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# A Modified Approach to Article 9 Deficiencies in Missouri

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# A MODIFIED APPROACH TO ARTICLE 9 DEFICIENCIES IN MISSOURI

WILLIAM H. HENNING\*

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## I. INTRODUCTION

Unlike real property foreclosures, which are the subject of detailed statutory regulation, Part 5 of Article 9 establishes a free-wheeling system for personal property foreclosures which gives significant latitude to secured creditors. The secured party can "sell, lease or otherwise dispose of any or all of the collateral"<sup>1</sup> so long as proper notice is given and "every aspect of the disposition including the method, manner, time, place and terms . . . [is] . . . commercially reasonable."<sup>2</sup> If the disposition creates a surplus, it must be turned over to the debtor; if part of the debt remains unpaid, the secured party can pursue a deficiency judgment.<sup>3</sup>

In theory, this system should benefit both parties by enhancing the amounts realized through foreclosure. In practice, it often leads to erratic results. On occasion, debtors have been denied an effective remedy notwithstanding significant procedural irregularities.<sup>4</sup> More often, the courts have imposed harsh penalties on secured parties who failed to comply fully with the rules.<sup>5</sup> There is some evidence that such overzealous protection of debtors is creating a backlash, causing some creditors to adopt default strategies that insulate

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1. MO. REV. STAT. § 400.9-504(1) (1978).

2. MO. REV. STAT. § 400.9-504(3) (1978). See generally, Wallach, *The Commercially Reasonable Resale Requirement of Article 9 of the Uniform Commercial Code*, 2 LENDING LAW F. 3 (1978).

3. MO. REV. STAT. § 400.9-504(2) (1978).

4. See *infra* notes 28-30, and accompanying text (discussion of *Wirth v. Heavey*).

5. See *infra* note 32, and accompanying text (discussion of *Gateway Aviation, Inc. v. Cessna Aircraft Co.*).

them from attack but that also tend to reduce the collateral's disposition value.<sup>6</sup> It would be unfortunate if such strategies became commonplace.

The purpose of this article is to examine critically the penalties for creditor misbehavior in Missouri. It will then propose a judicial approach to the problem which is somewhat different from those currently being used. It is hoped that adoption of this approach will help restore balance to the system and inure to the benefit of secured parties and debtors alike.

## II. CURRENT APPROACHES TO THE SECURED PARTY'S RIGHT TO A DEFICIENCY

The secured party's claim to a deficiency judgment following foreclosure is based on section 9-504(2), which states that "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency."<sup>7</sup> If there

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6. During a series of Continuing Legal Education seminars around the state in the spring of 1985, the author was told on several occasions that some lenders are beginning to avoid the foreclosure rules of Article 9. For example, if there is some hope that the debtor will be good for the deficiency, the secured party can commence a suit on the debt, recover a judgment and execute on the collateral and other nonexempt assets of the debtor. The property seized is then sold at an ordinary execution sale.

This procedure, which is specifically approved in MO. REV. STAT. § 400.9-501(1) (1978), has several advantages. The principal advantage is that a sale which is approved in any judicial proceeding is conclusively deemed to be commercially reasonable, MO. REV. STAT. § 400.9-507(2) (1978), and an execution sale is a judicial proceeding within the meaning of that rule. MO. REV. STAT. § 400.9-501(5) (1978). Thus, the procedure insulates the secured party from claims of creditor misbehavior. Further, the procedure actually reduces legal expenses. If the secured party intends to pursue a deficiency judgment it must sue eventually, and not having to litigate issues of commercial reasonableness will inevitably reduce the costs.

Early suit on the debt has no effect on the secured party's priority since the execution lien created by the sheriff's levy, MO. R. CIV. PROC. 76.07, will relate back to the date of perfection of the security interest, MO. REV. STAT. § 400.9-501(5) (1978), nor does it impair the security interest so as to release sureties. *State Bank v. Omega Electronics, Inc.*, 634 S.W.2d 234, 238-39 (Mo. App., S.D. 1982).

The secured party can always buy in at the execution sale and thereafter dispose of the collateral in any manner it wishes, thereby realizing a reasonable value from the collateral without running the risks inherent in an Article 9 resale. MO. REV. STAT. § 400.9-501(5) (1978).

Of course, bringing suit on the debt delays seizure of the collateral and this can be a serious disadvantage. If the debt was incurred through fraud or if the secured party has reliable information that the debtor is about to remove himself or his property from the state, attachment may be used, but this will not often be the case. *See generally*, MO. REV. STAT. § 521.010 (1978) (various grounds for attachment).

On the other hand, if the secured party does not intend to pursue a deficiency the strict foreclosure procedure set out at MO. REV. STAT. § 400.9-505(2) (1978) should be used since it obviates the need for any judicial proceedings. Despite its limitations, suit on the debt is often an attractive alternative to repossession and resale under Article 9.

7. MO. REV. STAT. § 400.9-504(2) (1978).

is creditor misbehavior,<sup>8</sup> however, the debtor may invoke section 9-507(1), which provides as follows:

If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.<sup>9</sup>

Taking these provisions together, the Code scheme seems straightforward: the secured party is entitled to a deficiency reduced by any actual losses attributable to its misbehavior. If the collateral is consumer goods, the debtor can recover his actual losses or a statutory penalty, whichever is greater.<sup>10</sup> The amount due each party should be calculated independently and the results netted against each other, leaving a judgment in favor of one of the litigants.

Despite their apparent simplicity, these provisions have received a mixed treatment from the courts, which have developed three basic lines of analysis. A few courts have applied the Code in a literal fashion, placing the burden of proving the damages caused by the secured party's noncompliance on the debtor.<sup>11</sup> Although there is little meaningful discussion of the appropriate measure of damages, a careful reading of the cases suggests that the debtor will recover the difference between the price actually received at the sale and the amount that would have been received had the proper procedures been followed (the disposition value).<sup>12</sup> To date, no Missouri case has adopted this

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8. As used in this article, the term "creditor misbehavior" refers to any conduct in violation of the rules set out in Part 5 of Article 9. Examples include failure to give proper notice of disposition, failure to give proper notice of proposed strict foreclosure, breach of the peace during repossession of collateral, improper purchase by the secured party at a private sale, and any of a myriad of activities, such as failure to advertise adequately, that would lead a court to conclude that the disposition was commercially unreasonable.

9. MO. REV. STAT. § 400.9-507(1) (1978).

10. As to the statutory penalty, see generally 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.3 at 1260-61 (1965); R. HILLMAN, J. McDONALD & S. NICKLES, COMMON LAW AND EQUITY UNDER THE UCC para. 26.02 [5] at 26-34 to 26-42 (1985).

11. See, e.g., *Barbour v. United States*, 562 F.2d 19, 21 (10th Cir. 1979); *Wilson Leasing Co. v. Seaway Pharmacal Corp.*, 53 Mich. App. 359, 220 N.W.2d 83 (1974); *Crowder v. Allied Inv. Corp.*, 190 Neb. 487, 490, 209 N.W.2d 141, 143 (1973); *Mallicoat v. Volunteer Fin. & Loan Corp.*, 57 Tenn. App. 106, 415 S.W.2d 347 (1966); *Hensley v. Lubbock Nat'l Bank*, 561 S.W.2d 885 (Tex. Civ. App. 1978).

12. As used in this article, the term "disposition value" refers to the amount that would be received upon disposition if Article 9's procedures were followed. This measure differs in theory from the property's fair market value. See *infra* note 27 for a discussion of this distinction. For an excellent discussion of the different concepts of

approach.

A number of courts have applied what is known as the "Norton presumption."<sup>13</sup> Under this approach, once creditor misbehavior is established the court presumes that the value of the collateral is at least equivalent to the outstanding debt, thereby negating any deficiency.<sup>14</sup> The burden is thus shifted to the secured party to prove that the collateral's disposition value is in fact less than the debt.<sup>15</sup>

The Norton presumption was applied in Missouri by the Kansas City Court of Appeals in *Wirth v. Heavey*,<sup>16</sup> a case in which the secured party improperly purchased the collateral at a private sale. The court held that the secured party had introduced sufficient evidence of the collateral's disposition value to support the trial court's award of a deficiency judgment. In effect, the misbehavior went unpunished because a commercially reasonable price was received from the sale.<sup>17</sup>

The third basic approach is a complete denial of a deficiency upon proof of creditor misbehavior.<sup>18</sup> While this approach cannot be supported by specific

value, see 1 J. BONBRIGHT, *THE VALUATION OF PROPERTY*, Part I at 3-112 (1937).

Many courts use the term "fair market value" loosely, and it is not clear which measure is being employed.

13. The presumption was first articulated in *Norton v. National Bank of Commerce*, 240 Ark. 143, 150, 398 S.W.2d 538, 542 (1966). See also *United States v. Willis*, 593 F.2d 247 (6th Cir. 1979); *United States v. Conrad Publishing Co.*, 589 F.2d 949, 955 (8th Cir. 1978); *United States v. Whitehouse Plastics*, 501 F.2d 692, 695 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975); *Zimmerman v. Cook*, 651 P.2d 910, 911 (Colo. App. 1982); *First Galesburg Nat'l Bank & Trust Co. v. Joannides*, 103 Ill. 2d 294, 469 N.E.2d 180 (1984); *State Bank v. Hansen*, 302 N.W.2d 760 (N.D. 1981); *Investors Acceptance Corp. v. James Talcott, Inc.*, 61 Tenn. App. 307, 329-30, 454 S.W.2d 130, 140-41 (1969).

14. It is important to stress that the presumption is that the collateral's value is at least as high as the debt. Should the debtor affirmatively prove that the value is higher than the debt, she would be entitled to the surplus.

15. As with the courts adopting the literal approach (see *supra* note 12), many courts applying the Norton presumption use the term fair market value. In most cases, it is unclear whether they are referring to a voluntary sale value or to the amount that would have been realized at an involuntary Article 9 resale if the proper procedures had been followed (the disposition value). See *infra* note 27 for a discussion of this distinction. The seminal decision clearly adopts the disposition value as the appropriate measure. See *Norton v. National Bank of Commerce*, 240 Ark. 143, 150, 348 S.W.2d 538, 542 (1966). For a case that clearly adopts the fair market measure, see *State Bank v. Hansen*, 302 N.W.2d 760 (N.D. 1981).

16. 508 S.W.2d 263 (Mo. App., K.C. 1974).

17. *Id.* at 269.

18. See, e.g., *Comfort Trane Air Conditioning v. Trane Co.*, 592 F.2d 1373, 1387 (5th Cir. 1979) (applying Georgia law); *Nixdorf Computer, Inc. v. Jet Forwarding, Inc.*, 579 F.2d 1175, 1179 (9th Cir. 1978) (applying California law); *Dynalectron Corp. v. Jack Richards Aircraft Co.*, 337 F. Supp. 659, 663 (W.D. Okla. 1972); *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492 (Iowa 1977); *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429, 432 (Ky. 1966); *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 408, 243 N.W.2d 745, 751 (1976).

language in the Code, a number of courts have rationalized it by pointing to similar decisions under the Uniform Conditional Sales Act.<sup>19</sup> The no-deficiency rule was first applied in Missouri by the St. Louis Court of Appeals in *Gateway Aviation, Inc. v. Cessna Aircraft Co.*<sup>20</sup> In that case, Cessna (the secured party) conducted a public sale of an airplane after giving proper notice to Gateway, which sent a representative to the sale but did not bid. The top bid of \$130,000 was refused. About two months later, and without further notice to Gateway, Cessna made a private sale of the airplane for \$134,000. The court held that Gateway was entitled to notice of the private sale and that "any right to a deficiency accrues only after strict compliance with the relevant statutes."<sup>21</sup> The trial court's judgment of almost \$100,000 in favor of Cessna was reversed.

The no-deficiency rule was also followed by the United States District Court for the Western District of Missouri in *Executive Financial Service, Inc. v. Garrison*.<sup>22</sup> In that case, Executive (the secured party) sought a deficiency judgment for the balance due on a leased computer system. The parties agreed that the lease was one intended to create a security interest and was therefore governed by Article 9.<sup>23</sup> Garrison moved for summary judgment, arguing that he had received neither written nor oral notice of the sale. Executive asserted that oral notice had been given and that the Code does not require a writing. The court concluded that a Missouri court faced with the same issue would require written notice and granted summary judgment, stating that "it is settled in Missouri that failure to comply with this notice requirement precludes a deficiency judgment."<sup>24</sup>

In light of these cases, it is difficult to know precisely where Missouri

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19. It has been argued convincingly that cases decided under the Uniform Conditional Sales Act (UCSA) do not support a no-deficiency rule under the U.C.C. Section 25 of the UCSA (Uniform Conditional Sales Act, § 25 (act withdrawn 1943)), was similar to MO. REV. STAT. § 400.9-507(1) (1978), but § 23 of the UCSA, which has no counterpart in the U.C.C., specifically discharged the debtor of all obligation where there was no resale. A number of courts held that a faulty sale did not amount to a resale at all, thus triggering the no-deficiency rule. *See, e.g.,* Manufacturers Hanover Trust Co. v. Goldstein, 270 N.Y.S.2d 261, 264 (1966); James Talcott, Inc. v. P & J Contracting Co., 27 Wis. 2d 68, 133 N.W.2d 473 (1965). For an excellent discussion of this issue, *see* R. HILLMAN, J. McDONALD & S. NICKLES, *supra* note 10, at para. 26.02[4][a] at 26-18 to 26-27.

The no-deficiency rule conflicts with the U.C.C.'s basic policy on damages as set out in MO. REV. STAT. § 400.1-106(1) (1978):

The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this chapter or by other rule of law.

20. 577 S.W.2d 860 (Mo. App., St. L. 1978).

21. *Id.* at 863.

22. 535 F. Supp. 263 (W.D. Mo. 1982), *aff'd*, 722 F.2d 417 (8th Cir. 1983).

23. MO. REV. STAT. §§ 400.9-102(2), 400.1-201(37) (1978).

24. 535 F. Supp. 263, 266 (W.D. Mo. 1982).

stands on the deficiency issue. On the one hand, *Wirth* can be distinguished from *Gateway* and *Executive Financial Services* on the ground that it involved purchase at a private sale rather than inadequate notice. This would give Missouri the *Norton* presumption for improper purchase cases, the no-deficiency rule for improper notice cases, and an undefined response to as yet unlitigated types of misbehavior. On the other hand, it is difficult to articulate a compelling rationale for differentiating between improper purchase and improper notice. Indeed, a strong argument can be made that improper purchase at a private sale is more insidious than failure to give proper notice and should be more severely punished. The primary purpose of the notice provision is to protect the right of redemption, a right that is rarely exercised. Purchasing at its own private sale, on the other hand, gives an unscrupulous creditor the opportunity of transferring the collateral to itself at a fraction of its value. Until the Missouri Supreme Court clarifies the issue, it is probably best to assume that there is a split of authority among the courts.

### III. CRITICISMS OF THE CURRENT APPROACHES

Each of the current approaches is defective in some respect. The literalist position, while defensible from both an evidentiary standpoint and as a matter of statutory construction,<sup>25</sup> ignores the fact that the secured party has better access than the debtor to much of the evidence. Since the secured party is in the best position to describe the procedures followed, considerations of efficiency and fairness suggest that it should have the burden of proving that a commercially reasonable sale occurred.<sup>26</sup>

The *Norton* presumption meets the evidentiary objection to the literalist approach, but the two positions share a common defect. Assuming the relevant

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25. MO. REV. STAT. § 400.9-507(1) states that the debtor has a right to recover for any loss caused by the secured party's noncompliance, and it is a general rule of evidence that the burden of proof is placed on the party seeking to assert a claim. As stated in MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337 at 948 (3d ed. E. Cleary 1984): "In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well."

26. A corollary doctrine of evidence is that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337 at 950 (3d ed. E. Cleary 1984).

Adoption of this principle not only places the burden of proving the collateral's value on the secured party, it also gives the secured party the burden of proving that a commercially reasonable sale was held. This can be important, even in cases where the debtor does not raise the issue of creditor misbehavior. For example, in *First Missouri Bank & Trust Co. v. Newman*, 680 S.W.2d 767 (Mo. App., E.D. 1984), the secured party in a deficiency action introduced evidence of a notice that would be appropriate for a private sale but not a public sale and then offered no evidence of the actual method of sale. The court in denying a deficiency held that the secured party has the burden of proving proper notice and a commercially reasonable resale even if the debtor does not raise creditor misbehavior as a defense. *Id.* at 770-71.

burden of proof is met, both require that the debtor be credited with the amount that the collateral would have brought if the secured party had followed the proper procedures and held a commercially reasonable resale. In short, they credit the debtor with the disposition value of the collateral instead of its fair market value.<sup>27</sup>

The problem with this approach is neatly illustrated by the facts of *Wirth v. Heavey*.<sup>28</sup> The misbehavior in that case consisted of the purchase by the secured creditor at a private sale. Such conduct is proscribed by the Code except where "the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations."<sup>29</sup> The reason for this limitation is to prevent the secured party

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27. The term "disposition value" is defined, *supra* notes 12, 15. In *Wirth v. Heavey*, the court quoted the *Norton* case for the proposition that the secured party's burden is to show "the amount that should reasonably have been obtained through a sale conducted according to law." 508 S.W.2d at 269.

Fair market value is an elusive term which can have a variety of meanings. As used herein it means the price which could be obtained if the item was offered for sale voluntarily with a reasonable amount of time for negotiations. See *In re Richardson*, 23 Bankr. 434, 442 n.12 (Bankr. D. Utah 1982), for a brief summary of the standard meanings of fair market value.

In R. HILLMAN, J. McDONALD & S. NICKLES, *supra* note 10, para. 26.02[1] at 26-11 n.33, the authors make the assumption that "a disposition complying in all respects with the provisions of Part 5 of Article 9 will yield proceeds equivalent to or, at least, approximating the actual value of the collateral. Part 5 of Article 9 needs revision if this assumption is invalid."

It is true that a proper disposition under Article 9 will bring the fair market value in many cases. The most obvious situation involves collateral that can be traded easily on a recognized market. A sale for less than the market price would be commercially unreasonable. It is also true that an Article 9 resale, with its flexible procedures and mandate of commercial reasonableness, should typically bring more than an execution sale or a real property mortgage foreclosure.

On a broad range of sales, however, it is the author's assumption that Article 9 resales bring less than fair market value. Article 9 requires that commercially reasonable procedures be followed, and "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." MO. REV. STAT. § 400.9-507(2) (1978). A low price may lead the courts to scrutinize closely the procedures followed, but it is insufficient standing alone to constitute creditor misbehavior. See *C.I.T. Corp. v. Duncan Grading & Constr.*, 739 F.2d 359, 361 (8th Cir. 1984) (case arising in Missouri).

A concrete example will help illustrate the problem. It is common in Missouri (and in other states) for repossessed automobiles to be sold at dealers' auctions even though low prices are obtained. Despite the low prices, it is likely that such sales are commercially reasonable. See MO. REV. STAT. § 400.9-507(2) (1978). The secured party should be able to present credible evidence as to the auction value of the vehicle, even though that value is significantly less than the amount the debtor would receive if he voluntarily sold the vehicle with time for negotiations. If the *Norton* presumption is followed, a secured party who fails to give notice but who obtains the prevailing auction price will not be penalized for its misconduct.

28. 508 S.W.2d 263 (Mo. App., K.C. 1974).

29. MO. REV. STAT. § 400.9-504(3) (1978).



"from succumbing to the natural temptation of 'buying' the property from himself at a fraction of its fair value."<sup>30</sup>

Since there is a significant temptation to violate the provision on private sale purchases, there should be a significant penalty for doing so, even in cases like *Wirth* where the secured party credits the debtor with a commercially reasonable amount. Such a penalty is necessary as a deterrent to other secured creditors who may be less fair with their debtors. Unfortunately, the message of *Wirth* is that creditors can violate this stricture with impunity.

The same argument can be made with respect to other types of misconduct. For example, the secured party's failure to give proper notice to the debtor rarely affects the price received at the sale, but it is essential to protect the debtor's right to redeem.<sup>31</sup> One can argue that few debtors actually redeem their collateral and that a total loss of deficiency is excessively punitive, but the right does exist and should be protected in some meaningful fashion. Under the *Norton* presumption, a secured party who otherwise sells in a commercially reasonable manner may not be punished at all for failing to give notice.

While the *Norton* presumption does not go far enough in protecting debtors, the no-deficiency rule goes too far. There is no statutory justification for it, and its imposition leads to excessively harsh results. *Gateway Aviation*<sup>32</sup> is a good example. In that case, the secured party gave the debtor proper notice of a public sale but then called off the sale because the bidding was too low. The secured party then searched for potential buyers and eventually sold at a price higher than the highest bid at the auction. Unfortunately, it did not give the

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30. G. GILMORE, *supra* note 10, § 44.6 at 1242. Professor Gilmore explains that there will presumably be bidders to compete with the secured party at a public sale but not at a private sale.

An exception permits the secured party to purchase in cases where it is easy to determine the value of the collateral at a given point in time (e.g., stocks traded over a major stock exchange) and, consequently, easy to ascertain whether the sale was commercially reasonable. With such ready access to a market, any sale price less than the going rate will be deemed unreasonable. The *Wirth* court suggested that the exception applies only where haggling over price and competitive bidding are not primary factors in the sale. 508 S.W.2d 263, 268 (quoting from *Nelson v. Monarch Investment Plan of Henderson, Inc.*, 452 S.W.2d 375, 377 (Ky. Ct. App. 1970)).

31. The debtor (or any other secured party) may redeem the collateral at any time prior to its disposition. MO. REV. STAT. § 400.9-506 (1978). The debtor must pay the full amount of the debt (which will undoubtedly have been accelerated), the expenses of the secured party in repossessing, preparing for sale and selling, and reasonable attorney fees and legal expenses to the extent provided by the agreement.

The right of redemption is cut off notwithstanding defects in the proceedings if, in a public sale, the purchaser has no knowledge of any defects and is not in collusion with the secured party or other bidders, or, in a private sale, if the purchaser acts in good faith. Arguably, the debtor's right of redemption is not extinguished if the purchaser does not have the necessary characteristics. Thus, the debtor still has the right to redeem from a secured party who improperly purchases at its own private sale.

32. 577 S.W.2d 860 (Mo. App., St. L. 1978). See also *supra* note 20 and accompanying text.

debtor notice of the private sale. The court of appeals imposed the no-deficiency rule and reversed a large trial court judgment for the secured party.

The debtor should have received notice of the private sale in order to protect its right to redeem, but the action taken by the secured party inured to the debtor's benefit. Moreover, while it does not negate the debtor's right to notice, it is worth pointing out that the debtor had a chance to redeem before the auction sale and failed to do so. It even sent a representative to the auction who failed to enter a bid. Under the circumstances, complete denial of a deficiency was an oppressive remedy.

#### IV. A SUGGESTED APPROACH

While each of the three basic approaches to the deficiency problem is flawed, the *Norton* presumption is the fairest because it seeks to strike a balance between the conflicting interests of secured party and debtor. There will undoubtedly be many instances in which the secured party will be unable to sustain its burden of proof and will consequently fail to recover a deficiency, but the opportunity for recovery is not foreclosed as a matter of law. The problem with the *Norton* presumption as adopted in *Wirth v. Heavey* is that there will also be many instances in which creditor misbehavior goes unpunished.

This problem can be alleviated to a significant extent by applying the *Norton* presumption but adopting the differential between the debt and the collateral's fair market value as the proper measure of damages. In essence, this approach treats the misbehaving creditor as a converter and credits the debtor with the amount he would have obtained if he had voluntarily sold the collateral with sufficient time for negotiations.<sup>33</sup> Damages should be measured as of the time of the sale unless the misbehavior consists of delaying the sale beyond a reasonable time.<sup>34</sup>

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33. RESTATEMENT (SECOND) OF TORTS § 222 A, comment c, provides for recovery of the "full value" of the chattel. In Missouri, the measure of damages for conversion is the reasonable market value at the time of its conversion. See *Nika Corp. v. City of Kansas City*, 582 F. Supp. 343, 357 (W.D. Mo. 1983); *Farmers & Merchants Bank v. Borg-Warner Acceptance Corp.*, 665 S.W.2d 636, 639 (Mo. App., E.D. 1983). See also D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.14 at 403-08 (1973).

34. There is one type of misbehavior where the market should be measured at a different time. Under MO. REV. STAT. § 400.9-505(1) (1978), if a debtor has paid 60% of the obligation and has not waived his rights in writing after default, he is presumed to have built up some equity in consumer goods. The secured party may not use strict foreclosure in such a case and must dispose of the collateral under the ordinary foreclosure rules within ninety days after repossession. If the secured party fails to do so the debtor's damages should be measured as of the ninetieth day after repossession.

Section 400.9-505(1) specifically permits the debtor to elect between alternative theories of recovery: either conversion or under § 400.9-507(1), which gives the debtor a choice between his actual loss or the statutory consumer penalty. See *supra* notes 9-10. This raises an implication that the ordinary measure of loss under § 400.9-507(1) should be something other than the conversion measure.

Where the secured party has misbehaved but is able to prove that the collateral was sold for its fair market value, it will not be penalized by a loss or reduction of its deficiency claim.<sup>35</sup> If the secured party is unable to sustain its burden of proving that the collateral's fair market value was less than the debt, it will recover nothing. If the debtor can prove that the collateral's fair market value exceeded the debt, he will recover the surplus. Finally, where the secured party proves that the collateral was worth less than the debt but more than the resale price, it will recover a reduced deficiency measured by the difference between the debt and the fair market value.

It must be recognized that proof of value, whether fair market or otherwise, is a highly imprecise process. In many individual cases, adoption of a different theoretical measure will have no practical effect on the ultimate recovery. When applied across the board, however, it is likely that adoption of a fair market measure will have a demonstrable impact on deficiency judgments.<sup>36</sup> The courts will have to develop criteria for the kinds of evidence that will be admissible to establish fair market value.<sup>37</sup>

#### V. CONCLUSION

The Missouri Supreme Court, when given the opportunity to resolve the conflict between the courts of appeal, should refrain from adopting the no-deficiency rule. While it is simple to apply and superficially appealing, its impact is capricious. In one case it may have a minimal effect on a creditor who has deliberately flouted the rules while in another case it may have a disas-

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This implication, however, is not persuasive when § 400.9-505(1) is taken in context. When the secured party fails to dispose of the collateral within ninety days, the debtor can treat it as a conversion or can obtain a court order mandating disposition under § 400.9-507(1). Assuming that the secured party complies fully with this order, the debtor can recover the greater of his actual loss, which would be the decrease in value between the ninetieth day after repossession and the date of disposition, the statutory penalty, or the conversion measure. The debtor's options in this situation are thus increased by the alternative remedies in § 400.9-505(1). However, this should not be construed as prohibiting a conversion measure in other cases of misbehavior.

35. In such cases, the courts should refuse to grant the secured party's attorney's fees for that portion of the litigation dealing with the issue of creditor misbehavior.

36. Many states have adopted anti-deficiency legislation in the real property area requiring that the mortgagor be credited with fair market value rather than the foreclosure price even where there is no evidence of misbehavior. *See generally*, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 8.3 at 601-02 nn.5-11 (2d ed. 1985). Such an approach has more impact in the real property area given the historically low values produced by foreclosure.

37. For example, the secured party should not be permitted to rely on the price actually received at the foreclosure sale as proof of fair market value unless it can affirmatively show that those procedures are designed to bring fair market value. *See, e.g.*, *State Bank v. Hansen*, 302 N.W.2d 760, 768 (N.D. 1981) (that the secured party "must introduce credible evidence of the fair market value of the collateral other than the price received for it and other than the opinions of its own agents or employees").

trous impact on a creditor whose error was not prejudicial to the debtor and who proceeded in all good faith.

The *Norton* presumption is a significant improvement over the no-deficiency rule, but if it is applied in the manner set out in *Wirth v. Heavey*<sup>38</sup> it is not a sufficient deterrent to certain types of misbehavior, such as failure to give notice, that are unlikely to affect the disposition price. By changing the focus from the collateral's disposition value to its fair market value, the *Norton* presumption can be fine-tuned to produce a result that more effectively advances the twin goals of fairness and deterrence.

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38. 508 S.W.2d 262 (Mo. App., K.C. 1974); see also *supra* notes 16-17.

