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Recent Developments: Uniform Commercial Code—Disposition of Collateral by Secured Party Following Default Repossession. Harris v. Bower, 266 Md. 579, 295 A.2d 870 (1972)

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purpose was to achieve "an aesthetically pleasing result"[53] is at least questionable. Thus the application of the usual standards of judicial review to the facts of *Mano Swartz* should yield a contrary result.

Mano Swartz is significant in that the court failed to recognize the interrelation between a community's aesthetic appeal and its general welfare. In time, when positions like those advocated in the states which accept aesthetic zoning emerge as the majority rule throughout the nation, a Maryland court will no doubt be swept along in the aftertow. In the intervening years, Maryland will be denied a useful tool in the struggle to enhance the beauty of its cities and to improve the quality of life for its citizens.

Ronald Carroll

UNIFORM COMMERCIAL CODE—DISPOSITION OF COLLATERAL BY SECURED PARTY FOLLOWING DEFAULT REPOSSESSION. *HARRIS V. BOWER*, 266 Md. 579, 295 A.2d 870 (1972).

In *Harris v. Bower*[1] the plaintiff brought an action for an accounting and other equitable relief with regard to the repossession of a boat. Plaintiff's late husband (Harris) purchased the boat in April 1966 from the defendant for $17,000, giving a promissory note secured by a security interest in the boat. Harris died in June 1969 leaving an outstanding balance due on the boat of the entire purchase price. The defendant refused to accept the boat in satisfaction of the debt since the market value had decreased to $13,900. In October 1969 the defendant sued to reduce the plaintiff's debt to judgment. A summary judgment was granted for $21,738. As Harris' estate was insolvent, the defendant repossessed the boat in March 1970 for the purpose of reselling it and applying the proceeds to satisfaction of the judgment. Defendant's efforts to resell in the two years that he held the boat included only one advertisement in a local paper which brought forth only three offers, all for less than the appraised market value.[2] No advertisements were placed in any trade journals or newspapers.

The plaintiff filed her bill of complaint for an accounting, damages and other relief two years after repossession of the boat by the defendant. The plaintiff contended that the defendant had accepted and retained possession of the boat in satisfaction of the obligation as was one of his options under § 9-505(2) of the Uniform Commercial

53. Mayor and City Council of Baltimore v. Mano Swartz, 268 Md. 79, 92, 299 A.2d 828, 835 (1973).

1. 266 Md. 579, 295 A.2d 870 (1972).

2. *Id.* at 582–84, 295 A.2d at 871–72.

Code,[3] despite the fact that he gave her no notice of such an intent. She further contended that the defendant did not act in a commercially reasonable manner in disposing of collateral as required by § 9-504(3) of the Uniform Commercial Code.[4]

The *Harris* court found that the defendant expressly refused to retain the collateral in satisfaction of the obligation, but that his efforts to dispose of the boat were not commercially reasonable. Consequently, the court determined that the plaintiff was entitled to a credit against the summary judgment award equal to the market value of the boat at the time of repossession.[5]

This decision involved for the first time in Maryland two important issues under the Uniform Commercial Code: (1) whether a written statement by a secured party of his intention to retain the collateral in satisfaction of an obligation is absolutely essential to a finding that a retention has occurred, and (2) the criteria for determining "commercially reasonable" conduct in the disposition of the repossessed collateral.

Section 9-505(2) provides that, if the secured party after default intends to keep the collateral in satisfaction of the debt, he must give written notice to the debtor of this intention. Upon written notice the debtor has an option to either accept the secured party's intentions or to object and require the secured party to dispose of the collateral under § 9-504.

The *Harris* court rejected the plaintiff's contention that the defendant should be held to have retained possession of the collateral in satisfaction of the debt, despite the fact that he did not give the notice required under § 9-505(2). Nevertheless, the court, by way of dicta, indicated that although it rejected the plaintiff's contention under this particular set of facts, it did not reject the principle that such written notice is not absolutely essential to a finding that the secured party in fact did retain the collateral in satisfaction of the debt.[6] The court reasoned that if the secured party conducted himself in an unreasonable

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3. MD. ANN. CODE art. 95B, § 9-505(2) (1972). The section reads in part:
> In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor .... If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification ... the secured party must dispose of the collateral under § 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

4. MD. ANN. CODE art. 95B, § 9-504(3) (1972). The section reads in part:
> 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 dispositions including the method, manner, time, place, and terms must be commercially reasonable.

5. The case was remanded for further consideration in conformity with the views expressed in the opinion.

6. 266 Md. at 587-88, 295 A.2d at 874.

manner he might be held to a retention without the formal notice.[7] In the instant case if the defendant had not expressly stated at the time of default that he did not intend to retain the boat in satisfaction for the debt, the court may have been justified in applying the principle it accepted in dictum[8] to the facts of the case.

The decisions in the few other jurisdictions that have decided this point are in general agreement with the *Harris* dictum.[9] It appears that the majority of cases have held that the notice required by § 9-505(2) serves only to allow the secured party to disregard the requirements of resale under § 9-504 when the debtor does not object to the retention.[10] The secured party's failure, after default, to serve the debtor with notice of his intention to retain the collateral in full satisfaction of the debt pursuant to § 9-505(2) would not appear to be a bar to the debtor's claiming that the creditor actually did retain the collateral in full satisfaction.[11]

The *Harris* dictum[12] and the other decisions rejecting the notice requirement as being absolutely essential[13] appear to be an equitable interpretation of § 9-505(2), since during the time the secured party had unfairly retained the collateral the debtor may have been able to apply the asset or the proceeds from its sale toward the repayment of the debt. Once the creditor has possession, he must act in a commercially reasonable manner in selling, leasing, retaining or disposing of the collateral.[14]

The plaintiff's second contention was that even if the court held that the defendant did not act in a manner that would require him to retain the collateral in satisfaction of the debt under § 9-505(2), he still did not comply with § 9-504(3), which provides the secured party with an alternative remedy (disposing of the collateral) after default by the debtor. Section 9-504(3) was derived primarily from the Uniform Trust Receipts Act[15] and the Uniform Conditional Sales Act.[16] The provisions of this section regarding the manner and method of disposition of

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7. *Id.* at 587, 295 A.2d at 874.
8. *Id.*
9. *See* Bradford v. Lindsey Chevrolet Co., 117 Ga. App. 781, 161 S.E.2d 904 (1968) (secured party retained collateral for over sixteen months before filing of suit); Farmers State Bank of Parkston v. Otten, ____ Mich. App. ____, 204 N.W.2d 178(1973) (secured party retained collateral for thirteen months); Michigan Nat'l Bank v. Marston, 29 Mich. App. 99, 185 N.W.2d 47 (1970) (secured party retained collateral for unreasonable length of time); Brownstein v. Fiberonics, 110 N.J. Super. 43, 264 A.2d 262 (1970) (secured party retained collateral four months before commencement of action).
10. Northern Fin. Corp. v. Chatwood Coffee Shop, Inc., 4 UCC REP. SERV. 674 (N.Y. App. Div. 1967).
11. *Id.*
12. 266 Md. at 587-88, 295 A.2d at 874.
13. *See* cases cited note 10 *supra*.
14. Michigan Nat'l Bank v. Marston, 29 Mich. App. 99, 185 N.W.2d 47 (1970).
15. Law of May 26, 1941, ch. 268, §§ 1-20, [1941] Laws of Md. 385-97 (repealed 1963).
16. This Act was never enacted in Maryland. Arnold, *Conditional Sales of Chattel in Maryland*, 1 MD. L. REV. 187 (1937).

the collateral are most closely aligned with the Trust Act in that the collateral may be sold at public or private sale,[17] and there is no statutory period during which the disposition must be made.[18] The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable in *all aspects*, including method, manner, time, place and terms.[19]

Authorities have pointed out that, in drafting Article 9 of the Code the draftsmen wanted to provide a flexible means for obtaining the maximum amount from the disposition of the collateral.[20] To effectuate that policy, the Code draftsmen rejected any specific restrictions on the disposition of the collateral except that it be commercially reasonable. However, in allowing this freedom of disposition, the draftsmen opened up a major area of concern in defining the term "commercially reasonable,"[21] a standard used many times in the Code.[22] The draftsmen attempted to establish under § 9-507(2)[23] certain

17. MD. ANN. CODE art. 95B, § 9-504 (1972), Comment 1, provides in part:
> The UNIFORM TRUST RECEIPTS ACT provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, he may sell such collateral at public or private sale.... THE UNIFORM CONDITIONAL SALES ACT insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the TRUSTS RECEIPTS ACT. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all the parties.

18. MD. ANN. CODE art. 95B, § 9-504 Comment 6 (1972), provides in part:
> Section 19 of the UUNIFORM CONDITIONAL SALES ACT required that sale be made not more than 30 days after possession taken by the conditional vendor. The UNIFORM TRUST RECEIPTS ACT contained no comparable provision. Here again this Subtitle follows the TRUST RECEIPTS ACT, and no period is set within which the disposition must be made, except in the case of consumer goods which under Section 9-505(1) must in certain instances be sold within ninety days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this Subtitle to encourage disposition by private sale through regular commercial channels.

19. Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 715 (E.D. Pa. 1968) (emphasis added).

20. 1 BENDER'S UCC SERV. § 8.04 [2] [a], at 883-85 (1972).

21. 39 MARQ. L. REV. 246 (1950).

22. *See* Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 210 (1967).

23. MD. ANN. CODE art. 95B, § 9-507(2) (1972), provides:
> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of dispositions. A disposition which has been approved in any judicial prodeeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

positive and negative criteria for determining whether the secured party has properly conducted himself. As summarized by Anderson in his treatise on the Code, this standard is:

> A secured party sells or disposes of the collateral in a commercially reasonable manner if he sells or disposes of it: (1) in the usual manner in any recognized market therefor; or, (2) at the price current, in any recognized market therefor, at the time of the disposition; or, (3) otherwise disposes of the collateral in conformity with reasonable commercial practices among dealers in the type of property in question; or, (4) disposes of the collateral through judicial proceeding, by any bona fide creditors' committee, or by a representative of creditors.[24]

As the above language demonstrates, Anderson supports the position that the Code draftsmen intended to fix a liberal standard in regard to the disposition of collateral.

Comment 2 of § 9-507 indicates that none of the specific methods set forth in that section "are to be regarded as either required or exclusive."[25] In situations covered by the last sentence of § 9-507(2) (sales by judicial proceedings) there appear to be no troublesome questions; however, the second sentence of § 9-507(2) is not so free from difficult questions in determining the kinds of dispositions that are to be considered commercially reasonable. The three categories of sales here, those in a recognized market, those at a price current in such a market and those in conformity with commercial practices, are all deemed sales made in a commercially reasonable manner. However, this may only be partially effective since the sales within these classes may still be attacked as violating the standard of commercial reasonableness as to other aspects of the sale, including time and place.[26] Therefore, although the Code draftsmen provide some instances where it can be assumed the secured party has acted commercially reasonable, it is necessary in most instances to examine the case law to determine the boundaries of commercial reasonableness.

The *Harris* court, after taking note of § 9-507(2), relied heavily in its consideration of commercial reasonableness on the case law of Oklahoma by drawing an analogy to *Dynalectron Corp. v. Jack Richards Aircraft Co.*[27] The collateral there was an aircraft with a fixed sales price of $75,000. The debtor defaulted and the secured party repossessed. Eight days after the repossession the secured party sold the

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24. 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-507:5 (2d ed. 1972).
25. MD. ANN. CODE art. 95B, § 9-507(2), Comment 2 (1972).
26. Certainly the draftsmen expressed their policy plainly by making all sales approved in judicial proceedings or by appropriate representatives of creditors commercially reasonable as a matter of law. On the other hand, sales in a recognized market, or at a price current in that market, and sales in conformity with dealer's practices were made commercially reasonable as a matter of law only as to manner. *See* note 20 *supra*.
27. 337 F. Supp. 659 (W.D. Okla. 1972).

aircraft for $22,500 without advertising in any customary trade journals or showing it for sale. The court concluded that the secured party did not act in a commercially reasonable manner and therefore was not entitled to a deficiency judgment against the debtor.[28]

The case relied upon by the *Dynalectron* court was *Old Colony Trust Co. v. Penrose Industrial Corp.*[29] That decision established some relevant tests for determining what is commercially reasonable conduct. The court stated:

> The pragmatic considerations under "commercial reasonableness" must relate to "every aspect of the disposition," § 9-504(3), and presumably the list that follows in the second sentence of 9-504(3)—"method, manner, time, place and terms"—is not exhaustive . . . . The relevant test is thus whether every aspect of the sale is commercially reasonable. It is commercially reasonable if the party (1) acts in good faith, (2) avoids loss, and (3) makes an effective realization. Furthermore, the party may obtain court approval if he (4) sells in the usual manner in a recognized market, or (5) sells at the current price in a recognized market, or (6) sells in conformity with reasonable commercial practices among dealers in the type of property.[30]

In *Old Colony* the court commented that the meaning of a "secured party acting in good faith"[31] was unclear. The comment to § 2-706[32] of the Code states that the standard of "in good faith and in a commercially reasonable manner" as applied in the Code is more comprehensive than the standard of "reasonable care and judgment" that had been established under the Uniform Sales Act.[33] The *Old Colony* court questioned whether the Code standard can be "more comprehensive" than the Uniform Sales Act standard since the standard in the Sales Act has been defined to mean "reasonable care and diligence to secure the best obtainable price in a fair sale . . . according to established business methods."[34] Despite the court's apprehension as to the meaning of "in good faith," it still provided an additional basis along with § 9-507(2) for determining whether a secured party has acted with commercial reasonableness in disposing of collateral. As *Harris* based its conclusion on a combination of § 9-507(3) and the *Dynalectron* decision, which is in turn based on the leading case of *Old Colony*, it appears that the *Harris* court had sound authority on which to base its conclusion.

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28. *Id.* at 663.
29. 280 F. Supp. at 698.
30. *Id.* at 715 (emphasis added).
31. *Id.* at 714.
32. MD. ANN. CODE art. 95B, § 2-706(1972).
33. 280 F. Supp. at 714.
34. Obrecht v. Crawford, 175 Md. 385, 2 A.2d 1 (1938).

The *Harris* decision that the defendant, who held the boat for two boating seasons without seriously attempting to dispose of it, did not act with commercial reasonableness appears to be equitable and in accord with the decisions on point.[35] Although it is somewhat difficult to apply the standards of § 9-507(3) since the defendant took no affirmative actions, it is not difficult using the standards of *Old Colony* to reach the same conclusion as was reached in *Harris*. Considering the short depreciation schedule of a boat, the defendant neither acted "in good faith" nor with an effort to avoid a loss by holding the plaintiff's boat in drydock for two years without seriously attempting to dispose of it.

By the *Harris* decision Maryland has adopted the sound majority view that commercial reasonableness must reach every aspect of the sale. This view appears to be in harmony with the intent of the draftsmen and the best interests of parties engaged in a commercial undertaking.

Jon W. Brassel

CRIMINAL LAW—SEARCH AND SEIZURE—INFORMATION FROM UNNAMED INFORMANT HELD TO BE RELIABLE WITHOUT ANY DEMONSTRATION OF THE INFORMANT'S INHERENT CREDIBILITY. *THOMPSON V. STATE*, 16 Md. App. 560, 298 A.2d 458 (1973).

In *Thompson v. State*[1] the Maryland Court of Special Appeals affirmed the conviction of the defendant for possession of heroin. Based upon information obtained from an unnamed informant (which had been given to the informant by a street seller of narcotics when he was attempting to consumate a prearranged "buy"),[2] the police ar-

35. *See* California Airmotive Corp. v. Jones, 415 F.2d 554 (6th Cir. 1969) (secured party sold repossessed collateral for $70,000 lower than the purchase price less than one year after contract); Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968) (mere price discrepancy does not establish that a sale of collateral was not commercially reasonable); Frontier Inv. Corp. v. Belleville Nat'l. Sav. Bank, 119 Ill. App. 2d 2, 254 N.E.2d 295 (1969) (judicial approval of sale is conclusive of its commercial reasonableness); Family Fin. Corp. v. Scott, 24 Pa. D. & C.2d 587 (1961) (where there is a wide discrepancy between any standard of value recognized in the trade and the sale price, there appear to be equitable grounds for opening the deficiency judgment).

1. 16 Md. App. 560, 298 A.2d 458 (1973).

2. The street seller of narcotics, when finding himself with an insufficient supply of heroin for sale, told his prospective purchaser (the primary informant) that heroin would be available for purchase after a one o'clock drop by "Guy." The primary informant was able to specify that the reference to "Guy" was a reference to the defendant.

When a primary informant is a mere conduit for hearsay information from a secondary source, the information evaluation process of Aguilar v. Texas, 378 U.S. 108 (1964), must begin at the secondary level. Dawson v. State, 11 Md. App. 694, 701 n.3, 276 A.2d 680, 683 n.3 (1971), *cert. denied*, 263 Md. 711 (1971).