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The Negligent Damage or Destruction of Collateral—Remedies Including Insurance Subrogation

Hubert V. Forcier*

I. INTRODUCTION

Nonpossessory security interests in personal property¹ such as those created by chattel mortgages and conditional sales contracts² are commonplace; yet there are surprisingly few cases analyzing many of the legal consequences which may result from the negligent damage or destruction of the collateral. Most of the existing cases have involved the right of the secured party or the debtor to proceed against a negligent third party. However, the collateral frequently may be damaged or destroyed as a result of the debtor's negligence or the combined negligence of the debtor and a third party. The first part of this Article will analyze the possible legal consequences of such damage or destruction.

Problems also may arise if any of the parties is insured and his insurer asserts subrogation rights. Commonly the interests of both the debtor and secured party will be insured in one policy. Where this occurs the insurer has usually been subrogated to the rights of the secured party against the third party. The second part of this Article will demonstrate that this result is clearly erroneous.

II. RIGHTS OF THE PARTIES ABSENT INSURANCE

As in the situation where the collateral is damaged or de-

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1. The scope of this Article is limited to personal property, although generally the same principles would apply to security interests in realty. Frequently, cases involving realty are cited as analogous to personalty cases in regard to problems discussed in this Article. *See, e.g.*, 1 T. SEDGWICK, DAMAGES 111 (1891).

2. For the purposes of Article 9 of the Uniform Commercial Code no distinction is made between chattel mortgages, conditional sale contracts, or other particular types of security interests. UNIFORM COMMERCIAL CODE § 9-102(2), Comment 2. However, the Code does distinguish between two general types: possessory security interests and nonpossessory security interests. Possessory security interests are those that give the secured party possession of the collateral. This possession gives notice to third parties of the secured party's interest. Nonpossessory security interests are those that give possession to the debtor. Notice of the secured party's interest is given by filing written notice in a public registry.

stroyed by an act of God, the debtor remains liable to the secured party on the outstanding debt³ when the collateral is damaged or destroyed by the negligence of the debtor or a third party. Furthermore, the security interest remains effective as to the collateral when it is only damaged and not totally destroyed.⁴ The only effect of the negligence of the debtor or third party is to create possible tort liability in them.

A. COLLATERAL DAMAGED BY THE SOLE NEGLIGENCE OF A THIRD PARTY

Generally either title or possession will be an interest sufficient to support a negligence action. Consequently, either the debtor or the secured party may separately maintain an action against a third party tortfeasor.⁵ The secured party must generally rely on title to support his action, since by definition his nonpossessory security interest leaves the debtor in possession.⁶ If the particular security agreement gives the secured

3. *Jolly v. Thornton*, 40 Cal. App. 2d 819, 102 P.2d 467 (1940); *Gas City Transfer Co. v. Miller*, 107 Ind. App. 210, 21 N.E.2d 428 (1939) (en banc); *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238, 99 S.W. 984 (1907).

4. *Jolly v. Thornton*, 40 Cal. App. 2d 819, 102 P.2d 467 (1940).

5. *E.g.*, *Lake City Auto Fin. Co. v. Waldron*, 83 So. 2d 877 (Fla. 1955) (en banc); *Motor Fin. Co. v. Noyes*, 139 Me. 159, 28 A.2d 235 (1942); *Associates Discount Corp. v. Gilineau*, 322 Mass. 490, 78 N.E.2d 192 (1948). *Contra*, *Commercial Credit Co. v. Standard Baking Co.*, 45 Ohio App. 403, 187 N.E. 251 (1933) (only party in possession may maintain the action).

6. *See, e.g.*, *Milton Mfg. Co. v. Chicago, B. & O. Ry.*, 237 F. 118 (S.D. Iowa 1916); *Southern Ry. v. Chambless*, 10 Ala. App. 326, 65 So. 417, *cert. denied*, 187 Ala. 672, 65 So. 1034 (1914); *Chicago, R.I. & Pac. Ry. v. Earl*, 121 Ark. 514, 181 S.W. 925 (1916); *Jolly v. Thornton*, 40 Cal. App. 2d 819, 102 P.2d 467 (1940); *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895); *Ryals v. Seaboard Air Line Ry.*, 158 Ga. 303, 123 S.E. 12 (1924); *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 646 (1941) (en banc); *Bell Fin. Co. v. Geffer*, 337 Mass. 69, 147 N.E.2d 815 (1958); *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924); *First Nat'l Acceptance Corp. v. Annett*, 121 N.J.L. 356, 2 A.2d 650 (Sup. Ct. 1938), *aff'd*, 124 N.J.L. 78, 11 A.2d 106 (Ct. Err. & App. 1940); *Stewart Motor Truck, Inc. v. New York City*, 158 Misc. 738, 287 N.Y.S. 881 (N.Y. Mun. Ct. 1936); *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925); *Wylie v. Ohio River & C. Ry.*, 48 S.C. 405, 26 S.E. 676 (1897) (title as of date of damage). *Contra*, *Remedial Sys. of Loaning v. New Hampshire Fire Ins. Co.*, 227 Ky. 652, 13 S.W.2d 1005 (1929) (semble); *Commercial Credit Co. v. Standard Baking Co.*, 45 Ohio App. 403, 187 N.E. 251 (1933).

That title in the secured party may be defeasible is not a defense. *Vangelo v. East Side Sav. Bank*, 11 N.Y.S.2d 982 (Rochester City Ct. 1939). If at the time of suit the debt has been completely paid, the secured party may not maintain the action. 1 T. SEDGWICK, DAMAGES

party only a lien interest rather than title, the secured party has not generally been permitted to maintain an action.⁷ However, even though the secured party has only a lien interest, if the debtor is actually in default, the secured party has at the very least a right to possession,⁸ which may enable him to maintain an action.⁹ The debtor, on the other hand, always has a sufficient formal interest in the collateral to maintain a negligence action since by definition he has possession.¹⁰

111 (1891). See *Lacey v. Great N. Ry.*, *supra*. Cf. *Flint Frozen Foods, Inc. v. Fireman's Ins. Co.*, 8 N.J. 606, 86 A.2d 673 (1952).

7. *Bankers Inv. Co. v. Calloway*, 183 Kan. 1, 325 P.2d 66 (1958); *Commercial Sec., Inc. v. Mast*, 145 Ore. 394, 28 P.2d 635 (1934). *Contra*, *Cresbard Grain Co. v. Farnham*, 60 S.D. 179, 244 N.W. 91 (1932).

8. UNIFORM COMMERCIAL CODE § 9-503.

9. *Banker's Inv. Co. v. Calloway*, 183 Kan. 1, 325 P.2d 66 (1958); *Cosgriff Neon Co. v. Mattheus*, 78 Nev. 281, 371 P.2d 819 (1962); *Commercial Sec., Inc. v. Mast*, 145 Ore. 394, 28 P.2d 635 (1934); *Carter v. Haynes*, 269 S.W. 216 (Tex. Ct. App. 1925) (by implication). The right to possession must be as of the date of damage to the collateral. *Bankers Inv. Co. v. Calloway*, *supra*.

10. *E.g.*, *J.P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co.*, 202 F.2d 469 (10th Cir. 1953); *Smith v. Louisville & N. Ry.*, 208 Ala. 440, 94 So. 489 (1922); *Pickwick Stages Corp. v. Gil*, 38 Ariz. 7, 296 P. 269 (1931); *Chicago, R.I. & Pac. Ry. v. Earl*, 121 Ark. 514, 181 S.W. 925 (1916); *Jolly v. Thornton*, 40 Cal. App. 2d 819, 102 P.2d 467 (1940); *Brown v. New Haven Taxicab Co.*, 92 Conn. 252, 102 A. 573 (1917); *Harper v. Donaldson*, 49 Ga. App. 608, 176 S.E. 535 (1934); *Anduha v. Maui County*, 30 Hawaii 44 (1927); *Craig v. Lee*, 81 Ind. App. 319, 142 N.E. 399 (1924); *Miller & Kizer v. Des Moines City Ry.*, 96 Iowa 1033, 195 N.W. 600 (1938); *City of Topeka v. Tuttle*, 5 Kan. 186 (1870); *Lacaze v. Morway*, 57 So. 2d 791, 794 (La. App. 1952); *Remedial Sys. of Loaning v. New Hampshire Fire Ins. Co.*, 227 Ky. 652, 13 S.W.2d 1005 (1929) (by implication); *Associates Discount Corp. v. Gillingham*, 322 Mass. 490, 78 N.E.2d 192 (1948); *Motor Fin. Co. v. Noyes*, 139 Me. 159, 28 A.2d 235 (1942); *Wohlwend v. J.I. Case Threshing Mach. Co.*, 42 Minn. 500, 44 N.W. 517 (1890) (by implication); *Mossler Acceptance Co. v. Moore*, 218 Miss. 757, 67 So. 2d 868 (1953) (by implication); *Smith v. Cowen*, 350 S.W.2d 96 (Mo. App. 1961); *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924); *Carter v. Black & White Cab Co.*, 102 Misc. 680, 169 N.Y.S. 441 (Sup. Ct. 1918); *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925); *Wilkes v. Southern Ry.*, 85 S.C. 346, 67 S.E. 292 (1910) (by implication); *Union Ry. v. Remedial Fin. Co.*, 163 Tenn. 130, 40 S.W.2d 1034 (1931); *Superior Lloyds of America v. Boesch Loan Co.*, 153 S.W.2d 973 (Tex. Civ. App. 1941); *Gover v. Central Vt. Ry.*, 96 Vt. 208, 118 A. 874 (1922); *Helf v. Hansen & Keller Truck Co.*, 167 Wash. 206, 9 P.2d 110 (1932).

It is frequently observed that the underlying obligation may be secured by other, undamaged collateral. In such a case, the secured party may not want to seek recovery from the tortfeasor but would rather proceed against this other collateral if the debtor defaults. Thus, it is reasoned that the debtor must have some remedy. *Capital Loan & Sav. Co. v. Baltimore & O. Ry.*, 44 Ohio App. 251, 184 N.E. 862 (1933); *Wilkes v. Southern Ry.*, *supra*. However, generally the debtor may maintain an action even though the debt exceeds the value of collateral

While it has been uniformly held that the debtor may recover from the tortfeasor for the entire damage done to the collateral,¹¹ courts are split as to the amount of damages a secured party may recover.¹² A slight majority of jurisdictions allows the secured party to recover only to the extent that he is damaged.¹³ In those jurisdictions the problem becomes one of defining his loss.

No one would question that a security interest is damaged when the collateral itself is damaged or destroyed.¹⁴ If the debtor defaults on the underlying obligation, the secured party would realize less than what he would have otherwise realized upon any disposition of the damaged collateral. However, the actual loss is not realized immediately upon the injury to the collateral; rather the loss is in the increased possibility that, if default occurs, the collateral will be insufficient to satisfy the debt. Thus, the damage should be measured by the difference between the value of the debtor's obligation as secured by the

and even though the debtor is in default. *E.g.*, *City of Topeka v. Tuttle, supra*. The debtor may proceed against the tortfeasor because he remains liable on the underlying obligation, and so long as he remains solvent, the secured party may choose to hold him liable rather than seek to recover from the tortfeasor in a negligence action. To maintain the action, the debtor need only be in possession at the time the damage occurs. Thus the action may be maintained even though the secured party takes possession of the collateral before the debtor commences his action, *Miller & Kizer v. Des Moines City Ry., supra*, and even though the secured party subsequently sells the damaged collateral in satisfaction of the debt, *Jolly v. Thornton, supra*.

11. *Rentz v. Huckabee Auto Co.*, 52 Ga. App. 329, 185 S.E. 575 (1936); *Gas City Transfer Co. v. Miller*, 107 Ind. App. 210, 21 N.E.2d 428 (1939) (en banc); *Associates Discount Corp. v. Gillineau*, 322 Mass. 490, 78 N.E.2d 192 (1948); *Ellis v. Snell*, 44 Tenn. App. 294, 313 S.W.2d 558 (1955). The argument that the debtor may only recover up to the amount of his equity in the collateral has been uniformly rejected. *E.g.*, *Ellis v. Snell, supra*.

12. In *Donnel v. G.G. Deering Co.*, 115 Me. 32, 97 A. 130 (1916) it was suggested that a secured party could only recover for the damage done to whatever possessory interest he might have. However, that case appears to have been overruled by *Motor Fin. Co. v. Noyes*, 139 Me. 159, 28 A.2d 235 (1942).

13. *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 327, 186 S.E. 575 (1936); *Ellis Motor Co. v. Hancock*, 38 Ga. App. 788, 145 S.E. 518 (1928); *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 646 (1941) (collateral damaged after default); *Miller v. Hartman-Salem Co.*, 145 So. 186 (La. App. 1933); *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924); *Cosgriff Neon Co. v. Mattheus*, 78 Nev. 281, 371 P.2d 819 (1962); *Cresbard Grain Co. v. Farnham*, 60 S.D. 179, 244 N.W. 91 (1932) (while damage exceeded debt, suit only for amount of debt); *Louisville & N. Ry. v. Mack*, 2 Tenn. Civ. App. 194 (1911).

14. *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 646 (1941).

undamaged property and its value as secured by the damaged property. However, determining these respective values may be difficult and, presumably for this reason, the secured party's interest in the collateral has been defined simply as the amount of the outstanding debt.¹⁵

Thus, the majority rule is that the secured party may recover from the tortfeasor for the actual damage to the collateral not exceeding the amount of the outstanding debt.¹⁶ However, the secured party is not allowed to recover both damages from the tortfeasor up to the amount of the debt and the same amount from the debtor on the underlying obligation; the amount the secured party recovers from the tortfeasor must be credited against the debtor's obligation.¹⁷

A large minority of jurisdictions, however, does not limit the secured party's recovery to the amount of the outstanding debt; rather, the secured party is allowed to maintain an action for the entire amount of damage to the collateral, even if the damage exceeds the amount of the debt.¹⁸ However, the secured party is not allowed a windfall. As in the majority jurisdictions, any recovery up to the amount of the debt must be credited to that

15. See cases cited in note 13 *supra*.

16. *Id.* It has often been argued that the secured party's recovery should be reduced by the salvage value of the damaged property. For example, if an outstanding debt of \$500 is secured by collateral that has been damaged to the extent of \$400 but has a salvage value of \$200, the recovery arguably should not exceed the balance between the debt and the salvage value, or under these facts, \$300. This argument has been uniformly rejected, based on the rationale that until the debt is satisfied the secured party is entitled to have the collateral completely unimpaired. *Bell Fin. Co. v. Geffer*, 337 Mass. 69, 145 N.E.2d 815 (1958); *Wylie v. Ohio River & C. Ry.*, 48 S.C. 405, 26 S.E. 676 (1897). *Accord*, *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 329, 185 S.E. 575 (1936). This rationale is understandable if there has been no default, because the secured party cannot yet realize on the collateral. If the secured party could recover for damages only up to the excess of the debt over the salvage value and the collateral subsequently depreciates even further before default, the collateral might then be insufficient to satisfy the balance after default. Conversely, had the property not been damaged initially, the secured party might have been satisfied even if the collateral had subsequently depreciated somewhat. Nevertheless, the general rule that the salvage value does not reduce the recovery has been applied even after default and execution of the security. *Gooding v. Shea*, 103 Mass. 360 (1869) (suit for conversion rather than negligence).

17. *Ellis Motor Co. v. Hancock*, 38 Ga. App. 780, 145 S.E. 518 (1928).

18. *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958); *Bell Fin. Co. v. Geffer*, 337 Mass. 69, 147 N.E.2d 815 (1958); *Wylie v. Ohio River & C. Ry.*, 48 S.C. 405, 26 S.E. 676 (1897); *Louisville & N. Ry. v. Mack*, 2 Tenn. Civ. App. 194 (1911).

debt. Any excess recovery must be held in constructive trust for the benefit of the debtor.¹⁹

While both the secured party and the debtor may maintain negligence actions against the tortfeasor, there are only a few cases which consider whether the debtor's recovery is a bar to a subsequent action by the secured party, and there are none which deal with the converse situation. It has generally been stated that the debtor's recovery from the tortfeasor will bar a subsequent action by the secured party.²⁰ Clearly a properly recorded security interest does not place the tortfeasor on constructive notice of the secured party's interest since the tortfeasor is not a "purchaser for value."²¹ It is unclear whether a tortfeasor who does have actual knowledge of the secured party's interest at the time he settles with the debtor may successfully plead that settlement as a bar to the secured party's subsequent action.²² However, it is clear that if the secured party makes

19. *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958); *Bell Fin. Co. v. Geffer*, 337 Mass. 73, 145 N.E.2d 815 (1958).

20. *E.g.*, *Chicago, R.I. & Pac. Ry. v. Earl*, 121 Ark. 514, 181 S.W. 925 (1916); *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895); *Associates Discount Corp. v. Gilineau*, 322 Mass. 490, 78 N.E.2d 192 (1948); *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925); *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 646 (1941) (en banc); *Capital Loan & Sav. Co. v. Baltimore & O. Ry.*, 44 Ohio App. 251, 184 N.E. 862 (1933). *Contra*, *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924).

Of course, an unsuccessful suit by the debtor is likewise res judicata in a subsequent action by the secured party. *Union Ry. v. Remedial Fin. Co.*, 163 Tenn. 130, 40 S.W.2d 1034 (1931).

21. Most constructive notice statutes are limited in their application to "purchasers for value." *Motor Fin. Co. v. Noyes*, 139 Me. 159, 28 A.2d 235 (1942); *Dyer v. Great N. Ry.*, 51 Minn. 345, 53 N.W. 714 (1892); *Loeb v. Chicago, St. L. & N.O. Ry.*, 60 Miss. 933 (1883).

22. One jurisdiction has explicitly held that actual notice does not preclude the debtor's prior recovery from barring the secured party's action. *Mercer v. New Amsterdam Cas. Co.*, 211 N.C. 288, 189 S.E. 762 (1937). A similar result is suggested by cases in which, although it was not presented with the actual notice issue, the court states that absent "fraud and collusion," the debtor's recovery bars a subsequent action by the secured party. *Lowery v. Louisville & N. Ry.*, 228 Ala. 137, 153 So. 467 (1934); *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895); *Ellis Motor Co. v. Hancock*, 38 Ga. App. 788, 145 S.E. 518 (1928); *Universal Credit Co. v. Collier*, 108 Ind. App. 685, 31 N.E.2d 646 (1941) (en banc); *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925). It has also been held in some jurisdictions that the tortfeasor, when being sued by the debtor, cannot defend on the grounds that the damaged property was subject to a security interest. *Illinois Cent. R.R. v. Hawkins*, 65 Miss. 200, 3 So. 410 (1887); *Martin v. Seaboard Air Line Ry.*, 108 S.C. 130, 93 S.E. 336 (1917); *Stotts v. Puget Sound Traction, Light & Power Co.*, 94 Wash. 338, 162 P. 519 (1917).

an actual demand on the tortfeasor that settlement be made with him, the tortfeasor may not successfully plead settlement with the debtor as a bar.²³ If the debtor's action for any reason is a bar to the secured party's subsequent action, the secured party's remedy is an action against the debtor to impose a constructive trust on any recovery the debtor receives.²⁴

Although no case holds that an action by the secured party bars an action by the debtor, several opinions contain dicta to the effect that, absent fraud or collusion, the debtor's action would be barred.²⁵ This result appears to be reasonable, at least if the damage does not exceed the debt, since such recovery is to be applied to the discharge of the debt, and thus the debtor has been

Since the tortfeasor could not advance such a defense unless he had actual knowledge and since those courts held that his only remedy is an interpleader, it follows that in those jurisdictions, actual notice does not preclude the debtor's action from barring a subsequent action by the secured party.

However, consider those cases holding that a properly recorded security interest does not give constructive notice, see cases cited note 20 *supra*. Had actual notice been considered irrelevant, no detailed consideration of constructive notice would have been necessary.

23. *Milton Mfg. Co. v. Chicago, B. & O. R.R.*, 237 F. 118 (S.D. Iowa 1916); *Lake City Auto Fin. Co. v. Waldron*, 83 So. 2d 877 (Fla. 1955) (en banc); *Commercial Sec., Inc. v. Mast*, 145 Ore. 394, 28 P.2d 635 (1934). *Contra*, *Ellis Motor Co. v. Hancock*, 38 Ga. App. 780, 145 S.E. 518 (1928).

However, in *Lake City Auto Fin. Co. v. Waldron*, *supra*, the Florida Court held that when demand is made upon the tortfeasor or his insurer and he expressly refuses to settle with the secured party, the secured party's subsequent action will nevertheless be barred. Compare *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895).

24. *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 329, 185 S.E. 575 (1936); *Motor Fin. Co. v. Noyes*, 139 Me. 159, 28 A.2d 235 (1942); *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925); *Carolina, C. & O. Ry. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 170 S.W. 591 (1914).

It has also been suggested that a common count for "money had and received" could be maintained, *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895), or an equitable action could be brought to compel application of the debtor's judgment toward the loan. *Commercial Credit Co. v. Standard Baking Co.*, 45 Ohio App. 403, 187 N.E. 251 (1933).

25. The strongest and most considered dicta appears in *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 329, 331, 185 S.E. 575, 576 (1936) (language quoted is from the official report only): "On recovery of the entire damages alleged by the [secured party] to have been sustained by the property, which in this case is an amount less than the balance due on the purchase-price, no other recovery can be had against the [debtor]." More general dicta appears in many cases: *Chicago, R.I. & Pac. Ry. v. Earl*, 121 Ark. 514, 181 S.W. 925 (1916); *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925); *Ellis v. Snell*, 44 Tenn. App. 294, 313 S.W. 2d 558 (1955); *Union Ry. v. Remedial Fin. Co.*, 163 Tenn. 130, 40 S.W.2d 1034 (1931); *Carolina, C. & O. Ry. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 170 S.W. 591 (1914).

benefited to the fullest possible extent by the secured party's recovery.²⁶ Furthermore, in those jurisdictions allowing the secured party to recover in excess of the outstanding debt, that excess must be held in constructive trust for the benefit of the debtor. Thus, the debtor has been benefited to the full extent of his loss by the secured party's recovery. In contrast, if the damage exceeds the debt, the secured party's recovery should not be held to be a total bar to the debtor's action in the jurisdictions that do not permit the secured party to recover in excess of the outstanding debt. To hold that it is a total bar would prevent the debtor from being compensated either directly or indirectly for any damage to his interest in the collateral to the extent that his interest exceeds the outstanding debt.²⁷

Jurisdictions which allow recovery in excess of the outstanding debt have not as yet considered the question of whether the secured party not only may,²⁸ but in fact must seek the total amount of damages if he sues at all. Assuming that the reason for allowing recovery of the excess is to avoid multiplicity of actions,²⁹ it follows that the secured party should be required to seek the total damages. If it were left to his discretion to sue for the excess, he most likely would not, since he is under an obligation to hold such amounts in constructive trust for the benefit of the debtor.³⁰ Thus, the only effective way to

26. *Rentz v. Huckabee Auto Co.*, 53 Ga. App. 329, 185 S.E. 575 (1936).

27. In *Gas City Transfer Co. v. Miller*, 107 Ind. App. 210, 21 N.E. 428 (1939) (en banc), the court held that the secured party could not maintain a negligence action against the third party tortfeasor on the grounds that such an action could only be for the value of the debt and would bar the debtor from recovering his equity in the collateral.

28. The court in *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958), holds only that the secured party *may* recover in excess of the debt.

29. Jurisdictions allowing the secured party to recover in excess of the debt have not articulated their reasons for such a holding. See cases cited note 25 *supra*. It would seem that the only policy supporting such a rule would be that of avoiding multiplicity of suits, *i.e.*, a suit by the secured party for damages up to the amount of the debt and then a subsequent suit by the debtor for the excess. *Gas City Transfer Co. v. Miller*, 107 Ind. App. 210, 21 N.E. 428 (1939) (en banc).

30. Since the secured party has little incentive to recover the value of the loss over and above the amount of the debt, something must be done to either force him to make a good faith effort or to protect the debtor in some other way. This might be done by allowing the secured party to recover a pro rata share of his attorney fees from the debtor, if he has been successful in recovering the excess; by permitting the debtor to recover the excess, if the secured party did not make a good faith effort to do so; or by providing for both.

further the policy of avoiding multiple actions is to require that he sue for the total amount.

B. COLLATERAL DAMAGED BY THE SOLE NEGLIGENCE OF THE DEBTOR

When the negligence of the debtor causes damage to the collateral, the secured party should be able to maintain a negligence action against the debtor. While no court has been presented with such a case, dicta in one opinion has recognized this possibility.³¹ A secured party with title to the collateral has a sufficient interest to maintain a negligence action against third parties. Furthermore, many cases hold that the secured party may sue the debtor for conversion of the collateral.³² Thus, there is no reason why the secured party should not be able to maintain a negligence action against the debtor.³³

One can only speculate as to why no case has been reported in which a secured party has sought to recover against the debtor for the negligent destruction of the collateral.³⁴ Presumably the explanation is that, in the usual case where the collateral is damaged or destroyed, the secured party will be able to recover immediately from the debtor on the underlying obligation. This immediate recovery is facilitated by the liberal

31. *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924). In this regard consider the ambiguous dicta in *Finance Corp. v. King*, 150 Colo. 13, 17-18, 370 P.2d 432, 435 (1962) (en banc): "And while the defendant was so in possession of the automobile, the law imposes upon him the duty to use care in use of the chattle [sic]; and he is only liable for the willful damage to the chattle [sic] mortgage."

32. Annot., 73 A.L.R. 799 (1931).

33. The Uniform Commercial Code arguably provides some authority against such an action. The Code states that in the case of a possessory security interest, the secured party must exercise "reasonable care" with regard to the collateral. UNIFORM COMMERCIAL CODE § 9-207 (1). A negative implication may possibly be drawn from the failure of the Code to provide a duty of care in the converse situation. However, this argument based on negative implications is not too strong given the general common law duty of due care.

34. It might have been expected that such an action would have been brought in the situation where the debtor went through bankruptcy after negligently damaging the property. See *Finance Co. v. King*, 150 Colo. 13, 370 P.2d 432 (1962). In such a case the underlying obligation would have been "discharged" since it was "provable," see generally W. COLLIER, BANKRUPTCY MANUAL § 57.07 (ed. W. Laube & W. Hill, 1966), but the tort claim for damages would not be "discharged" since it would not be "provable" if the action had not been commenced and pending at the time the "petition" was filed, *id.* § 63.29. However it might be argued that "discharge" of the underlying obligation, like satisfaction bars the secured party's negligence action. Cf. 1 T. SEDGWICK, DAMAGES 111 (1891).

interpretation given acceleration clauses. For example, the Uniform Commercial Code provides that the underlying obligation may be accelerated by the creditor whenever he, in good faith, believes that the obligation is impaired.³⁵ Thus, when the collateral is damaged or destroyed, he would, in most situations, justifiably consider the underlying debt to be impaired and could then immediately accelerate the time for payment. Proceeding on the underlying obligation would be preferable to a negligence action, since the secured party would not have to prove either damage or the negligence itself.

C. COLLATERAL DAMAGED BY THE COMBINED NEGLIGENCE OF THE DEBTOR AND THIRD PARTY

Obviously the debtor's own negligence should bar his recovery against a third party tortfeasor in a jurisdiction that recognizes the doctrine of contributory negligence.³⁶ It is equally clear that the debtor as a joint tortfeasor is as liable to the secured party as if he were the sole tortfeasor. The more difficult questions are how and to what extent his negligence affects the secured party's right of action against the third party.

Courts have uniformly held that the debtor's negligence is not imputed to the secured party,³⁷ reasoning that the secured party has no more control over his debtor than a bailor normally has over his bailee. Thus, since negligence is not imputed in the bailment situation, it will not be imputed in the secured transaction.³⁸

On the other hand, the debtor's negligence may be a partial limitation on the secured party's right to recover in jurisdictions that allow recovery by the secured party in excess of the outstanding debt. If the debtor is negligent and therefore cannot recover directly against the tortfeasor, it follows that the secured party should not be allowed to recover the excess as constructive

35. UNIFORM COMMERCIAL CODE § 1-208.

36. *E.g.*, *Anduha v. Maui County*, 30 Hawaii 44 (1927); *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958).

37. *Coonse v. Bechold*, 71 Ind. App. 663, 125 N.E. 416 (1919); *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958); *Morris Plan Co. v. Hillcrest Farms Dairy, Inc.*, 323 Mass. 452, 82 N.E.2d 889 (1948); *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924); *Commercial Credit Corp. v. Satterthwaite*, 107 N.J.L. 17, 150 A. 235 (Sup. Ct. 1930).

38. *Lacey v. Great N. Ry.*, 70 Mont. 346, 225 P. 808 (1924); *Commercial Credit Co. v. Satterthwaite*, 107 N.J.L. 17, 150 A. 235 (Sup. Ct. 1930).

trustee for the benefit of the debtor.³⁹ Thus, even in the jurisdictions generally following the minority rule regarding the secured party's recovery, the secured party will not be allowed to recover for damages in excess of the outstanding debt when the debtor is contributorily negligent.⁴⁰

Since both the debtor and the tortfeasor are liable to the secured party, the question becomes whether the one initially proceeded against may recover over against the other. The formal requisites for contribution or indemnity may well be present. If both are of equal fault, the one satisfying their common liability to the secured party may seek contribution from the other.⁴¹ On the other hand, if they are not of equal fault, as where the debtor is passively negligent while the third party is actively negligent, then the one of lesser fault may seek indemnity from the other, assuming the former had satisfied their liability to the secured party.⁴²

However, regardless of whether the debtor and the third party are of equal fault, the debtor should ultimately bear the entire loss. But for the fact that the debtor had given a security interest in the property, he would have born the entire loss, since his contributory negligence would have prevented his recovery of any damages. The interest of the secured party is extremely limited. As between the debtor and secured party, the security interest becomes choate only upon a default on the underlying debt⁴³—an event which may never occur. If there is no default and the obligation is satisfied, the security inter-

39. *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958). It follows that other defenses which the third party may have against the debtor would have the same effect. *Milton Mfg. Co. v. Chicago, B. & O. Ry.*, 237 F. 118 (S.D. Iowa 1916).

40. *Harvard Trust Co. v. Racheotes*, 337 Mass. 73, 147 N.E.2d 817 (1958).

41. Contribution generally results in the concurrent tortfeasors equally sharing the liability. *E.g.*, *Russell v. United States*, 113 F. Supp. 353 (M.D. Pa. 1953); *Showers v. United States*, 113 F. Supp. 350 (M.D. Pa. 1953); *Mulding v. St. Louis, K.C. & C.R.R.*, 116 Mo. App. 655, 94 S.W. 801 (1906); *Hucherson v. State*, 105 W. Va. 184, 142 S.E. 444 (1928). However, in some jurisdictions the concurrent tortfeasors share the liability in proportion to the relative fault. *Little v. Miles*, 213 Ark. 225, 212 S.W.2d 935 (1948); *Mitchell v. Branch*, 45 Hawaii 128, 363 P.2d 969 (1961); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

42. *E.g.*, *Miller v. Pennsylvania R.R.*, 236 F.2d 295 (2d Cir. 1956); *Chicago Great W. Ry. v. Casura*, 234 F.2d 441 (8th Cir. 1956); *Southwestern Bell Tel. Co. v. East Texas Pub. Serv. Co.*, 48 F.2d 23 (5th Cir. 1931).

43. UNIFORM COMMERCIAL CODE §§ 9-503, 9-504(1).

est automatically terminates.⁴⁴ Furthermore, in regard to other claims by third parties, the debtor rather than the secured party is liable as the sole owner of the property. For example, statutes imposing liability on the owner of an automobile typically define "owner" as the debtor rather than the secured party, regardless of who has title to the automobile.⁴⁵ Hence, it is clear that the mere existence of the security interest should not shift any part of this burden from the debtor to the third party.⁴⁶

Once it is recognized that, as between the debtor and the third party, the debtor should ultimately bear the loss, a remedy for the third party must be found. There is no statutory remedy. Furthermore, it is not reasonable to expect a remedy to be provided by statute,⁴⁷ since there is no readily recognizable interest group which would benefit from such legislation and, thus, would have pushed for its adoption.⁴⁸ In addition, it is quite clear that a court, in exercise of its equitable jurisdiction, could provide a remedy by subrogating the third party tortfeasor to the rights of the secured party against the debtor.⁴⁹ Since in good conscience the total loss resulting from the dam-

44. The debtor may file a "termination statement" which he has demanded from the secured party. UNIFORM COMMERCIAL CODE § 9-404. However this provision does not mean that the secured party has any rights after satisfaction of the debt.

45. *E.g.*, MINN. STAT. §§ 170.54, 170.21(9) (1965).

46. In *Commercial Credit Co. v. Standard Baking Co.*, 45 Ohio App. 403, 187 N.E. 251 (1933), it was held that the secured party could not recover from the third party tortfeasor in a negligence action because the debtor may have been contributorily negligent. The opposite result would have forced the third party to bear a loss which he would not otherwise have borne. See Comment, 40 YALE L.J. 135, 136 (1930). It was, however, even more unfair for the court to shift the burden from the admittedly negligent third party to the wholly innocent secured party.

47. *Contra*, Comment, 38 BOSTON U.L. REV. 620 (1958).

48. Unfortunately, statutory reform in tort law is unlikely to occur unless it is promoted by some lobby or pressure group. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 281-85 (1963). The interests of the third party tortfeasor are not represented by any such group. Even if we assume that the third party's liability insurer would be subrogated to such a remedy, there is no real incentive for the insurance lobby to support the establishment of this remedy. In many cases the interests of the debtor and the third party are jointly insured, so that the insurer cannot recover from the third party tortfeasor anyway. See Part III *infra*.

49. Subrogation is an equitable doctrine under which one party who has satisfied an obligation primarily owed by another party is allowed to recover from that other person based on the rights the obligee initially had against the other. RESTATEMENT OF RESTITUTION § 162 (1937).

age to the collateral ultimately ought to be borne by the debtor, and since the secured party could have initially proceeded against the debtor, it follows that if the secured party chooses instead to proceed against the tortfeasor, the tortfeasor upon paying the loss to the secured party ought to be subrogated to the rights the secured party initially had against the debtor. The rights of the secured party to which the tortfeasor could be subrogated are (1) an action on the underlying debt or (2) an action for negligent destruction of the collateral.

III. RIGHTS OF THE PARTIES IF INSURED

The interests of the debtor and the secured party may be insured either separately or jointly by a single insurer in a single policy. The rights and liabilities of all of the parties are significantly different, depending upon the type of insurance chosen.

A. SUBROGATION RIGHTS WHERE THE INTERESTS OF THE DEBTOR AND SECURED PARTY ARE INSURED SEPARATELY

A property insurer upon paying its insured for a loss may be subrogated to the rights of the insured against third parties. Regardless of how the collateral is damaged or destroyed, the insurer may be subrogated to contract claims of its insured.⁵⁰ Most commonly this type of subrogation arises where a secured party has insured his interest in the collateral. The insurer, upon paying the loss to the secured party, is subrogated to the rights of the secured party on both the underlying debt and the security agreement as it extends to the remaining collateral.⁵¹ In addition, equity demands that an insurer be subrogated to its insured's tort claims.⁵² Thus, if the property is damaged or destroyed as the result of negligent conduct, the secured party's

50. King, *Subrogation Under Contracts Insuring Property*, 30 TEXAS L. REV. 62, 71-72 (1951).

51. An interesting problem arises if the loss is only partial and the insurer exercises his option to repair. Such action by the insurer would have the effect of simply restoring the collateral. The insurer could not then be subrogated to the rights of the secured party on the underlying debt since the secured party has not been satisfied. See Billings, *The Significance of Subrogation in Automobile Insurance Practice*, 1948 Ins. L.J. 707, 713. However, the issue remains as to whether the insurer may be subrogated to the tort claim of the secured party against the debtor. Arguably, if such recovery threatened the solvency of the debtor, the insurer may be prohibited from recovery since the subrogation rights of the insurer should not interfere with the rights of its insured, the secured party, to collect on the debt.

52. King, *supra* note 50, at 64-65.

insurer would be subrogated to negligence claims of the secured party. These subrogation claims may be against either the debtor or third party or both, depending upon which was negligent. Similarly if the third party's negligence is the sole cause of the damage, the debtor's insurer would be subrogated to the debtor's tort claim against the third party.⁵³

A difficult subrogation problem arises where the damage is caused by the combined negligence of the debtor and a third party. If the secured party's insurer, who is subrogated to the tort claim of the secured party, first recovers from the third party who in turn is indemnified by his liability insurer, the subrogation rights of the third party's liability insurer must be determined. It has been demonstrated that absent insurance the third party, having paid the secured party, is subrogated to the secured party's rights against the debtor. Achieving a parallel result when each is insured is somewhat more complicated. The third party's liability insurer is subrogated to the rights of the third party; the third party, who satisfied the secured party's insurer, is subrogated to that insurer's rights; and finally the secured party's insurer is in turn subrogated to all the rights of the secured party against the debtor. In essence the third party's insurer is subrogated to a subrogation right which itself includes a subrogation right.

If recovery is had against the debtor, the question then becomes how he will be indemnified. His property insurance could be one source of indemnification, since he can insure the collateral to its full value and use the proceeds to satisfy his liability to the third party's insurer. Such a payment causes him no loss since, although the collateral is not restored, his debt is discharged. A second source of indemnification might be the debtor's liability insurance. It is doubtful that he could recover on both since he would then be gaining a windfall.

B. SUBROGATION RIGHTS WHERE THE INTERESTS OF THE DEBTOR AND SECURED PARTY ARE INSURED IN A SINGLE POLICY

Frequently, the interest of both the debtor and the secured party will be protected in one insurance policy. They may both

53. J.P. (Bum) Gibbins v. Utah Home Fire Ins. Co., 202 F.2d 467 (10th Cir. 1953); Lacaze v. Morway, 57 So. 2d 791 (La. App. 1952); Solberg v. Minneapolis Willys-Knight Co., 177 Minn. 10, 224 N.W. 271 (1929); Mossler Acceptance Co. v. Moore, 218 Miss. 757, 67 So. 2d 868 (1953) (by implication).

be named insureds⁵⁴ or, more commonly, the secured party may be protected under some type of mortgage clause. However, merely because the secured party is protected under a mortgage clause does not mean that he is also an "insured." There are two general types of mortgage clauses: the "open mortgage" or "loss-payable" clause and the "union" or "standard" mortgage clause.⁵⁵ Under the open mortgage clause, the debtor remains the sole named insured and the secured party is merely an appointee of the insurance proceeds.⁵⁶ As an appointee the secured party is subject to most of the defenses the insurer may have against the debtor.⁵⁷ In contrast, under the union mortgage clause the debtor and the secured party are separate insureds, and thus many defenses good against the debtor will not be good against the secured party.⁵⁸ For the purposes of this Article the most important distinction between the two types of clauses is the difference in the subrogation rights inuring to the benefit of the insurer. Under an open mortgage clause, the insurer can be subrogated only to the rights of the debtor since the debtor is the sole insured.⁵⁹ In contrast, under the union mortgage clause the insurer could be subrogated to the

54. *Bankers Inv. Co. v. Calloway*, 183 Kan. 1, 325 P.2d 66 (1958).

55. See, e.g., *G. COUCH, INSURANCE* §§ 42.647-49, 42.690 (2d ed. 1963). It appears that even though such clauses are termed "mortgage" clauses, they are applicable to other types of security interests as well. *National Cas. Co. v. General Motors Acceptance Corp.*, 161 So. 2d 848, 852 (Fla. App. 1964).

56. E.g., *Posner v. Fireman's Ins. Co.*, 49 Ill. App. 2d 209, 199 N.E.2d 44 (1964).

57. E.g., *Southwestern Funding Corp. v. Motors Ins. Corp.*, 59 Cal. 2d 91, 28 Cal. Rptr. 161, 378 P.2d 361 (1963) (en banc).

Even under an open mortgage clause the insurer will not be able to resist the secured party's claim to the proceeds on the grounds that the debtor settled with the third party tortfeasor, thus defeating the insurer's subrogation rights. *Remedial Sys. of Loaning v. New Hampshire Fire Ins. Co.*, 227 Ky. 652, 13 S.W.2d 1005 (1929); *Sargent v. Fireman's Ins. Co.*, 89 N.H. 171, 195 A. 346 (1937); *Superior Lloyds of America v. Boesch Loan Co.*, 153 S.W.2d 973 (Tex. Civ. App. 1941). *Contra*, *Elmore v. Royal Ins. Co.*, 154 Kan. 93, 114 P.2d 786 (1941).

58. *Mossler Acceptance Co. v. Moore*, 218 Miss. 757, 67 So. 2d 868 (1953); *National Cas. Co. v. General Motors Acceptance Corp.*, 161 So. 2d 848 (Fla. App. 1964); *Bennett Motor Co. v. Lyon*, 14 Utah 2d 161, 38 P.2d 69 (1963).

59. *Solberg v. Minneapolis Willys-Knight Co.*, 177 Minn. 10, 224 N.W. 271 (1929) (apparently an open mortgage clause—see Record at 14). Cf. *Capital Fire Ins. Co. v. Longhorne*, 146 F.2d 237 (8th Cir. 1945) (applying Minnesota law).

However, if the debtor settles with the tortfeasor and the insurer must pay the secured party, note 57 *supra*, the insurer may be subrogated to the underlying obligation. *Remedial Sys. of Loaning v. New Hampshire Fire Ins. Co.*, 227 Ky. 652, 13 S.W.2d 1005 (1929).

rights of either the debtor or the secured party against third parties.⁶⁰ Of course, assuming that the insurer has no defense good against the debtor, it cannot be subrogated to the rights of the secured party against the debtor since he is its own insured,⁶¹ and such subrogation would render the debtor's protection under the policy worthless.⁶²

If both the debtor and secured party are insureds under a single policy and the damage to the collateral is caused by the sole negligence of a third party, the subrogation rights are clear and simple. The secured party's insurer may seek recovery from the third party based on either the tort claim of the debtor or the tort claim of the secured party. However, that insurer cannot be subrogated to the rights of the secured party on the underlying debt since the debtor is its own insured.

A more difficult situation arises where the loss is caused by the combined negligence of the debtor and a third party. Initially it is obvious that the insurer can no more be subrogated to the secured party's right against the debtor in tort than on the underlying debt. The one case in which the problem was presented did, however, hold that the insurer is subrogated to the rights of the secured party against the third party.

In *Harvard Trust Company v. Racheotes*,⁶³ the Massachusetts Supreme Judicial Court was presented with an undisputed factual situation. An automobile owned and operated by one Leonard collided with an automobile operated by Racheotes. It was agreed that both were negligent. The Leonard automobile suffered \$506.11 in damages. Prior to the accident Leonard had mortgaged the automobile to the Harvard Trust Company to secure a loan of \$424, \$318 of which remained outstanding at the time of the accident. The Home Insurance Company of New York had issued a \$50 deductible collision policy, apparently with a standard mortgage clause, in favor of the Harvard Trust Company.⁶⁴ Leonard paid \$50 of the repair costs, and Home paid the

60. Cf. Comment, 49 COLUM. L. REV. 866, 868 (1949).

61. *Palisano v. Bankers & Shippers Ins. Co.*, 276 App. Div. 523, 95 N.Y.S. 2d 543 (1950).

62. *E.g.*, G. COUCH, INSURANCE § 61.369 (2d ed. 1964).

63. 337 Mass. 73, 147 N.E.2d 817 (1958).

64. The mortgage required only that a policy be acquired with an open mortgage clause. The precise terms of the policy were not given by the court, but without discussion it subrogated the insurer to the rights of the secured party. In this regard consider *Remedial Sys. of Loaning v. New Hampshire Fire Ins. Co.*, 227 Ky. 652, 13 S.W.2d 1005 (1929), where a Kentucky court suggested that it would have been willing to subrogate the insurer under an open mortgage clause to the rights of the secured party against the tortfeasor.

balance with a check payable to both Leonard and Harvard. Home then brought an action in the name of Harvard to recover the amount of the loss it had paid. The court asserted that Home was subrogated to the rights of Harvard against Racheotes. On that premise Home was awarded \$318 since Home as subrogee of the mortgagee, Harvard, could recover from Racheotes, the tortfeasor, at least to the extent of the outstanding debt.

The error of the *Harvard* court is apparent from the dilemma which its result presents. As previously demonstrated, if the debtor is contributorily negligent, the third party tortfeasor, or his insurer who has paid the secured party's insurer, ought to be subrogated ultimately to the rights of the secured party against the debtor.⁶⁵ Certainly the third party tortfeasor's rights in this regard ought not be altered by the fact that the debtor and the secured party are both insured by a single insurer. Yet allowing the tortfeasor to recover from the debtor would permit the insurer of the debtor and the secured party to do indirectly what it could not do directly. That insurer could not itself be subrogated to the rights of the secured party against its own insured. That being so, how can it shift the loss to the debtor by itself recovering from the third party whose liability insurer in turn recovers from the debtor?

The dilemma can only be resolved by initially refusing to allow the insurer of both the debtor and the secured party to be subrogated to the rights of the secured party against the tortfeasor. It is no answer to say that the tortfeasor or his liability insurer may recover from the debtor, and the debtor may then be indemnified by his insurer. The insurer may simply defend on the grounds that it has already paid the loss, but more significantly such a result creates a circuitry: the insurer of the debtor

65. However, strictly applying subrogation principles, the tortfeasor or his insurer could not be subrogated to the rights of the secured party against the debtor because the joint insurer, through which their rights flow, could not be subrogated to the rights of the secured party against the debtor. As previously demonstrated where the parties are insured separately the third party's liability insurer would be subrogated to the rights of the third party, who in turn is subrogated to the rights of the third party's insurer. It was further demonstrated that the right of the secured party's insurer, to which the third party or his insurer is so subrogated, consists of its right to be subrogated to the rights of the secured party against the debtor. However, where the secured party and the debtor are jointly insured, their insurer could not be subrogated to the secured party's rights against the debtor since it cannot be subrogated to rights against its own insured. Therefore, the third party or his insurer cannot be subrogated through the joint insurer to the rights of the secured party against the debtor.

and secured party recovers from the tortfeasor or his liability insurer, the tortfeasor or his insurer recovers from the debtor, and, finally, the debtor recovers from the insurer of the debtor and secured party. Thus, it is clear that the Massachusetts court was wrong in the *Harvard* case.

IV. CONCLUSION

Although the remedies for the negligent damage or destruction of collateral have not been completely developed by case law or legislation, certain basic rules can and should be deduced from the existing cases and principles. While the secured party usually is found to have standing to bring an action to recover for the negligent damage or destruction of the collateral, the courts are split on whether his recovery should be limited to the amount of the debt. On balance, however, it seems that the secured party should be permitted to recover for all the damage done to the collateral in order to avoid a multiplicity of suits. While the secured party should be able to maintain an action against a debtor whose negligence has caused damage to or the destruction of the collateral, where the collateral has been damaged or destroyed by the combined negligence of the debtor and a third party, the third party should be able to recover from the debtor any damages the secured party has recovered from him.

Insurance is a complicating factor in analyzing these situations because of the subrogation problems which are presented. Where the debtor and the secured party are jointly insured, their insurer should not be subrogated to the rights of either of them against the third party tortfeasor, if the third party has a good defense, such as contributory negligence, against the other insured. The insurer should not be subrogated to the rights of one of its insureds, ignoring its basic liability to the other under the policy.