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REPRESENTING THE LOW INCOME CONSUMER IN REPOSSESSIONS, RESALES AND DEFICIENCY JUDGMENT CASES

*James J. White**

The goal of this article is to lend a helping hand to the debtor's lawyer in his job of defending deficiency judgment suits brought following the repossession and resale of a debtor's encumbered personal property. Although some of the following discussion is relevant to the defense of any creditor's suit, and some applies to representation of the debtor prior to repossession or resale, the focal point of the discussion is the low-income consumer who has lost his automobile, television or some other "hard good" and has become a defendant in a suit brought by his secured creditor for a deficiency judgment. This focus has both controlled the selection of matter for discussion and shaped the analysis of the matter discussed. The reader will find the emphasis not upon the author's notion of the proper interpretation of the Uniform Commercial Code (UCC), but rather upon the ways in which the debtor's lawyer can distinguish unfavorable cases and upon the arguments he can make to capitalize upon favorable authority.

Since most of the available defenses and counterclaims in a deficiency suit arise from the creditor's misbehavior in the course of the repossession or resale of collateral, we will first give separate consideration to the rules under Article 9 of the UCC governing these creditor activities. We will then discuss the specific defenses and counterclaims which may arise either from the creditor's failure to comply with those rules or from the acts of third persons. Finally, we will examine some of the tactical considerations of which the debtor's lawyer should be aware.

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REPOSSESSION

Section 9-503 of the UCC authorizes a secured party to take possession of his collateral upon the default of the debtor, and to do so "without judicial process if this can be done without breach of the peace"¹ The negative implication of this section is that the creditor may not employ self-help techniques if doing so would result in a breach of the peace. To be sure, only an uncommonly lucky debtor's lawyer will see his client before the goods have been repossessed. The mode of repossession is also important after the fact because the creditor's commission of a breach of the peace may expose him to tort liability and to liability under section 9-507, and it may deprive him of his right to a deficiency judgment. Thus, a lawyer who is defending a deficiency judgment suit can fruitfully inquire into the circumstances of the repossession.

The meaning of the phrase "breach of the peace" has been the subject of countless judicial opinions.² The draftsmen's knowing choice of this shopworn phrase,³ and their failure either to cast the concept into a new mold or to give a new statutory definition of the phrase suggests that the numerous pre-Code cases are still good law. One can distill from these cases two general factors which are crucial in defining the acts which constitute a breach of the peace: (1) whether there is entry by the creditor upon the debtor's premises; and (2) whether there is contemporaneous consent or opposition by the debtor or one acting on his behalf to the repossession.

In general, the creditor may not enter the debtor's home or garage without permission; however, he can probably take a car from the debtor's driveway without incurring liability. The debtor's consent, freely given, legitimates any entry; conversely, the debtor's physical objection bars repossession even from a public street. This crude two-factor formula of creditor entry and debtor response must, of course, be refined by at least a consideration of third party response, the type of premises entered, and possible creditor deceit in procuring consent.

¹ UNIFORM COMMERCIAL CODE § 9-503. All references are to the 1962 official text of the Code and to the official comments to the 1962 version. [Hereinafter the Code is cited only by section number.]

² See, e.g., cases cited in notes 10 & 12 *infra*. See also cases collected in Annot., 99 A.L.R.2d 358 (1965).

³ UNIFORM CONDITIONAL SALES ACT § 16; UNIFORM TRUST RECEIPTS ACT § 6. See also references to prior uniform statute provisions in the comments to § 9-503.

Physical Intrusion as a Breach of Peace

Perhaps the most articulate and forceful statement of the general rule that entry into the debtor's residence in his absence is a breach of the peace is found in *Girard v. Anderson*.⁴ There the creditor repossessed a piano from the debtor's home in the latter's absence. Although the debtor maintained that the house had been locked, the creditor testified that his agents entered through an unlocked door. Despite the presence of a clause in the sale contract purporting to authorize forcible entries, the court found that the entry, even according to the creditor's testimony, was a breach of the peace.

The great majority of cases dealing with entry into debtor's residence⁵ are in agreement with *Girard*. However, in *Cherno v. Bank of Babylon*,⁶ the most current and complete interpretation of section 9-503, the New York Court of Appeals arguably departed from this general rule. There, the creditor, without authority from the debtor, procured a key to the debtor's business premises, opened the door and removed the collateral. The court held that there was no breach of the peace despite the unauthorized entry. It pointed out that the debtor's landlord, who was present during at least part of the time the creditor was on the premises, did no more than call the police and ask that the creditor's employees leave the key when they were finished.

Although this is a damaging case for the debtor's lawyer, it can properly be distinguished from most entry cases on several grounds. In the first place, it arose in the context of a contest among the creditors of the original debtor, not between the secured creditor and his debtor. The plaintiff, assignee for the benefit of the creditors of the original debtor, was suing in "conversion . . . for punitive damages and . . . for violation of the Penal Law,"⁷ rather than defend-

⁴ 219 Iowa 142, 257 N.W. 400 (1934).

⁵ E.g., *Evers-Jordan Furniture Co. v. Hartzog*, 237 Ala. 407, 187 So. 491 (1939); *Anderson v. Tadlock*, 27 Ala. App. 513, 175 So. 412 (1937); *Renaire Corp. v. Vaughn*, 142 A.2d 148 (D.C. Mun. Ct. App. 1958); *Lewis v. Burglass*, 172 So. 807 (La. App. 1937); *Hileman v. Harter Bank & Trust Co.*, 174 Ohio St. 95, 186 N.E.2d 853 (1962); *M.J. Rose Co. v. Lowery*, 33 Ohio App. 488, 169 N.E. 716 (1929); *Childers v. Judson Mills Store Co.*, 189 S.C. 224, 200 S.E. 770 (1939); *Lark v. Cooper Furniture Co.*, 114 S.C. 37, 102 S.E. 786 (1920). *But see* *Singer Sewing Mach. Co. v. Hayes*, 22 Ala. App. 250, 114 So. 420 (1927).

⁶ 54 Misc. 2d 277, 282 N.Y.S.2d 114 (Sup. Ct. 1967), *aff'd*, 29 App. Div. 2d 767, 288 N.Y.S.2d 862 (1968).

⁷ 54 Misc. 2d at 278, 282 N.Y.S.2d at 116-17.

ing in a suit for a deficiency judgment. The decision may mean only that the court was not motivated to reallocate the loss among the various creditors by allowing one to sue another for conversion. Had the plaintiff been an outraged debtor, the court might have found a breach of the peace.

Second, the *Cherno* case involved entry upon the debtor's business premises, not his residential property. Since the law has traditionally recognized the sanctity of a man's home, *Cherno* may not extend to entry into the debtor's residence. If the purpose of the breach of the peace limitation is to avoid forcing the debtor into a confrontation in his role as family protector, the distinction between home and office is probably valid and may, therefore, be successfully utilized by the debtor's lawyer in various jurisdictions.⁸ Furthermore, even if the distinction is not recognized, *Cherno* may represent only a minority view. In a recent Texas case, which did not discuss section 9-503, a creditor's unauthorized entry into a Gulf Oil station, on facts much like those in *Cherno*, was held to be a breach of the peace.⁹

Thus, the great majority of courts find unauthorized entries into the debtor's residence to be breaches of the peace, and a majority find entry into his place of business or garage¹⁰ to be such a breach. As one moves away from the residential threshold to the yard, the driveway, and finally the public street, however, the debtor's argument becomes progressively more tenuous.¹¹ We have found no case

⁸ In fairness one should note that the *Cherno* opinion does not recognize any such distinction and, in fact, implicitly rejects it by stating that its holding is in conflict with *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400 (1934).

⁹ *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262 (Tex. Civ. App. 1968). See also *Soulios v. Mills Novelty Co.*, 198 S.C. 355, 17 S.E.2d 869 (1941).

¹⁰ If the garage doors are closed or locked, a breach of the peace is almost certain to be found. See *Dominick v. Rea*, 226 Mich. 594, 198 N.W. 184 (1924); *Wilson Motor Co. v. Dunn*, 129 Okla. 211, 264 P. 194 (1928); *Voltz v. General Motors Acceptance Corp.*, 332 Pa. 141, 2 A.2d 697 (1938); *A.B. Lewis Co. v. Robinson*, 339 S.W.2d 731 (Tex. Civ. App. 1960). But if the garage doors are open and the creditor enters and tows the car away, at least one case, *C.I.T. Corp. v. Short*, 273 Ky. 190, 115 S.W.2d 899 (1938), has held that he is not liable for unlawful repossession (at least not for punitive damages). Cf. *Kroeger v. Ogsden*, 429 P.2d 781 (Okla. 1967) (repossession of airplane from open hangar owned by debtor held not unlawful repossession).

¹¹ If the repossession is from the property of a third person, it is probably lawful in the absence of some special circumstance. See *Commercial Credit Co. v. Spence*, 185 Miss. 293, 184 So. 439 (1938) (window broken while repossessing car from hotel lot; repossession held unlawful). In *Martin v. Cook*, 237 Miss. 267, 114 So. 2d 669 (1959), the unscrewing of a small panel to gain entry into a truck in

which holds that the repossession of an automobile from a driveway or a public street (absent other circumstances, such as the debtor's objection) constitutes a breach of the peace; many cases uphold such a repossession.¹²

Consent of the Debtor or a Third Person to Repossession

The debtor's voluntary and contemporaneous consent to a repossession will free the repossession from the objection that it involved a breach of the peace.¹³ If a creditor's agent obtains consent by flashing a counterfeit policeman's badge, or if the consent is given by a mechanic at the garage, or by the debtor's wife or child, the consent may not free the creditor from liability.

In *North v. Williams*,¹⁴ the reposessor entered the debtor's

order to repossess it from the property of a third person was held not to be a breach of the peace, and the repossession was found to be lawful. *See also* Rutledge v. Universal C.I.T. Credit Corp., 218 Ark. 510, 237 S.W.2d 469 (1951) (repossession from service station held to be lawful); *Furches Motor Co. v. Anderson*, 216 Miss. 40, 61 So. 2d 674 (1952) (repossession from automobile lot held to be lawful).

¹² Driveway cases: *Dearman v. Williams*, 235 Miss. 360, 109 So. 2d 316 (1959); *Gill v. Mercantile Trust Co.*, 347 S.W.2d 420 (Mo. App. 1961); *Ikovich v. Silver Bow Motor Car Co.*, 117 Mont. 268, 157 P.2d 785 (1945); *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962); *Gregory v. First Nat'l Bank*, 241 Ore. 397, 406 P.2d 156 (1965); *Morrison v. Galyon Motor Co.*, 16 Tenn. App. 394, 64 S.W.2d 851 (1932); *Pioneer Fin. & Thrift Corp. v. Adams*, 426 S.W.2d 317 (Tex. Civ. App. 1968).

Public street cases: *King v. General Motors Acceptance Corp.*, 140 F. Supp. 259 (M.D.N.C. 1956); *McWaters v. Gardner*, 37 Ala. App. 418, 69 So. 2d 724 (1954); *General Motors Acceptance Corp. v. Shuey*, 243 Ky. 74, 47 S.W.2d 968 (1932); *General Motors Acceptance Corp. v. Vincent*, 183 Okla. 547, 83 P.2d 539 (1938); *Malone v. Darr*, 178 Okla. 443, 62 P.2d 1254 (1936); *First Nat'l Bank & Trust Co. v. Winter*, 176 Okla. 400, 55 P.2d 1029 (1936); *Leedy v. General Motors Acceptance Corp.*, 173 Okla. 445, 48 P.2d 1074 (1935); *Haydon v. Newman*, 162 S.W.2d 1041 (Tex. Civ. App. 1942). *See also* cases cited in Annot., 146 A.L.R. 1331 (1943).

But even though the creditor may not be liable for unlawful repossession of the car, he may be liable for conversion of personal property within the repossessed car. *See Sanders v. General Motors Acceptance Corp.*, 180 S.C. 138, 185 S.E. 180 (1936).

¹³ In most of the following cases the creditor introduced evidence of consent, and the court held that the debtor failed to carry the burden of proof that the repossession was against his consent: *Klett v. Security Acceptance Co.*, 38 Cal. 2d 770, 242 P.2d 873 (1952) (furniture from store); *Besner v. Smith*, 178 A.2d 924 (D.C. Mun. Ct. App. 1962) (television set from house); *Johnson v. Modern Furniture & Appliance Co.*, 76 So. 2d 338 (La. App. 1954) (furniture from house); *White v. Southern Mercantile Co.*, 162 So. 229 (La. App. 1935) (furniture from house); *Sims v. Horton*, 43 Wash. 2d 907, 264 P.2d 879 (1953) (car from street).

Courts will sometimes strain, however, to find that consent was not freely given and is therefore invalid. *See, e.g., Dorsey v. Central Fin. Co.*, 65 So. 2d 137 (La. App. 1953).

¹⁴ 120 Pa. 109, 13 A. 723 (1888).

residence by posing as a piano tuner; nevertheless, the repossession was held to be lawful. In *Barham v. Standridge*,¹⁵ however, a seller-garageman who procured possession by promising that he would repair the car and return it was not as fortunate. In *Rhodes-Carroll Furniture Co. v. Webb*,¹⁶ the court found a creditor who had gained entrance by telling the debtor's wife that he was a policeman liable for trespass. One can explain some of the inconsistencies in these cases by the magnitude of the fraud and the propensity of such a fraud to foreclose willing consent. Other policies (such as the desire to penalize those who pose as policemen) may also explain some of the decisions. Not all of the cases, however, accommodate themselves to such a rational scheme.

Turning to the power of a third party to give consent, one might anticipate, first, that the validity of such consent would depend upon the third party's apparent authority to speak for the debtor and, second, that the consenter's age and familial relation to the debtor would be highly relevant to the apparent authority question. To a considerable extent, the cases substantiate these expectations for they hold that neither the consent of the debtor's tenant nor that of his infant daughter can legitimate an entry which would otherwise constitute a breach of the peace.¹⁷ The courts, however, have divided on the issue of the power of an adult closely related to the debtor to give effective consent. In *Bing v. General Motors Acceptance Corp.*,¹⁸ a South Carolina federal court found that the debtor had no cause of action for wrongful repossession after his sister had authorized the repossession of his car from the driveway. Similarly, in *Austin v. General Motors Acceptance Corp.*,¹⁹ a wife's consent to the repossession of a car from a garage was held sufficient to absolve the creditor from liability. Since neither case involved an entry into the debtor's residence, they cannot be considered authority for the proposition that a third party can invite a repossessing creditor into the debtor's home. In the *Bing* case, the court's statements about consent are merely dicta, for the creditor would probably have repossessed the car from the driveway even without consent.

¹⁵ 201 Ark. 1143, 148 S.W.2d 648 (1941); *accord*, *Franklin v. Spratt*, 174 Ark. 268, 295 S.W. 26 (1927).

¹⁶ 230 Ala. 251, 160 So. 247 (1935).

¹⁷ *Luthy v. Philip Werlein Co.*, 163 La. 752, 112 So. 709 (1927) (daughter); *McDaniel v. Lieberman*, 157 So. 834 (La. App. 1934) (tenant).

¹⁸ 237 F. Supp. 911 (E.D.S.C. 1965); *see also* *Carter v. Mintz & Goldblum*, 8 So. 2d 709 (La. App. 1942) (wife's consent ineffective).

¹⁹ 239 Miss. 699, 125 So. 2d 79 (1960).

The effect of a clause in the security agreement purporting to authorize non-judicial repossession is unclear. When such a clause seeks to permit the creditor to stomp down the door and burst into the debtor's parlor at any hour of the day or night, the courts have no trouble granting relief to the debtor. In *Hileman v. Harter Bank & Trust Co.*²⁰ the creditor's representatives entered the debtor's home through a window; the court brushed aside such a clause in the following manner:

These acts of the bank's employees, if not consented to, would have constituted the offense of breaking and entering. Even with prior consent, they are such acts as are likely to produce violence and to provoke or incite others to break the peace. Hileman's immediate armed reaction, although not condoned, was an entirely natural one.

The insertion in a mortgage of a clause whereby a mortgagor purportedly consents in advance to a breaking and entering is an attempt to confer upon a mortgagee an extraordinary privilege not enjoyed by an absolute owner and is not needed for the reasonable protection of the mortgagee's investment. The existence of the privilege is a threat to the peace and contrary to public policy. A contractual provision purporting to authorize a breaking is, therefore, void.²¹

Yet such clauses may sanction more refined creditor conduct. In a nineteenth century case, *Williams v. North*,²² such a clause exonerated an entry obtained by fraud. Other courts which have found no breach consistently have made passing reference to such clauses.²³ It is impossible to say whether these references are simply rationales for predetermined conclusions, or whether they play a determinative role in the decisions, but surely they are entitled to little

²⁰ 174 Ohio St. 95, 186 N.E.2d 853 (1962); *accord*, *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400 (1934). The clause in *Hileman* reads as follows:

In the event of any default in the payment of any installment when due on said note . . . then mortgagee may at its option and without notice, elect to treat the entire balance remaining unpaid . . . immediately due and payable; whereupon mortgagor agrees to deliver the chattel(s) to the mortgagee and mortgagee may, upon the failure of the mortgagor so to do, with or without the aid of legal process, make use of such force as may be necessary to enter upon, with or without breaking into any premises where the chattel(s) may be found and take possession thereof and sell and dispose of the same according to law, together with mortgagor's equity of redemption

²¹ 174 Ohio St. at 97, 186 N.E.2d at 854-55.

²² 120 Pa. 109, 13 A. 723 (1868).

²³ *See, e.g.*, *Besner v. Smith*, 178 A.2d 924 (D.C. Mun. Ct. App. 1962); *Furches Motor Co. v. Anderson*, 216 Miss. 40, 61 So. 2d 674 (1952); *Commercial Credit Co. v. Cain*, 190 Miss. 866, 1 So. 2d 776 (1941); *Cherno v. Bank of Babylon*, 54 Misc. 2d 277, 282 N.Y.S.2d 114 (Sup. Ct. 1967), *aff'd*, 29 App. Div. 2d 767, 288 N.Y.S.2d 862 (1968).

weight. The breach of the peace rule in section 9-503 answers not only to the needs of the debtor, but also to those of his wife and children, and to the public policy against fistfights and shoot-outs. Such a rule should not be varied merely because of a prior agreement between a creditor and a debtor.²⁴

Debtor and Third Party Opposition to Repossession

When the creditor repossesses in disregard of the debtor's unequivocal oral protest, most courts find the creditor guilty of a breach of the peace.²⁵ This rule, holding an oral protest sufficient to fore-

²⁴ It is consistent with the underlying policy to find, on the one hand, that a consent given contemporaneously with the repossession is effective and, on the other hand, that one given weeks or months before in a clause in the security agreement is ineffective. In the former case, the debtor fully appreciates the consequences of his consent and has no time in which to change his mind. That is not so in the latter case. For these reasons, the contemporaneous consent affords substantial protection against violence, while an earlier written consent does not. Since the goal of the breach of the peace doctrine is to prevent violence, not to protect contract expectations, the distinction is appropriate.

²⁵ *Crews & Green v. Parker*, 192 Ala. 383, 68 So. 287 (1915) (furniture from debtor's restaurant); *Manhattan Credit Co. v. Brewer*, 232 Ark. 976, 341 S.W.2d 765 (1961) (car from driveway); *Wilson v. Kuykendall*, 112 Miss. 486, 73 So. 344 (1917) (mules from barn); *Cecil Baber Elec. Co. v. Greer*, 183 Okla. 541, 83 P.2d 598 (1938) (refrigerator from "premises"); *Ben Cooper Motor Co. v. Amey*, 143 Okla. 75, 287 P. 1017 (1930) (car from garage); *Lark v. Cooper Furniture Co.*, 114 S.C. 37, 102 S.E. 786 (1920) (furniture from home); *Morrison v. Galyon Motor Co.*, 16 Tenn. App. 394, 64 S.W.2d 851 (1932) (truck from yard) (dictum). *Contra*, *Fulton Inv. Co. v. Fraser*, 76 Colo. 125, 230 P. 600 (1924) (wheat from granary); *J.I. Case Threshing Mach. Co. v. Barney*, 54 Okla. 686, 154 P. 674 (1916) (machine from debtor's premises); *Westerman v. Oregon Auto. Credit Corp.*, 168 Ore. 216, 122 P.2d 435 (1942) (car from street).

Some courts require affirmative consent from the debtor before a repossession will be found lawful. If the debtor neither consents to nor opposes the repossession, the court will find the repossession unlawful. *See Price v. General Motors Acceptance Corp.*, 95 So. 2d 834 (La. App. 1957); *Carey v. Interstate Bond & Mortgage Co.*, 4 Wash. 2d 632, 104 P.2d 579 (1940). *Contra*, *Rutledge v. Universal C.I.T. Credit Corp.*, 218 Ark. 510, 237 S.W.2d 469 (1951).

If, in addition to an oral protest, the debtor offers passive physical resistance, such as refusing to leave the car as it is towed away, the creditor is liable for any injuries caused to the debtor during the repossession. *Burgin v. Universal Credit Co.*, 2 Wash. 2d 364, 98 P.2d 291 (1940).

If the creditor attempts to overcome the oral protest of the debtor by trickery, by threats or by intimidation, he is liable for wrongful repossession. *See American Discount Co. v. Wyckroff*, 29 Ala. App. 82, 191 So. 790 (1939); *Kensinger Acceptance Corp. v. Davis*, 223 Ark. 942, 269 S.W.2d 792 (1954); *Levy v. Address-Hanna, Inc.*, 96 So. 2d 373 (La. App. 1957); *Firebaugh v. Gunther*, 106 Okla. 131, 233 P. 460 (1925); *Ray v. Navarre*, 47 Okla. 438, 147 P. 1019 (1915) (debtor intimidated when creditor was accompanied by armed deputy sheriff purporting to act *colore*

close non-judicial repossession, is wise because it does not beckon the repossessing creditor to the brink of violence. Speaking of the debtor's wife, one court has put the matter as follows:

It would have availed her nothing to have measured her strength with that of the two employees of the defendant. The plaintiff's evidence shows that she was intimidated by the superior force arrayed against her. In order to constitute coercion, it is not always necessary to apply physical force. The highway robber says to his victim, "stand and deliver." And the victim obeys the command and surrenders his purse, yet no physical force is employed, but, notwithstanding, in the eye of the law, he was forced to give up his property. The conduct of defendant and its agents differs only in degree from that of the highwayman, for in each instance it was stand and deliver. The defendant was enforcing its contract with a high hand; and was inviting a breach of peace when it invaded plaintiff's home after having been notified not to do so.²⁶

Not all courts agree with this view, and several have held that third parties must do more than protest orally for the creditor's action to become a breach of the peace.²⁷ These cases do not explain why a third party's protest is different from the debtor's. Perhaps these courts constitute part of the minority which finds that oral protests, by whomever made, are insufficient to result in a breach of the peace. However, the cases may be founded upon the proposition that whereas words spoken by an owner are swiftly followed by violent action, words spoken by a third party are not.

Thus, the courts generally have reached sound conclusions in defining a breach of the peace. In the absence of consent, entry into a debtor's house is not permitted. For the most part, courts ignore clauses purporting to authorize even a repossession which results in a breach of the peace, and they will not usually permit a

officii); Pagan v. Drake Furniture Co., 73 S.C. 364, 53 S.E. 542 (1906); Texas Auto Co. v. Clark, 12 S.W.2d 655 (Tex. Civ. App. 1928).

²⁶ Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 563, 91 S.W. 1020, 1021 (1905).

²⁷ Third party's protest insufficient: Commercial Credit Co. v. Cain, 190 Miss. 866, 1 So. 2d 776 (1941) (debtor's husband protested the repossession of a car from a public street); Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1909) (debtor's mother protested the repossession of a horse from a barn); Singer Mfg. Co. v. Rios, 96 Tex. 174, 71 S.W. 275 (1903) (debtor's employee protested the repossession of a machine from a tailor shop).

Third party's protest rendered repossession a breach of peace: Freeman v. General Motors Acceptance Corp., 205 N.C. 257, 171 S.E. 63 (1933) (wife protested repossession of automobile from driveway or street). See also Morrison v. Galyon Motor Co., 16 Tenn. App. 394, 64 S.W.2d 851 (1932) (dictum).

creditor to repossess in the face of unequivocal oral protests. Conversely, they do permit the repossession of cars from private driveways and public streets. In view of the current public and congressional concern for consumer protection,²⁸ and the vintage of some of the cases holding against the debtor, a debtor's lawyer should not hesitate to extrapolate from some of the favorable holdings, or to challenge apparently well-entrenched doctrine.

RESALE OF REPOSSESSED COLLATERAL

If the creditor wishes to recover a deficiency judgment, he must first sell the collateral.²⁹ Section 9-504(3) specifies the path he must follow in the conduct of a proper sale.³⁰ Since his failure to adhere to the statutory requirements might entitle the debtor to a penalty under section 9-507, and in some states will completely preclude a deficiency judgment, the debtor's lawyer should scrutinize the creditor's performance with meticulous care.

Section 9-504 imposes two requirements upon the reselling creditor: (1) the creditor must send notice; and (2) every aspect of the sale, including the "method, manner, time, place and terms," must be "commercially reasonable." The notice requirement is easy to understand and to apply; it is inspired by the forlorn hope that the

²⁸ This concern has recently been manifested by the enactment of the Federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-77 (Supp. IV, 1969), 18 U.S.C. §§ 891-96 (Supp. IV, 1969), by the promulgation of the UNIFORM CONSUMER CREDIT CODE by the National Commission on Uniform State Laws, and by the Federal Trade Commission study of automobile warranties.

²⁹ If the creditor retains the collateral under § 9-505, he has no right to a deficiency judgment. Theoretically, he could "dispose" of the collateral by leasing it and recover the amount by which the debt exceeded the value of the rents and salvage. In practice, however, the lender against consumer goods will establish his deficiency by selling at a public or private sale.

³⁰ Section 9-504(3) reads as follows:

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 of 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.

debtor, if notified, either will in some way acquire enough money to redeem the collateral or will send his friends to bid for it.³¹ The second condition is both more important and more difficult to define in operational terms. Its importance lies in the fact that the amount of the deficiency judgment will be inversely proportional to the sales price; if the price is high, the amount of the judgment will be low, and vice versa. The "method, manner, time, place and terms" tests are only proxies for "insufficient price," and their importance lies exclusively in their use in guarding against an unfairly low price.³²

In ascertaining the meaning of the language of section 9-504(3), one may not safely rely upon pre-Code cases. Here the Code departs from old formulae; it specifies no advertising requirements, requires no publication, states no requisite number of days prior to sale for giving notice, and does not require that the notice be sent by registered mail or conform to any specific form. In this section, therefore, the lawyer's search for meaning must concentrate on the Code, its comments, and on the post-Code cases.

The Notice Requirement

The statute requires that "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"³³ The quoted language suggests three defenses that might be available to the debtor's lawyer: (1) the notice may never have been sent; (2) if the notice was sent, it may not have contained the correct information; and (3) it may not have been timely sent.

³¹ See Comment 5 to § 9-504.

³² In some cases the terms of the sale or the place at which it was held may be such as to prevent a debtor who planned to redeem from being able to do so. Redemption by a consumer-debtor is a very rare occurrence.

³³ Section 9-504(3). The exception to the notice requirement for sales on recognized markets does not encompass the sellers of hard goods. Used cars (and, *a fortiori*, other kinds of hard goods whose used market is even more uncertain) have been found to be items *not* "customarily sold on a recognized market." *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966); *One Twenty Credit Union v. Darcy*, — Mass. App. Dec. —, 5 UCC REP. SERV. 792 (1968); *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964) (truck); *Alliance Discount Corp. v. Shaw*, 195 Pa. Super. 601, 171 A.2d 548 (1961); *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (C.P. Allegheny County 1961); see II G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 44.5, at 1236 (1965). *Contra*, *Third Nat'l Bank & Trust Co. v. Stagnaro*, 25 Mass. App. Dec. 58 (1962) (tractor and trailer).

One cannot assure his client of victory upon the client's statement that he did not receive notice. The client may have forgotten, or he may be lying. Even if he is telling the truth and his memory is correct, however, the creditor may still prevail; all he need prove is that he "sent" the notice.³⁴ Therefore, even if the notice is lost in the mail, the debtor cannot complain of not receiving it.

Despite this unfavorable state of the law, it is probably wise to put the creditor to his proof in any case in which the debtor does not remember receiving the notice. If the creditor is meticulous, he will have retained a business record in the form of a copy of the notice with the initials of the sending employee; he will alternatively have made a ledger entry of the sending of the notice, which he can offer into evidence together with the testimony of his employee to prove that the notice was sent. Not all creditors are meticulous, and months after the event, the creditor may be unable to muster sufficient admissible evidence to prove his case. For example, in *Barker v. Horn*,³⁵ the creditor seems to have sent a notice of sale, but he thoroughly bungled its introduction into evidence:

On cross-examination, [debtor] denied that he received a letter from T. E. Martin on September 9, 1966 by registered mail. . . . He denied that his signature appeared on a card exhibited to him. If this was a return receipt for registered mail, it was never introduced. [Creditor] stated that T. E. Martin was his attorney and apparently sought to testify that he had a copy of a notice Martin had sent. The copy was not introduced when objection was made on account of lack of personal knowledge by the witness. Thus, there was no evidence upon which to base any finding that notice was given.³⁶

In special circumstances some courts may be willing to require more than a mere "sending" on the part of the creditor. In *Mallicoat v. Volunteer Finance & Loan Corp.*,³⁷ the creditor sent a notice to

³⁴ Section 1-201(38) reads as follows:

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

An opinion by the Attorney General of Maryland, 50 OP. ATT'Y GEN. 28 (Md. 1965), and a dictum in *Barker v. Horn*, 245 Ark. 310, 432 S.W.2d 21 (1968), suggest that oral notification might be sufficient. The sending requirement of § 9-504(3) indicates, however, that the notice must in all cases be written.

³⁵ 245 Ark. 310, 432 S.W.2d 21 (1968).

³⁶ *Id.* at 311, 432 S.W.2d at 22.

³⁷ 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

the debtor informing him of the pending sale. Although the notice was returned to the creditor undelivered, he nevertheless sold the repossessed automobile. The court found that the creditor had failed to properly notify the debtor inasmuch as it knew that the debtor was in its own locale and knew that he had not received its notice, and yet had made no additional attempt, by telephone or otherwise, to contact the debtor. Nothing in the Code mentions an additional requirement of a second contact when the creditor learns that the first has failed, but debtors' lawyers will wish to build upon the judicial gloss which *Mallicoat* has deposited on section 9-504.

Notice of a public sale must give different information from that announcing an intent to sell privately. In the latter case, the notice need only state "the time after which" the collateral is to be sold; in the former case, it must state "the time and place" at which the sale will occur.³⁸ If the creditor has used his private sale form for a public sale, he has violated section 9-504(3).

Finally, the notice may not have been timely. Section 9-504(3) requires "reasonable notification" and Comment 5 to this section states:

[A]t a minimum [the notice] must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.

No cases yet define the minimum "sufficient" time in this context.³⁹ It ought to mean that the notice be sent at such a time and in such a way that the creditor would reasonably expect it to arrive in the debtor's hands in time to give him several business days in which to arrange for alternative financing. No responsible creditor who has just repossessed a car or washing machine can expect his debtor to buy for cash from savings; he will well understand that the debtor needs time to look for credit.

Commercial Unreasonability—Insufficient Price

Section 9-504 specifies that every aspect of a sale of a repossessed item, "including the method, manner, time, place and terms must be commercially reasonable;" it does not state that a sale can be overturned because the sale price is too low. Presumably, the price is

³⁸ Section 9-504(3), *supra* note 30.

³⁹ "More than a week's notice" is enough time. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964).

one of the "terms" of sale. Whether or not this is so, however, each of the enumerated factors is logically important only to the extent that it contributes to an insufficient price. If the sale price is sufficient, the debtor has suffered no injury, even if the sale was held at midnight on the steps of the Kremlin.⁴⁰ The first sentence of section 9-507(2)—which was undoubtedly inserted to allay creditors' fears that courts would focus on the sale price—gives a backhand recognition to the importance of the price:

The fact that a better price could have been obtained by a sale at a different time, or in a different method than that selected by the secured party, is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.⁴¹

Some of the recent cases give explicit recognition to the primacy of resale price.⁴² Careful examination of other cases in which the courts hasten to punish creditors for failure to give notice suggests that the insufficiency of the resale price may be the real, though unarticulated, reason for the outcomes.⁴³ Notwithstanding the statement in section 9-507(2) that low resale price alone is not enough, the crucial issue which one gleans from the "method, manner and time" language and from the several cases interpreting section 9-504(3) is just that—was the price sufficient?

Finding that his job is to prove that the price was insufficient is only the beginning of wisdom for the debtor's lawyer. He must determine the kind of evidence to gather, the margin by which the

⁴⁰ Here, as above, we ignore the de minimus number of cases in which the debtors could, and would, redeem.

⁴¹ Section 9-507(2).

⁴² The most explicit judicial recognition of this fact is contained in *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (C.P. Allegheny County 1961), where, after much discussion of commercial reasonability, orders were given that the case "be set down for hearing, limited to the questions of the reasonable value of the motor vehicle collateral at the time of resale . . ." *Id.* at 592.

⁴³ Although courts frequently rely on lack of notice, they seldom mention any causal connection between the debtor's injury and his failure to receive notice; there is no suggestion that he would have redeemed or have been otherwise moved to action by receipt of a notice. Hidden among the facts are some interesting data on the resale prices. See, e.g., *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966) (car purchased for more than \$350 in September and resold for \$75 in January); *Baber v. Williams Ford Co.*, 239 Ark. 1054, 396 S.W.2d 302 (1965) (car purchased in August for at least \$882.90, including interest but not including downpayment, and resold, apparently in December, for \$210); *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968) (car purchased for \$2,195, excluding interest but including downpayment, and resold, apparently after only a few months, for \$850).

fair market value must exceed the resale price in order to give him a chance of winning, and the appropriate market (retail, wholesale) against which to measure the resale price. In addition, in the eventuality that he cannot present substantial evidence on the price issue, he would like to know who has the burden of going forward—debtor or creditor.

Of the handful of post-Code cases which shed some light on these issues, *Atlas Constr. Co. v. Dravo-Doyle Co.*⁴⁴ is the most helpful. In that case, the court upheld a jury verdict which found the sale to be commercially unreasonable. The seller of a crane repossessed it and sold it to the single bidder at the resale for \$19,500. At the trial, the debtor showed that the "Green Guide Handbook" listed a price for comparable equipment of \$25,310. In addition, the debtor produced a witness who testified that he would have paid between \$25,000 and \$28,000 for the crane at the time of the resale. In reaching its result, the court relied upon the two foregoing pieces of evidence concerning the price and also pointed out that the creditor contacted only one potential purchaser.

The case suggests several kinds of evidence to which the debtor's lawyer may resort. First, it is one of at least four reported cases in which courts have accepted price handbooks as evidence of the value of the collateral.⁴⁵ When the creditor is seeking a deficiency upon the sale of an automobile, the debtor's lawyer should first have recourse to such price handbooks. If the car was sold at substantially less than the wholesale value shown in the handbook, the debtor may have a good case. Second, the debtor was able to produce an expert to testify concerning the fair market value. Finding a willing used car or appliance salesman to testify may not be beyond the power of the debtor and his lawyer.

Dravo-Doyle also suggests the importance of the solicitation of bidders. Although the creditor's territory covered parts of Pennsylvania, Ohio, Maryland and West Virginia, it made "no effort to contact" anyone other than the ultimate purchaser.⁴⁶ Although

⁴⁴ 114 Pitts. Leg. J. 34 (C.P. Allegheny County 1965).

⁴⁵ See also *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (C.P. Allegheny County 1961). In *Alliance Discount Corp. v. Shaw*, 195 Pa. Super. 601, 171 A.2d 548 (1961), and in *Ekman v. Mountain Motors, Inc.*, 364 P.2d 998 (Wyo. 1961), the courts admitted the book but said it was only a guide. Whether the creditor objected to the introduction of such handbooks on the ground that they were hearsay does not appear.

⁴⁶ 114 Pitts. Leg. J. at 39.

Article 9 does not require a specific number of bidders, every single-bid sale invites scrutiny by the debtor's lawyer. If other repossessioners of such goods in the community routinely solicit several bids before they sell, the debtor has a forceful argument that such multiple bids are a prerequisite of a commercially reasonable sale.

In *Dravo-Doyle*, the debtor's evidence indicated that the resale price was equal to approximately 75 percent of the fair market value. In *Family Finance Corp. v. Scott*,⁴⁷ the fact that the automobile in question had been sold at half its apparent fair market value caused the court to open a deficiency judgment entered by confession. It would be foolish to suggest that these two lower court cases have established an unchangeable pattern and that, consequently, any time the resale is less than 75 percent of the fair market value the sale is ipso facto commercially unreasonable. Yet, they should tell the debtor's lawyer that he has a case worth investigating whenever the resale price is less than 75 percent of the fair market value. Undoubtedly the court's ultimate judgment on the insufficiency of the sale price in a close case will be affected by its impression of the creditor's good faith and diligence as evidenced by all of his post-default behavior, and particularly by the care with which he sent the notice and by the extent of his solicitation of bidders.

None of the opinions discussing section 9-504(3) mentions any dispute among the litigants concerning the proper market against which to measure the resale price.⁴⁸ In *Dravo-Doyle*, the court used the retail market for cranes; in *Family Finance*, the court referred to the wholesale and the retail listings in a handbook. Comment 2 to section 9-507 strongly suggests that the wholesale market is the appropriate measure, at least in the case in which the creditor does not maintain retail facilities:

One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales.

Despite this reference to the wholesale market, a bold debtor's lawyer will not consider the question closed. Note the reference in both the body of and comments to section 9-507 that the sale must conform

⁴⁷ 24 Pa. D. & C.2d 587 (C.P. Allegheny County 1961).

⁴⁸ In *Baber v. Williams Ford Co.*, 239 Ark. 1054, 396 S.W.2d 302 (1965), the court mentioned that the resale had been at wholesale. Evidently the debtor did not contend that a wholesale resale was improper.

to "reasonable commercial practice among dealers in the type of property sold . . ." If most of the financiers of the type of collateral in question sell at retail, or if the creditor is also a retail seller, is it not worth the lawyer's breath and ink to argue that the retail market is the proper measure of the resale price?

Finally, if all else fails and the debtor's lawyer cannot muster his own evidence of the commercial unreasonability of the resale, he can at least argue that the creditor has not carried his burden of going forward. In *Mallicoat v. Volunteer Finance & Loan Corp.*,⁴⁹ plaintiff creditor called its loan manager as its sole witness. The loan manager testified that the car in question had been sold for \$150 at the public sale and that the sale had been advertised on posters. On cross-examination, he could not say where or when the posters had been posted, and he apparently did not testify about the fair market value of the car.

The court, holding that the creditor had the burden of proving a commercially reasonable resale, found that the loan manager's testimony was not sufficient:

Since the proof incident to advertisement and sale was peculiarly within the knowledge of Volunteer Finance, the burden was upon it to show a compliance with the Act. . . . The testimony of Mr. Austin . . . that the property was disposed of at a public sale, standing alone, was not sufficient to carry this burden.⁵⁰

Judge McAmis cites the conventional doctrine that the burden should be upon the creditor since he had the knowledge. This conclusion is supported by the equally conventional learning that the burden is upon the moving party. Here, as usual, the creditor was the plaintiff seeking a deficiency judgment. When one moves from evidence of the actual conduct of the advertising and sale by the creditor, however, the *Mallicoat* opinion is less informative. Although the general status of the market is more likely to be within the knowledge of the creditor than that of the debtor, it is not "exclusively" or even "peculiarly" within his knowledge. Moreover, the court does not state whether the creditor must show some external evidence of the market value of the sold collateral to carry his burden of proving that the sale was commercially reasonable.

Although it perhaps may be sufficient if the creditor shows an apparently reasonable attempt to sell, a debtor's lawyer can and

⁴⁹ 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

⁵⁰ *Id.* at 114, 415 S.W.2d at 351 (1966).

should argue that it is incumbent upon the creditor to submit some evidence—beyond the mere circumstance of the sale—to prove that the sale price was at or near the relevant market price for such collateral.⁵¹

CONSEQUENCES OF CREDITOR MISBEHAVIOR

A creditor's misbehavior in repossessing or reselling collateral can bring upon him a variety of unpleasant consequences. Some of these have only marginal importance to the debtor's lawyer; others will be important in virtually every deficiency judgment suit. They may be classified as follows: (1) criminal liability under state and federal laws; (2) tort liability for improper collection behavior; (3) statutory liability under section 9-507 for loss caused by deviation from the provisions of Part 5 of Article 9; (4) statutory liability under section 9-507 as a penalty for the improper repossession or resale of consumer goods; and (5) denial of a deficiency judgment.

The possibility of criminal liability arising from an unduly vigorous repossession merits only a passing word. If, for example, a repossessing creditor drags the debtor's wife from her automobile by the hair, or if he enters the debtor's house by removing a screen door, he will probably be guilty of a crime under state law. If debtor's lawyer can then find a prosecutor willing to prosecute such crimes, he will have a useful device to inhibit such behavior. If the debt collector threatens violence, but does not commit a battery or an assault, he may still be guilty of "extortionate" collection practice. The federal Consumer Credit Protection Act⁵² defines such practices as follows:

An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.⁵³

Although this portion of the Act was designed principally to inhibit Mafia activities, the provisions are broad enough to cover the activities of all creditors. Even if one is unable to interest the United States attorney in prosecuting, the Act's provisions may still assist the debtor's

⁵¹ The Arkansas cases discussed in the text accompanying notes 84 through 88 *infra* employ such a presumption in cases in which there was a defect, such as a failure to give notice in compliance with § 9-504(3).

⁵² 15 U.S.C. §§ 1601-77 (Supp. IV, 1969), 18 U.S.C. §§ 891-96 (Supp. IV, 1969).

⁵³ 18 U.S.C. § 891(7) (Supp. IV, 1969).

lawyer in arguing that such behavior is or ought to be regarded as tortious.⁵⁴

The creditor's potential tort liability is of greater importance to the debtor than are possible criminal sanctions. Here the debtor's lawyer has a variety of available actions from which to choose: the creditor may have entered the house without permission (trespass); he may have threatened the debtor's wife and child (assault); he may have shoved one of them (battery); or he may have taken some valuable diamonds when he repossessed the car (conversion). Moreover, the collection activity, as a whole, may constitute an intentional infliction of emotional injury or an invasion of the debtor's privacy. Space and time do not permit analysis of the mass of relevant case law. Suffice it to say that the debtor's lawyer in a deficiency suit should examine both local tort law and the secondary sources⁵⁵ which have collected the cases in any situation in which there has been any hint of impropriety in the repossession.

The third weapon in the debtor's armory is the damage provision of section 9-507. That section gives the debtor a cause of action against the creditor, not just for improper repossession, but for "any loss caused by failure to comply with the provisions of this Part."⁵⁶ It also gives the court authority to restrain the creditor from committing future acts in contravention of Part 5 of Article 9. Because of the difficulty of proving actual loss, and because the economic loss of the low-income consumer in a wrongful repossession or resale will almost always be a piddling sum, the debtor's right to compensatory damages alone is not likely to deter a creditor bent upon improper collection behavior.

If one wishes not merely to compensate those debtors who find their way to a lawyer, but also to shape creditors' conduct vis-à-vis consumer-debtors in general, he needs something which will cause the creditor more economic pain. It is not surprising, therefore, that the draftsmen installed a provision in section 9-507 to produce precisely this result.⁵⁷

⁵⁴ It is not unusual for courts to consult statutes for a standard of conduct in tort cases. See W. PROSSER, *THE LAW OF TORTS* § 35 (3d ed. 1964) and the cases there cited.

⁵⁵ See S. RIESENFELD, *CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION* 268 (1967); CCH *POV. L. REP.* ¶ 3545 (1968); Annot., 22 A.L.R.2d 1227 (1952) (assault); Annot., 99 A.L.R.2d 358 (1965); Annot., 19 A.L.R.3d 1318 (1968) (right of privacy).

⁵⁶ Section 9-507(1).

⁵⁷ See II G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 44.9.3 (1965).

The Low Income Consumer

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 per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.⁵⁸

The sentence is a penalty—a “minimum recovery,” the comment⁵⁹ calls it—and the consumer is entitled to it even if he has not suffered a penny’s loss. Whether the prospect of such a penalty would be sufficient to forestall creditor misbehavior⁶⁰ is impossible to predict. Given the fact that the penalty is computed on the basis of the *original* principal amount⁶¹ and includes the total interest charge,

⁵⁸ Section 9-507(1).

⁵⁹ *Id.*, Comment 1.

⁶⁰ In some cases the Consumer Credit Protection Act and the proposed UNIFORM CONSUMER CREDIT CODE provide for penalties equal to twice the amount of the credit service charge plus costs plus attorneys’ fees for any successful action. Consumer Credit Protection Act § 130, 15 U.S.C. § 1602 (Supp. IV, 1965-68); UNIFORM CONSUMER CREDIT CODE § 5.203 (Revised Final Draft, Nov. 1968).

⁶¹ The one reported case in which the penalty was computed, *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960), illustrates the difficulties of computation. There, the debtor purchased a boat which the court characterized as consumer goods. The “cash price” was \$5,980.00 or \$5,480.00 (depending upon whether you include the downpayment in the calculation of the “cash price”). The debtor paid \$500.00 down and executed a 60-month purchase agreement and note involving monthly payments of \$158.53. This totaled \$9,511.80 (60 x \$158.53). Debtor asked for only \$3,598.21 and received a verdict for \$3,000. However, because the penalty is figured on the cash price, debtor in such a case should have recovered either \$4,579.80 or \$4,629.80. The computation would be 10% of the cash price (\$5,480.00 x .10 = \$548.00) or (\$5,980.00 x .10 = \$598.00) plus the time-price differential of (\$9,511.80 — \$5,480.00 = \$4,031.80). Professor Gilmore recognized that *Dolbow* was wrong, but apparently he miscalculated the time-price differential. See II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.3 n.2, at 1260 (1965).

Whether one should include the downpayment in the “cash price” is not clear. Arguing for inclusion is the usual meaning of the words and their meaning as revealed in the usual retail installment form, *e.g.*:

1. Cash Sale Price		
Cash Price	\$ _____	
Taxes	\$ _____	
Installation Costs	\$ _____	
	\$ _____	\$ _____
2. Down Payment:		
Cash	\$ _____	
Trade-in	\$ _____	\$ _____
3. Difference (Item 1 less Item 2)		\$ _____
4. Official Fees		\$ _____
	\$ _____	\$ _____
5. Insurance Costs		
Type	Terms	
Credit Life	_____	\$ _____
	_____	\$ _____
6. Principal Balance		\$ _____
7. Time Price Differential		\$ _____

however, a debtor may recover a sum substantially in excess of his actual loss. For example, an automobile loan of \$2,000 financed at \$6 per hundred over a period of three years would produce a penalty of \$560.⁶² Because the interest cost will constitute such a large part of the total cost of installment purchases with terms of three years or more, the penalty may be sufficient in those cases to at least wipe out a deficiency.⁶³

The final and potentially most significant consequence of a creditor's misbehavior is that it may cause him completely to lose his right to a deficiency judgment. Whether denial of a deficiency judgment to a misbehaving creditor is consistent with or permissible under Article 9 is subject to dispute. Professor Gilmore states that the draftsmen of Article 9 did not consider this question.⁶⁴

The creditor can surely argue that, since section 9-507 is a comprehensive codification of a debtor's remedies and since that section is silent as to denial of a deficiency judgment, such a denial is not a permissible remedy. The statement in section 9-201 that the creditor has all the rights which his agreement with the debtor gives him (except when the Code specifically provides otherwise) bolsters this argument.⁶⁵

The debtor, however, can respond to such arguments, first, by pointing to the Code's incorporation of the general rules of the common law and of equity (a court's denial of a deficiency is only the exercise of its traditional equitable powers).⁶⁶ Second, he can point

8. Time Balance (sum of Items 6 and 7) \$ _____
 9. Time Sales Price (sum of Items 2 and 8) \$ _____
 Time Balance is payable in _____ consecutive monthly install-
 ments of \$ _____ each, all payable on the same day of each
 month. The first installment is due _____, 19____
 or one month from the date of this contract if not otherwise specified).

Arguing against including the downpayment in the "cash price" is the possibility that such inclusion would produce different penalties in the same transaction depending upon whether the original lender were the seller or a third party creditor. (In the latter case the penalty would be 10% of the loan principal, a figure which would not include any part of the downpayment.)

⁶² The computation in this example would be as follows: \$200 (10% of the principal amount) plus \$360 (the credit service charge which equals \$6 × 20 (hundreds) × 3 (years)) = \$560 (the penalty).

⁶³ See the *Dolbow* example in note 63 *supra*, where the total amount due was \$9,511.80 after the downpayment, but where the penalty would be \$4,629.80.

⁶⁴ II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4, at 1264 (1965).

⁶⁵ Note that the Code specifically authorizes deficiencies in §§ 9-502(2) and 9-504(2). A counter-argument is that the § 9-201 rights are always subject to general equitable principles.

⁶⁶ Section 1-103.

to the case law developed under the Uniform Conditional Sales Act,⁶⁷ where courts dealing with a similar statute denied deficiencies to misbehaving creditors.⁶⁸ Debtor can then argue that Part 5's silence in the face of this prior case law indicates that the Code leaves courts free to reach this result.

Several courts have permitted creditors who had violated Part 5, nevertheless, to recover deficiency judgments subject to a set-off of the debtor's damages or penalty under section 9-507.⁶⁹ In most of these cases, however, the creditor's right to a deficiency judgment does not seem to have been contested. None of the opinions, even when the issue was raised, contains extensive discussion of the question.⁷⁰ In the absence of such argument and discussion, these cases are weak authority for the proposition that a creditor who violates Part 5 is nevertheless entitled to a deficiency judgment. Indeed, a federal district court in Pennsylvania, in holding that a misbehaving creditor had forfeited this right, felt free to disregard a Pennsylvania state court decision of this type.⁷¹

⁶⁷ UNIFORM CONDITIONAL SALES ACT § 22 (1922) provided:

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

Section 25 of the same act provided further:

If the seller fails to comply with the [resale] provisions [of the Act] . . . the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.

⁶⁸ See, e.g., *Frantz Equip. Co. v. Anderson*, 37 N.J. 420, 181 A.2d 499 (1962); *United Sec. Corp. v. Tomlin*, 198 A.2d 179 (Del. Super. 1964); *Commercial Credit Corp. v. Swiderski*, 195 A.2d 546 (Del. Super. 1963), *motion for rehearing denied*, 196 A.2d 214 (Del. Super. 1963).

⁶⁹ See, e.g., *Mallicoat v. Volunteer Fin. & Loan Corp.*, 245 Ark. 310, 432 S.W.2d 21 (1968); *Abbott Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964); *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960).

⁷⁰ In *Mallicoat* the court cited § 9-507 and "remanded for the determination of the amount still due plaintiff, if any, after allowing defendants an off-set for the amount due them." 57 Tenn. App. at 115, 415 S.W.2d at 351-52. In *Abbott Motors*, 28 Mass. App. Dec. at 43, the court considered the question and decided that the creditor retained its deficiency right subject to a set-off under § 9-507(1). Note, however, that this case was not followed in the *One Twenty* case, —Mass. App. Dec. —, 5 UCC REP. SERV. 792 (1968).

⁷¹ See *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *modified on other grounds*, 335 F.2d 846 (3d Cir. 1964), in which the judge referred to the *Dolbow* case, 193 Pa. Super. 649, 165 A.2d 704 (1960), but declined to follow its lead:

It seems to this Court, however, that to permit a recovery by a security holder of a loss in disposing of collateral when no notice has been given, permits a continuation of the evil which the Commercial Code sought to correct

In denying deficiencies, several courts have demonstrated what creditors must regard as treacherous ingenuity. Some of these courts merely assert that a misbehaving creditor should not, and therefore does not, have the right to a deficiency;⁷² others have constructed elaborate, if somewhat fictional, justifications for denial. The doctrine of denying deficiency judgments has experienced its most visible and extensive growth in the Georgia Court of Appeals, which has faced the issue four times since 1966. In the first case, *Moody v. Nides Finance Co.*,⁷³ the debtor's sister-in-law drove in the encumbered car to the finance company office to make a payment which was overdue. She gave the finance company's agent the keys to the car for a road test to "see whether we have our money's worth in it." After the drive, the loan manager simply informed her, "We are going to keep it."⁷⁴ The finance company later sold the car at a private sale without giving notice to the debtor. In reversing the trial court's decision for the creditor, the Georgia Court of Appeals found that the taking of the car in the circumstances described amounted to an accord and satisfaction, an agreement to take the car in full satisfaction of the debtor's liability. It appears from the opinion that this novel argument had not occurred to the debtor's lawyer and he had not pleaded it. As an afterthought the court stated that it would "likely have reached the same result by applying UCC provisions."⁷⁵

In the second Georgia case, *Johnson v. Commercial Credit Corp.*,⁷⁶ the debtor voluntarily turned in the car after he had made six payments. Although the seller urged him to keep the car by advising, "You can't afford to turn it in It's worth more than you owe on it . . . ," he nevertheless assured the debtor, "It's up to you if you want to turn it in."⁷⁷ Here the defendant-debtor, presumably aware of the *Moody* case, pleaded accord and satisfaction and won in the appellate court.

In my view, it must be held that a security holder who sells without notice may not look to the debtor for any loss.

222 F. Supp. at 702.

⁷² See, e.g., the passage quoted from *Skeels* in note 73 *supra*. See also *Associates Discount Corp. v. Cary*, 47 Misc. 2d 369, 262 N.Y.S.2d 646 (N.Y. City Ct. 1965); *One Twenty Credit Union v. Darcy*, — Mass. App. Dec. —, 5 UCC REP. SERV. 792 (1968).

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

⁷⁴ *Id.* at 860, 156 S.E.2d at 311.

⁷⁵ *Id.* at 861, 156 S.E.2d at 312.

⁷⁶ 117 Ga. App. 131, 159 S.E.2d 290 (1968).

⁷⁷ *Id.*, 159 S.E.2d at 291.

In the third Georgia case, *Braswell v. American National Bank*,⁷⁸ plaintiff-creditor moved for summary judgment on his allegation of repossession and resale of the automobile. The defendant answered that plaintiff had not given him notice of the sale. The trial court granted the plaintiff-creditor's motion and the court of appeals reversed. The appellate court this time did not find an accord and satisfaction; instead, it rested its decision on the proposition that failure to allege and prove proper notice under section 9-504 precluded plaintiff-creditor from recovering a deficiency under the UCC. The court went on to make the somewhat startling assertion that "the majority of the courts in the country" agreed with its position.⁷⁹

These cases make instructive reading for any debtor's lawyer who practices before a court which has not yet dealt with the deficiency question. The Georgia court, like a skater testing March ice, showed great hesitance to base its decision on the UCC, and in both *Moody* and *Johnson* it ultimately preferred to use the barest kind of fiction to enable it to stand on familiar common law doctrine.⁸⁰ Having tested the ice in *Moody*, however, the court was finally willing to rest its conclusion exclusively on the UCC in *Braswell*.

In Arkansas, the evolution of the anti-deficiency law is not as far advanced as it is in Georgia; and it has followed quite a different course. In *Baber v. Williams Ford Co.*,⁸¹ the Arkansas Supreme Court dealt with a question of the sufficiency of a notice of resale. Finding that the notice issue was a question for the jury to decide, the court remanded the case for a new trial. In the course of its discussion, the court indicated that if the secured party were "to hold

⁷⁸ 117 Ga. App. 699, 161 S.E.2d 420 (1968).

⁷⁹ *Id.* at 701, 161 S.E.2d at 422. In the fourth Georgia case, *Bradford v. Lindsey Chevrolet Co.*, 117 Ga. App. 781, 161 S.E.2d 904 (1968), the court backslid a bit. There, the court of appeals held that a creditor who had repossessed but made no sale for more than fifty days, who made no demand for payment until suit, and who still possessed the auto at the time of judgment had rescinded and forfeited any right to a deficiency judgment. The court cites *Moody* and *Braswell* and states that the result would be the same under the Code. *Id.* at 782-83, 161 S.E.2d at 906. Since the creditor had not disposed of the collateral, and therefore had not qualified for a deficiency judgment under any reading of the Code, the court is correct about the UCC outcome.

⁸⁰ Accord and satisfaction is normally founded on the agreement of both parties that one is accepting something in satisfaction of the other's liability. See generally 6 WILLISTON, CONTRACTS §§ 1838 *et seq.* (rev. ed. 1938). The creditors' "agreement" in *Moody* and *Johnson* almost certainly exists only in the court's mind.

⁸¹ 239 Ark. 1054, 396 S.W.2d 302 (1965).

the debtor liable for any deficiency . . . [it] must give the debtor 'reasonable notice.'"⁸² The same court in *Norton v. National Bank of Commerce*⁸³ took a different approach in reversing and remanding the lower court:

Upon the issue of Norton's damages simple considerations of fair play cast a burden of proof upon the bank. It was the bank which wrongfully disposed of the car without notice to the debtors. Thus it was the bank's action which made it at least difficult, if not impossible, for Norton to prove the extent of his loss with reasonable certainty. A chattel such as a car may well be a thousand miles away before the debtor learns of its sale without notice. It would be manifestly unfair for the creditor to derive an advantage from its own misconduct. We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law.⁸⁴

In *Barker v. Horn*⁸⁵ the Arkansas court reiterated the doctrine that the collateral should be presumed to have a value equal to the debt, but it did not remand the case for a new trial. Instead, the court reversed and dismissed the creditor's claim.

After these three cases the state of the law in Arkansas is still in doubt. It seems clear enough, on the one hand, that the court is not willing to stand by its dictum in *Barber* to the effect that failure to give notice ipso facto deprives the creditor of any right to a deficiency. On the other hand, it is clear that some sort of presumption is working against a creditor who does not comply with Part 5. What evidence would be sufficient to overcome this "presumption," however, is not clear. Perhaps the Arkansas court, like the Georgia Court of Appeals, is bending familiar doctrine to deny any deficiency to the creditor; subsequent cases may disclose that the presumption is almost impossible to overcome. *Barker* hints at that conclusion, inasmuch as the court there did not remand and, therefore, did not even give the creditor a chance to rebut the presumption.

In sum, the weight of authority may well be that the failure to comply with Part 5 of Article 9 precludes a creditor's recovery of a deficiency; at worst, the scales of authority are very nearly in

⁸² *Id.* at 1057, 396 S.W.2d at 304.

⁸³ 240 Ark. 143, 398 S.W.2d 538 (1966).

⁸⁴ *Id.* at 149-50, 398 S.W.2d at 542.

⁸⁵ 245 Ark. 310, 432 S.W.2d 21 (1968).

balance on that point. None of the cases which are cited for the proposition that a misbehaving creditor retains a right to a deficiency is strong authority. All such cases seem to have assumed that conclusion; none apparently has arrived at it in the face of a litigated dispute on that issue.

On the other side of the scale, *Skeels v. Universal C.I.T. Credit Corp.*⁸⁶ in Pennsylvania and *Braswell* in Georgia stand clearly and unequivocally for the proposition that a creditor who violates the provisions of Part 5 loses his right to a deficiency. The decisions in the other Georgia cases and the Arkansas cases, although more equivocal, also arrive at that conclusion. Whether the doctrines of these cases result from judges' reluctance to give up pre-Code doctrine,⁸⁷ or whether they arise from a deeper judicial hostility to creditors who seek deficiencies, they constitute a body of case law which is enjoying both rapid growth and acceptance. Moreover, there is every indication that this doctrine can be successfully cultivated in all but the most barren judicial soil.⁸⁸

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

⁸⁷ The creditor's loss of a deficiency judgment for failure to comply with statutory requirements was commonplace under pre-Code law. See, e.g., *Island Installment Corp. v. Panico*, 37 Misc. 2d 186, 233 N.Y.S.2d 812 (Sup. Ct. 1962); *Mott v. Moldenhauer*, 261 App. Div. 724, 27 N.Y.S.2d 563 (1941). See also II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4, at 1262 (1965).

⁸⁸ It should be noted that various states have enacted statutes which preclude or restrict the deficiency judgment problem. See, e.g., ILL. REV. STAT. ch. 121½, §§ 526, 580, and 416 (1967); CAL. CIVIL CODE § 1812.5 (West Supp. 1968). The UNIFORM CONSUMER CREDIT CODE also restricts the ability of a creditor to recover in a deficiency judgment suit. Section 5.103 of the UCCC provides as follows:

Restrictions on Deficiency Judgments in Consumer Credit Sales

- (1) This section applies to a consumer credit sale of goods or services.
- (2) If the seller repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest and the cash price of the goods repossessed or surrendered was \$1000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of the goods, and the seller is not obligated to resell the collateral.
- (3) If the seller repossesses or voluntarily accepts surrender of goods which were not the subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the cash price of the sale was \$1000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale.
- (4) For the purpose of determining the unpaid balance of consolidated debts or debts pursuant to revolving charge accounts, the allocation of payments to a debt shall be determined in the same manner as provided for determining the amount of debt secured by various security interests (Section 2.409).
- (5) The buyer may be liable in damages to the seller if the buyer has wrongfully damaged the collateral or if, after default and demand, the buyer has wrongfully failed to make the collateral available to the seller.
- (6) If the seller elects to bring an action against the buyer for a debt arising from a consumer credit sale of goods or services, when under this

Finally, consider a question which will occur only to a debtor's lawyer with uncommon gall: can the debtor recover his loss or penalty under section 9-507 and *also* use the foregoing doctrine to deny the creditor a deficiency? This seems an outrageous thought, but there is respectable authority to support such an argument. At least one debtor achieved this Valhalla under the Uniform Conditional Sales Act.⁸⁹ Moreover, the district court in the *Skeels* case granted the debtor exactly that—punitive damages *and* freedom from a deficiency. The Court of Appeals for the Third Circuit reversed the award of punitive damages, but gave the debtor both compensatory damages and freedom from the deficiency.⁹⁰

TACTICAL CONSIDERATIONS

One who represents a debtor must take careful note of the economic costs involved in the litigation process to the seller, the creditor, and the creditor's lawyer. He should also have some idea about the relationship between the creditor and seller and about the fee arrangement of the opposing counsel.⁹¹

First, who is the creditor and why should he seek deficiencies? Notwithstanding the militant consumer's characterization of him as one who derives positive joy from grinding his heel into the debtor's neck, the creditor is not likely to sue for psychological gratification. He does not conceive of litigation as a way to vindicate his "rights;" rather, he is a businessman who lends money to make money and who sues only to increase his long- or short-term profit.

Second, consider the relation of our creditor (bank or finance company) and the original seller of the collateral. Contrary to one's expectations, the appliance or automobile dealer may play the dom-

section he would not be entitled to a deficiency judgment if he repossessed the collateral, and obtains judgment

(a) he may not repossess the collateral, and

(b) the collateral is not subject to a levy or sale on execution or similar proceedings pursuant to the judgment.

(7) The amounts of \$1000 in subsections (2) and (3) are subject to change pursuant to the provisions on adjustment of dollar amounts (Section 1.106).

⁸⁹ *Commercial Credit Corp. v. Swiderski*, 195 A.2d 546 (Del. Super.), *motion for rehearing denied*, 196 A.2d 214 (Del. Super. 1963).

⁹⁰ 335 F.2d 846 (3d Cir. 1964).

⁹¹ Most of the information concerning the practices of creditors and creditors' lawyers was obtained from interviews with collection attorneys and bank and finance company representatives in the Detroit area, and from interviews with debtors' attorneys practicing in all parts of the country. I believe that the practices described are widespread, though certainly not universal.

inant role and the bank or finance company the subservient one. This is so because the seller's commercial paper bears a handsome interest charge for which many financiers will compete.⁹² The significance of this lies in its stimulation of the creditor's willingness to settle any suit which threatens his relationship with the seller.

Third, what is the creditor's probable return in a deficiency suit? If one assumes a rather favorable case in which a car securing an outstanding balance of \$2,500 has been sold for \$1,500, the suit will improve the creditor's position by no more than \$1,000. To clear this \$1,000, however, the debtor must be able to pay the judgment and the litigation process must be friction free—without cost to the creditor. If the creditor's lawyer is not on a retainer and the claim proves uncollectible, creditor might increase his loss by \$500 or more by prosecuting a deficiency suit. The persistent pursuit of deficiency judgments, therefore, offers the creditor only marginal returns, unless many such suits go by default against debtors who prove to be collectible. The addition of any moderate cost may render such suits unprofitable.

The creditor's lawyer is the final object of inquiry. If creditor is in a large city, his lawyer is likely to be a collection specialist. A good collection specialist runs an efficient, high-volume, "low-mark-up" operation. He depends upon defaults, upon mimeographed pleadings and upon his secretaries' ability to turn out complaints, garnishments, and other papers. He may be on either a retainer or a flat fee arrangement with his large clients, and one can be certain that he has not included many three-day trials, 18-page interrogatories, or much legal research in that fee.

There are various ways in which one who recognizes these economic facts can increase the creditor's risks and reduce the potential

⁹² There is little written material on the mechanics of dealer financing. The prototype arrangement is one in which the automobile dealer procures an inventory loan ("floor plan") from a bank or finance company. He often receives this at a favorable interest rate on the understanding that he will sell most of the chattel paper to the bank or otherwise funnel his customers through the bank for automobile financing. When he sells the paper to the bank, it will pay him the principal amount at once and will set aside a part of the total interest charge as a "dealer reserve." Monthly, or perhaps more often, the bank will remit the dealer reserve to the dealer. There may be limited recourse against the reserve (*e.g.* if customer defaults within two months, the loss may come out of the reserve), but the reserve is essentially a rebate of part of the interest to the dealer.

The current rise in interest rates, however, may change this relationship as chattel paper becomes less profitable to the banks in comparison with other investments.

profitability of repossessions and deficiency suits to both the creditor and to his lawyer. If one is fortunate enough to become involved in the case before repossession occurs, he may wish to advise his client, in any case in which the debtor-client has a meritorious defense, to passively resist the creditor's attempt to repossess. He should then notify the creditor that he has advised his client not to relinquish the goods without a court order. He should further inform the creditor that he stands ready to sue for trespass or any other tort which is committed in the course of a non-judicial attempt to get possession. If the creditor believes this threat, he must contend with one of two substantial additional costs—tort damages or the legal costs of a contested repossession suit. Either of these may cause the creditor to retreat.

Once the creditor has repossessed the collateral and has commenced his suit for a deficiency judgment, there are at least three possible tactics which the debtor's lawyer should consider. First, he should determine the circumstances surrounding the repossession. If the creditor's acts constituted a breach of the peace, they may well have constituted a tort. In this event, the debtor's lawyer should counterclaim for damages resulting from such actions. The institution of such a counterclaim increases the creditor's risks. In case he proceeds to judgment and loses, he will lose not only a lawyer's fee, but may also be liable for damages in an amount greater than his deficiency.

Second, debtor's lawyer should determine whether the seller's performance was defective. If he finds a defect, debtor's lawyer should consider joining the seller as a third party defendant. This joinder can have two consequences. It minimizes the holder in due course problem, inasmuch as claims based upon defective performance which could not be successfully asserted against the creditor (a holder in due course) can be asserted in the same lawsuit against the seller. More important, joinder of the seller may disturb the delicate relationship which sometimes exists between the creditor and the seller. If, as suggested above, the creditor is the supplicant in that relationship, it may be in his long-term interest to settle the suit. The continuation of the suit will inevitably cause friction between him and his seller-customer when his deficiency suit has the direct consequence of putting his good customer on the witness stand and making him publicly defend the quality, and perhaps disclose the inferiority, of his product.

The third tactic for the debtor's lawyer to consider is the liberal use of discovery. Although he may not have the time or the

money to take oral depositions, nevertheless it is easy to devise a relatively standard set of written interrogatories concerning the repossession and collection activity of the creditor and the performance of the seller. Not only is liberal discovery good practice for its own sake, but it adds another substantial cost and gives any creditor's lawyer who is working on a flat fee an additional reason for settling the case for a reasonable amount.⁹³

CONCLUSION

It is part of the liberal catechism these days that the law, both as written by the legislatures and as interpreted by the courts, favors the Establishment and unfairly discriminates against the poor.⁹⁴ While there is an undeniable kernel of truth in this idea, that truth is not universal, and the catechism should not cause one to yield too readily in cases such as the deficiency suit in which the well-represented debtor has the stronger position.

In the deficiency suit the creditor is cast in the role of plaintiff; he suffers from most of the traditional problems of plaintiffs and a few others as well. It is he who seeks a dividend from the court; it is he who wants the court to operate cheaply and quickly; it is he who must repossess without breach of the peace and give notice and resell at the right price. Finally, it is he who must fight his way through the jungle of evidentiary rules and somehow get proof of all the appropriate facts before the court. Moreover, the judges—or at least many of the appellate judges—do not favor him; they interpret the language of his contract and of the Code unfavorably to him, and they sometimes construct ingenious traps and snares to impede his progress. Thus, in the deficiency suit, the debtor occupies a powerful citadel; his lawyer should not be tricked into hasty retreat by his friends' lamentations of its weakness and his enemies' assertions of their power.

⁹³ The outer limits of ethical behavior by debtor's lawyer are difficult to define. Surely a motive to increase his opponent's expenses does not render unethical what would otherwise be the permissible pursuit of a meritorious claim; yet at some point the debtor's claim becomes so unmeritorious and his lawyer so stimulated by an intent to delay that opposition does become a violation of the ethics. See CANONS OF PROFESSIONAL ETHICS § 30. No definite guidelines mark the boundary of ethical conduct here, and each debtor's lawyer will have to stumble on as best he can.

⁹⁴ Judge Skelley Wright's recent article is an appropriately simplistic example of this thinking. Wright, *The Courts Have Failed the Poor*, N.Y. Times, March 9, 1969, § 6 (Magazine), at 26.