §§ 247-49 (1965).

87. Northern Trust Co. v. Kuykendall, 273 N.E.2d 526 (Ill. Ct. App. 1971).

88. UCC § 9-203(4).

89. *Id.* § 9-101, Comment. It must be remembered that these acts apply only when the "debtor" is a consumer, and they do not change the applicability of Article 9 regarding businessmen, merchants, jobbers or other industrial or commercial debtors. This is not to suggest, however, that the consideration of state retail sales acts is not important. Professor Gilmore, citing Alliance Discount Corp. v. Shaw, 195 Pa. Super. 601, 171 A.2d 548 (1961), notes that the UCC and retail installment sales acts often work in "double harness." "For the secured party's failure to comply with the Article 9 provisions or standards the consumer-debtor could recover under the more liberal [retail installment sales act] sanctions." 2 G. Gilmore, *supra* note 17, at 1261.

lar to 9-504. If the buyer wrongfully rejects or revokes acceptance of goods or fails to make preliminary delivery payments, one of the seller's remedies is to sell the goods and recover damages.[90] According to 2-706, if the seller elects to sell the goods at a private sale, he must give the buyer reasonable notification of his intention to sell.[91] The seller need not, however, notify the buyer of the time and place of the sale.[92]

The notice requirements of 9-504 and 2-706 are essentially the same regarding public sales. These provisions require that the secured party (or seller) give the debtor (or buyer) reasonable notice of the time and place of the sale. The purpose of these notice requirements is to provide the debtor (or buyer) an opportunity to bid at the sale or procure attendance of other bidders to insure the highest possible sale price.[93]

A 2-706 sale made in good faith and in a commercially reasonable manner (including compliance with the notice requirements) is an express condition precedent to the seller's right to recover the difference between the sale price and the contract price.[94] Two leading cases indicate that the seller's failure to give notice of the sale results in the forfeiture of this 2-706(1) right.[95]

The result of the failure to give notice under 9-504 need not be the same as that under 2-706; there are at least two distinctions between the provisions. First, 2-706 expressly states that before the seller can recover the difference between the sale price and the contract price, the seller must have conducted the sale in good faith and in a commercially reasonable manner.[96] As noted earlier, 9-504 does not create any explicit condition precedent to a secured party's right to a deficiency judgment. Second, if a seller does not give notice under 2-706, he forfeits his 2-706(1) right to collect the differ-

90. UCC § 2-703(d).

91. *Id.* § 2-706(3).

92. *Id.* Comment 8. In comparing 2-706 and 9-504, it is recognized that each section's context is different. In 9-504 the Code is concerned (among other things) with preserving the debtor's equity in the collateral—a concern of little or no importance under 2-706.

93. *Id. See also* Nelson v. Monarch Inv. Plan, 452 S.W.2d 375 (Ky. Ct. App. 1970).

94. UCC § 2-706(1).

95. Foster v. Colorado Radio Corp., 381 F.2d 222 (10th Cir. 1967); Portal Galleries Inc. v. Tomar Prods. Inc., 60 Misc. 2d 523, 302 N.Y.S.2d 871 (Sup. Ct. 1969).

96. UCC § 2-706(1) provides that "[w]here the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price."

ence between the sale price and the contract price.[97] The seller, however, is not without a remedy—he merely loses the right to use the sale price as an absolute measure of damages. He may still recover damages based on the market value of the goods under 2-708.[98]

This comparison between 2-706 and 9-504 illustrates that the drafters of the Code did not intend to deprive the secured party (or seller) of all rights should he fail to comply with duties owed to the debtor (or buyer). In 2-706 the seller does not lose his interest in the collateral if he fails to comply with the sale provisions. Section 9-504 is analogous to 2-706, and it can be argued that the secured party's failure to give notice should not result in his loss of a deficiency judgment.

This rule, which allows the secured party to retain his interest in the collateral despite his failure to comply with duties owed the debtor, underlies 9-207 and 9-208. Section 9-207 delineates the secured party's responsibilities to the debtor when the secured party acquires possession of the collateral either before or after the debtor's default.[99] If the secured party fails to meet requirements of 9-207, he can be held liable for any resulting loss. The secured party does not, however, lose his security interest.[100] Similarly, 9-208 provides that the debtor may require the secured party to produce a statement of account or a list of the collateral being held by the secured party.[101] The penalty for noncompliance, like the penalty of 9-507(1), is limited to damages based upon actual loss.[102]

The secured party's right to a deficiency judgment is the extent of his remaining interest in the collateral. Sections 2-706, 9-207 and 9-208 illustrate a Code policy of allowing the secured party to retain his interest in the goods or collateral despite his failure to comply with the obligations owed the debtor. In light of this policy, the secured party should not lose his right to a deficiency judgment for failing to give the required 9-504(3) notice of resale.

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97. UCC § 2-706, Comment 2.

98. *Id.*

99. *Id.* § 9-207, Comment 4.

100. UCC § 9-207(3) provides that "[a] secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest."

101. UCC § 9-208(1).

102. *Id.* § 9-208(2).

The Question Viewed from Article 9, Part V

Two major arguments for denying a deficiency judgment can be inferred from the remedial provisions of Part V of Article 9. First, a deficiency judgment should be denied because the secured party's failure to give notice deprives the debtor of his right to redeem the collateral.[103] The second argument is that denial of deficiency judgments acts as a deterrent against commercially unreasonable behavior on the part of the secured party.[104]

There are, however, at least two major instances in which the failure to notify the debtor will not result in the debtor's loss of a right to redeem the collateral. The debtor has a right to redeem until the secured party has disposed of the collateral, has entered into a contract to dispose of the collateral or has become entitled to retain the collateral in discharge of the debt under 9-505.[105] Unless the collateral has actually been sold to a good faith purchaser for value and the debtor's interest thus terminated,[106] an improper disposition does not cut off the debtor's right to redeem.[107] If the secured party has purchased the collateral or the collateral has not been placed in a purchaser's hands, the debtor still has a right to redeem. Second, the debtor retains a right to redeem if the secured party disposes of the collateral in units or by more than one contract;[108] even if part of the collateral is sold, the debtor may redeem the remainder.[109] Therefore, if the secured party resells a portion of the collateral without complying with the notice requirements of 9-504, the debtor will nonetheless be able to redeem the remaining collateral.

The argument that 9-507 remedies are inadequate to deter the secured party from noncompliance with the resale provisions of 9-504 can also be challenged. Section 9-507 provides for judicial review of the resale both before and after it has taken place.[110] This judicial review is the ultimate safeguard against any violation of the debtor's

103. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964).

104. Farmers Bank v. Odom, 246 A.2d 85, 88 (Del. Super. Ct. 1968); *see also* Posel, *supra* note 47, at 345.

105. UCC § 9-506.

106. *Id.* § 9-504(4).

107. *See* 2 G. GILMORE, *supra* note 17, at 1256.

108. UCC § 9-504(3) provides that "[d]isposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels."

109. L. LAKIN & H. BERGER, A GUIDE TO SECURED TRANSACTIONS 192 (1970).

110. UCC § 9-507.

rights.[111] By the provisions of 9-507(1), "[i]f it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions."[112] As noted earlier, neither this provision nor its comments state that the secured party's commercially unreasonable behavior before the resale will deprive him of the right to sell the collateral or collect a subsequent deficiency judgment, whereas such conduct may well make him liable for damages under 9-507 or 9-207.

In the event the collateral is consumer goods, the debtor can collect actual damages, and at a minimum, the credit charge plus ten percent of the principal or the time price differential plus ten percent of the cash price.[113] As a result, a debtor may collect damages in excess of the actual loss. Such penalties are calculated on the original principal and total interest charge. In purchases with terms of three years or longer, the interest charge constitutes a significant part of the total price. In these cases the penalties may be sufficient to eliminate the deficiency.[114]

The adequacy of the debtor's remedy in 9-507 can also be illustrated in those cases in which 9-505 requires the secured party to resell the collateral. If the secured party fails to comply with 9-505,

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111. Lakin & Berger, *The Secured Party: Enforcement of His Security Interest Under Article 9 After the Debtor's Default*, 8 AM. BUS. L.J. 1, 22 (1970).

Again a distinction should be made between theory and reality. The value of this provision may be limited because of the unlikelihood the debtor will learn of the secured party's improper disposition before the sale. *See* Note, *Remedies on Default Under the Proposed Uniform Commercial Code as Compared to Remedies Under Conditional Sales*, 39 MARQ. L. REV. 246, 265 (1956).

Section 9-507 judicial review remains an available check on the secured party's conduct. As pointed out in the Brief Amicus Curiae of Permanent Editorial Board for the Uniform Commercial Code in the pending appeal of Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), a business debtor in most instances can avail himself of this remedy, and with the advent of legal service lawyers, it is becoming readily available to the indigent debtor. *See* Brief for Permanent Editorial Board for the Uniform Commercial Code as Amicus Curiae at Appendix B, 6, Adams v. Southern California First Nat'l Bank, *appeal docketed* sub nom No. 72-1484, 9th Cir., March 15, 1972.

112. UCC § 9-507(1).

113. *Id.*

114. *See* White, *supra* note 46, at 218-19. In respect to this possibility, Professor Gilmore has noted:

> If repossession took place before much had been paid the recovery of 10% plus the financing charges could perfectly well exceed the payments. In such a case, at least, the Code provision would amount to a real penalty.

2 G. GILMORE, *supra* note 17, at 1260.

the debtor may recover damages either under 9-507 or in conversion under 9-505(1). As one commentator has noted,

> [i]ts effect [the choice of 9-507 damages or 9-505(1) conversion] is to give the buyer an option to recover between two amounts, thus putting him in the advantageous position of being able to pick the remedy which will give him the greatest amount of damages, and consequently, provide the seller with an effective incentive to abide by the terms of the Code.[115]

ARGUMENTS DENYING DEFICIENCY JUDGMENTS RECONSIDERED

An analysis of the cases which have denied deficiency judgments after a secured party has sold collateral without giving written notice to the debtor indicates that perhaps the courts have viewed a secured party's failure to give notice from certain preconceived notions of fairness and equity. This is particularly evident when the *Norton*[116] and *Skeels*[117] decisions are reconsidered.

The court in *Norton*,[118] which would allow the secured party a deficiency judgment, was obviously influenced by its own notion of fair play. In that case, the debtor-car dealer was not given an opportunity to repurchase the chattel paper which he had sold to the bank with recourse even though he had always repurchased the paper in the past.[119] The bank was unable to explain why it chose that particular instance to act without notifying Norton.[120] At one point the court explicitly discussed the fairness aspect of the case:

> Upon the issue of Norton's damages simple considerations of fair play cast the burden of proof upon the bank. It was the bank which wrongfully disposed of the car without notice to the debtors. Thus it was the bank's action that made it at least difficult, if not impossible, for Norton to prove

115. Note, *supra* note 111, at 266.

116. 240 Ark. 743, 398 S.W.2d 538 (1966).

117. 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964).

118. Norton v. National Bank, 240 Ark. 743, 398 S.W.2d 538 (1966). In that case the assignor of a conditional sales contract was held entitled to 9-504(3) notice when the assignee of the chattel paper repossessed and sold the collateral after the debtor's default. The court held that the assignee was entitled to a deficiency judgment. In the absence of a showing of the resale value of the collateral had notice been given, however, a presumption that the collateral was worth the amount of the outstanding debt would prevail.

119. *Id.* at 744, 398 S.W.2d at 539.

120. *Id.*

> the extent of his loss with reasonable certainty. It would be manifestly unfair for the creditor to derive an advantage from its own misconduct.[121]

A similar passage is found in the *Skeels*[122] decision, which reached an opposite conclusion and denied a deficiency judgment. Considering the extraordinary circumstances in *Skeels*, it is not surprising that a deficiency judgment was denied. The crucial question in that case was whether the credit company, by repossessing the debtor's entire inventory, intended to force the debtor out of business.[123] In affirming the denial of a deficiency judgment, but reversing the award of punitive damages to the debtor, the court of appeals explained the role of fairness in the decisions:

> These provisions [sections 1-103 and 1-203, dealing with the applicability of equity principles and the obligation of good faith] superimpose a general requirement of fundamental integrity in commercial transactions regulated by the Code. In the present case a jury could not easily avoid the conclusion that it would be grossly improper and inconsistent with good faith dealing for a secured creditor, aware that his debtor had defaulted on currently due loan repayments, to persist in assurance that he was about the make further advances of needed operating capital, and then, without notice, exercise his security rights to seize the delinquent debtor's entire stock in trade.[124]

In addition to the considerations of fairness and good faith, an unstated reason underlying the decisions appears to be that the secured party's failure to give notice forced the court to consider certain imponderables. The debtors could not prove the extent of their damages with certainty.[125] The debtors might have claimed that the secured parties' failure to give notice deprived them of their

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121. *Id.* at 747, 398 S.W.2d at 542 (emphasis added).

122. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.3d 846 (2d Cir. 1964). In *Skeels*, the secured party-finance company's repossession of part of the debtor-car dealer's inventory had the effect of putting the debtor out of business.

123. *Id.* at 698.

124. Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846, 851 (3d Cir. 1964).

125. The court in Norton v. National Bank, 240 Ark. 743, 398 S.W.2d 538 (1966) referred to this, saying: "Thus it was the bank's action that made it at least difficult, if not impossible, for Norton to prove the extent of his loss with reasonable certainty." *Id.* at 747, 398 S.W.2d at 542.

right to redeem and prevented them from procuring bidders and buyers at the respective resale. Consequently, the courts would have been obliged to speculate what might have happened had notice been given in each case. Since the secured parties could have prevented this by complying with the simple notice requirements, the courts were probably inclined to deny the requested deficiency judgments.

Responding to the above arguments, two points should be stressed. First, contrary to the *Norton* opinion, allowing the secured party to reserve a deficiency judgment does not allow him to take advantage of his own misconduct. A secured party may not initially enter the transaction unless he is assured that he can obtain a deficiency judgment upon default. The secured party's right to the deficiency judgment is created when the debtor defaults and is not a product of the secured party's misconduct. Second, permitting the secured party to recover a deficiency judgment and limiting the debtor to 9-507(1) damages is fair and consistent with good faith since the secured party is penalized by having to pay damages and yet is allowed to collect the outstanding amount. Damages under 9-507(1), when coupled with judicial review, adequately protect the debtor's interest.

CONCLUSION

After considering the arguments on both sides, this writer concludes that the secured party should not forfeit his right to a deficiency judgment when he fails to give the debtor notice of resale. Allowing a deficiency judgment under these circumstances is consistent with the underlying purpose of the UCC; the Code was adopted to eliminate the restrictions of the pre-Code law and to substitute flexibility and commercial reasonableness for the rigidity and formalism of the prior law.[126] In view of these purposes, denial of a deficiency judgment is a harsh result. The reasons for a secured party's noncompliance with the 9-504(3) notice requirements may be varied, ranging from accidental or inadvertent omissions of relatively minor and inconsequential requirements to deliberate and possibly fraudulent acts aimed at injuring the debtor's interests. If deficiency judgments are denied in all cases, all the possible reasons for not complying with the notice provisions will be treated the

126. *See* Gilmore, *supra* note 68, at 7.

same. It would seem to be better to use 9-507(1) damages and treat each problem on a case-by-case basis.

The damage provisions of 9-507(1) adequately protect the debtor. The judicial review offered by this section has the ultimate effect of safeguarding the rights of both parties. The secured party can be protected by obtaining prior judicial approval of his proposed method of disposition, thus virtually ensuring that it will be commercially reasonable. The debtor can obtain judicial review of the method of disposition both prior to and subsequent to the resale. In this manner, the creditor is given maximum freedom of action without compromising the protection afforded the debtor.

If the secured party does not lose his right to a deficiency judgment because of the failure to give adequate notice of the resale, it is up to the courts to decide whether the *Norton* approach should be adopted. According to the *Norton* decision, the secured party is not denied a deficiency judgment if he fails to give notice. He must, however, overcome the presumption that, had the collateral been properly resold, it would have brought a price equal to the amount of the debt. In a majority of cases decided under the *Norton* approach, the secured party has failed to meet this burden and in effect has lost the deficiency judgment.[127]

Regardless of whether the courts follow the *Norton* decision, a secured party should not be denied the right to a deficiency judgment under these circumstances. The Code must function on the theory that the overwhelming number of commercial transactions are executed in good faith,[128] and this assumption is most likely accurate.[129] In those relatively few instances in which the secured party, for whatever reason, has failed to comply with 9-504(3) notice requirements, it is better to adopt a flexible standard which would allow the secured party to be made whole and yet which would protect the debtor on a case-by-case basis. This protection is already afforded by 9-507; such protection does not require an additional judicially created penalty denying the secured party's right to a deficiency judgment.

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127. For cases where the creditor failed to meet the burden, see L.W. Johnson v. Commercial Credit Corp., 117 Ga. App. 131, 159 S.E.2d 290 (1968); Gallatin Trust and Savings Bank v. Darrah, 152 Mont. 256, 448 P.2d 734 (1968); Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969). For a case where the creditor met the burden, see Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alas. 1969).

128. *See* Gilmore, *supra* note 68, at 11.

129. *See* Lakin & Berger, *supra* note 111, at 1.