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Defending Deficiency Judgment Suits in Kentucky: Article Nine, Part 5 of the Uniform Commercial Code

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DEFENDING DEFICIENCY JUDGMENT SUITS IN KENTUCKY: ARTICLE NINE, PART 5 OF THE UNIFORM COMMERCIAL CODE

This comment will attempt to develop the defenses available to lawyers representing consumer-debtors in deficiency judgment suits in Kentucky.[1] Primary emphasis will be placed on the statutory provisions of the Uniform Commercial Code [hereinafter the Code] with relevant case and statutory law discussed in connection with the defenses arising under Article Nine of the Code. Since most of the available defenses arise from creditor misbehavior in the course of repossession or resale of the collateral,[2] consideration will be given to the types of creditor conduct which give rise to debtor defenses. A special effort will be made to evaluate the authority of pre-Code Kentucky law. In areas where the Kentucky Court of Appeals has not ruled on relevant Code provisions, attention will be given to the law developed in other jurisdictions. In passing, the discussion will be directed to debtor crossclaims and remedies found both within the Code and beyond.

REPOSSESSION

Assuming the debtor is in default, Section 9-503 authorizes the secured creditor to take possession of the collateral "unless otherwise agreed" and "without judicial process if this can be done without breach of the peace. . . ." Otherwise, the creditor "may proceed by [judicial] action."[3] Examination of the security agreement will in-

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[1] This comment focuses on defenses to creditor foreclosure of conditional sales contracts with defaulting consumers. Article Nine of the Kentucky revision of the UNIFORM COMMERCIAL CODE [hereinafter cited as UCC or CODE], KY. REV. STAT. ch. 355 [hereinafter cited as KRS], covers conditional sale transactions; *see* UCC § 9-102(2). For analytical purposes, this comment assumes that the collateral in question is consumer goods as defined in UCC § 9-109(1). However, the principles developed in this comment are not limited to consumer transactions and will apply to other types of collateral.

[2] *See generally* R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS 385-412 (1969); White, *Representing the Low-Income Consumer in Repossessions, Resale, and Deficiency Judgment Cases*, 3 UCC L.J. 199 (1971).

[3] UCC § 9-503 reads as follows:

> 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. 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 to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under KRS § 355.9-504.

dicate whether "self-help"[4] by the creditor is excluded, and whether subsequent repossession of the collateral by the creditor was in violation of the contract. If no contractual limitation upon creditor repossession exists, inquiry into the mode of repossession may reveal that the creditor pursued the "self-help" course and thus created a possible breach of the peace defense to repossession.

In the repossession context, breach of the peace has been the subject of only a few Kentucky Court of Appeals decisions. While Kentucky Revised Statutes Chapter 437 [hereinafter KRS] provides statutory definitions of the offenses against public peace, "[t]he term 'breach of the peace' is generic, and includes all violations of public peace or order or acts tending to the disturbance thereof."[5] The use of this generic phrase and the failure of the Code to define it indicates that pre-Code decisions are still good law and will be authority under the Code.[6] An early case, *Hawkins Furniture Co. v. Morris*,[7] stated the general rule for repossession as follows:

> If in taking possession of property over the objection of the mortgagor, he [the creditor] would be required to use such force as would amount to a breach of the peace, or an assault, or subject him to an action for trespass, he must resort to the courts for redress and cannot forcibly or violently take possession of the mortgaged property.[8]

Since the Court has stated that breach of the peace is not limited to the specific fact situations which have been the subject of its decisions,[9] it is facilitative for analytical purposes to postulate two basic situations in which the breach of the peace defense may arise and to discern from Court opinions the general contour of Kentucky law.[10]

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[4] "Self-help" as used in this comment refers to creditor repossession undertaken without any judicial process as compared to repossession made pursuant to replevin and claim and delivery statutes.

[5] O'Leary v. Commonwealth, 441 S.W.2d 150, 154 (Ky. 1969) *citing* King v. Commonwealth, 105 S.W. 419 (Ky. 1907).

[6] It should be noted that many pre-CODE cases were decided under statutory laws allowing sellers to repossess peaceably if it was possible to do so. *See* LEGISLATIVE RESEARCH COMMISSION, UNIFORM COMMERCIAL CODE, ANALYSIS OF EFFECT ON EXISTING KENTUCKY LAW, RESEARCH PUB. No. 49, at 388 (1957) [hereinafter LRC No. 49].

[7] 137 S.W. 527 (Ky. 1911).

[8] *Id.* at 528. *Accord*, Farmer's & Depositor's Bank v. Taylor, 162 S.W.2d 764 (Ky. 1942); Cartwright v. C.I.T. Corp., 70 S.W.2d 388 (Ky. 1934); A. C. Morris Co. v. Heaton, 29 S.W.2d 617 (Ky. 1930).

[9] O'Leary v. Commonwealth, 441 S.W.2d 150, 154 (Ky. 1969).

[10] A format suggested by White, *Representing the Low-Income Consumer in Repossessions, Resale and Deficiency Judgment Cases*, 3 UCC L.J. 199 (1971) [hereinafter cited as White].

The first type of situation involves repossession that is made in spite of protests by the debtor. In *National Bond & Investment Co. v. Whitehorn,*[11] the Court held unlawful the repossession of a debtor's automobile by the creditor's agents who stopped the debtor on a public street and took his care in spite of protests that led to the debtor's subsequent arrest for breach of the peace. This case suggests that oral protests can be sufficient if some threat of violence also exists. In *C. F. Adams Co. v. Sanders,*[12] the Court held that creditor repossession of a clock from the debtor's home was not unlawful in spite of the debtor's wife's "agitation." Inferentially, the Court could not find a threat of violence. In *Fort Knox National Bank v. Gustafson,*[13] a debtor's wife "*vigorously* protested repossession" (emphasis added), and the Court in dictum stated that "repossession could not be had peaceably."[14]

When asserting breach of the peace defenses, lawyers should examine creditor behavior to find conduct inviting violence or public disorder. If a debtor has objected to repossession in unequivocal terms, the circumstances of the repossession will, in most instances, warrant a valid defense. Although not articulated by the Court of Appeals,[15] the underlying policy of the breach of the peace doctrine is to prevent violence, and public interests are protected by the rule as well as debtors' rights. Thus, even if confronted with a sales contract purporting to authorize forceful repossession, a debtor's counsel can argue that contract expectations are subordinated to public interests. Without further elaboration, it can be stated that any actual assault or forceful coercion calculated to overcome debtor protests will constitute breach of the peace in Kentucky.[16]

The second basic fact situation in which breach of the peace defenses may arise concerns repossession from a debtor's premises. In this situation, the Court has allowed repossession when sales contracts have authorized it.[17] The only limitation seems to be

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[11] 123 S.W.2d 263 (Ky. 1938).
[12] 66 S.W. 815 (Ky. 1902).
[13] 385 S.W.2d 196 (Ky. 1964).
[14] Fort Knox Nat'l Bank v. Gustafson, 385 S.W.2d 196, 201 (Ky. 1964).
[15] At least since the adoption of the UCC, the Court of Appeals has not elaborated on the policy behind the breach of the peace doctrine. For policy statements, see Cherno v. Bank of Babylon, 54 Misc.2d 277, 282 N.Y.S.2d 114, 119-20 (Sup. Ct. 1967); Girard v. Anderson, 257 N.W. 400 (Iowa 1934).
[16] See text at note 8 *supra. See* Nat'l Bond & Inv. Co. v. Whitehorn, 123 S.W.2d 263 (Ky. 1939).
[17] *Cf.* G.M.A.C. v. Holbrook, 375 S.W.2d 698 (Ky. 1964); G.M.A.C. v. Curry, 338 S.W.2d 897 (Ky. 1960); C.I.T. Corp. v. Short, 115 S.W.2d 899 (Ky. 1938); Cartwright v. C.I.T. Corp., 70 S.W.2d 388 (Ky. 1934); G.M.A.C. v. Dickinson, 60 S.W.2d 967 (Ky. 1933).

that repossession cannot involve forcible entry. However, when repossession is not authorized in the contract, it is clear that creditors are not at liberty to commit trespass to recover their collateral. Typically, these cases come before the Court of Appeals in actions for tort recovery and not in suits for deficiency judgments.[18] Nevertheless, the general principle can be discerned that recovery of collateral from debtors' premises is permissible only when contractually authorized; otherwise, a trespass would result and the repossession would be unlawful under the principle announced in *Hawkins*.[19]

Aside from the basic situations in which repossession is objected to by debtors, or when the collateral is repossessed from the debtor's premises, breach of the peace can be established when creditors act in any manner tending to disturb the public tranquility. Debtors' lawyers are advised to scrutinize the manner of repossession to find behavior which courts will find objectionable. For example, breach of the peace was found in *Driver v. Commonwealth*[20] where a creditor's agent broke a window of a secured car parked on a public street in order to repossess it. When raising defenses based on breach of the peace, lawyers are strongly urged to emphasize that any creditor misconduct is unnecessary in view of the judicial recourse available to creditors, and that Section 9-507(1) is specifically designed to penalize heavy-handed credit behavior.[21]

While the analysis to this point has been predicated on the continuing validity of Section 9-503, the self-help provision now stands on questionable constitutional footing, and a recent Supreme Court decision can be utilized by debtors' lawyers to invalidate any summary repossession. In *Fuentes v. Shevin*,[22] the Supreme Court held unconstitutional on procedural due process grounds Florida and Pennsylvania replevin statutes that authorized state agents to seize goods pursuant to *ex parte* applications by creditors. Under the statutes, creditors could have goods repossessed without giving any prior notice to debtors and without affording debtors any prior hearing. The Court, in deciding *Fuentes*, expanded upon a principle announced in *Sniadach v. Family Finance Corp.*[23] that summary procedures whereby debtors' wages could be garnished without a prior hearing violated the fourteenth amendment's due process clause. The *Sniadach* Court

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[18] *See, e.g.*, Home Finance Co. v. Ratliff, 374 S.W.2d 494 (Ky. 1964); G.M.A.C. v. Shuey, 47 S.W.2d 968 (Ky. 1932).

[19] *See* text at note 8 *supra*.

[20] 299 S.W.2d 260 (Ky. 1957).

[21] *See* text at note 59 *infra*.

[22] 407 U.S. 67 (1972).

[23] 395 U.S. 337 (1969).

reasoned that wage garnishments imposed tremendous hardships on wage earners and that such results could not be permitted without the garnishee having an opportunity to defend.

The impact of the *Sniadach* decision on the continuing validity of Code Section 9-503 was not fully realized, however, until *Fuentes*. Lower courts were able to distinguish *Sniadach* from ordinary replevin procedures on the ground that *Sniadach* involved a particularly objectionable hardship to garnishees. In fact, the lower courts in *Fuentes v. Faircloth*[24] reached their decisions in favor of the Florida statute by making this distinction. The Supreme Court, in overruling the lower courts' decisions, explained that a person has a right to a fair hearing at a meaningful time whenever significant property rights are threatened. The Court explicitly pointed out that the property need not be a necessity of life because the "Fourteenth Amendment speaks of 'property' generally."[25]

The utility of *Fuentes* for challenging self-help repossession in Kentucky is subject to a number of as yet unanswered questions. Since the *Fuentes* Court invalidated state statutes authorizing state agents to repossess goods, creditors' self-help conceivably is not state action which brings it under fourteenth amendment limitations. However, since creditor repossession is authorized under Section 9-503, state sanction of the procedure is necessarily state action. More difficult problems arise if sales contracts authorize creditor repossession. Again, a state action problem is involved because contracts present a separate authorization for repossession apart from Section 9-503. While arguing that state law gives legitimacy to such contractual provisions has considerable support in Supreme Court decisions,[26] an obstacle exists under Kentucky case law.

In *C.I.T. Corp. v. Thompson*,[27] a trial court had cancelled the effect of a conditional sales contract on the ground that it violated the debtor's constitutional rights.[28] The Court of Appeals reversed, stating that the "purchaser had agreed for the lien to be enforced in the manner set forth in the contract."[29] Without elaborating, the Court

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[24] 317 F. Supp. 954 (S.D. Fla. 1970).

[25] Fuentes v. Shevin, 407 U.S. 67, 90 (1972).

[26] *See* Evans v. Newton, 382 U.S. 296 (1966); Reitman v. Mulkey, 387 U.S. 369 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemar, 334 U.S. 1 (1948). *But see* Kirksey v. Thelig, 41 U.S.L.W. 2325 (D. Colo. Dec. 11, 1972) holding that self-help repossession pursuant to 9-503 is not action under color of state law.

[27] 169 S.W.2d 820 (Ky. 1943).

[28] The Court of Appeals did not elaborate on the constitutional decisions reached by the lower court.

[29] C.I.T. Corp. v. Thompson, 169 S.W.2d 820, 822 (Ky. 1943).

appeared to base its opinion on a waiver of constitutional rights theory. *Fuentes* may be of considerable help in overcoming the waiver theory because the Supreme Court was also dealing with a sales contract that authorized creditor repossession without judicial process. The Supreme Court rejected a waiver defense by pointing out that the sales contract provided for repossession without any mention of how or through what process the seller could reclaim the goods; thus an agreed statement of the seller's rights could not constitute a waiver of the buyer's due process rights because "a waiver of constitutional rights in any context must, at the very least, be clear."[30]

In the event that a court can be persuaded that summary repossession violated a debtor's constitutional rights, the question of what consequences such a violation will have on a deficiency judgment is difficult to ascertain. While the discussion of Code Section 9-507, which concerns debtors' remedies is postponed,[31] it should be pointed out that Section 9-507 provides remedies for creditor violations of Article Nine provisions. Obviously, the *Fuentes* case interjects non-Code limitations on creditor conduct. An enterprising attorney might argue that the *Fuentes* prior notice limitation is now incorporated into Section 9-503 restrictions, but considerable doubt must exist as to the likelihood of succeeding on Section 9-507 remedies. One final fact should be noted before considering resale of the collateral. Kentucky's claim and delivery statutes, KRS § 425.120 through § 425.180, are analogous to the Florida and Pennsylvania statutes struck down in *Fuentes* since they also authorize summary repossession. Thus, if the creditor elects not to pursue self-help repossession and instead chooses these judicial procedures for repossession, a debtor's lawyer should not hesitate to rely on *Fuentes*.[32]

RESALE

If the repossession is lawful or the defenses to repossession fail, a debtor's lawyer should focus his attention on the Code requirements for resale of the collateral. Code Section 9-504(3) requires that the creditor must send "reasonable notification" to the debtor, and that the sale must be "commercially reasonable."[33] In raising defenses

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[30] Fuentes v. Shevin, 407 U.S. 67, 95 (1972).

[31] See text at note 59 *infra*.

[32] It is anomalous that *Fuentes* stands as better authority for defeating repossession under heretofore acceptable claim and delivery statutes than for self-help repossession by creditors. It would seem that creditor self-help violates a debtor's due process rights to a greater degree than state replevin procedures.

[33] UCC § 9-504(3) provides as follows:

(Continued on next page)

based on inadequate notice, pre-Code cases are not reliable authority. The Code does not specify advertising requirements nor does it specify the number of days prior to sale for giving notice.[34] Thus, cases decided under prior statutory law may not determine what is "reasonable notification."

In Kentucky, the leading case defining the Section 9-504(3) notice requirement is *Nelson v. Monarch Investment Plan of Henderson, Inc.*[35] The Court of Appeals construed Section 9-504(3) to mean that "the debtor is entitled to notification of a specific date after which the creditor may proceed to dispose of the collateral."[36] The Court reasoned that such notice would give the debtor a deadline within which to protect himself. The mere fact that the debtor knew that the collateral would be sold eventually was not sufficient notice.[37]

The specific time requirement applies both to public and private sales; however, the Code also states that with public sales, notice of the place of the sale must be sent.[38] Thus, if a creditor uses a public sale to dispose of the collateral but has failed to notify the debtor of the place of the sale, he has violated Section 9-504(3), and the debtor's insufficient notice defense will be good.

The sending requirement of Section 9-504(3) indicates that the notice must be in writing. "Send" is a defined term in the Code,[39] and if the transmission is by mail, the Code clearly indicates that failure to correctly address a letter will not be sufficient.[40] Lawyers

(Footnote continued from preceding page)
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. Unless collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if 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 he may buy at private sale.

[34] *See* White, *supra* note 10, at 209-12. *Cf.* KRS § 426.160.
[35] 452 S.W.2d 375 (Ky. 1970).
[36] Nelson v. Monarch Inv. Plan, 452 S.W.2d 375, 377 (Ky. 1970).
[37] *Id.* at 377-78.
[38] *See* note 33 *supra.*
[39] *See* UCC § 1-301(38).
[40] *Id.*

should be aware, however, that even after the letter is improperly addressed, receipt of the notice within the time at which it would have arrived if properly sent is sufficient.[41]

No cases define how much time is to be allowed between the date of notice and the date of resale. Comment 5 to Section 9-504(3) in the official text states that notice must be sent with sufficient time for the debtor "to take appropriate steps to protect [his] interests."[42] While KRS § 426.160 does not control,[43] it can be argued that the ten days' notice time for resale pursuant to executed judgment liens is a good indication of legislative intent regarding what is a reasonable time. Lawyers should emphasize that debtors need time to look for money or credit to protect their interests, and that at least a week or ten days is reasonable time to arrange for other financing.

While the mode of repossession and notice are certainly relevant to defending deficiency suits, the actual sale of the collateral is generally the crux of the dispute. Obviously, if the resale price is low, the debtor's deficiency will be high; thus, the requirements of Section 9-504(3) that the "method, manner, time, place, and terms [of the resale] must be commercially reasonable" are protections against insufficient price. As one commentator points out, "[i]f the sale price is sufficient, the debtor has received no injury even if the sale was held at midnight on the steps of the Kremlin."[44] This idea was given at least implicit recognition by the Court of Appeals in *BSY Co. v. Fuel Economy Engineering Co.*[45] There, a subcontractor had quit its job after the prime contractor had advanced the subcontractor considerable sums of money. In addition, the subcontractor was delinquent in its payments to a third party vendor for the price of a cement machine. The prime contractor bought the third party's lien on the machine and, after repossession, "bought" the machine by giving the subcontractor credit on its prior advancement debt for the entire purchase price of the machine. No notice of this "sale" was given to the subcontractor nor were any other buyers considered.

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41 *Id.*

42 THE AMERICAN LAW INSTITUTE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE 723 (1972). It should be noted that the Comments are authority for explaining the general policy behind CODE sections.

43 *See* Comment to KRS § 355.9-504. According to Professor Frederick W. Whiteside, of the College of Law, University of Kentucky, Lexington, Kentucky, KRS § 426.160 applies to sales of personal property pursuant to execution and levy on judgment liens. By implication, it does not apply to foreclosure of conditional sales contracts which are covered by the CODE.

44 White, *supra* note 10, at 212.

45 399 S.W.2d 308 (Ky. 1965).

The Court held that the resale by the prime contractor was commercially reasonable.

A 1933 case, *General Motors Acceptance Corp. v. Dickinson,*[46] is still cited in post-Code cases, primarily because the statutory provisions that were applicable are substantially similar to Code Section 9-504(3).[47] In *Dickinson,* the Court of Appeals held that the seller who has repossessed must exercise ordinary diligence in obtaining the "best price" on resale, but that determining ordinary care in reselling an automobile does not require "due regard for the fair and reasonable market value of the car."[48] This holding is consistent with the dictum in the recent case of *Fort Knox National Bank v. Gustafson,*[49] where the Court of Appeals, in citing Section 9-507(1), stated that:

> [T]he mere fact that a better price could have been obtained by sale at a different time, or different place or manner is not of itself sufficient to establish that the sale was not commercially reasonable.[50]

Notwithstanding the fact that a low price will not, by itself, establish a good defense, the implication is that a low price is the prime indication that the creditor may have failed to properly conduct the sale. Therefore, lawyers might contend that if the price is low the creditor must go forward with showing that the sale was commercially reasonable. A Tennessee case, *Mallicoat v. Volunteer Finance & Loan Corp.,*[51] can be cited for its holding that "[s]ince the proof incident to advertisement and sale was peculiarly within the knowledge of Volunteer Finance, the burden was upon it to show compliance with [9-504(3)]."[52] Because in Kentucky it is incumbent upon a creditor to obtain the "best price," it can also be argued that the general status of a market is more likely to be within the knowledge of the creditor than the debtor, and thus the seller should carry the burden of showing why a low price was obtained.[53]

Although the Court of Appeals held in *Nelson v. Monarch Investment Plan of Henderson, Inc.*[54] that the sale of a $1,400 repossessed automobile for $750 to the highest bidder of three used-car dealers

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[46] 60 S.W.2d 967 (Ky. 1933).
[47] LRC No. 49, *supra* note 6, at 389.
[48] G.M.A.C. v. Dickinson, 60 S.W.2d 967, 969 (Ky. 1933).
[49] 385 S.W.2d 196 (Ky. 1964).
[50] *Id.* at 201-02.
[51] 415 S.W.2d 347 (Tenn. 1966).
[52] Mallicoat v. Volunteer Fin. & Loan Corp., 415 S.W.2d 347, 351 (Tenn. 1966).
[53] *See* White, *supra* note 10, at 216.
[54] 452 S.W.2d 375 (Ky. 1970).

was commercially reasonable, it did so because "there was nothing to indicate lack of good faith, unfairness or fraud."[55] This holding seems to signify that the creditor must make a good faith effort to obtain a reasonable price.[56] In that connection, a recommended trial tactic is asking the seller what he would have done if he had sold the collateral for himself. If the collateral was disposed of by public sale, an examination should be made into how the sale was advertised and what effort was made to solicit a large number of bidders. Likewise, if a private sale was involved, lawyers should inquire whether the seller took the first offer tendered or whether a good faith effort was made to contact all or most potential buyers.

Although it may be sufficient if the creditor shows an apparently reasonable attempt to sell, debtor's counsel can argue that the creditor should submit some evidence beyond the mere circumstances of the sale to prove that the sale price was at or near the relevant market price for such collateral.[57] If the price is low, lawyers should be able to find something in the creditor's "method, manner, time, or place" to indicate a commercially unreasonable sale.[58]

REMEDIES

While creditor misbehavior in repossessing or reselling the collateral may subject him to criminal penalties or tort liabilities under non-Code law,[59] Section 9-507(1) is immediately available in defining

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[55] Nelson v. Monarch Inv. Plan, 452 S.W.2d 375, 376 (Ky. 1970).

[56] It should be noted that the general "good faith" provision of UCC § 1-203 cuts across all of the CODE.

[57] *See* White, *supra* note 10, at 216. As a "bibliographical suggestion," the introduction to KRS Chapter 355 in the Banks-Baldwin edition recommends obtaining a copy of the drafters' comments to learn the *"purpose and effect"* of each CODE provision. By following that suggestion, practitioners representing debtors can construct a favorable position regarding the seller's resale duties that cannot be found in the sparse case law or in the vacuous language of the CODE itself.

Comment 1 to § 9-504 states that "this section follows the provisions on the section on resale by a seller following a buyer's rejection of the goods," which is § 2-706. Section 2-706 uses the same language of § 2-504(3) that "every aspect of the sale, including the method, manner, time, place, and terms be commercially reasonable." In adding gloss to § 2-706, Comment 2 states:

> The seller must act "in good faith and in a commercially reasonable manner" in making the resale. This standard is intended to be more comprehensive than that of "reasonable care and judgment" established by prior uniform statutory provisions.

Comment 4 states:

> [§ 2-706] frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices *so as to realize as high a price as possible* in the circumstances (emphasis added).

[58] It is submitted that if a court or jury is sufficiently impressed that a resale price is too low, a lawyer only needs to provide a "peg" on which "to hang" a favorable decision.

[59] *See* White, *supra* note 10, at 216-17.

his Code liability. The damage provision of Section 9-507(1) gives the debtor a cause of action against the creditor for "any loss caused by failure to comply with the provisions of this Part." Because of the difficulty of proving actual loss and because the economic loss to the consumer may be small, Section 9-507(1) also provides that:

> 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.

Thus, the consumer is entitled to a minimum recovery even if he has suffered no loss.

Equitable remedies are also available.[60] If the resale of the collateral can be shown to have been fraudulent or collusive, KRS § 426.320 provides that the sale may be set aside. While the exact effect of *Fuentes* is yet to be determined, lawyers can contend that summary repossession is no longer allowable and that return of the collateral to the consumer is proper. If resale has occurred following repossession, it should be argued that the sale should be vacated and the collateral returned to the debtor. Finally, the Court of Appeals has not recognized the doctrine that creditor noncompliance with Part 5 of Article Nine may result in a creditor's forfeiture of his right to a deficiency judgment. Nevertheless, several courts have adopted the position that creditor noncompliance bars recovery of a deficiency.[61] Considering the equitable merit of the doctrine, perhaps the time is ripe for its acceptance in Kentucky.[62]

James A. Harris, Jr.

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[60] UCC § 1-103 authorizes non-CODE remedies.

[61] *Cf.* Skeels v. C.I.T. Corp., 222 F. Supp. 696 (W.D. Pa. 1963); Norton v. Nat'l Bank of Commerce, 398 S.W.2d 538 (Ark. 1966); Braswell v. American Nat'l Bank, 161 S.E.2d 420 (Ga. 1968); Moody v. Nides Fin. Co., 156 S.E. 2d 310 (Ga. 1967); Franz Equip. Co. v. Anderson, 181 A.2d 499 (N.J. 1962).

[62] With respect to the analysis in note 57 *supra*, the argument can be made that a creditor is barred from a deficiency judgment if he fails to comply with his resale duties as a result of the CODE drafters' intent, embodied in Comment 2 of § 2-706, that "failure to act properly under this section deprives the seller of the measure of his damages here provided. . . ." The Court of Appeals has not decided this issue.

With regard to "finding law" in the Comments, it should be noted that the Court of Appeals has not been reluctant to use the Official Comments to bridge considerable gaps in the CODE. For an excellent case showing the Court's adroitness in applying the Comments to reach results not specifically provided for in the CODE text, see Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky. 1965).