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## Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code

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## DEFAULT, ENFORCEMENT AND REMEDIES UNDER REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

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### INTRODUCTION

In November 1966, the Permanent Editorial Board for the Uniform Commercial Code—noting, among other things, that 47 of the 54 sections of Article 9 of the Code had been non-uniformly amended and that some 337 such amendments were in force—appointed a special Review Committee to restudy Article 9 in depth.<sup>1</sup> In April 1972, the American Law Institute and the National Conference of Commissioners on Uniform State Laws (the two organizations responsible for drafting the Code) published the final version of the work product of that Review Committee: the 1972 Official Text of Article 9 (referred to herein as “Revised Article 9”).<sup>2</sup> Illinois promptly became the first state to enact Revised Arti-

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\* Member of the Illinois Bar. The author gratefully acknowledges the assistance of his associate, Peter A. Flynn, in the preparation of this article.

The substance of this article will be a chapter in a forthcoming practice handbook on secured transactions under Revised Article 9 of the Uniform Commercial Code, which is to be published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

1. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE ix-xi (1967). The Review Committee completed its work in October 1970 and submitted its report to the Permanent Editorial Board. In February 1971, the Permanent Editorial Board accepted the report with some amendments. The resulting Final Report of the Permanent Editorial Board, published under date of April 25, 1971, was submitted to the American Law Institute in May 1971 and to the National Conference of Commissioners on Uniform State Laws in August 1971. Each organization made minor changes which were approved by the other.

2. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT AND COMMENTS OF ARTICLE 9 SECURED TRANSACTIONS. This is a buff-colored softcover text. Part I thereof contains the 1972 Official Text and Comments of Article 9 Secured Transactions (in its entirety) and related sections (1-105, 1-201(9) and (37), 2-107 and 5-116). Part II thereof contains the 1972 Official Text showing the changes made in the former text of Article 9 and in related sections and the reasons for the changes. Both parts also contain an Article 11, which contains an effective date and

cle 9, to become effective on July 1, 1972.<sup>3</sup> As of this writing, Arkansas, Virginia and North Dakota have become respectively the second, third and fourth states to adopt Revised Article 9.<sup>4</sup> It is anticipated that the 1972 Official Text will be enacted by many of the legislatures of the remaining 47 Code jurisdictions during 1973.

The "restudy" of Article 9 by the Review Committee, as is apparent from even a cursory reading of the 1972 Official Text, was indeed "in depth." It produced extensive amendments to Article 9, both by way of substantive changes and in the form of clarifications of the prior text.<sup>5</sup>

The purpose of this article is to consider the present status of Part 5 of Article 9, which deals with the enforcement of security interests, and the rights and remedies of both debtors and secured parties, on default. In general, the basic provisions of Part 5 of Article 9 seem to have worked reasonably well. Revised Article 9 makes few changes in Part 5. The changes made, however, are important; more important still are recent judicial developments concerning two major aspects of the Article 9 default provisions: the constitutionality of the basic "self-help" provisions of Section 9-503, and the remedies available to debtors against secured parties who fail to comply with the disposition provisions of Sections 9-504 and 9-505.

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transition provisions for the application of Revised Article 9. The text of Article 11, prepared by the Reporters, has not been approved by the drafting organizations and is submitted as a working draft only.

In June 1972, the entire Uniform Commercial Code was republished as the 1972 Official Text. It, of course, incorporates all previous amendments to the Code approved by the Permanent Editorial Board and not merged into the 1972 Official Text of Article 9. All citations in this article to the Code, including the Official Comments, are to be the 1972 Official Text unless noted otherwise.

3. Ill. P. L. No. 77-2810 (Sept. 8, 1972). See ILL. REV. STAT. ch. 26 (1973 supp.).

4. 4 C.C.H. SEC. TRANS. GUIDE, Report Letters #103 (Feb. 20, 1973); #106 (April 3, 1973); #107 (April 19, 1973).

5. The 1972 Official Text completely rewrote two critical sections—9-103, concerning choice of law in multiple state transactions, and 9-313, concerning fixtures. It added 9-114, concerning filing to safeguard the interest of a consignor in consigned goods (even where the consignment is not a security interest) and 9-408 (dealing with financing statements covering consigned or leased goods). It also amended — extensively in many cases — 27 of the 54 sections of former Article 9. In some instances — as with 9-503 and 9-504, discussed below — the very decision not to amend a particular provision itself indicates a strong substantive comment. Revised Article 9 has already generated substantial commentary. Much of it is catalogued in Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 482-83 nn.20 & 21 (1973).

I. THE BASIC STRUCTURE OF PART 5 OF ARTICLE 9

Rights upon default, of course, are the essence of the rights of a secured creditor. They distinguish him from an unsecured creditor by according him the ability to proceed immediately against property earmarked for payment or performance of an obligation.<sup>6</sup>

To be sure, one might gain a contrary impression of the importance of the default provisions of Article 9. The subject matter of default is usually deferred until the last—in Article 9 itself, in security agreements, in texts and even in seminars and institutes on Article 9. Naturally, the consequences of default are the last things that any party to a secured transaction wants to consider, and the default itself the last thing that any party wants to happen. It has been well said that a secured party “who at the outset of a transaction purposely plans a definite foreclosure upon the collateral is usually either a knave or a fool.”<sup>7</sup> Defaults do happen, however, and the whole purpose of a secured transaction is to insure that the creditor will not find himself without an enforceable remedy if default in payment or performance of the underlying obligation should occur. As a practical matter, thought must be given to the possibility of default, and the consequences which attach to it, at the outset of any secured transaction.

Part 5 of Article 9 renders that thought process extremely important by substituting flexibility in default procedure (in general subject only to the test of “commercial reasonableness”) for the rigidity and complexity of default procedure under pre-Code chattel security law, and, except for the limitations stated in Section 9-501(3), permitting the parties to establish whatever default procedure they feel appropriate in the particular transaction.<sup>8</sup> On default, a secured party may take possession of the collateral (Section 9-

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6. The word “immediately” must be qualified where the debtor is a subject of a proceeding under the Bankruptcy Act; but even in such situations, the secured creditor is entitled to special treatment in the bankruptcy court. He cannot be lumped with the conglomerate mass of unsecured creditors.

7. Hogan, *The Secured Party And Default Proceeding Under The UCC*, 47 MINN. L. REV. 205 (1962). Professor Hogan adds, “Assuring repayment of indebtedness, and not realization upon the collateral, is the main object of any sensible lender.” *Id.* Professor Hogan’s article is an excellent, detailed analysis of the earlier text of Article 9 and of pre-Code and early Code decisional law. The present writer, while drawing upon Professor Hogan’s organization of the subject matter, emphasizes the developments which have occurred since the appearance of his article. That article retains, however, considerable validity, and is well worth consulting.

8. *Id.* at 207-08.

503), and thereafter sell it or lease it or otherwise dispose of it (Section 9-504), or keep it in satisfaction of the underlying obligation (Section 9-505), or in appropriate cases, such as where the collateral is accounts or chattel paper or commercial paper, simply collect it (Section 9-502). If the collateral is documents, the secured party may proceed either as to the documents or as to the goods covered by the documents (Section 9-501(1)). Additionally, the secured party may, although in most cases he need not, "reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure" (Section 9-501(1)).

This broad variety of possible default procedures reflects not only the basic freedom-of-contract tenet of the Code (expressed in Section 1-102(3)), but also the desirability of providing sufficient alternative methods of disposing of collateral to allow maximum realization on each of the wide variety of types of collateral in which security interests may be created. For example, goods, negotiable documents (or the goods they cover: see 9-501(1)) and investment securities will normally be sold in order to realize their maximum value; the preferred method of sale, depending upon circumstances, may be either public sale at auction or private disposition—both authorized by Section 9-504(3). On the other hand, commercial paper, accounts and chattel paper will normally be collected by the secured party rather than sold, since a sale would probably realize substantially less than collection. Some general intangibles—such as good will, literary rights, copyrights and the like—will probably be sold; others—for example, rights to payment which are excluded from the definition of "accounts" in Section 9-106—would normally be collected.<sup>9</sup>

Some limitations on this generally flexible approach must, however, be mentioned. Sections 1-102(3), 1-203 and 1-208 of the Code impose basic—and undisclaimable—obligations of good faith, diligence, reasonableness and care upon both secured parties and debtors. In addition, Section 1-103 provides that general legal and equitable principles apply under the Code, unless expressly displaced by a particular Code provision.<sup>10</sup> And Section 9-501(3), modi-

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9. It is not intended to suggest that the methods noted are the only "commercially reasonable" ways of realizing on given types of collateral. The whole thrust of Part 5 of Article 9, after all, is that "circumstances alter cases."

10. For an example of such a supplementing of the Code by non-Code principles, see notes 17 and 18 and accompanying text, *infra*.

fied by the 1972 Official Text to reflect changes in Sections 9-504(3) and 9-505(2), contains specific restrictions on the parties' right to vary the Code default provisions by agreement. The parties may not, in the security agreement, waive or vary the following to the extent that they give rights to the debtor and impose duties on the secured party: (a) the provisions of Sections 9-502(2) and 9-504(2), insofar as they require accounting for surplus proceeds of collateral; (b) Sections 9-504(3) and 9-505(1), which deal with disposition of collateral; (c) Section 9-505(2), concerning a proposal by a secured party to retain the collateral in satisfaction of the obligation; (d) Section 9-506, which deals with redemption of collateral; and (e) Section 9-507(1), which prescribes the secured party's liability for failure to comply with Part 5. The parties may nevertheless determine in the security agreement the standards by which the fulfillment of the rights and duties under the cited sections is to be measured, if such standards are not manifestly unreasonable.<sup>11</sup>

However, some of the rights granted debtors in the cited sections may be modified or renounced by an agreement in writing signed by the debtor—but only *after* default. Under both former and Revised Article 9, the debtor's right to compel a disposition of consumer goods collateral, where he has paid 60 percent of the cash price or 60 percent of the loan (9-505(1)), and his right of redemption under Section 9-506 may be so modified or renounced. Revised Article 9 additionally permits the debtor, in a statement signed by him *after* default, to modify or renounce his right to notification of a sale under Section 9-504(3) and his rights under Section 9-505(2). The premise of these provisions is, of course, that the ability of a secured party to overreach a debtor in the areas in question is substantially lessened after default.

Thus the deliberate flexibility of Part 5 of Article 9—subject, however, to the general standard of “commercial reasonableness” and to the other limitations discussed above, designed to prevent overreaching on the part of secured parties—reflects the expansive definition of “security interest” in Section 1-201(37) and accommodates the ever-increasing variety of secured transactions in the modern market place. The purpose of this article is to examine how

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11. 9-501(3). In *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga. App. 691, 155 S.E.2d 651 (1967), the court noted that default was one of the standards determined contractually by the parties under this subsection.

Part 5 of Article 9 works in practice, and the potential impact of recent judicial developments upon its provisions.

Since it is the act of default which triggers Part 5 of Article 9, let us begin by asking:

## II. "DEFAULT": WHAT IS IT?

As one might expect, the answer is: Almost anything the parties say it is. The Code does not define "default," and the general freedom-of-contract rule of Section 1-102(3) gives the parties great leeway to provide their own definition, subject to the overriding standards of good faith and reasonableness set forth in that section and in Sections 1-203 and 1-208.

In the absence of agreement as to what constitutes default, a court may well hold that the term is restricted to its customary meaning of a failure to pay or perform.<sup>11.1</sup> Accordingly, most security agreements include a paragraph captioned "Events of Default." Common boilerplate lists among such events: (1) failure to pay the secured obligation (or any installment) when due, or to perform any promise made in the security agreement; (2) breach of any warranty made in the security agreement or any concurrently executed document (such as a loan agreement); (3) any misrepresentation in either the security agreement or any other document delivered by or on behalf of the debtor to the secured party in the course of financing; (4) any event accelerating the maturity of other indebtedness of the debtor under another undertaking; (5) creation of any encumbrance upon the collateral;<sup>12</sup> (6) any levy, judicial seizure or attachment of the collateral; (7) any uninsured loss or theft of or damage to the collateral; (8) death or dissolution of the debtor; and (9) insolvency of the debtor, or his or its subjection to a receivership, an assignment for the benefit of creditors or a bankruptcy proceeding.

The parties may, of course, add other events to this list. Some draftsmen, who may prefer brevity, simply use an "insecurity

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11.1 See, *e.g.*, *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969).

12. The creation of an encumbrance on the collateral includes, of course, the granting of a junior security interest in the collateral to another party. Section 9-311, unchanged by the 1972 amendments, permits the debtor to do this, notwithstanding any contrary agreement. The secured party, when he learns that a debtor has done so, may or may not waive the default. If his intention is not to do so, he would be wise to act promptly upon learning that the debtor has created a junior security interest. Many secured creditors are, however, not at all concerned about other creditors, secured or not, standing behind them.

clause” of the type referred to in Section 1-208 of the Code<sup>13</sup> as a shorthand means of covering all the events of default mentioned—and more. The “more,” however, can cause problems. The better reasoned cases, as well as the good-faith requirement of Section 1-208, suggest that invocation of an insecurity clause requires somewhat more of a feeling of insecurity on the creditor’s part than might warrant his seeing a psychiatrist.<sup>14</sup> The creditor should be able to point to some event, or some information received by him, that constitutes a good reason to feel insecure.<sup>15</sup> A sudden premonition, without more, is not a sound basis on which to act.

Some limitations, however, should be noted. To begin with, it can be expensive to proceed under Part 5 of Article 9 without first insuring that an actual default has occurred. In *Klingbiel v. Commercial Credit Corp.*,<sup>16</sup> the Tenth Circuit affirmed an award of punitive damages, in an amount almost twice the value of the collateral, against a secured party which had seized collateral four days before

13. Section 1-208 provides:

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

14. See, e.g., *Parks v. Phillips*, 71 Nev. 313, 289 P.2d 1053 (1955) (upholding verdict for buyer under a conditional sales contract where he claimed damages arising out of repossession of his vehicle by the seller 30 days before any default in payments); compare *Roy v. Goings*, 96 Ill. 361 (1880) (holding that the foreclosure of a mortgage on crops by a mortgagee under an insecurity clause was not in good faith where the mortgagee claimed insecurity because the mortgage was defective and inoperative), and *Furlong v. Cox*, 77 Ill. 293 (1875) (holding that the mortgagor and mortgagee could not have intended to give the latter an uncontrolled option to repossess collateral under a mortgage with an insecurity clause where the collateral was property indispensable to the carrying on of a business), with *Hogan v. Akin*, 181 Ill. 448, 55 N.E. 137 (1899) (finding error in the exclusion of testimony tending to show that at the time of repossession the mortgagee had probable cause for feeling insecure).

15. In *Van Horn v. Van De Wol, Inc.*, 6 Wash. App. 959, 497 P.2d 252 (1972), an unsecured creditor holding a note of the defendant corporation, who accelerated payment under an insecurity clause because of a belief that the defendant had been denied a bank loan, was held to have acted in good faith even though the belief was erroneous. The court found that the plaintiff knew that the defendant, which operated a golf course, had lost money during the prior business year, was faced with increasing competition from a newly established public golf course, and had refused to refrain from mortgaging the corporate realty until after plaintiff had been paid. The court concluded that the overall view of defendant’s financial stability known to plaintiff justified his action, even if part of his information was erroneous. (The Washington enactment of 1-208 did not include the second sentence thereof; the omission appears without effect upon the decision.)

16. 439 F.2d 1303 (10th Cir. 1971). The opinion, extremely well written, is worth reading for enjoyment alone.



the debtor's first monthly payment was due and at a time when the debtor was not in default. Also, even though an event of default (as defined in the security agreement) has occurred, that fact is not always sufficient to trigger the default provisions of Article 9. *Margolin v. Franklin*<sup>17</sup> is a recent case in point. A secured party under an automobile security agreement had, over a seven-month period, regularly accepted payments which were eight to 12 days late. Suddenly, and without notice to the debtor, he repossessed the automobile 12 days after a contract payment date. Even though the debtor was technically in default, the court held that the secured party was required to give the debtor reasonable and specific notice of his sudden decision to hold the debtor to the strict terms of the security agreement.<sup>18</sup>

Let us assume, however, that an event of default sufficient to invoke the default provisions of Article 9 has occurred. What may the secured party do?

### III. THE RIGHT TO SELF-HELP

Because of a desire to minimize realization expenses, the secured party frequently first considers the avenue of self-help repossession and sale. At this writing, however, the continued availability of traditional self-help repossessions is in some doubt. The self-help provision, insofar as tangible collateral (or "goods") is concerned,<sup>19</sup> is found in Section 9-503. It provides in part:

Unless 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.

This portion of Section 9-503 is currently the focus of constitutional attacks based upon the decisions of the Supreme Court in *Sniadach v. Family Finance Corp.*<sup>20</sup> and *Fuentes v. Shevin.*<sup>21</sup>

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17. 132 Ill. App. 2d 527, 270 N.E. 2d 140 (1st Dist. 1971). A more recent like holding is *Ford Motor Credit Corp. v. Waters*, 273 So.2d 96 (Fla. App. 1973).

18. In this case, the common law of waiver and estoppel supplemented the Code provisions, as contemplated by 1-103.

19. Insofar as intangible collateral is concerned, 9-502 is a self-help provision. See discussion following note 54 *infra*.

20. 395 U.S. 337 (1969).

21. 407 U.S. 67 (1972).

Self-help repossession finds roots in the common law.<sup>22</sup> Under the Code it is invoked as to all classes of "goods" collateral (described in Section 9-109): consumer goods, equipment, farm products and inventory.<sup>23</sup> Reported litigation over self-help repossession, however, has so far centered upon what may be the most frequent use of that remedy: the seizure of consumer automobile collateral.<sup>24</sup>

Under Section 9-503 repossession may be effected without judicial process if it does not involve a "breach of the peace." A potential breach of the peace situation is presented, for example, where the debtor has made known his objection to repossession of the collateral by the creditor.<sup>25</sup> In such cases, the secured party must proceed by judicial "action."<sup>26</sup> Conversely, cases where the secured party repossesses by stealth, not involving a threat of violence and not disturbing the peace and quiet of the community, have been held not to constitute a breach of the peace.<sup>27</sup>

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22. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 574 (2d ed. 1968); 2 BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 856-58 (T. Cooley, 4th Ed. 1899).

23. While self-help may in theory also be invoked as to instruments, chattel paper and documents, a security interest in these classes of collateral is normally a possessory one from the outset. Accordingly, the self-help concept is primarily associated with goods.

24. As the amicus curiae brief of the Permanent Editorial Board in *Adams v. Egley*, discussed *infra* note 44, points out at page 21 there are several reasons for the popularity of automobile repossessions. While other consumer goods are often taken as collateral primarily for psychological reasons, automobiles are treated as genuine collateral by all secured parties, since there is a second-hand car market in which substantial value may be realized. Also, automobiles are most likely to be available for peaceful repossession, since they appear on the streets, and at the same time are the most likely to suffer removal from the places of their usual keeping by a debtor who believes or suspects that repossession is imminent.

25. *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970) (removal of lawn mower from debtor's premises over debtor's objection by coercion constituted breach of peace and subjected secured party to action for trespass and conversion); *Stone Mach. Co. v. Kessler*, 1 Wash. App. 750, 463 P. 2d 651 (1970).

26. The term "action" is defined in 1-201(1) to include "recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined." The term means a summons and complaint under New York practice; a motion for repossession is insufficient. *Dolbeck Sanitation, Inc. v. A. & M. Carting Enterprises, Inc.*, 11 U.C.C. Rep. 628 (Sup. Ct. N.Y. 1972). In *In re Yale Express System Inc.*, 250 F. Supp. 249 (S.D. N.Y. 1966), *rev'd on other grounds* 370 F.2d 433 (2d Cir. 1966), the court observed that this included an action for replevin. Currently replevin is available only in states whose procedure has conformed to, or has been altered to conform to, the requirements outlined in *Fuentes v. Shevin*, 407 U.S. 67 (1972), discussed in ensuing text.

27. *Cherno v. Bank of Babylon*, 54 Misc. 2d 277, 282 N.Y.S.2d 114 (Sup. Ct. 1967), *aff'd. mem.*, 288 N.Y.S.2d 862 (1968), (entry into premises leased by the debtor and then in the possession of an assignee for the benefit of his creditors by use of a key obtained without authorization and the removal therefrom by employees of a bank of collateral covered by a security agreement, even if a trespass, did not constitute a breach of the peace, since "there was nothing in what they did that disturbed public order by any act of violence, caused

The constitutional battle presently under way, however, may render the distinction between judicial and "self-help" remedies academic. *Sniadach v. Family Finance Corp.*<sup>28</sup> was the opening gun in that battle. *Sniadach* involved a Wisconsin pre-judgment wage garnishment procedure, under which wages were frozen on the service of a garnishment writ pending the outcome of the underlying action. The Supreme Court held that the procedure constituted a taking of property without prior notice and opportunity for a hearing, thereby violating the procedural due process guarantee of the fourteenth amendment. The property of which the wage-earner was deprived was the use of the garnished portion of her wages during the interim period between the service of the garnishment and the determination of the main suit. Significantly, the Court stressed the nature of the property right in issue, calling it "a specialized type of property presenting distinct problems in our economic system"<sup>29</sup> and commenting that garnishments of the Wisconsin type "may as a practical matter drive a wage-earning family to the wall."<sup>30</sup>

*Sniadach* spawned two lines of decisions in response to constitutional attacks upon statutory replevin and similar procedures. One line, represented by *Blair v. Pitchess*<sup>31</sup> and *LaPrease v. Raymours Furniture Co.*,<sup>32</sup> held statutory replevin procedures unconstitutional on the *Sniadach* rationale. The other line, represented by *Fuentes v. Faircloth*<sup>33</sup> and *Brunswick Corp. v. J. & P. Inc.*,<sup>34</sup> held such procedures constitutional, often—as in both of the cited cases<sup>35</sup>—on the theory that *Sniadach* was limited to the "specialized property" situation the Court there stressed.

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consternation or alarm, or disturbed the peace and quiet of the community"); *Thompson v. Ford Motor Credit Co.* 324 F. Supp. 108 (D.S.C. 1971); *Harris Truck & Trailer Sales v. Foote*, 58 Tenn. App. 710, 436 S.W.2d 460 (1968) (question of breach of peace erroneously submitted to jury).

28. 395 U.S. 337 (1969).

29. *Id.* at 340.

30. *Id.* at 341-42.

31. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

32. 315 F.Supp. 716 (N.D.N.Y. 1970).

33. 317 F.Supp. 954 (S.D.Fla. 1970), *rev'd sub. nom.* *Fuentes v. Shevin*, 407 U.S. 67 (1972), discussed in following text.

34. 424 F.2d 100 (10th Cir. 1970). This replevin action involved bowling equipment, a fact used in later cases as a basis for a distinction between commercial and consumer situations. In *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), the lower court held this "a distinction without a difference as far as Due Process is concerned." *Id.* at 957.

35. See *Brunswick Corp. v. J. & P., Inc.*, 424 F.2d at 105, quoted and followed in *Fuentes v. Faircloth*, 317 F. Supp. at 957.

In general, the replevin procedures attacked permitted a private party, without notice to the other party, to obtain a pre-judgment writ of replevin through a summary process of ex parte application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff was then required to execute the writ by seizing the property and holding it for three days or so, during which the defendant might reclaim possession by posting his own security bond in like amount. In default of a counter-replevin bond the sheriff delivered the property to the plaintiff pending a final judgment in the underlying action.

In *Fuentes v. Shevin*,<sup>36</sup> however, the Supreme Court, in a four-to-three decision, held such Florida and Pennsylvania statutory replevin procedures invalid under the fourteenth amendment—in the process casting considerable doubt on the apparent “specialized property” limitation of *Sniadach*<sup>37</sup>—on the ground that they deprived persons of property without due process by failing to provide notice and an opportunity to be heard before seizure of the property. Mr. Justice White, for the dissenters, quoted the portion of Section 9-503 set forth above, and observed:

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, § 9-503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.<sup>38</sup>

In February 1972—four months before the Supreme Court’s decision in *Fuentes*, and amid a growing divergence of views concerning the scope of *Sniadach*—the first decision sustaining a constitutional attack on Section 9-503 was rendered in *Adams v. Egley*.<sup>39</sup> A similarly grounded attack had failed a year earlier.<sup>40</sup> How-

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36. 407 U.S. 67 (1972).

37. See 407 U.S. at 88-90; but see *id.* at 90 n.21, pointing out that “the relative weight of . . . property interests” is not without bearing upon “the form of notice and hearing required by due process.”

38. *Id.* at 103. Justice White was the author of the dissenting opinion, concurred in by Chief Justice Burger and Justice Blackmun. Justice Stewart wrote for the majority (Justices Douglas, Brennan and Marshall concurring). Justices Powell and Rehnquist did not participate in the decision.

39. 338 F.Supp. 614 (S.D.Cal. 1972), *appeal pending sub. nom.* Adams v. Southern

ever, this earlier decision was only a trickle of the flood to come. The constitutionality of Section 9-503 as applied to automobile repossessions is now under challenge in litigation pending in all parts of the nation. As of this writing a substantial majority of the reported decisions have upheld its constitutionality,<sup>41</sup> almost entirely on the basis of absence of state action. Ultimate decision of the issue by the Supreme Court seems assured.

Since *Adams v. Egley* has progressed the farthest of the reported decisions, it is appropriate to discuss it briefly. *Adams v. Egley* was an action for a declaratory judgment and damages, involving self-help repossessions of motor vehicles by secured parties after default. In one instance, the secured party had sold the repossessed vehicle. In both of the situations before the court, the debtors had been in default for several months and constant requests for payment had been made. Represented by the Legal Aid Society of San Diego, the debtors challenged the validity of the repossessions on constitutional grounds derived from *Sniadach*. The important threshold question before the court was whether the repossessions constituted "state action" for fourteenth amendment purposes.<sup>42</sup> The court rejected defendants' contention that no state action could be found, since the repossessions were undertaken by private parties in accordance with the provisions of a security agreement; it held that the mere presence of Section 9-503 in the statute books satisfied the state action requirement.<sup>43</sup>

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California First Nat'l Bank, No. 72-1484, Court of Appeals, Ninth Circuit. See note 44 *infra*.

40. *McCormick v. First Nat'l Bank*, 332 F.Supp. 604 (S.D. Fla. 1971).

41. Decisions holding 9-503 constitutional, in addition to that cited in the preceding footnote, are *Colvin v. Avco Fin. Services, Inc.*, 4 C.C.H. SEC. TR. Guide ¶ 52,046 (D. Utah 1973); *Kirksey v. Thelig*, 351 F. Supp. 727 (D. Colo. 1972); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *Kipp v. Cozens*, 11 U.C.C. Rep. 1067 (Super. Ct. Calif. 1972); *Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972), and numerous unreported decisions in power courts, mostly in California. Decisions holding that section unconstitutional, in addition to *Adams v. Egley*, are *Gibbs v. Titelman*, \_\_\_ F. Supp. \_\_\_ (E.D. Pa. 1972), and *Chrysler Credit Corp. v. Dinitz*, 11 U.C.C. Rep. 627 (N.Y. Civ. 1972).

42. An alternative ground of attack made on 9-503 in this case was that the repossessions were "under color of state law" and violated the Civil Rights Act, 42 U.S.C. § 1983 (1968).

43. The court rested this holding on *Reitman v. Mulkey*, 387 U.S. 369 (1967). In that case the Supreme Court affirmed a decision of the Supreme Court of California voiding under the equal protection clause of the fourteenth amendment a provision of the California Constitution which prohibited restrictions on an individual's right to sell or lease real estate to whomever he chose. The California court had found that the constitutional provision, adopted

The ultimate question thus became which line of authorities on pre-judgment replevin to follow. The court chose the first line, and held Sections 9-503 and 9-504 unconstitutional, at least as applied to the facts before the court, under the due process clause of the fourteenth amendment. In the course of its opinion the court noted the following: (1) *Sniadach* meant a return of the entire domain of pre-judgment remedies to the long-standing procedural due process principle that, except in extraordinary circumstances, an individual may not be deprived of his property without notice and hearing; (2) the waiver of a constitutional right is not to be found in a situation where the contracting parties are not of equal bargaining power and standard form contracts are involved; (3) repossession without judicial process often results in the taking of property not included as collateral in the security agreement, particularly where the subjects of seizures are vehicles, which may contain other property stored inside; and (4) the subjects of consumer secured transactions are commonly household appliances, furniture and automobiles—all of which may be considered necessary for ordinary day-to-day living and hence within the rationale of *Sniadach*. An appeal from this decision is currently pending before the Court of Appeals for the Ninth Circuit.<sup>44</sup>

Unless and until the Supreme Court rules adversely to the con-

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in 1964 pursuant to an initiative and referendum, overturned state laws enacted from 1959 to 1963 bearing on the right of private persons to discriminate, that it invalidly involved the state in racial discrimination in the housing market and that it changed the situation from one in which discriminatory practices were restricted to one in which they were encouraged.

44. The appeal, under the name *Adams v. Southern California First Nat'l Bank*, No. 72-1484, was argued orally before the Ninth Circuit on January 12, 1973. Among the briefs submitted on appeal was an amicus curiae brief on behalf of the Permanent Editorial Board. In outline, the Board's brief, prepared by Professor Soia Mentschikoff of the University of Chicago Law School, argues the following: (1) the Code fairly allocates rights and duties in the event of default on secured transactions; (2) the nature of automobile sales and financing is such as to leave only a minute number of debtors with defenses which would entitle them to continued use of the automobile serving as collateral; (3) prior judicial review, with its consequent delays, would enhance the evils involved in the cases of bad faith or dishonest debtors, while leaving untouched the evils involved in cases of bad faith or dishonest secured creditors; and (4) prior judicial notice and hearing is not constitutionally required for the taking of possession of property after a debtor's default under a statutory scheme which also provides for immediate injunctive relief ordering return in the rare cases of improper taking, when the economic and other consequences of such requirements would be materially burdensome to all debtors and to the public at large. An unpublished article by Dr. Robert W. Johnson, Purdue University, entitled *Denial of Self-Help Repossession: An Economic Analysis*, is an appendix to the brief. Dr. Johnson was Reporter-Economist on the drafting of the Uniform Consumer Credit Code and is currently a Presidential appointee to the National Commission on Consumer Finance as a public member.

stitutionality of Section 9-503, it may be anticipated that creditors not directly bound by *Adams v. Egley* will continue to effect self-help repossessions under Section 9-503.

At this point, it should be noted that—although, as the court indicated in *Messenger v. Sandy Motors, Inc.*,<sup>45</sup> most repossession cases involve creditors who have been patient with debtors in an effort to obtain payment and avoid repossession—there are cases of creditor overeagerness or abuse. A creditor may accelerate payment in bad faith or may otherwise repossess before default. The debtor has two remedies in this situation. He may seek return of the automobile and damages for the wrongful repossession, or he may seek damages in conversion.<sup>46</sup> Decisions under the Code, as well as under pre-Code law, make it clear that a secured party, quite apart from constitutional considerations, must be reasonably sure of his ground before he repossesses.<sup>47</sup>

#### *Rights, Remedies and Duties of Secured Party in Possession*

A secured party who takes possession after default, whether through self-help or with the aid of a court, must be mindful of his duties and aware of his rights and remedies. These are catalogued in Section 9-207, which was not changed by the 1972 amendments and which (as Official Comment 2 points out) essentially restates the common law of pledge.

The primary duty of a secured party in possession is to use reasonable care in the custody and preservation of the collateral, an obligation which may not be disclaimed but one as to which stan-

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45. 121 N.J. Super. 1, —, 295 A.2d 402, 406-08 (1972).

46. The amicus curiae brief filed by the Permanent Editorial Board in *Adams v. Southern California First Nat'l Bank* (see notes 39 and 44 *supra*) argues that "if self-help does result in repossession, a debtor with a right to continued use may immediately request a mandatory injunction restoring possession to him on such terms as a court of equity may decree." Brief Amicus Curiae of the Permanent Editorial Board for the Uniform Commercial Code at 26.

It seems clear that disposition of a chattel wrongfully repossessed could be restrained under 9-507(1), and the additional step of directing its return can be characterized as ancillary relief. Section 9-507(1) authorizes recovery of damages for the wrongful repossession. Recovery in conversion is authorized by the common law supplementing the Code, as contemplated by 1-103.

47. See, e.g., *Ferraro v. Pacific Fin. Corp.*, 8 Cal. App. 3d 339, 87 Cal. Rptr. 226 (1970) (creditors assessed with general damages of \$2,812 and punitive damages of \$33,000 for wrongful repossession), and *Klingbiel v. Commercial Credit Corp.*, 439 F.2d 1303 (10th Cir. 1971) (creditor assessed with general damages of \$770 and punitive damages of \$7,500 for wrongful repossession). Pre-Code case illustrations may be found in Hogan, *supra* note 7, at 212, n.30.

dards that are not “manifestly unreasonable” may be set by the security agreement.<sup>48</sup> Violation of this duty can be expensive to a secured party, as illustrated by a recent Maryland case, *Harris v. Bower*.<sup>49</sup> A secured party who had repossessed a boat appraised at \$13,900 failed to maintain it and permitted it to depreciate “at a ruinously progressive rate” for a period covering two boating seasons, in a manner the court found “not only not commercially reasonable but . . . also utterly lacking in common sense.” While the court rejected the debtor’s argument that the secured party had in effect accepted the collateral in satisfaction of the obligation, it observed that he had “come perilously close to painting himself into a corner in this regard” and held that the lower court could, on remand, credit the debtor with \$13,900, the uncontroverted market value of the boat at the time of repossession.<sup>50</sup> The court concluded that, after allowance of a proper credit, the secured party, who had become the record owner of the boat, “may make whatever disposition of it suits his fancy.” Normally, of course, the secured party performs the duty of care of the collateral without having to be told to do so, since it is in his self-interest to act with reasonable promptness and thereby realize the maximum value from the collateral.

An important right of the secured party in possession, particularly with respect to equipment collateral, is that he may use or operate the collateral (1) for the purpose of preserving the collateral or its value, (2) pursuant to the order of a court of appropriate jurisdiction or (3) except as to consumer goods (concerning which the Code imposes restrictions on the rights of the secured party), in the manner and to the extent provided in the security agreement.<sup>51</sup> But this right must, of course, be exercised in a manner consistent with the duties imposed by Section 9-207 and by Part 5 of Article 9. Although those duties are typically of greater concern to the se-

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48. See 1-102(3).

49. 266 Md. 579, 295 A.2d 870 (1972).

50. Since the secured party had failed not only to preserve the collateral but also to dispose of it with reasonable promptness, the court could have reached this conclusion via either 9-207(3) and (4) itself, or 9-507(1), which renders a secured party liable to the debtor for failure to comply with the requirements of Part 5 of Article 9. Although 9-207 does not itself appear in Part 5, it is incorporated therein by 9-501(1) and (2). It may be noted that consumer legislation in some states—see, for example, ILL. REV. STAT. ch. 121½, §§ 526, 580 (1971)—may well convert unreasonable delay in disposition on the part of a secured party in possession into a forced election to retain the collateral in satisfaction of the debt. The Code, however, takes a different approach. See 9-505(1).

51. See 9-207(4).



cured party who has a possessory security interest *ab initio* than to a secured party with a filed security interest who has merely taken possession after default,<sup>52</sup> the latter kind of secured party should—as *Harris v. Bower* shows—keep those duties well in mind.<sup>53</sup>

#### IV. REALIZATION ON COLLATERAL

We now arrive at the stage in default procedure which is of greatest concern to secured parties, and to which all of the preceding steps—determination of default, repossession of the collateral and its preservation while in the secured party's custody—are ultimately directed: disposition of the collateral by the secured party in a manner which realizes its maximum value.

Part 5 of Article 9 provides three broad methods (within each of which a multitude of minor variations can be found) for realizing on collateral: (1) collection, (2) sale, lease, or "other disposition" to third parties and (3) retention of the collateral by the secured party

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52. Much of the decisional law under 9-207 has involved the care of instrument collateral which was the subject of possessory security interests. See, e.g., *Reed v. Central Nat'l Bank*, 421 F.2d 113 (10th Cir. 1970); *Grace v. Sterling, Grace & Co.*, 30 App. Div. 2d 61, 289 N.Y.S.2d 632 (1st Dep't 1968), both of which held secured parties liable for failure to exercise conversion rights on debentures resulting in impairment of value when they were not converted into stock prior to the redemption call date. Section 9-207(3) provides that a secured party is liable for any loss caused by his failure to meet any obligation imposed by subsections (1) and (2) thereof but that he does not thereby lose his security interest. It is common practice in drafting security agreements covering possessory security interests—especially where the collateral is securities—to include a paragraph which imposes upon the debtor the duty of exercising conversion rights and the like. Such a clause, if carelessly drafted, may go beyond the "determin[ation] of standards by which [reasonableness and care] is to be measured" permitted by 1-102(3), and resemble more closely an outright—and forbidden—disclaimer of those obligations by the secured party. However, it is believed that the act of pledging securities (for example) ought not by itself to impose upon the secured party the full range of duties, often subject to the second-guessing provided by hindsight, which would be expected of a trustee.

53. In passing, it should be noted that the status of a possessory security interest (as opposed to one under which the secured party takes possession only after default) in light of *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), is somewhat unclear. It can be argued that a disposition after default of collateral continually in the possession of the secured party, since it serves to deprive the debtor of his ultimate ownership of the collateral, should be treated in the same manner for due process purposes as a repossession of collateral by the secured party. On the other hand, the decided cases have focused less upon the question of ultimate ownership than upon deprivation of possession—an emphasis which would suggest that sale of collateral subject to a possessory security interest should be constitutionally permissible even without notice and hearing, irrespective of asserted constitutional deficiencies in self-help repossessions. See, e.g., *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1972), *aff'd on opinion below*, 460 F.2d 1064 (2d Cir.), *cert. denied*, 406 U.S. 961 (1972), upholding the warehouseman's lien foreclosure provisions of 7-210 against due process objections.

in discharge of the debtor's obligation. As indicated above, which method a secured party will prefer normally depends principally on the type of collateral in question. At the outset, it may be noted that the Code provision dealing with the first method of realization—collection from third parties (Section 9-502)—has produced the least reported litigation among the Article 9 default sections. On the other hand, the provisions for disposition to third parties (Section 9-504) has produced the most reported litigation among these sections. Apparently no reported case to date has involved a proposal to accept the collateral in discharge of the obligation under Section 9-505—at least not a proposal the secured party knew he was making. As we will see, some cases have denied a deficiency judgment to a secured party after a disposition ruled defective under Section 9-504 by equating, in substance, the disposition with a proposal under Section 9-505.

#### A. *Collection*

Collection is the normal method of realization on most intangible and paper collateral.<sup>54</sup>

The most liquid assets of a business debtor are the obligations owing to him by his customers. These obligations—or rights to payment—are classified, now that the class of contract rights has been eliminated from Article 9,<sup>55</sup> as accounts, general intangibles, chattel paper or instruments, depending on how they are evidenced. An open account arising from a sale on unsecured credit is probably the simplest form of such an obligation. A motor vehicle retail installment contract evidencing a purchase money security interest in an automobile sold by a dealer is a more complex illustration; such a contract becomes chattel paper when used by the seller to finance his inventory.

Sometimes the businessman merely grants his lender a security interest in such obligations. The businessman collects the accounts

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54. See note 9 *supra* and accompanying text. In some cases, intangible and paper collateral will be divided into categories on the basis of "collectibility." The secured party will then himself collect the "good" accounts under 9-502, selling the remainder pursuant to 9-504 (often at a discount and to a firm which specializes in difficult collections). Both the collection and the sale must be "commercially reasonable," of course. The secured party confronting a bundle of doubtful accounts may also hire a collection firm—again, subject to the requirement of commercial reasonableness—and "deduct his reasonable expenses of realization from the collections," holding his debtor liable for any resulting deficiency. See 9-502(2). The choice of method depends, here as elsewhere, on practicalities.

55. See 9-106. A conforming change was made in 9-502(2) and 9-504(2).

in regular course, as permitted by Section 9-205, and the lender does not normally notify the businessman's customers to make payment directly to the lender unless the businessman defaults. This type of financing is sometimes known as non-notification financing.<sup>56</sup> Sometimes, in arrangements which are called "factoring," the businessman sells his accounts or chattel paper outright to his financier; such a sale may be either with or without recourse.<sup>57</sup> Because of the complex provisions of many arrangements involving a transfer of accounts or chattel paper, and the resulting difficulty of deciding whether the transfer is for security purposes or is a genuine sale,<sup>58</sup> Article 9 has always covered both forms of transaction.<sup>59</sup>

The collection rights of a secured party, which should be considered in light of this background, are set forth in Section 9-502. Whenever it is so agreed, and in any event on default, the secured party may notify an account debtor (*i.e.*, the person obligated to his debtor on an account which is collateral)<sup>60</sup> or the obligor on an instrument to make payment to him directly, whether or not his own debtor had previously been making collections on the collateral; the secured party may also take control of any proceeds to which he is entitled under Section 9-306. A secured party who is entitled to recourse against the debtor (or who expects to seek a deficiency judgment against him) and who undertakes collection from account debtors or obligors must proceed in a commercially reasonable manner and may, if he does so, deduct from collections his reasonable expenses of realization.

If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus and, unless agreed otherwise, the debtor is liable for any deficiency. If, however, the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or liable for any deficiency only if the security agreement so provides.

The secured party frequently encounters no trouble in collecting—or no more trouble than the debtor would have if the debtor

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56. Greenberg, *Inventory and Accounts Receivable Financing*, 1956 U. ILL. L.F. 601, 617-18.

57. *Id.* at 616-17.

58. The difference was litigated under pre-Code law. See *Blackford v. Commercial Credit Corp.*, 263 F.2d 97 (5th Cir.), *cert. denied*, 361 U.S. 825 (1959).

59. See 9-102(1)(a) and Official Comment thereto.

60. An "account debtor" is defined under 9-105(1) (a) as "the person who is obligated on an account, chattel paper or general intangible." The words "contract right" were deleted by the 1972 amendments to conform to the change in 9-106. See note 55 *supra* and accompanying text.

were doing the collecting. As the paucity of reported cases under Section 9-502 suggests, paper and intangible collateral do not often present the difficult realization problems that are frequently encountered in disposing of other types of collateral.

*B. Disposition by Sale, Lease, "or Otherwise"*

Sale is the normal method of realization in the case of tangible collateral—*i.e.*, "goods." Lease as a method of realization was an innovation of original Article 9; if reported decisions are any indication of its utilization, it has not been frequently used. Similarly, although Section 9-504(1) provides that a secured party may, after default, "sell, lease or otherwise dispose of" collateral, apparently no one has yet proposed an "or otherwise" disposition that would meet the "commercially reasonable" requirement of Section 9-504(3).

In general, a Section 9-504 disposition may be of all, or any part, of the collateral, in its then condition or following any commercially reasonable preparation or processing, and may be "at any time and place and on any terms" so long as "every aspect" of the disposition is "commercially reasonable." Any sale, of course, is subject to the Article on Sales—Article 2.

1. The Requirement of Commercial Reasonableness

The first two sentences of Section 9-504(3) impose the requirement of commercial reasonableness for any disposition thereunder. They state:

Disposition 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 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.

This criterion was intended to substitute a measure of flexibility for the sometimes straight-jacketing requirements of pre-Code law. The overriding mandate is "commercial reasonableness"; the particulars to be observed are "method, manner, time, place and terms." How can a secured party flesh out this rather loose, but pervasive, criterion?

As the Comment to Section 9-507(2) notes, in view of the sanc-

tions provided by subsection (1) of that section against a secured party who does not dispose of collateral in a commercially reasonable manner, "it is of great importance to make clear what types of disposition are to be considered commercially reasonable." Section 9-507(2) accordingly enables a secured party who has doubts to obtain a binding opinion in advance of a disposition. It provides that a disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors is conclusively deemed commercially reasonable.<sup>61</sup> A declaratory judgment proceeding, for example, was used in *Old Colony Trust Co. v. Penrose Industries Corp.*<sup>62</sup> to obtain a ruling that a proposed private disposition of the stock of a radio station was commercially reasonable.

Section 9-507(2) also provides some specific criteria of what is commercially reasonable: (1) a sale in the usual manner in a recognized market; (2) a sale at the price current in a recognized market at the time of sale; and (3) a sale in conformity with reasonable commercial practices among dealers in the type of property sold. However, these criteria in turn generate questions. What, for example, is a "recognized market"? As to investment securities collateral, probably no one would question that the New York Stock Exchange is a recognized market. Beyond that, however, there seems little certainty except in a negative way. Several decisions have held that there is not a recognized market for used automobiles.<sup>63</sup> It follows, of course, that a price listed in a dealer's redbook or bluebook is not a price current in such a market.

Finally, the first sentence of Section 9-507(2) provides some aid to the secured party against his debtor, or other creditors, who may try to second-guess him on price alone: "The 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." This provision applies to Code sales a rule

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61. The sentence goes on to say that this does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

62. 398 F.2d 310 (3d Cir. 1968), *aff'g* 280 F. Supp. 698 (E.D. Pa.). The case is noted subsequently at notes 65 and 111 *infra*.

63. *Norton v. National Bank of Commerce*, 240 Ark. 131, 398 S.W.2d 538 (1966); *Community Management Ass'n v. Tousely*, \_\_\_ Colo. App. \_\_\_, 505 P.2d 1314 (1973); *Nelson v. Monarch Inv. Plan, Inc.* 452 S.W.2d 375 (Ky. 1970); *Alliance Discount Corp. v. Shaw*, 195 Pa. Super. 601, 171 A.2d 548 (1961).

followed in bankruptcy sales.<sup>64</sup> While it may be helpful to a secured party on occasion, it does not (as the words "of itself" show) insulate him from the consequences of a disposition which, on all the evidence, was not commercially reasonable.

## 2. More on Commercial Reasonableness: "Method, Manner, Time, Place and Terms"

The fundamental question in determining the reasonableness of a disposition is usually its form: should it be by way of public sale, private sale, lease or "otherwise"? While no flat rules can be stated, there are some guidelines which follow from the specific rules of Section 9-504(3) and from the case law. In situations where it is customary to sell goods (such as livestock) by auction, for example, it may be that a public sale is the only "commercially reasonable" method of disposition; at least it would seem difficult to fault the secured party for so proceeding. In cases where there is no ready public market for the collateral and the secured party knows of a particular buyer with a need for such goods, a private sale would seem commercially reasonable, and an attempt at public auction might well not be.<sup>65</sup> No doubt there are other situations in which a private sale would result in a greater realization than a public auction, or, for that matter, in which (as the Official Comment to Section 9-505 tells us) "the parties [would be] better off without a resale of the collateral" at all.

It seems likely, however, that the preferred method of disposition will be the public sale. But here we run into difficulty. Notwithstanding the mass of reported decisions under the default provisions of Article 9, a clear answer to the question of what constitutes a "public sale" under Section 9-504 has still not crystallized. The question apparently has not been considered by courts of last resort, and is not extensively dealt with even in reported lower court decisions.<sup>66</sup> Some reliable guidelines for a secured party contemplating a public sale can, however, be culled from pre-Code law.

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64. See, e.g., *In re Stanley Eng'r Corp.*, 164 F.2d 316 (3d Cir. 1947), *cert. denied sub nom.* *Root v. Galman*, 332 U.S. 847 (1948).

65. In *Old Colony Trust Co. v. Penrose Industries, Inc.*, 280 F. Supp. 698, 713 (E.D. Pa.), *aff'd*, 398 F.2d 310 (3d Cir. 1968), the secured parties relied upon thoroughly experienced advice from a large media broker that "a private or 'negotiated' sale would produce the highest price" for the stock of a radio station. A public or "semi private" sale of limited bidding was rejected because of S.E.C. problems.

66. In *American Plan Corp. v. Eiseman*, 4 Ohio App. 2d 385, 212 N.E.2d 824 (1965), the court assumed without discussion that a public sale had been made. In *Massey-Ferguson*

There is evidence that the draftsmen of the Code considered "public sale" to mean a sale by auction.<sup>67</sup> That implies a sale at which the public is invited, by prior advertisement, to appear and bid for the goods to be sold.<sup>68</sup> The goods should, of course, be available for inspection by prospective bidders before the sale; the advertisement should appear in at least one newspaper of general circulation, reasonably in advance of the time of sale, and should provide reasonable information concerning the time and place of sale<sup>69</sup> and what is to be sold.<sup>70</sup> The goods must be offered and sold for cash to the highest responsible bidder;<sup>71</sup> and bidders must, of course, know of other bids and be permitted to raise their bids.<sup>72</sup> The place of sale, moreover, must be accessible to the general public,<sup>73</sup> and the sale itself, if not conducted by one of the parties, must generally be under the direction of a licensed auctioneer.<sup>74</sup>

A sale in which these incidents are observed should be held a "public sale" under Section 9-504. Since a secured party may buy at a public sale, but not at a private sale, it is important that he not be under an erroneous impression as to the nature of the sale—especially in view of the sanctions for non-compliance with Section 9-504 provided by Section 9-507(1).

Insofar as the timing of a disposition under Section 9-504 is concerned, there are limitations which a secured party must observe

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Fin. Corp. v. Hamlin, 9 U.C.C. Rep. 142 (Tenn. App. 1971), the court held that a notice of a public sale was not a reasonable one and defeated the purpose of a public sale; see note 69 *infra*. In *In re Bishop*, 11 U.C.C. Rep. 1071 (Ref., W.D. Va. 1972), the court reviewed several of the criteria mentioned in ensuing text and concluded that the sale was not a public one because it was not advertised in any newspaper or even by signs.

67. Comment 1 to 9-504 states that in respect to the requirement of a commercially reasonable disposition, that section follows the provisions of 2-706 on resale by the seller after a buyer's rejection. Comment 4 to 2-706 states that a public sale thereunder contemplates a sale by auction.

68. RESTATEMENT OF SECURITY § 48, comment c at 139 (1941).

69. Massey-Ferguson Fin. Corp. v. Hamlin, 9 U.C.C. Rep. 142 (Tenn. App. 1971), held an advertisement of an offer to sell a repossessed tractor on a date certain "seriously defective" for failure to specify when the sale (as opposed to the offer) would take place, and, even if the sale were to take place on a date certain, for failure to specify the hour of sale; the sale itself was "not commercially reasonable."

70. *In re Kiamie's Estate*, 309 N.Y. 325, 130 N.E.2d 745 (1955). Professor Grant Gilmore has observed that this decision is "excellent law under the Code." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.5 at 1234 (1965).

71. RESTATEMENT OF SECURITY § 48, comment c at 140 (1941).

72. *Offredi v. Huhla*, 135 Conn. 20, 60 A.2d 779 (1948) (a sale on sealed bids submitted to the court was not a public sale).

73. *Hagan v. Continental Nat'l Bank*, 182 Mo. 319, 81 S.W. 171 (1904).

74. RESTATEMENT OF SECURITY § 48, comment c at 140 (1941).

in addition to the generally flexible standard of commercial reasonableness. First, the flexibility does not exist as to consumer goods, where the debtor has paid 60 percent of the cash price or of the other indebtedness secured thereby. In such cases, Section 9-505(1) requires the secured party to dispose of the goods under Section 9-504 within 90 days from the date of repossession, or risk exposure to liability for conversion or for the 10 percent penalty provided by Section 9-507(1).<sup>75</sup> Secondly, a secured party who has repossessed may not hold collateral for a long time in order to accumulate storage charges and thus increase his deficiency claim, particularly where no reason for not making a prompt disposition exists.<sup>76</sup>

There are risks to an indefinite wait in the hope of a more favorable market. An alternative course, discussed below, is to proceed judicially, levying on the collateral under Section 9-501(5).<sup>76.1</sup> Secured parties who have been laggard in their disposition have been held to have accepted the collateral—however unintentionally—in satisfaction of the debt,<sup>77</sup> or have been found liable in damages where circumstances indicated that a prompt resale would have produced a surplus.<sup>78</sup>

Concerning the commercial reasonableness of a disposition as a unit vis-a-vis one in parcels, the secured party must, among other things, balance the multiple realization costs of a disposition in parcels against a possible depression of the market by placing a large block of the collateral thereon for sale at one time.<sup>79</sup>

### 3. Notice of Disposition

The notice requirements with respect to a disposition, con-

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75. For a case in point, see *Crosby v. Basin Motor Co.*, 83 N.M. 77, 488 P.2d 127 (1971).

76. 9-504, Comment 6.

76.1. See notes 123-25 *infra* and accompanying text.

77. *Bradford v. Lindsey Chevrolet Co.*, 117 Ga. App. 781, 161 S.E.2d 904 (1968) (retention of repossessed car for 50 days before filing suit and for 12 months after filing without demand for payment); *Brownstein v. Fibernics Industries, Inc.*, 110 N.J. Super. 43, 264 A.2d 262 (1970); *Northern Fin. Corp. v. Chatwood Coffee Shop, Inc.*, 4 U.C.C. Rep. 674 (Sup. Ct. N.Y. 1967).

78. *Farmers State Bank v. Otten*, \_\_\_ S.D. \_\_\_, 204 N.W.2d 178 (1973) (repossession of farm equipment prior to action on obligation and retention for 15 months before a sale under judgment on obligation).

79. In *Hutchinson v. Southern California First Nat'l Bank*, 27 Cal. App. 3d 572, 103 Cal. Rptr. 816 (1972), debtors charged a secured party with "dumping large blocks" of a stock "on the market at distress prices." The sale occurred after the market had rallied after a severe decline. The court held, however, that the action of the secured party was commercially reasonable and affirmed a dismissal of the complaint.



tained in subsection (3) of Section 9-504, were substantially revised by the 1972 Official Text.

(a) When Notice Is Not Required

We begin with the instances in which notice is excused. It is excused in the situations where the collateral is perishable, where it threatens to decline substantially in value or where it is of a type customarily sold on a recognized market. The rationale of excusing notice in these situations is the absence of prejudice to the debtor, and, in the first two cases, the desire to minimize delay in disposition by the secured party.

These rules must be invoked cautiously, however. In a recent case, repossessed dairy cattle which "needed feed" but were reported to be in "good general condition" by a veterinarian who tested them for disease two weeks after the debtor had requested that the secured party retake the cattle were held not "perishable" and not a threat "to decline speedily in value" within the meaning of Section 9-504(3).<sup>80</sup> As to collateral of a type "customarily sold on a recognized market," registered investment securities are virtually all that can flatly be said to qualify. Used automobiles, for example, do not.<sup>81</sup>

(b) Persons Entitled to Notice

The 1972 Official Text makes changes concerning the persons entitled to notice of a proposed disposition under subsection (3) of Section 9-504. The earlier text of that subsection required the secured party to give notice of an intended disposition to the debtor. Except as to consumer goods, notice was also required to be given to any person with a security interest in the collateral who had filed a financing statement in the same state indexed in the debtor's name, and, in addition, to any person—in or out of state, and whether or not he had filed—"known by the [selling] secured party to have a security interest in the collateral." Thus the earlier text of subsection (3) required not only a new search by the selling secured party of the record of filed financing statements prior to a disposition, but also a search for any other information that might have come to his attention (by telephone, letter or otherwise) and could serve to charge him with knowledge of the existence of another

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80. United States v. Mid-States Sales Co., 336 F. Supp. 1099 (D. Neb. 1971).

81. See cases cited at note 63, *supra*.

secured party. These notice requirements could not be waived, and, as we will shortly see, non-compliance was often a highly expensive proposition for the selling secured party.

The 1972 amendments change much of this. Revised Section 9-504(3) allows a debtor, after default, to waive or modify his right to receive "reasonable notification" of the sale or other disposition to be made. (In this connection, "debtor" includes a third party owner who has furnished the collateral as well as the party owing the secured obligation.)<sup>82</sup> Revised Section 9-504(3) also places on the junior secured party who desires to receive notice of a disposition the burden of informing the senior secured party of his interest,<sup>82,1</sup> before either the senior secured party sends notice to the debtor or the debtor waives or renounces his own right to notification. The junior secured party must now furnish the senior secured party with written notice of his claim of interest in the collateral before either of those events occurs. Otherwise he is not entitled to notice of disposition—and revised Section 9-504(3) still provides that where the collateral is consumer goods, a junior secured party is not entitled to that notice.<sup>83</sup>

The 1972 amendments thus reverse the burden of responsibility. Formerly the senior secured party was required to search for others; now it is they who must advise the senior secured party of their claim. This substantially aids efficient disposition under Section 9-504.

### (c) Time and Manner of Notice

Revised Section 9-504(3) still requires, however, that in most

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82. Section 9-105(1)(d) so provides. See also 9-112 (when collateral is not owned by debtor).

82.1 Both Revised 9-504(3) and Revised 9-505(2) assume that, since a junior secured party will be aware of his junior status, it is the senior secured party who will be selling under 9-504(3) or proposing to retain the collateral under 9-505(2). In practice, this assumption will virtually always be true. Even where it is not, the obligation of good faith imposed by 1-203 will normally protect the status of the senior secured party. Although the literal language of 9-505(2) can be read to raise a question concerning who would prevail if a junior secured party unaware of his junior status made a proposal under that section and a senior secured party failed to object, the chance of any question arising is almost nil. If the junior secured party knows of the senior's existence (as is almost always the case), 1-203 dictates the result. At least as between the competing secured parties, moreover, the problem cannot arise under 9-504(3), since subsection (4) of that section provides that a sale thereunder discharges only the security interest under which it is made and all *subordinate* liens.

83. The reasons for this are at least twofold. There is unlikely to be a junior security interest in consumer goods. Even if there were, it is unlikely that any sale thereof on default by a senior secured party would result in any realization for the junior secured party.

cases the debtor must be given "reasonable notification" of the time and place of any public sale or of the time after which a private sale or any other disposition will be made. While many security agreements establish a five-day notice as a standard of reasonableness, the validity of such a standard under present conditions may be questionable in some cases. The advent of several Monday holidays (with resultant three-day weekends), and current delays in the mails, may not leave the debtor much, if any, time to act on a notice of disposition sent five days in advance; in other words, such notice may not be "reasonable." On the other hand, ten days' notice would appear reasonable, as a rule of thumb, in most cases.

Although revised Section 9-504(3) requires a claim of interest in the collateral by a competing secured party to be in writing, it has no explicit parallel requirement for the notice of disposition itself. One court has held that written notice of a disposition is not required, despite the requirement of Section 9-504(3) that the notice be "sent,"<sup>84</sup> at least where the debtor admitted receipt of oral notice.<sup>85</sup> Another court has opined to the contrary.<sup>86</sup> Most prudent secured parties, however, will prefer to give written notice. Since receipt of a written notice sent by mail is not required,<sup>87</sup> the mere sending of such notice may not necessarily avoid an issue of fact. But it will certainly help in most cases; the use of registered mail should resolve all but the most bizarre situations.

It should be noted that where a secured party learns that notice, although sent, has not reached the debtor, he has been held to be under a duty to take further steps to notify the debtor.<sup>88</sup>

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84. The term "send" is defined in 1-201(38) as follows:

"Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

85. *Crest Inv. Trust, Inc. v. Alatzas*, 264 Md. 571, 287 A.2d 261 (1972).

86. *Foundation Discounts, Inc. v. Serna*, 81 N.M. 474, 468 P.2d 875 (1970).

87. *Hudspeth v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964) (notice sent by certified mail to the debtor, who resided on a rural mail route, was not received by him before the sale because it was held for him at the post office, and he did not go into town to pick it up).

88. *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W. 2d 347 (1966).

#### 4. The Status of Purchasers at a Section 9-504 Disposition

##### (a) What the Purchaser Gets

To facilitate attaining the secured party's objective of maximum realization from collateral after default—an objective shared by any debtor facing a deficiency judgment—Section 9-504(4) of the Code provides substantial protection for the purchaser of the collateral upon a disposition. A post-default disposition by a secured party not only transfers to a purchaser for “value” (defined in Section 1-201(44)) all of the debtor's rights therein, but also discharges the security interest of the seller and in addition any subordinate security interest or lien—including (it is one of the few areas where taxes are not as inevitable as death) a federal tax lien.<sup>89</sup> Also included is a lien arising by reason of a levy on the collateral under a judgment. This provision for a sale of collateral free of all liens except those of senior parties makes a sale under Section 9-504 a preferable means of realization, since a purchaser at a judicial sale must often take under the rule of *caveat emptor* and may take subject even to undisclosed liens.<sup>90</sup>

A purchaser at an Article 9 disposition, moreover, takes free of all such rights and interests even though the secured party fails to comply with the requirements of the default sections (or with those

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89. Reference is made, of course, to a junior lien, since the secured party presumably verified his priority position before entering the transaction. A secured party who has reason to believe that such a lien may exist may have a search made. If the search discloses a filed federal tax lien, due notice to the government in accordance with the Internal Revenue Code of 1954, § 7425(b) and (c)—*i.e.*, at least 25 days in advance of disposition—will operate to discharge the lien. W. PLUMB & L. Wright, *Federal Tax Liens* 236 (1967).

90. See *Roberts v. Hughes*, 81 Ill. 130 (1876); *England v. Clark*, 5 Ill. 487 (1843); and Note, 20 MINN. L. REV. 805 (1940). This rule, whose operation may be harsh on occasion (as the foregoing authorities demonstrate), still prevails in several states. See, *e.g.*, *Altec Lansing v. Friedman Sound, Inc.*, 204 So. 2d 740 (Fla. App. 1967); *First Nat'l Bank v. Sheriff of Milwaukee County*, 34 Wis. 2d 535, 149 N.W.2d 548 (1967). In *Citizens Bank v. Perrin & Sons, Inc.*, 253 Ark. 639, 488 S.W.2d 14 (1972), the court held that a sale of the collateral by a judgment creditor of the debtor was, by reason of 9-311 (which changed prior Arkansas law), not a conversion; the court reasoned that the sale had not adversely affected the position of the secured party, who was free to pursue the collateral notwithstanding the judgment sale. The court noted that the security interest was not discharged under 9-504(4). However, a different rule prevails in Delaware. In *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, \_\_\_ Del. \_\_\_, 300 A.2d 8 (1972), the Delaware Supreme Court affirmed the denial of a secured party's motion to set aside an execution sale of the collateral. It held that the long-established Delaware policy (that chattels sold at an execution sale be sold free of all encumbrances so as to ensure the highest price and stimulate bidding) had not been changed by 9-311. The sale stood, and the secured party was held entitled only to priority in the proceeds. The court distinguished the Florida and Wisconsin cases cited above.

of any judicial proceedings) if: (a) in the case of a public sale, the purchaser has no knowledge of any defects in the sale and does not buy in collusion with the secured party, other bidders or the person conducting the sale, or (b) in the case of any other disposition, he acts in good faith.<sup>91</sup> In other words, a purchaser—even at a public sale—is protected so long as he is not acting in bad faith; he is under no duty to inquire into the circumstances of the sale.<sup>92</sup>

#### (b) The Secured Party as a Purchaser

Section 9-503(3) permits a secured party to buy at any public sale. It is often necessary for a secured party to buy, or at least to bid and be prepared to buy, at a public sale, so that the collateral is not sold for less than what the secured party regards as its fair market value.<sup>93</sup>

The secured party may buy at a private sale if the collateral is of a type (a) customarily sold in a recognized market, or (b) which is the subject of widely distributed standard price quotations. (If registered securities were the collateral, for instance, and the secured party purchased them at a private sale at the price at which such securities were concurrently sold on the New York Stock Exchange, the purchase would fit both exceptions.)

### 5. Application of the Proceeds of Disposition

Section 9-504(1) delineates the order of distribution of the proceeds of a disposition. They are applied in the following order: (1)

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91. See 9-504(4) and Comment 4 thereto. "Good faith," defined in 1-201(19), means simply "honesty in fact in the conduct or transaction concerned"; the test would be met, for example, by a purchaser who has negligently failed to discover the existence of other liens or security interests. Query, however, if a purchaser who had deliberately avoided inquiry could satisfy the good-faith requirement: 1-103 applies to the Code "the [supplementary general] principles of law and equity," one of which is that—as the proverb has it—there are none so blind as those who will not see.

92. 9-504, Comment 4. *But see* note 91 *supra*.

93. Public sales under the Code are usually a better means of realizing a fair value than judicial sales, which are notoriously unsatisfactory in that regard for reasons set forth in note 90 *supra*. However, even at an Article 9 public sale, the secured party is often the only bidder. Especially in that situation, and generally when the secured party buys, he should be careful to observe all of the requirements of a "public sale" discussed in the text at notes 66-74 *supra*. The protection afforded by the first sentence of 9-507(2) against a finding of commercial unreasonableness based solely on inadequacy of selling price is far from absolute; and price inadequacy, while not alone sufficient, is almost always the first step in inducing debtors as well as courts to inquire vigorously into other possible defects in the sale. The requirement of good faith (see note 91 *supra*) applies to the value a purchasing secured party puts on the collateral—especially when he is the only bidder—as much as to any other aspect of the sale.

to the secured party's expenses of realization; (2) to satisfaction of the indebtedness secured by the security interest under which the disposition occurs; and (3) to the satisfaction of indebtedness secured by any subordinate security interests. Under Section 9-504(2), the debtor is generally entitled to any remaining proceeds.

Realization expenses include "the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party."<sup>94</sup> It will be noted that the test is reasonableness.

The second order of application, the indebtedness secured by the security interest under which the disposition is made, normally presents little difficulty.

Third comes the holder of a subordinate security interest, who stands next in line if any proceeds of a disposition remain after satisfaction of realization expenses and of the indebtedness secured by the security interest under which the disposition is made. However, Section 9-504 requires such persons to act affirmatively if they wish a place in the queue. The participation of a junior secured party in the proceeds of the disposition is conditioned upon the receipt from him<sup>95</sup> by the senior secured party, before distribution of the proceeds is completed, of written notification of demand for satisfaction of the junior security interest. Also, if the senior secured party so requests, the holder of a junior secured interest must furnish reasonable proof of his interest. If he does not do so, the senior secured party may ignore his demand. At a minimum, reasonable proof would include a copy of the security agreement, signed by the debtor.

If any surplus proceeds remain, an infrequent event even when there is no subordinate security interest, the debtor is entitled to them if the security interest secures an "indebtedness";<sup>96</sup> in practice, that means anything other than a sale of accounts or chattel

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94. The words "lease" and "leasing" were inserted in 9-504(1)(a) by the 1972 amendments solely as a matter of clarification.

95. Not merely his transmittal. This differs, for example, from the general rule concerning the selling secured party's notice of disposition (as to which see the text at note 87 *supra*). The premise here, which accords with the 1972 amendments to 9-505, discussed below, is to promote efficient dispositions.

96. 9-504(2). This subsection is identical to the last two sentences of 9-502(2).

paper. If the proceeds of the disposition do not pay the indebtedness under which the disposition is made, leaving a deficiency, the debtor is liable for the deficiency unless the parties have otherwise agreed. However, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.<sup>97</sup>

### C. *Acceptance of Collateral in Satisfaction of the Obligation*

Section 9-505(2) establishes a procedure by which a secured party in possession may propose to retain collateral in satisfaction of the obligation. The antecedent for this provision was Section 23 of the Uniform Conditional Sales Act.<sup>98</sup> As Official Comment 1 to Section 9-505 points out, the provision was included in Article 9 because “[e]xperience has shown that the parties are frequently better off without a resale of the collateral.” One writer has noted that Section 9-505(2) is often employed, for example, in cases of disposition of unregistered securities whose public sale under Section 9-504(3) would be fraught with difficulty.<sup>99</sup>

The 1972 amendments made changes in the text of Section 9-505(2) which parallel those made in Section 9-504(3). These changes are a substantial improvement over the earlier text. Before considering why, however, an exception to the basic rule of Section 9-505(2) should be noted. The exception, made in subsection (1) of Section 9-505, provides that where a debtor has paid 60 percent of an obligation secured by consumer goods collateral, and has not signed after default a statement renouncing or modifying his rights under Part 5 of Article 9, a secured party taking possession of the collateral must dispose of it within 90 days under Section 9-504.

As noted earlier, there are apparently no reported decisions concerning explicit proposals to accept collateral in satisfaction of

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97. The term “contract rights” was deleted from 9-504(2) to conform to other 1972 amendments. See note 55 *supra* and accompanying text.

98. Section 23 of the Uniform Conditional Sales Act read quite simply:

Where there is no resale, the seller may retain the goods as his own property without obligation to account to the buyer except as provided in Section 25, and the buyer shall be discharged of all obligation.

Section 25 provided for recovery of damages for not less than one-quarter of the payments made if the seller failed to comply with other provisions of the Act relating to redemption, resale, application of proceeds, deficiency and rights of parties where there was no resale. See 3 UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE 501 (1968).

99. Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 521 (1973). In this connection see *SEC v. Guild Films Co.*, 279 F. 2d 485 (2d Cir.), *cert. denied sub nom. Santa Monica Bank v. SEC*, 364 U.S. 819 (1960).

a secured debt, although some decisions treat a disposition defective under Section 9-504 as what amounts to an involuntary "proposal" under Section 9-505(2).<sup>100</sup> Since (as we will see) revised Section 9-505(2) removes many criticisms justly levelled at the earlier text, however, more frequent use of it may be anticipated.

Many of the criticisms of the earlier text centered upon the length of the waiting period between the making of a retention-in-satisfaction proposal by a secured party and the final expiration of the time within which the debtor (or competing secured parties) might object.<sup>101</sup> Section 9-505(2) set that period at 30 days; but in practice the period could more closely approximate 40 days, partly because of lack of clarity in the language of the section. To begin with, the 30-day period did not begin to run as to any potential objector until his "receipt of . . . notification" of the proposal, which might not occur until five days or more after notice of the proposal had been sent. The only safe course for a secured party to follow, therefore, was to transmit the notice by registered mail, return receipt requested. Otherwise he had no way of knowing, and might have a difficult time proving, when (or even whether) the notice had been received and the running of the 30-day period begun. A further complication occurred in cases involving multiple debtors, or multiple secured parties claiming a security interest in the collateral. In that situation, the secured party making the proposal had to date the running of the overall 30-day period from the point at which notice was received by the *last* party entitled to it.

Compounding these problems as to the beginning of the period was a similar problem as to when it actually ended. In practice, the safest position for a secured party was to treat as timely any notice of objection which had been deposited in the mails within 30 days from the date the objector received notice of the proposal, as best the proposing secured party could ascertain it. Again, the notice of objection might not reach the secured party for several days—or at all.<sup>102</sup>

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100. See cases cited at note 77 *supra*.

101. See, e.g., G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 44.3, at 1225 (1965); Kriple, *Practice Commentary to § 9-505*, 62½ MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANN. pt. 3 at 627 (1964).

102. Curiously, the former text, while requiring "receipt" of notification of a proposal, contained no such requirement concerning a notice of objection. It simply directed that objections be made "in writing within thirty days . . ." See G. GILMORE, *supra* note 101, at 1224-25.



The 1972 Official Text solves most of these problems. Section 9-505(2) now reduces the waiting period to a maximum of 21 days, measured from *dispatch* of the notice (not receipt) to *receipt* (not dispatch) of an objection. Ostensibly, the waiting period is reduced by only nine days; in practice, the reduction is much more substantial and the time period much less subject to guesswork.

Further serious criticisms of former Section 9-505(2), paralleling to some degree those made of former Section 9-504(3),<sup>103</sup> concerned the third parties entitled to notice of a retention-in-satisfaction proposal. The former text required the proposing secured party to search the financing statement files under the debtor's name in the appropriate state—even when the collateral was instruments or securities, concerning which no search is necessary when a possessory security interest is taken<sup>104</sup>—for the names of possible competing secured parties, and to transmit notice of the proposal to each of them. The former text also required a secured party to maintain records even of telephone conversations or casual encounters with persons claiming an interest in the collateral, since notice was required to be given to any third party “known by the secured party in possession to have an interest in” the collateral.

The 1972 Official Text also eliminates these criticisms and shifts to the junior secured party the burden of giving notice of his interest.<sup>105</sup> First, the new text requires notice of a proposal to be given to the debtor only if he has not signed after default a statement renouncing or modifying his rights under Section 9-505(2). For the first time, this language clearly permits a debtor to reduce or waive the waiting period. Second, as before, in the case of consumer goods collateral, no other notice need be given under any circumstances; but in all other cases notice need now be sent only to a competing secured party from whom the secured party initiating the proposal has received, before sending notice to the debtor (or before the debtor's renunciation or modification of his rights, whichever happens first), written notice of a claim of interest in the collateral. These are the only persons entitled to notification of a proposal.

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103. See the text following note 81 *supra*.

104. See 3-304(5) and 9-309, providing that holders in due course and bona fide purchasers of such collateral “take priority over an earlier security interest even though perfected” and that filing under Article 9 is not notice to such parties. Under 1-201 (32) and (33), “purchaser” includes a secured party.

105. See note 82.1 *supra*. In the nature of things, the junior secured party is more likely to be aware of the senior secured party than the reverse.

Finally, the 1972 Official Text also obviates the former possibility of a surprise objector. The earlier text required disposition under Section 9-504 not only if an objection was received from "the debtor or other person entitled to receive notification," but also if "any other secured party"—whether or not he was entitled to notice, and whether or not the proposing secured party knew of his existence—"object[ed] in writing within thirty days after the secured party obtain[ed] possession" of the collateral. Thus a junior secured party with a claim to the collateral, who had not previously made his existence known to the proposing secured party, but who had learned of the proposal in time to object, was always a possibility. Under revised Section 9-505(2), however, only a person entitled to receive notice (a comparatively narrow group, as indicated above) may object to a proposal.

Under revised Section 9-505(2), in short, if the initiating secured party receives an objection within the 21-day period from a person entitled to receive notification, he must dispose of the collateral under Section 9-504. Otherwise, his proposal is accepted and he becomes the owner of the collateral. This is a major, and much-needed, simplification of the former rules.

The 1972 Official Text does not specify the contents of a written notice under Section 9-505(2), save that it must propose to retain the collateral in satisfaction of the obligation. Since a notice should, as one writer has forcefully observed,<sup>106</sup> contain a "commercially reasonable" amount of information, the prudent secured party should include in his notice, in addition to the fact that he proposes to retain the collateral in satisfaction of the obligation, a statement that the obligation is in default and that he is in possession of the collateral, a statement of the amount of the obligation and a description of the collateral.

#### V. THE DEBTOR'S RIGHT OF REDEMPTION

Section 9-506, unchanged by the 1972 amendments, is the source of the debtor's right to redeem under Article 9. As with the secured party's duty of disposition, flexibility attends the debtor's right of redemption.

The period in which a debtor, or any other secured party, may redeem (which may be shorter or longer than that provided under

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106. G. GILMORE, *supra* note 101, at 1224.

pre-Code chattel security statutes) begins when the secured party takes possession after a default (or, in the case of a possessory security interest, when the secured party declares a default). It continues until it is terminated by one of the following events: (a) disposition, or entry into a contract for disposition, of the collateral by the secured party; (b) acceptance by the secured party of the collateral in satisfaction of the debt, following a successful proposal under Section 9-505(2); or (c) the signing by the debtor or a competing secured party or both, after default, of a written agreement waiving or releasing the right of redemption.<sup>107</sup> Except in cases where notice of disposition is excused,<sup>108</sup> the debtor necessarily has notice of the likely termination of the time in which he may redeem.

The right to redeem is exercisable by the debtor or any competing secured party, and may be exercised as to part of the collateral only—a point to be noted if the projected disposition of the collateral is to be by parcels rather than as a unit.<sup>109</sup> It may not be waived except by an agreement in writing after default. The right is exercised by tendering fulfillment of all obligations secured by the collateral, as well as expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition and in arranging for a sale, including (to the extent provided in the security agreement and not prohibited by law) his reasonable attorneys' fees and legal expenses.

Although perhaps not often exercised, the debtor's right of redemption is zealously guarded by many courts. Denial of a deficiency judgment to a secured party who failed to give reasonable notification of a disposition, for example, is rested by some courts on the ground that the lack of notice hindered the debtor from exercising his right of redemption.<sup>110</sup> There are, however, limits. In *Old Colony Trust Co. v. Penrose Industries Corp.*,<sup>111</sup> a proceeding for

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107. Where there are several debtors, or competing secured parties, the right of redemption is personal to each and must (if a waiver is desired) be waived by all; a waiver terminates the right only as to the waiving party or parties.

108. See the text accompanying notes 80 and 81 *supra*.

109. See the Official Comment to 9-506, pointing out that the fact that a secured party has "sold or contracted to sell part of the collateral would not affect the debtor's right . . . to redeem what was left." The comment adds that "in calculating the amount required to be tendered the debtor would receive credit for net proceeds [*i.e.*, after deducting the secured party's realization expenses] of the collateral sold."

110. See, *e.g.*, *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968), and compare *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282 (1971). See also cases cited at note 114 *infra*.

111. 398 F.2d 310 (3d Cir. 1968).

a declaratory judgment that a proposed sale of collateral (consisting of the common stock of a radio station) was commercially reasonable, the court held that a petition for redemption was untimely when filed six months after the secured party had entered into a contract for disposition of the collateral under Section 9-504.

## VI. THE CONSEQUENCES OF VIOLATION OF THE CODE DEFAULT PROVISIONS

Subsection (1) of Section 9-507 imposes sanctions—sometimes stiff ones—for violations of the default provisions of Article 9. If it is established that the secured party is not proceeding in accordance with Part 5, Section 9-507(1) authorizes a court to order or restrain disposition on appropriate terms and conditions. If the disposition has occurred, the debtor or any person entitled to notice of disposition or whose security interest has been made known to the secured party prior to the disposition may recover from the secured party any loss caused by a failure to comply with the default provisions. Note should be taken that any person whose security interest “was made known to the secured party prior to the disposition,” even if not made known in accordance with revised Section 9-504(3) and even though he would not be entitled to a notice of disposition, may nevertheless assert that a proposed disposition was not commercially reasonable and recover damages.<sup>112</sup>

Of major significance in the present climate of judicial and legislative expansion of consumer rights is the final sentence of Section 9-507(1), which provides a minimum recovery by the debtor, where consumer goods are involved, consisting of the entire finance charge<sup>113</sup> plus 10 percent of the principal amount of the debt or 10 percent of the cash price. This minimum penalty affords consumer debtors a remedy more effective in dollar terms than one limited to actual loss, as is the case with non-consumer goods.

The interrelationship between the penalty provisions of Section

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112. Section 9-507 was left unchanged by the 1972 amendments. Language similar to the quoted language in the footnoted sentence was removed from both 9-504(3) and 9-505(2), and the requirement was imposed in both subsections, as earlier discussed, that a junior secured party notify the senior security party of his existence by written notice of a claim of interest in order to be entitled to notification of a disposition under 9-504(3) or of a proposal to accept the collateral in satisfaction of the debt under 9-505(2).

113. The Code terms are “credit service charge” and “time price differential”, both of which are included in what is fast becoming (under the impetus of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (1968)) the more commonly used term “finance charge.”

9-507(1) and the right of a secured party to a deficiency judgment under Section 9-504(2), where the secured party has not complied with Part 5, has produced a divergence of views among courts which have considered the problem. One line of decisions holds that the failure of a secured party to comply with the notification requirements of Section 9-504(3) flatly bars him from recovering any deficiency.<sup>114</sup> Another line of decisions dealing with the same situation holds that the failure of the secured party to give notice of a disposition does not ipso facto bar a deficiency judgment, and that a debtor's claim for damages under Section 9-507(1) may be offset against the amount of the deficiency to which the secured party would otherwise be entitled.<sup>115</sup>

*Skeels v. Universal CIT Credit Corp.*<sup>116</sup> began the first line of decisions, a line which severely penalizes a secured party. The rationale of *Skeels* and its progeny is at least two-fold—first, that the secured party, by failing to give notice, has precluded the debtor from exercising his right of redemption, and second, that the debtor is not limited to the remedies provided in Section 9-507(1). The bar to a deficiency thus becomes a judicially created penalty in addition to the penalty contained in Section 9-507(1). The result seems questionable.

*Norton v. National Bank of Commerce*,<sup>117</sup> the forerunner of the second line of decisions, reasons that the damage provisions of Sec-

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114. *Skeels v. Universal CIT Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *vacated on other grounds*, 335 F.2d 846 (3d Cir. 1964); *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); *Leasco Data Process Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971); *Aimonetto v. Keepes*, \_\_\_ Wyo. \_\_\_, 501 P.2d 1017 (1972). Arguably *Morris Plan Co. v. Johnson*, 133 Ill. App. 2d 717, 271 N.E.2d 404 (1971), belongs to this line; however, see *Tauber v. Johnson*, 8 Ill. App. 3d 789, 291 N.E.2d 180 (1972). In New York, previous decisions of the New York courts under the Uniform Conditional Sales Act influenced the result. However, previous New Jersey decisions under that Act in accord with New York cases thereunder did not yield the same result; see *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 276 A.2d 402 (1971).

115. *Weaver v. O'Meara Motor Co.*, 452 P.2d 87 (Alaska 1969); *Norton v. National Bank of Commerce*, 240 Ark. 131, 398 S.W.2d 538 (1966); *Universal CIT Credit Corp. v. Rone*, 248 Ark. 665, 453 S.W.2d 37 (1970); *Community Management Ass'n v. Tousely*, \_\_\_ Colo. App. \_\_\_, 505 P.2d 1314 (1973); *Tauber v. Johnson*, 8 Ill. App. 3d 789, 291 N.E.2d 180 (1972); *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. 35, 5 U.C.C. Rep. 788 (1964); *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (1969); *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 276 A.2d 402 (1971), *aff'd*, 118 N.J. Super. 521, 288 A.2d 872 (1972); *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W. 2d 347 (1966); *Grant County Tractor Co. v. Nuss*, 6 Wash. App. 866, 496 P.2d 966 (1972).

116. 222 F. Supp. 696 (W.D. Pa. 1963), *vacated on other grounds*, 335 F.2d 846 (3d Cir. 1964).

117. 240 Ark. 131, 398 S.W.2d 538 (1966).

tion 9-507 are designed to enable a debtor to recover at a minimum the difference between the proceeds of an improperly held sale of collateral and the larger amount that a properly held sale would have produced. If those damages are off-set against the creditor's deficiency judgment, the effect will be to reduce that judgment to the amount which the creditor would have recovered had he complied with the Article 9 default provisions. The end result is the same as though the creditor had held a proper sale in the first instance.

In *Norton*, the collateral was a used car whose status as consumer goods was left open. The court held that there was no "recognized market" for used cars and that the secured party had improperly failed to give the debtor notice of the disposition, so that the debtor had a right to damages as provided in Section 9-507. However, the lack of proper notice and the absence of a recognized market for the collateral meant that the debtor, through no fault of his own, was unable to show what a commercially reasonable sale would have brought, and therefore could not prove the amount of his damages. The court resolved that dilemma by announcing that in such cases it would presume that the collateral was worth the amount of the debt, and would place the burden upon the creditor to show otherwise. Thus the creditor would forfeit his deficiency judgment unless he could prove that a commercially reasonable sale of the car would have yielded less than the amount of the debt. On the other hand, such proof would also establish the missing element in the debtor's damage claim, paving the way for the desired offset of damages against the creditor's deficiency claim.

While almost all decisions in the *Norton* line have involved deficiency actions by secured parties who failed to give notice of the disposition, it seems reasonably clear that those courts would apply the same logic to an action initiated by a debtor asserting that notice of disposition of the collateral was not sent and that a commercially reasonable disposition would have produced a surplus, or to cases involving Part 5 violations other than lack of notice. In other words, the burden of proof that the disposition was commercially reasonable would still be upon the secured party. Indeed, one court following the *Norton* view has placed that burden upon a secured party asserting a deficiency against a debtor who had received notice of, but did not attend, a sale described as "public."<sup>118</sup>

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118. *Massey-Ferguson Fin. Corp. v. Hamlin*, 9 U.C.C. Rep. 142 (Tenn. App. 1971).

And the *Norton* court itself has reached the same result in a deficiency action by a secured party who gave notice of the disposition, but violated Section 9-504(3) by purchasing at what was a private sale.<sup>119</sup>

While presently the two lines of cases are about equal in number, only three of the decisions in both lines are by courts of last resort; and it is difficult to prognosticate which approach will ultimately prevail—even in some of the jurisdictions in which one view or the other has so far found favor. Nor can one presently anticipate what, if any, action the Permanent Editorial Board will take concerning amendment of the Code in view of these two divergent views and the resulting non-uniform treatment of Section 9-507. The Board may take the view, as the draftsmen of the Code did with some of its provisions, that the question is one on which uniformity is not essential.

One other question concerning the effect of noncompliance with the default provisions of the Code has arisen and been decided. Suppose a secured party after default repossesses a consumer debtor's car on which the consumer debtor has paid in excess of the 60 percent required by Section 9-505(1), but fails to sell the car until more than 90 days after repossession and also fails to give the debtor notice of the disposition. The secured party has thereby violated both Section 9-504(3) and Section 9-505(1). May a debtor therefore recover a double penalty under Section 9-507(1)? The only court which appears to have considered the matter has decided that he may not.<sup>120</sup>

## VII. MISCELLANEOUS SPECIAL RULES DEPENDING ON THE NATURE OR USE OF THE COLLATERAL

Article 9 sets forth some special disposition rules (unchanged by the 1972 amendments) which depend on the nature or use of certain types of collateral: consumer goods, equipment, documents of title and security agreements involving both personal property and real estate. A brief discussion of those rules, which have apparently presented no difficult problems (at least from the standpoint of reported litigation), is in order.

Note has already been taken of the special rules concerning

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119. *Carter v. Ryburn Ford Sales, Inc.*, 248 Ark. 236, 451 S.W.2d 199 (1970).

120. *Crosby v. Basin Motor Co.*, 83 N.M. 77, 488 P.2d 127 (1971).

consumer goods—compulsory disposition in the 60 percent payment situation under Section 9-505(1), and the limited notice requirements on disposition under Section 9-504(3) and on a proposal to accept the collateral in satisfaction of the obligation under Section 9-505(2).

Special provisions particularly useful in the case of commercial collateral are found in Section 9-503, whose repossession self-help provisions have already been discussed. For example, a secured party may render equipment unusable without removing it from the debtor's premises, and may dispose of it on the debtor's premises under Section 9-504. In combination, these two provisions are especially valuable where the collateral is heavy equipment. Disposition expenses are reduced, and realization proceeds accordingly increased, when the secured party can take advantage of these provisions.

Section 9-503 also grants another important right to the secured party. If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available to the secured party, at a place reasonably convenient to both parties, as designated by the secured party. Such a provision in a security agreement would appear particularly useful in cases of inventory and equipment collateral, as well as farm products (particularly in this age of the corporate and sometimes far-flung farmer). In *Clark Equipment Co. v. Armstrong Equipment Co.*,<sup>121</sup> the Fifth Circuit held such a provision in a security agreement (which covered road-building equipment located in five adjoining southern states) enforceable by mandatory injunction. The court observed that the injunctive relief granted by the lower court was "the only appropriate remedy for the enforcement of the terms of the agreement in view of the location of the property in five different states."<sup>122</sup>

If the collateral is documents, subsection (1) of Section 9-501 provides that the secured party may proceed either as to the documents or as to the goods covered thereby. This accords the secured party the option of disposing directly of the documents as collateral, or of using the documents to obtain possession of the underlying

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121. 431 F.2d 54 (5th Cir. 1970), cert. denied, 402 U.S. 909 (1971).

122. 431 F.2d at 57. The trial court directed the debtor to assemble the equipment and the secured party to sell the collateral and account for the proceeds, requiring a \$1,000,000 bond, which was posted by the secured party. The court of appeals noted that the only issue before it was the injunction.



goods and then proceeding as to the goods. (Under Section 7-403(3), of course, the secured party cannot proceed as to the goods without surrendering the documents to the bailee having possession of the goods.)

Finally, where the security agreement covers both real and personal property, subsection (4) of Section 9-501 allows the secured party another option: He may either proceed against the personal property under the default sections of Article 9, or proceed as to both types of property in accordance with his rights and remedies in respect to the real property. In the event he chooses the latter course, he need have no concern with compliance with the default sections, since non-Code law will apply.

#### VIII. THE ALTERNATIVE ROUTE: JUDICIAL PROCEEDINGS

Suppose that a secured party, for whatever reason, cannot or does not wish to dispose of collateral under Part 5 of Article 9. Section 9-501(1) expressly authorizes him to reduce his claim to judgment and to foreclose or otherwise enforce his security interest by "any available judicial procedures"; the section simply refers the secured party to non-Code law to determine the availability, requirements and results of any such procedure.<sup>123</sup>

Of course, one method by which a secured party may proceed judicially is to reduce his claim against the debtor to judgment and then to obtain a lien on the collateral (and any other available property of the debtor) by virtue of an execution based on the judgment. When a secured party has reduced his claim to judgment, Section 9-501(5) conveniently provides that any execution lien on the collateral "shall relate back to the date of the perfection of the security interest in such collateral."<sup>124</sup> Accordingly, a secured party who files an action on his claim need not ordinarily be concerned about the effect on his priority status (as otherwise determined under Part 3 of Article 9) of the time required to pursue the judicial remedies to a conclusion. A secured party in that situation should note, however, that if he repossesses the collateral and also proceeds to reduce his claim to judgment (whether concurrently or not) and if the repossession involves taking possession of collateral in any way

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123. Compare 1-103, providing that "the principles of law and equity . . . shall supplement [the Code] provisions."

124. This subsection reaches the same result as reached in *In re Adrian Research & Chem. Co.*, 269 F.2d 734 (3d Cir. 1959).

other than pursuant to an execution issued following a judgment, his repossession and disposition of the collateral will be subject to the requirements of Part 5 of Article 9.<sup>125</sup> This is true because Article 9 exempts from the default provisions only seizures of collateral made pursuant to — not merely collateral to or concurrent with — judicial proceedings.

Subsection (5) of Section 9-501 also provides that a judicial sale pursuant to a post-judgment execution is a foreclosure of the security interest by judicial procedure within the meaning of that subsection. Thus the secured party may purchase the collateral at such a sale without regard to any of the normal requirements of Article 9, such as notice of disposition and standards of commercial reasonableness.<sup>126</sup> As noted earlier, however, judicial sales have the drawback of being subject to the doctrine of *caveat emptor*.<sup>127</sup>

Where the debtor is bankrupt, of course, the secured party has no choice; he must proceed judicially. If he wishes, he may consent to the sale of the collateral by the trustee in bankruptcy, with his lien attaching to the proceeds. Or he may file a petition to reclaim the collateral, if he wishes to dispose of it himself.<sup>128</sup> Whether such a petition is granted will depend on equitable considerations and the substance of the transaction, rather than on the form of the security agreement or on a determination—generally irrelevant under Article 9—of who had title.<sup>129</sup> Even if the petition is denied, it is believed

125. *Bradford v. Lindsey Chevrolet Co.*, 117 Ga. App. 781, 161 S.E.2d 904 (1968); *Farmers State Bank v. Otter*, \_\_\_ S.D. \_\_\_, 204 N.W.2d 178 (1973).

126. At least where he leaves the collateral in the debtor's possession; see text at note 125 *supra*.

127. See note 90 *supra* and accompanying text.

128. He has a third option in such cases; he may elect to file a proof of claim in the bankruptcy proceeding for the entire debt due him, or merely for the deficiency remaining after the sale or reclamation of the collateral. See 3 COLLIER ON BANKRUPTCY ¶ 57.07 n.19. (14th ed. 1971).

129. See *In re Yale Express System, Inc.*, 370 F.2d 433 (2d Cir. 1966), a reorganization proceeding in which the creditor held a chattel mortgage lien on trucks in the debtor's possession. Distinguishing such a lien from a conditional sale, the district court held that title to the trucks was in the debtor in such a lien situation, rather than in the creditor (as would have been the case under a conditional sale). Reasoning that the fundamental issue on a reclamation petition is who owns the property in question, the district court concluded that since title to the property was in the debtor, the petition to reclaim should be denied. The Second Circuit reversed. It noted that Article 9 had dispensed with the technicalities of title (see 9-202), and concluded that where a petition to reclaim is brought by virtue of secured creditor status, a bankruptcy court should likewise not be controlled by the question of title. Instead, equitable considerations and the substance of the transaction should govern in determining whether the reclamation petition should be granted.

that, in a rehabilitation proceeding, the bankruptcy court may exercise its equitable powers to require rental payments to a secured creditor for the use of the collateral.<sup>130</sup>

### CONCLUSION

On balance, the Article 9 default provisions seem to be working reasonably well. As indicated previously, the amendments to those provisions made by the 1972 Official Text should make them work even better.

Prognostication of the future course of the judicial developments discussed above, however, is not now possible. Those developments have threatened, if not seriously cramped, both the standard "self-help" repossession and disposition procedure established by Sections 9-503 and 9-504 and also the alternative route of foreclosure and disposition through judicial proceedings. And the significance of the current dispute over the nature of the debtor's remedies for violation of the default requirements of Article 9 by a secured party should not be minimized. On the whole, however, it is believed that the quiet revolution worked by Article 9 in the previously complex, obscure and often contradictory pattern of default enforcement of security interests has taken root and will not be easily dislodged. Indeed, it can fairly be said that the current controversies noted in this article indicate that the provisions of Part 5 of Article 9 have taken hold so completely as no longer to be relegated to technical obscurity, as not infrequently occurred with similar pre-Code chattel security provisions. Much of the credit for that development must go to the flexibility of the Code provisions.

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Where the Uniform Commercial Code is not applicable, however, questions of title and of the form of the security agreement may still be determinative. *See, e.g., In re Spanish Language Television, Inc.*, 456 F.2d 159 (9th Cir. 1972) (the denial of a reclamation petition on behalf of a conditional seller was reversed where, under the applicable Uniform Conditional Sales Act, title was reserved in the seller).

130. Although "in the past bankruptcy courts have been reluctant to award such rental payments[,] the considerations underlying this reluctance may well be different now in light of our holding that a creditor cannot assure himself the right to reclaim merely by labeling his security device a conditional sales contract." *In re Yale Express System, Inc.*, 370 F.2d 433, 439 (1966) (dictum). However, the Second Circuit refused to impose this remedy on a latter appeal in the same case; it agreed with the district court's conclusion that to grant such rent as relief would seriously impair the progress of the Chapter 10 reorganization, since all creditors would have been entitled to such rent. 384 F.2d 990 (1967).