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"INVOLUNTARY STRICT FORECLOSURE" UNDER SECTION 9-505(2) OF THE UNIFORM COMMERCIAL CODE: TARPIT FOR THE TARDY CREDITOR

Wendell H. Holmes*

INTRODUCTION

Secured parties everywhere should harken to the tale of poor Byron Millican.¹ It seems that in May 1979, Mr. Millican (d/b/a Millican Auto Sales) had the misfortune to sell a used Buick Skylark to one Jenny Turner, taking in payment a retail installment contract for the price plus finance charge totalling \$4,228.20.² The contract was sold with recourse by Millican to the First National Bank of New Albany, Mississippi. Unfortunately for Mr. Millican, but all too familiar to those in the used car business, Turner proved to be a poor credit risk; after making only a few of the scheduled 36 payments, Turner defaulted.³

Even more unfortunately for Mr. Millican, the car, once located by the repossession agent of the Bank,⁴ was a mess.⁵ It attracted no interest from potential buyers after the Bank reassigned the contract to Millican in July 1981.⁶ Finally, in February 1982, Millican sued Turner for the amount he had paid the bank upon reassignment, interest, collection fees, and costs. The trial court ultimately held for Turner. No doubt to the amazement of both Millican and his attorney, in *Millican v. Turner*⁷ the Supreme Court of Mississippi upheld the lower court's basic interpretation of section 9-505(2)⁸ of the Uniform Commercial Code (UCC): If Millican's retention of the car for six months before filing suit was "an unreasonably long time," he would be deemed to have retained the car in satisfaction of the debt and barred from suing on the underlying obliga-

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1. See *Millican v. Turner*, 503 So. 2d 289 (Miss. 1987).

2. *Id.* at 290.

3. *Id.*

4. There was substantial disagreement as to timing: Turner claimed the repossession occurred in "August or December of 1979"; Millican placed it in the "spring of 1981." *Id.* at 290.

5. According to the court, when the repo man located the car, "the tires were flat, the windshield was broken, the inside door panels were loose, and grass had grown up around the car, as if it had been abandoned." *Id.*

6. Millican claimed that he attempted, unsuccessfully, to sell the car for 10 to 12 months after reassignment. *Id.*

7. 503 So. 2d 289 (Miss. 1987).

8. Miss. CODE ANN. § 75-9-505(2) (Supp. 1989). For the full uniform text of the statute, see *infra* text at note 44.

tion.⁹ The court remanded the case for a factual determination of whether Millican's delay in acting was unreasonably long.¹⁰

Imagine the incredulity with which Mr. Millican must have received the news that he might have discharged a debt of at least \$2,583.90 (the amount he was required to pay the Bank) by retaining possession, for six months prior to filing suit, of a car with an estimated worth of \$800.00.¹¹ On the other hand, had Mr. Millican—or his lawyer—been attentive to the caselaw developing under section 9-505(2), he might have been spared any shock.

No doubt it comes as little surprise that more cases interpreting article 9 of the UCC deal with issues of default than any other single topic. In turn, within the area of default the preponderance of cases has involved the effect of allegedly commercially unreasonable sales of collateral on the secured party's right to a deficiency under section 9-504.¹² Likewise, scholarly writing on default has focused primarily upon section 9-504 and the problems attendant to resale.¹³ Largely unnoticed, however,

9. *Millican*, 503 So. 2d at 291-92. The history of the litigation is, itself, fairly interesting. Turner first defended on the ground that Millican had breached his duties under § 9-504 in making a commercially unreasonable sale and not giving her notice of the sale. No sale having been made, of course, that argument did not get very far, and Turner eventually confessed a motion to dismiss her counterclaim for violation of § 9-504. *Id.* at 290. However, Turner thereafter amended her answer to raise retention in satisfaction of § 9-505(2). The trial court (sitting without a jury) returned a verdict for Turner based on both § 9-505(2) and common law accord and satisfaction. Turner wisely elected not to pursue the accord and satisfaction theory on appeal, since the facts did not support it. See RESTATEMENT (SECOND) OF CONTRACTS § 281 (1979) (defining "accord" as a contract whereby a party promises to accept a substituted performance in satisfaction of an existing duty on the part of the performing party). Since there was no mutual assent to any settlement, an accord and satisfaction could not have occurred.

For further discussion of the invocation of accord and satisfaction in cases under § 9-505(2), see *infra* note 90 and accompanying text.

10. *Millican*, 503 So. 2d at 291-92. The court suggested that the trier of fact should consider, *inter alia*, the type of collateral, depreciation rate, and relevant market, and that expert testimony might well be introduced to aid the fact-finder. *Id.*

11. *Id.* at 290. Note also the corresponding evaporation of whatever settlement leverage Millican might otherwise have had prior to the appeal.

12. For general background and collections of cases on this issue, see 9 R. ANDERSON, UNIFORM COMMERCIAL CODE §§ 9-504:79 to :94 (1985); 9 W. HAWKLAND, R. LORD & C. LEWIS, UNIFORM COMMERCIAL CODE SERIES § 9-507:07 (1986); T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 9-504[A][8] (Cum. Supp. No. 1 1989); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 25-19 (3d ed. 1988). For further discussion, see *infra* notes 29-43 and accompanying text.

13. For recent articles on this issue, see Donaldson, *Commercially Reasonable Disposition of Collateral Under Article 9 of the UCC: The Question of the Burden of Proof*, 20 U.C.C. L.J. 307 (1988); Garner & Alber, *Disposition of Repossessed Goods Under Article 9 of the Texas U.C.C.*, 11 TEX. TECH L. REV. 563 (1980); Page, *A Secured Party's Right to a Deficiency Judgment After Non-Compliance with the Resale Provisions of Article 9*, 60 N.D.L. REV. 531 (1984); Rudow, *Determining the Commercial Reasonableness of Sale of Repossessed Collateral*, 19 U.C.C. L.J. 139 (1986); Comment, *Failure of Notice in the Disposition of Collateral: The Effect on Debtor and Creditor Rights Under the Alabama Uniform Commercial Code*, 14 CUMB. L. REV. 181 (1984); Comment, *California Article 9 No-Deficiency Rule: Undermining the Secured Party's Security*, 34 HASTINGS L. J. 153 (1982);

is an ever-expanding number of cases where the secured party does *not* dispose of the collateral, at least for some more or less extended time, but rather retains it without communicating with the debtor. When he finally sues on the debt—with or without having first sold the collateral—the question addressed in *Millican* is posed: What, if anything, are the consequences of delay? Since the “strict foreclosure” provision of the UCC, section 9-505(2),¹⁴ governs expressly only those instances in which a secured party notifies the debtor of his desire to keep the collateral in satisfaction of the debt, courts have commonly gone beyond the language of the Code to fashion a response. With increasing frequency, the response, as in *Millican*, is that section 9-505(2) can be forced upon the secured party as well as elected by him—in the words of one authority, that the secured party may be subject to “involuntary strict foreclosure.”¹⁵

This article will analyze the concept of involuntary strict foreclosure and attempt to place it within the broader context of creditors’ remedies and debtors’ rights under part 5 of article 9. The article first reviews the remedial scheme of part 5 and focuses upon the ostensible role of section 9-505(2) within the statutory pattern. It then discusses the real and personal property analogues to section 9-505(2) and demonstrates that they are imperfect frames of reference for interpretation of section 9-505(2). Thereafter, the article reviews three lines of cases that have developed under section 9-505(2) and suggests that the proper approach is taken by those courts that have rejected the notion of involuntary strict foreclosure. The article concludes, however, that the judicial experience with section 9-505(2), just as with the resale cases under section 9-504, illustrates that the remedial provisions of part 5 of article 9 are fundamentally flawed and in need of revision.

I. THE ARTICLE 9 REMEDIAL SCHEME

A. Creditors’ Remedies

The default and realization rules of part 5 of article 9¹⁶ give the secured party maximum freedom of choice in formulating a plan for collecting the balance of the secured indebtedness. The fundamental rule is stated in section 9-501: “[The secured party] may reduce his claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure The rights and remedies referred to in this subsection are cumulative.”¹⁷

Comment, *The Secured Creditor’s Right to a Deficiency Judgment After Misbehavior Under U.C.C. § 9-504(3)*, 21 Hous. L. Rev. 359 (1984).

14. For the full text of the section, see *infra* note 44 and accompanying text.

15. W. HAWKLAND, R. LORD & C. LEWIS, *supra* note 12, § 9-505:09.

16. U.C.C. §§ 9-501 to 507 (1987).

17. U.C.C. § 9-501(1) (1987). The primary purpose for this statement is to reject the doctrine of election of remedies, which applied at common law to conditional sales transactions. Under this rule, the vendor could either repossess or sue on the debt, but not both; assertion of either right would forfeit the other. See, e.g., Warren, *Statutory Damages and the Conditional Sale*, 20 OHIO ST. L.J. 289, 290-91 (1959). Sections 9-501(1) and (5) vitiate

The Code then proceeds in a logical progression. Under section 9-503, default entitles the secured party to possession of the collateral; this may be effected either through judicial proceedings such as replevin or by self-help if there is no breach of the peace.¹⁸ Assuming that after default there is no mutually negotiated settlement of the secured party's claim,¹⁹ he may proceed in regard to the collateral in two ways: either resale under section 9-504 (with the right thereafter to sue for any deficiency²⁰) or retention in full satisfaction of the indebtedness under section 9-505. In all events, the rules are broad, generally non-technical, and keyed to the standard of "commercial reasonableness." In the words of one commentator, the goals of the Code are twofold:

First, to assure the highest possible realization price, a considerable discretion is conferred upon the secured party seeking to realize upon his collateral. There is a remarkable absence of stringent requirements for mandatory public sales, detailed public notices, or other specific prohibitions. For the most part, the Code requires only that the secured party must be "commercially reasonable" in making the disposition. Second, the Code aims at increasing the ability of a court to review the conduct of the secured party in the disposition of the collateral. An explicit statutory grant permits the court to interfere prospectively with dispositions that will violate the Code requirements and to require the payment of money damages when the defective dispositions have already occurred.²¹

the idea of election. Hogan, *The Secured Party and Default Proceedings Under the U.C.C.*, 47 MINN. L. REV. 205, 249 (1962). The Uniform Conditional Sales Act also rejected the election of remedies doctrine. U.C.S.A. § 24 (1918).

In theory, then, the secured party under article 9 can pursue various avenues for collection simultaneously, subject only to the imperative that he cannot collect more than the amount owed. White and Summers note, however, that the cases on "double-barrel" attacks on debtors are split, with some courts allowing multiple remedies to be pursued simultaneously, while others force the secured party to exhaust one remedy before pursuing the other. In either event, courts seem sensitive to the underlying problem of creditor harassment of debtors. J. WHITE & R. SUMMERS, *supra* note 12, § 25-4, at 1197-98.

18. U.C.C. § 9-503 (1987).

19. The U.C.C. prohibits any pre-default waiver of rights by debtors. *Id.* § 9-504(3). This was also the approach of the Uniform Conditional Sales Act. U.C.S.A. § 26 (1918).

20. U.C.C. § 9-504(2) (1987).

21. Hogan, *supra* note 17, at 207. In so doing, the Code drafters drew heavily from experience under the two most important pre-Code statutes, the Uniform Conditional Sales Act (UCSA) and the Uniform Trust Receipts Act (UTRA).

The UCSA contained detailed rules governing the seller's rights upon default. *E.g.*, unless the seller gave the buyer prior notice of his intention to repossess under § 17 (in which case the buyer's redemption rights were eliminated), he was forced to hold the goods for 10 days, during which the buyer could redeem by complying with the terms of § 18. In any event, unless the seller elected to retain the goods under § 23, he was required under § 19 to make a sale at public action, with detailed rules on time and notice (including posting and publication in some cases). As Grant Gilmore pointed out, not only did this virtually guarantee a deficiency, but also it contained a plethora of possibilities for technical errors by the seller that engendered constant challenges by defaulting buyers. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 44.4, at 1227-28 (1965). The attempt (albeit largely unsuccessful) of the Code drafters to encourage private rather than public sales is perhaps the

B. Debtor's Rights

The rights provided to the defaulting debtor under article 9 can be easily summarized. First, the debtor is entitled to know what the secured party intends to do with the collateral. If the secured party plans to sell it, then he must give the debtor notice of the sale unless the collateral is perishable, is subject to a rapid decline in value, or is sold on a recognized market.²² If the creditor's intent is to keep it in satisfaction of the debt, then he must give the debtor notice of this as well; and if the debtor objects, he can force a sale.²³ In either event, if the collateral is sold, the debtor has a right to any surplus remaining after payment of the expenses of disposition, the primary secured debt, and subordinate security interests of which the selling secured party has been notified in writing.²⁴ The debtor also has a right of redemption.²⁵

While section 9-504 on resale is often said to be the central rule of part 5 for the secured party,²⁶ the key rules from the perspective of the debtor are those found in section 9-507. Because of the importance of

most important legacy of the UCSA experience. U.C.C. § 9-504 official comment 1 (1977).

On the other hand, the UTRA was almost completely unregulated as regards default. Under the UTRA, the entruster could, after five-days notice to the trustee (either personal or ordinary mail), "sell the goods, documents or instruments for the trustee's account, at public or private sale, and [could] at public sale himself become a purchaser." U.T.R.A. § 6(3)(b). As Gilmore notes, rarely did the trustee have any equity to protect, and he asserts that there was never a case in which an entruster was sued for improper disposition. G. GILMORE, *supra*, at 1228-30. The Code embraces the UTRA approach, but adds the talismanic mandate of commercial reasonableness and provision for judicial review under § 9-507. See *infra* notes 22-28 and accompanying text.

22. The Code requires notice of the time and place of a public sale, or the time after which a private sale is to be made. U.C.C. § 9-504(3) (1987). The Code does not specify arbitrary time limits for either sale or notice except for the special case of consumer goods under § 9-505(1). See *infra* notes 44-49 and accompanying text. Indeed, the Code does not explicitly demand even written notice, although the command that notice be "sent" in § 9-504(3), coupled with the definition of "send," connotes the contemplation of written notice. See U.C.C. § 1-201(38)(1987) ("send" defined as "in connection with any writing or notice . . . to deposit in the mail or deliver for transmission by any other usual means of communication"). In any event, only the foolhardy creditor would rely upon oral (ergo objectively unverifiable) notice to satisfy § 9-504. The debtor may, of course, waive the right to notification after default. *Id.* § 9-504(3).

23. U.C.C. § 9-505(2) (1987).

24. *Id.* § 9-504(1)(2).

25. *Id.* § 9-506:

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under section 9-504 or before the obligation has been discharged under section 9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

26. See, e.g., J. WHITE & R. SUMMERS, *supra* note 12, § 25-9, at 1213 (§ 9-504 is "guts" of part 5).

section 9-507 to the thesis of this article, it is set forth in full below:

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.

(2) 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 sale also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding 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.²⁷

While much of this section is self-explanatory, for present purposes attention should be drawn to the first two sentences of subsection (1). The first sentence countenances pre-disposition judicial review of the secured party's conduct and authorizes the court to issue either mandatory or prohibitory injunctions, as appropriate, to redress creditor misconduct. The second sentence, however, deals with post-disposition review of creditor misconduct, on its face entitling the debtor to recover damages for "any loss caused." Probably the key default issue under the Code, however, has been what *other* relief, beyond damages proved, is available to the aggrieved debtor—most especially, the denial of a deficiency judgment.²⁸

As previously noted, where the creditor fails to comply with the resale rules of section 9-504, the issue of his right to a deficiency has been repeatedly litigated and the results well-documented in the academic literature.²⁹ While I see no need in this article to replot this ground at

27. U.C.C. § 9-507 (1987).

28. Obviously, other claims may be asserted: for example, damages in conversion for wrongful repossession under § 9-503.

29. For cases and commentary on this issue, see *supra* notes 12-13 and accompanying text.

length, a brief summary is necessary for the reader who is not well-acquainted with this issue.³⁰ In effect, three divergent lines of cases have arisen: The "absolute bar" cases; the "rebuttable presumption" cases; and the "damages only" cases.³¹

The absolute bar cases hold, on various theories, that the misbehaving creditor loses entirely his right to a deficiency. The seminal case, *Skeels v. Universal C.I.T. Credit Corp.*,³² viewed the essential injury as the loss of the debtor's right of redemption when deprived of notice and the opportunity to bid at the sale. While other courts have espoused different rationales, the basic premise is stated by Professor Gilmore: "We may conclude that the secured party's compliance with the default provisions of Part 5—both the formal requirements of notice and the like and the substantial requirement of a 'commercially reasonable sale'—is a condition precedent to the recovery of a deficiency."³³

While Gilmore's prescience about much of the future of Article 9 is undeniable, on this point he fell wide of the mark, because the majority of jurisdictions have adopted the "rebuttable presumption" rule. The leading case, *Norton v. First National Bank*,³⁴ held that the secured party who failed to give notice was not absolutely barred from a deficiency. Rather, the court stated that it would "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."³⁵ By virtue of this decision and a series of others that ensued,³⁶ the rebuttable presumption rule also became known as the "Arkansas Rule."³⁷ This name has now, however, assumed a delicious irony: In 1987, Arkansas abandoned the rebuttable presumption rule in favor of the absolute bar rule.³⁸ Whether this presages a more general shift in that direction is, of course, too early to tell.³⁹

30. For a recent case summarizing the various approaches, see *Wang v. Wang*, 440 N.W.2d 740 (S.D. 1989). Perhaps the most useful general discussion is in J. WHITE & R. SUMMERS, *supra* note 12, § 25-19, and the following text draws heavily upon their treatise.

31. The last characterization is that of the author only.

32. 222 F. Supp. 696 (W.D. Pa. 1963), *vacated on other grounds*, 335 F.2d 846 (3d Cir. 1964).

33. G. GILMORE, *supra* note 21, § 44.9.4, at 1264.

34. 240 Ark. 143, 398 S.W.2d 538 (1966).

35. *Id.* at 150, 398 S.W.2d at 542.

36. For summaries, see J. WHITE & R. SUMMERS, *supra* note 12, § 25-19, at 1249-50 nn.20-28.

37. See, e.g., *Wang v. Wang*, 440 N.W.2d 740 (S.D. 1989).

38. *First State Bank of Morrilton v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987). It should be noted that this ideological shift is not unique. Georgia at one time embraced the absolute bar rule, *Gurwitch v. Luxrest Furniture Mfg.*, 233 Ga. 934, 214 S.E.2d 373 (1975), but in 1987 it changed to the rebuttable presumption rule. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987).

39. As of this writing the most recent state supreme court case on the issue, *Wang v. Wang*, 440 N.W.2d 740 (S.D. 1989), adopted the "Arkansas Rule," without acknowledgment that it is no longer the rule in Arkansas.

Finally, a smaller number of courts have read the Code literally and found that the debtor is entitled only to the relief that section 9-507(1) explicitly provides: a set-off for whatever damages he can prove he suffered as a result of the secured party's misdoings. An illustrative case is *Beneficial Finance Co. v. Young*,⁴⁰ in which the Supreme Court of Oklahoma held that damages under section 9-507(1) adequately protected debtors. The court specifically noted that part 5 is silent on any grounds for denial of a deficiency and stated that any such forfeiture would be impermissible as punitive damages not sanctioned by section 1-106.⁴¹

Young and similar cases are no doubt correct in holding that part 5 of article 9 contains no suggestion of any intention to bar a creditor's right to a deficiency based solely upon noncompliance with the statute. Were that the end of the issue one could unreservedly endorse the result in *Young*. Unfortunately, it is not. To say that an exclusive statutory right to actual damages proved adequately protects debtors (at least in the absence of affirmatively tortious conduct) is either breathtakingly disingenuous or naive. Even the principal drafter of article 9, Professor Gilmore, referred to the "liability for loss" standard in section 9-507(1) as a rule "of almost childlike simplicity" and suggested that "the draftsmen might have been better advised if they had spelled out their intentions somewhat more clearly."⁴² It may be true, as Gilmore goes on to suggest, that the drafters thought that it was self-evident that a proper resale was a condition precedent to recovery of a deficiency. That, after all, was the almost universal result in cases construing the Uniform Conditional Sales Act notwithstanding express provision for only a right to "actual damages, if any," and in all events a statutory penalty of "one-fourth of the sum of all payments which have been made . . . plus interest."⁴³ We are now, however, a generation away from the prior uniform security laws, and many lawyers and judges who deal with these issues know only of the UCC.

Thus, it is *not* self-evident that the UCC does not mean just what it says. What it says is, however, not a sufficient shield for the debtor in many cases. To be sure, there are clearly cases in which technical non-compliance does not injure the debtor in any quantifiable way. In those cases, imposition of the "absolute bar" rule is surely penal, and one need go no further than the Code language to reach an equitable result. It is

40. 612 P.2d 1357 (Okla. 1980).

41. *Id.* at 1359. Under § 1-106, punitive damages are recoverable only "as specifically provided in this Act or by other rule of law." U.C.C. § 1-106(1) (1987). The court stated that the denial of a deficiency is penal in nature and that Article 9 obviously has no provision for punitive damages. However, the court went on to hold that such "punishment" of creditors could be justified by a showing of "malice, fraud, or oppression." *Young*, 612 P.2d at 1360.

For other cases adopting the "damages only" rule, see J. WHITE & R. SUMMERS, *supra* note 12, § 25-19, at 1252 nn. 32-34.

42. G. GILMORE, *supra* note 21, § 44.9.2, at 1255. Interestingly, Louisiana, the last state to enact Article 9, adopted the "damages only" position statutorily. See LA. REV. STAT. ANN. § 10:9-507(1) (Supp. 1991).

43. U.C.S.A. § 25 (1918); see G. GILMORE, *supra* note 21, § 44.9.2, at 1256-57.

just as true that in other cases the debtor may very well suffer actual injury but have neither the resources, sophistication, nor opportunity to prove his damages at trial. In those instances, section 9-507(1) is simply ineffective, and history has shown that ineffective remedial rules will invariably lead courts to find some other means to police misconduct. The "rebuttable presumption" rule may be the most reasonable way of doing this. The place for such a device, however, is in the Code itself, or inevitably conflicting interpretations of a purportedly uniform statute will develop.

The purpose of this brief exegesis of the deficiency dilemma under section 9-504 is to suggest that there are basic shortcomings in the Code's remedial scheme. What has seemingly gone unnoticed by many, however, is that courts have found another tool for reviewing other forms of perceived creditor misconduct in the seemingly innocuous rule of "strict foreclosure" under section 9-505. Before examining those cases in detail, however, I will first discuss the literal provisions of section 9-505 and its intended role in part 5 of article 9.

C. Section 9-505

To the casual observer, the text of section 9-505 would appear to be the source of little controversy because it seems that it would, as a practical matter, be rarely invoked:

(1) If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this Part a secured party who has taken possession of collateral must dispose of it under Section 9-504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under Section 9-507(1) on secured party's liability.

(2) 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 he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.⁴⁴

44. U.C.C. § 9-505 (1987). Prior to 1972, notice was required to be given under subsec-

The rationale of subsection (1) is clear: If a consumer debtor has achieved substantial equity in the collateral—as he surely would upon payment of sixty per cent of the price—then that equity should be preserved by forcing the secured party to sell the collateral and presumably turn the surplus over to the debtor.⁴⁵ Likewise, the ninety-day rule recognizes that consumer goods ordinarily depreciate rapidly and that expeditious action by the creditor should be mandated.⁴⁶ Not surprisingly, this has generated very few reported cases.⁴⁷ In one sense, forcing a sale may be perverse, because the rate of depreciation may effectively guarantee a deficiency judgment. One should not overlook, however, that there is in addition to recovery in conversion an express penalty for violation of this section: the credit service charge plus ten per cent of the principal indebtedness or the time price differential plus ten per cent of the cash price.⁴⁸ At least one court has awarded this penalty where it exceeded the value of the collateral.⁴⁹

The present focus is, of course, subsection (2). Obviously, after default the secured party and debtor may enter into a negotiated settlement that could entail the secured party's retention of the collateral plus payment by the debtor of all, part, or no amount of the deficiency in the value of the collateral. If the secured party is satisfied with the collateral alone, though, section 9-505(2) provides a unilateral means to the same ends, so long as the debtor fails to object.

Section 9-505(2) is generally described as a rule of convenience. In the words of the official comment, "[e]xperience has shown that the parties are frequently better off without a resale of the collateral; hence this section sanctions [an] alternative arrangement."⁵⁰ So long as the debtor

tion (2) to all secured parties who had properly filed a financing statement against the debtor in addition to those whose interest was known to the secured party, and the required time period was 30 days. U.C.C. § 9-505(2)(1962). The class of persons entitled to notice was narrowed in 1972 to those who have given the secured party notice of their claims, and the time shortened to 21 days. A similar change regarding notice to other creditors was made in the resale rule. Compare U.C.C. § 9-504(3) (1962) with U.C.C. § 9-504(3) (1987).

45. U.C.C. § 9-505 official comment 1 (1987). Under the Uniform Conditional Sales Act, resale (for any transaction) was mandatory if the buyer had paid over 50% of the price. U.C.S.A. § 19 (1918).

46. W. HAWKLAND, R. LORD & C. LEWIS, *supra* note 12, § 9-505:02, at 614. It should be noted that this is the sole provision in article 9 requiring the secured party to dispose of the collateral within an arbitrary time period.

47. Those few include *Keller v. La Rissa, Inc.*, 60 Haw. 1, 586 P.2d 1017 (1978); *Marshall v. Fulton Nat'l Bank*, 145 Ga. App. 190, 243 S.E.2d 266 (1978); *Chicago City Bank & Trust Co. v. Anderson*, 26 Ill. App. 3d 421, 325 N.E.2d 701 (1975); *Michigan Nat'l Bank v. Marston*, 29 Mich. App. 99, 185 N.W.2d 47 (1970); *Charley v. Rico Motor Co.*, 82 N.M. 290, 480 P.2d 404 (1971).

48. U.C.C. § 9-507(1) (1987).

49. See *Crosby v. Basin Motor Co.*, 83 N.M. 75, 488 P.2d 127 (1971) (statutory damages of \$236.32 awarded where conversion value was \$231.47).

50. U.C.C. § 9-505 official comment 1 (1987). It might be noted that the statute contains ambiguities that this article does not seek to address. First, it speaks of the secured party retaining the collateral "in satisfaction of the debtor's obligation." U.C.C. § 9-505(2) (1987). Presumably, this means retention of *all* collateral in *complete* satisfaction of the

would not expect to realize any appreciable surplus from the disposition of the collateral, one would assume that he would be all too happy to be absolved of his potential liability for a deficiency judgment (although he is also losing not only the collateral but also the payments he has made).⁵¹ Gilmore explained the rationale for the rule as follows: "The best and simplest way of liquidating any secured transaction, default having occurred, is for the secured party to keep the collateral as his own free of the debtor's equity, waiving any claim to a deficiency judgment."⁵² The only potential flaw Gilmore seems to have perceived in the process was the possibility of oppressive forfeiture agreements, but he viewed this as adequately addressed by "publicity through notice and the enlightened self-interest of the debtor, competing secured creditors, and representatives of unsecured creditors in insolvency proceedings."⁵³

D. Section 9-505(2) Analogues

Gilmore stated that the analogues of section 9-505(2) were twofold: the land mortgagee's right to a decree of strict foreclosure and the conditional seller's right to eliminate the equity of redemption by repossessing the goods.⁵⁴ While the Code rule shares characteristics of both, neither is a perfect analogy. Indeed, the differences that exist suggest that even taken literally section 9-505(2) may not be a particularly wise provision.

To begin with, strict foreclosure of a land mortgage clearly has one effect in common with the Code rule: The mortgagor loses his equity of

obligation, but the Code is not explicit on this point. Of course, no one is hurt if the secured party elects to retain *part* of the collateral in satisfaction of *all* obligations, but such largesse on the creditor's part is highly unlikely. More pernicious would be a proposal to retain *all* of the collateral as satisfaction of only *part* of the obligation, meaning that a deficiency judgment would still be possible. The Code's language does not expressly foreclose this, but surely it is beyond the policy of the statute. See W. HAWKLAND, HAWKLAND'S HANDBOOK ON CHAPTER 9 LOUISIANA COMMERCIAL LAW § 5:10 (1990).

Moreover, the statute does not contemplate strict foreclosure through the initiative of the debtor. Again, such an arrangement could be expressly negotiated, but what of the simple abandonment of the collateral by the debtor into the secured party's possession? The last state to adopt article 9, Louisiana, added non-uniform amendments to § 9-505 to address this. Under the Louisiana version, abandonment or surrender of collateral by a consumer is deemed to be an offer in satisfaction of the debt or for sale, but the secured party will be deemed to have accepted the goods in satisfaction of the debt unless he gives contrary notice to the debtor within 20 days. LA. REV. STAT. ANN. § 10:9-505(3) (Supp. 1990). Conversely, in cases not involving consumer goods, abandonment or surrender of the collateral is deemed to be for the purpose of sale, absent contrary written agreement. *Id.* § 10:9-505(4).

Of course, in other jurisdictions silent retention of the collateral following abandonment can give rise to the involuntary strict foreclosure problem that is the subject of this article.

51. Hogan, *supra* note 17, at 215 n. 51.

52. G. GILMORE, *supra* note 21, § 44.3, at 1220.

53. *Id.* at 1226. The proceedings of the New York Law Revision Commission likewise reflect no awareness of the potential for involuntary strict foreclosure. See 2 State of New York, Report of the Law Revision Commission and Record of Hearings on the Uniform Commercial Code 1113, 1170-71 (1954).

54. G. GILMORE, *supra* note 21, § 44.3, at 1220.

redemption.⁵⁵ Indeed, strict foreclosure historically developed in response to the recognition of redemption rights and was initially the only means to their termination.⁵⁶ However, in America strict foreclosure did not necessarily deprive the mortgagee of his right to sue to enforce the personal obligation of the mortgagor and, thereby, to obtain a deficiency, although there was apparently a split of authority.⁵⁷ Moreover, strict foreclosure of a land mortgage was by definition a *judicial* proceeding, and in any event has now been abandoned in most jurisdictions in favor of sales, either judicial or by power-of-sale mortgages.⁵⁸ Clearly, though, the land mortgagee could not by strict foreclosure cause a unilateral forfeiture of the equity of redemption without judicial intervention.

In fact, in the sense that it is consensual rather than judicial in nature and involves not only the elimination of the debtor's equity but also the satisfaction of the underlying obligation, section 9-505(2) more closely resembles the use of a deed absolute or deed in lieu of foreclosure. The deed absolute is a purchase of the mortgagor's equity of redemption in which the mortgagor conveys the fee simple title to the mortgagee in exchange for the cancellation of the underlying obligation.⁵⁹ Like section 9-505(2), this procedure appears to have obvious advantages to both creditor and debtor: It is quicker than a foreclosure sale, nonadversarial, minimizes expenses, is confidential rather than public, and settles each party's rights in a single transaction.⁶⁰ On the other hand, the inherently superior bargaining position of the mortgagee and potential for oppressive conduct has led most courts to examine such transactions with the strictest scrutiny for evidence of overreaching or, in some cases, even to apply a presumption of fraud that the mortgagee must rebut.⁶¹

Once again, however, important distinctions exist between the deed absolute and section 9-505(2). The most obvious is that the deed absolute requires affirmative participation by the debtor, who must execute a deed

55. 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* ¶ 469 (rev. ed. 1987); 10 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 5160, at 133 (J. Grimes repl. ed. 1957).

56. IV AMERICAN LAW OF PROPERTY § 16.178, at 427 (A. Casner ed. 1952); G. THOMPSON, *supra* note 55, § 5160, at 132.

57. See R. POWELL & P. ROHAN, *supra* note 55, ¶ 469, at 37-348; G. THOMPSON, *supra* note 54, § 5162, at 139 (at common law there was no deficiency under strict foreclosure unless court ordered a public sale); IV AMERICAN LAW OF PROPERTY, *supra* note 56, §§ 16.178-79, at 429-33 (in England, suit on underlying obligation after foreclosure reopens foreclosure and allows redemption; opposite rule said to apply in America but courts have split).

58. IV AMERICAN LAW OF PROPERTY, *supra* note 56, § 16.179, at 431-32; R. POWELL & P. ROHAN, *supra* note 55, ¶ 469, at 37-346-47; G. THOMPSON, *supra* note 55, § 5160, at 134-35.

59. IV AMERICAN LAW OF PROPERTY, *supra* note 56, § 16.63, at 117-18; R. POWELL & P. ROHAN, *supra* note 55, ¶ 469.1 [1], at 37-348-49; Kelley, *Foreclosure by Contract: Deeds in Lieu of Foreclosure in Missouri*, 56 UMKC L. REV. 633 (1988).

60. R. POWELL & P. ROHAN, *supra* note 55, ¶ 469.1 [1], at 37-349; Kelley, *supra* note 59, at 640-42.

61. R. POWELL & P. ROHAN, *supra* note 55, ¶ 469.1[1], at 37-349; Kelley, *supra* note 59, at 639.

in order to give up his equity. Section 9-505(2), on the other hand, is satisfied if the debtor merely remains silent. Thus, section 9-505(2) can operate essentially unilaterally. Moreover, the creditor who properly utilizes section 9-505(2) eliminates junior lienors; this is not true of the deed absolute and, indeed, may preclude its use.⁶²

The personal property analogue to the Code was, as previously noted, in the area of conditional sales. At common law, the simple act of repossession barred the action on the debt by the doctrine of election.⁶³ The Uniform Conditional Sales Act, while eschewing the election doctrine generally,⁶⁴ allowed the seller to retain the goods "as his own property" without obligation to the buyer and in discharge of all the buyer's obligations,⁶⁵ unless the seller was subject to compulsory resale⁶⁶ or the buyer properly demanded resale within ten days of repossession.⁶⁷

Unlike the Code, the prior uniform rule required no affirmative action by the secured party; presumably he could simply make a subjective decision at any time after the debtor's ten-day grace period for redemption⁶⁸ or demand for sale had passed. For other reasons, however, it seems likely that the "strict foreclosure" option was a more attractive one under the Uniform Conditional Sales Act (UCSA) than under the UCC. To begin with, the highly regulated resale procedure under the UCSA was fraught with potential for technical defects and subsequent litigation. Thus, rather than take the steps necessary to preserve his deficiency rights, a seller might very well have preferred to keep the goods under section 23 and thereafter make whatever private disposition he could.

This, in turn, suggests a further reason why section 9-505(2) is often an unrealistic remedy. By definition, the secured party under the UCSA was almost invariably a dealer; thus he would have at least the facilities for sales of used goods, if not an eager market. The UCC, of course, governs loan as well as sales transactions (or leases that are functionally security transactions⁶⁹) and it would obviously be the unusual case in which a lender would wish to retain the goods instead of selling them. Indeed, at least one well-known case, *Reeves v. Foutz and Tanner, Inc.*,⁷⁰ held that section 9-505(2) cannot be used by a secured party who intends to resell goods in the ordinary course of business, but rather that any subsequent

62. R. POWELL & P. ROHAN, *supra* note 55, ¶ 469.1 [4], at 37-353; Kelley, *supra* note 59, at 665-68.

63. For a discussion of the doctrine of election, see *supra* note 17 and accompanying text.

64. Section 24 allowed the seller to sue for deficiency after repossession if a public sale had been made. U.C.S.A. § 24 (1918).

65. *Id.* § 23.

66. *Id.* § 19; see *supra* note 45.

67. U.C.S.A. § 20 (1918). The demand had to be written, delivered personally or by registered mail, and served within 10 days of the retaking. Upon receipt of the demand, the seller was required to sell within 30 days at public auction. *Id.* §§ 19-20.

68. *Id.* § 18.

69. See U.C.C. § 1-201(37) (1987) ("security interest" includes leases intended as security).

70. 94 N.M. 760, 617 P.2d 149 (1980).

sale is subject to section 9-504 and the debtor must be paid over any surplus. If section 9-505(2) is limited to instances where the secured party keeps the collateral for its own use, then obviously the provision is a dead letter.⁷¹

Thus, if section 9-505(2) were applied only literally, it would seem to be of very limited practical significance. The ordinary lender would be interested not in the collateral but in realizing as much cash as possible to apply to the debt, and would therefore sell it. If other courts follow *Reeves*, even purchase-money sellers will be unlikely to make the election to retain, since they, too, would ordinarily not be interested in personal use of the collateral. Even if the rationale of *Reeves* is rejected, however, the mandatory delay in section 9-505(2) will often make it unattractive, because the secured party will not want to risk further depreciation of the collateral or market fluctuations.

Finally, and most importantly, with tangible personal property it will be the unusual case where there is any appreciable equity in the collateral; the rapidity with which most collateral will depreciate almost guarantees a deficiency. This fact creates an overwhelming incentive to resell and sue for the remaining debt.⁷² Only where the collateral is accounts, chattel paper, instruments (subject to separate default rules in section 9-502⁷³), investment securities, precious metals, jewelry, or unique goods

71. The facts of *Reeves* are fairly extreme. The debtors were semi-illiterate Navajo Indians; the secured party was a pawnbroker who used § 9-505(2) as a fairly heavy-handed means of depriving the debtors of the surplus value of the jewelry they pawned. It is no surprise that the court wished to prevent a windfall; however, a blanket holding that § 9-505(2) can never be used by one who intends to resell is an overly broad means to accomplish this. A more appropriate device would be to find a violation of the secured party's implied duty of good faith under § 1-203, rendering the surplus recoverable by the debtors under § 9-507(1) or § 1-103. Cf. G. GILMORE, *supra* note 21, § 44.3, at 1226-27:

Now what is to happen when a secured party makes a proposal to retain, say, a million dollars' worth of collateral in satisfaction of a hundred-thousand-dollar debt—or a thousand dollars' worth of collateral in satisfaction of hundred-dollar debt—and, through oversight in the million-dollar case or ignorance in the thousand-dollar case, no one who is qualified to object does so within the statutory time limits? The courts will do what they always have done and always will do. If fraud is alleged by someone who has standing to complain of it, the allegation will be inquired into. If the fraud is proved, the offending transaction will be set aside and the court will devise an appropriate remedy.

72. Gilmore notes that the demand for a deficiency was the death knell of both the real estate strict foreclosure action and the conditional seller's election of remedies. G. GILMORE, *supra* note 21, § 44.3, at 1221.

73. See U.C.C. § 9-502 (1987):

(1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under Section 9-306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of re-

would there likely be even a rough equivalency between the value of the collateral and the debt owed. Since only such equivalency would make section 9-505(2) appealing, its voluntary use would seem severely circumscribed.

But, of course, section 9-505(2) has, as I have already discussed, not been limited to the secured party's option. Its involuntary imposition by courts against creditors has assumed a position of far greater prominence than its occasional voluntary election. I now turn to an analysis of those cases.

II. JUDICIAL INTERPRETATIONS OF SECTION 9-505(2)

As previously discussed, courts faced with violations of the resale provisions of section 9-504 have fashioned three disparate responses to the problem: The absolute bar rule, the rebuttable presumption rule, and the damages only rule.⁷⁴ A similar pattern has emerged in cases where the debtor's grievance is not defective notice of resale but, rather, either delay in or failure to sell. In these cases, section 9-505(2) has frequently been invoked by debtors asserting an *implied* agreement by the secured party to retain the collateral in full satisfaction of the debt. The result of such a finding would be the loss of a right to a deficiency judgment. Just as with section 9-504, three distinct views have emerged. One extreme I characterize as the "delay is enough" cases: An unreasonable delay in disposing of the collateral will be deemed an implied retention in satisfaction of the debt.⁷⁵ The intermediate view I call the "delay plus facts" cases: Delay alone will not cause the imposition of section 9-505(2), but may be coupled with other facts that collectively evince an implied agreement to retain the collateral in satisfaction of the debt.⁷⁶ At the other extreme are the "damages only" cases: Section 9-505(2) is triggered only by an affirmative election of the secured party and will not be deemed to apply by implication. These courts limit the debtor to a set-off for damages under section 9-507.⁷⁷ I discuss representative cases from each group.

alization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreements so provides.

74. For a discussion of these rules, see *supra* notes 29-43 and accompanying text.

75. For a discussion of the "delay is enough" cases, see *infra* notes 78-98 and accompanying text.

76. For a discussion of the "delay plus facts" cases, see *infra* notes 99-134 and accompanying text.

77. For a discussion of the "damages only" cases, see *infra* notes 135-46 and accompanying text.

A. "Delay is Enough" Cases

This article began with a brief discussion of *Millican v. Turner*,⁷⁸ a good example of the harshness that the "involuntary strict foreclosure" doctrine can visit upon a secured party and the lack of profound court analysis that these cases often evidence. Factually, the result in the case seems almost outrageous, at least from the perspective of the secured party. To begin with, the collateral had apparently been abandoned by the debtor and was in terrible condition at the time of repossession.⁷⁹ The facts suggest that Millican could probably not have sold the car without first making a substantial investment in its refurbishing, an investment which the UCC certainly sanctions but does not ordinarily demand.⁸⁰ Moreover, the denial of a deficiency judgment to Millican placed him in a worse position than many purchase-money sellers, since he had been forced by the assignee of the contract to repurchase it.⁸¹ Thus, Millican lost not simply the value of the goods sold, but his cash as well. Under those circumstances, to deprive him of any chance for a deficiency judgment merely because of a delay in acting—something seemingly beyond his control, to a large extent—is using a cannon to kill the proverbial gnat. There is no evidence in the opinion either of overreaching by Millican or of any prejudice to Turner by the delay in filing suit after the contract (and car) were reassigned to Millican.

This last point also illustrates why the imposition of involuntary strict foreclosure upon Millican was the sole avenue for Turner's relief. Applied literally, the UCC would give Turner only damages for the delay under section 9-507(1), and it is highly unlikely under the facts that any could be proved. Lacking a direct means for policing Millican's supposed misconduct, the court simply looked to section 9-505(2). In so doing, however, the court acknowledged neither textual nor policy difficulties with its analysis. Rather, to the court the issue was simple: "[U]nder what circumstances may a creditor who has repossessed collateral be deemed to have retained that collateral in satisfaction of the debt it secures."⁸² After

78. 503 So. 2d 289 (Miss. 1987); see *supra* notes 1-11 and accompanying text.

79. *Millican*, 503 So. 2d at 290.

80. Under § 9-504, the collateral may be sold "in its then condition or following any commercially reasonable preparation or processing." U.C.C. § 9-504(1) (1987). To be sure, there are a number of opinions that have suggested that to act "commercially reasonably" the secured party may be required to make certain repairs prior to sale. A well-known example is *Liberty Nat'l Bank & Trust v. Acme Tool Div. of Rucker Co.*, 540 F.2d 1375 (10th Cir. 1976); see generally Burke, *Uniform Commercial Code Annual Survey--Secured Transactions*, 32 Bus. Law. 1133, 1161-62 (1977) (discussing cases on both sides of the issue). *Millican*, however, seems an unlikely candidate for the imposition of such a requirement. Given the low value of the collateral after default—a car sold at least twice previously and estimated to be worth \$800.00—the cost of repair seems clearly disproportionate to the incremental increase in the potential sales price.

81. *Millican*, 503 So. 2d at 290.

82. *Id.* at 291. Of course, in phrasing the issue in that manner (particularly by the use of the "deemed to" language), the court fairly clearly telegraphs the answer it intends to give.

citing part of the text of section 9-505(2), the court noted briefly the split of authority on the issue and then, without further explanation, announced its adoption of the "majority position":

[W]hen a creditor who has repossessed collateral retains it for an unreasonably long period without disposing of it, he is deemed to have retained the collateral in satisfaction of the debt which it secures and is thus precluded from suing on the note, regardless of whether he has notified the debtor that he is so retaining the collateral. What constitutes an unreasonable delay is a question for the trier of fact.⁸³

The court did not, however, mention even in passing the debtor's right to damages under section 9-507(1) as a possible alternative remedy. Nor did it pause, even for a second, and reflect upon whether such a holding makes any sense from a policy perspective in light of the lack of any suggestion of bad faith by Millican or injury to Turner.

Rather, the court posed only one simple question to be answered upon remand, that is, whether Millican's retention of the car without disposition⁸⁴ for a period of six months after reassignment of the contract was an unreasonably long period. This determination, the court suggested, would depend upon "the types of collateral, how rapidly it depreciates, the market for such collateral, and other relevant circumstances."⁸⁵ In light of the realities of Article 9 litigation and the all-or-nothing outcome that necessarily accompanies the court's legal holding, the prudent creditor would seem to have but one rational course: settle for whatever pittance he can get before trial on remand, and retreat to lick his wounds.

This lack of concern for either textual integrity or sound policy has, unfortunately, characterized many of the "delay is enough" cases. Indeed, the first reported case that would have been governed by the UCC, *Bradford v. Lindsey Chevrolet Company*,⁸⁶ did not bother to cite section 9-505(2) at all. The case bears some striking similarities to *Millican*: A car, purchased by a minor from Lindsey Chevrolet under a conditional sales contract in July 1965, was wrecked in November of the same year. No further payments were made,⁸⁷ and the finance company to which the contract had been sold repossessed the car and transferred the car and contract back to Lindsey Chevrolet in April 1966, after Lindsey had satisfied its repurchase obligation. Lindsey's only attempt at collection was instituting suit against Bradford, who guaranteed the contract, in July 1966. Bradford's sole defense was that the repossession of the automobile was a "waiver" of the right to collect on the debt.⁸⁸

83. *Id.*

84. *Id.* The court never addressed the issue of whether the efforts Millican made to sell the car during the interim met the standards of commercial reasonableness. Presumably, it deemed this irrelevant to an inquiry under § 9-505(2), making delay the only salient issue.

85. *Id.*

86. 117 Ga. App. 781, 161 S.E.2d 904 (1968).

87. *Id.* One assumes that the car was uninsured.

88. 117 Ga. App. at 783, 161 S.E.2d at 906. As previously noted, the common law

In reversing a judgment n.o.v. for Lindsey Chevrolet, the court said only the following:

Irrespective of whether the law prior to the Georgia Uniform Commercial Code . . . or the Commercial Code itself applies here, the result is the same. See § 109 A-9-501 et seq. of the Georgia Uniform Commercial Code. The action of the holder in legally repossessing the security under a conditional sales contract, the retention of the same without sale and without excuse for not selling, and without demand for payment of the contract, for a period of approximately 50 days before suit on the contract and for over 16 months from the time of filing suit to the time of trial, constituted a rescission and satisfaction of the contract and no recovery could be had thereon.⁸⁹

While the common law doctrine of election of remedies would undoubtedly support this result, the court offered no explanation of how the provisions of part 5 of the UCC could be construed in the same fashion. The most that can be said is that the court apparently drew upon a perceived distinction between "accord and satisfaction" and "rescission and satisfaction," the term it employed in *Bradford*.⁹⁰

doctrine of election of remedies would clearly yield this result; however the rule was different under the Uniform Conditional Sales Act. See *supra* note 17 and accompanying text. The court does not discuss which law pertained in Georgia prior to its adoption of the UCC in 1962.

89. 117 Ga. App. at 783, 161 S.E.2d at 906.

90. A slightly earlier case dealing with a defective sale, *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968), sheds further light on the court's meaning and suggests that it was basing its rationale more on common law principles than on involuntary strict foreclosure. In *Braswell*, the debtor claimed that the secured party's failure to give him notice of a public sale barred a deficiency judgment, and the court agreed. In the course of the opinion, however, the court noted that the Code expressly requires affirmative action by the secured party to retain the collateral in satisfaction of the debt, and provides only a right to damages for noncompliance with the notice of sale provisions. 117 Ga. App. at 701, 161 S.E.2d at 422. However, the court simply aligned itself with the "majority" of courts that had found strict compliance with Part 5 a condition precedent to recovery of a deficiency. *Id.*

Alternatively, the court raised but did not elaborate on the issue of accord and satisfaction. It stated merely that since the repossession was lawful, the taking could not constitute accord and satisfaction, but that this did not preclude a finding that the underlying contract had been rescinded. *Id.* Presumably, it is this notion of implied rescission that formed the basis of the decision in *Bradford*.

It is not, however, clear how the court could apply an accord and satisfaction analysis to such a case in any event, since this presupposes both mutual consent and new consideration. See *supra* note 9. Indeed the same court, in a contemporaneous opinion, rejected a debtor's argument that his agreement to allow repossession only on condition of his release constituted an accord and satisfaction. The court stated that since the right to repossess was provided both by the security agreement and by § 9-503 of the UCC, there was no consideration for an accord and satisfaction. *Barnes v. Reliable Tractor Co.*, 117 Ga. App. 777, 161 S.E.2d 918 (1968).

In any event, the accord and satisfaction or rescission theories have generally not been embraced by later courts, although there is the occasional exception. See, e.g., *Ace Parts & Distrib., Inc. v. First Nat'l Bank*, 146 Ga. App. 4, 245 S.E.2d 314 (1978) (discussing "novation of satisfaction" but holding against debtor on facts). As previously noted, the *Millican*

While many cases have reached the same result as *Millican*,⁹¹ that court's description of the "delay is enough" approach as the majority rule is questionable. At least as many courts appear to have embraced the "delay plus facts" analysis discussed in the next section. What is clear, however, is that there is no necessary trend away from this simplistic approach. Indeed, the most recent state high court to consider the issue, the Supreme Court of South Dakota, seems to have taken this tack. In *Wang v. Wang*,⁹² the collateral (motor vehicles) was repossessed by the secured party in July 1980. In December 1984, after a trial on the underlying debt and pending appeal, the secured party sold the collateral to himself at an "auction" attended only by himself and his lawyer. The sale price was \$100.00; testimony indicated a value of approximately \$30,000.00. In a subsequent action against the debtor and guarantor for a deficiency, the court reversed a verdict for the secured party. The court stated that notwithstanding the failure of the secured party to give notice under section 9-505(2), "under the facts of this case [the secured party's] actions operated as a de facto election of strict foreclosure."⁹³

Before turning to the "delay plus facts" cases, one other note is in order. There is yet another approach to the delay problem that reaches the same basic result as *Millican* and like cases but, perhaps, shows somewhat greater concern for the textual integrity of the UCC. An illustrative case is *Alamosa National Bank v. San Luis Valley Grain Growers, Inc.*⁹⁴ There, the secured party repossessed its personal property collateral and was still in possession at the time of trial, some 17 months later. The trial court held that this was an implied election to retain in

court expressly rejected the accord and satisfaction theory. See *supra* note 9.

91. See, e.g., *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173 (1st Cir. 1989) (alternative holding); *In re Myers*, 20 U.C.C. Rep. Serv. 1420 (Bankr. W.D. Va. 1976); *Schultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. 1976); *Haufler v. Ardinger*, 28 U.C.C. Rep. Serv. 893 (Mass. App. Ct. 1979) (erroneously applies 60% price rule to § 9-505(2)); *Northern Fin. Corp. v. Chatwood Coffee Shop, Inc.*, 4 U.C.C. Rep. Serv. 674 (N.Y. Sup. Ct. 1967); *Farmer's State Bank v. Ballew*, 626 P.2d 337 (Okla. App. 1981) (dictum); *Texas Nat'l Bank v. Karnes*, 711 S.W.2d 389 (Tex. App. 1986) (tort liability imposed in addition to forfeiture of deficiency); *Service Chevrolet, Inc. v. Sparks*, 99 Wash. 2d 199, 660 P.2d 760 (1983); *Swanson v. May*, 40 Wash. App. 148, 697 P.2d 1013 (1985) (commercial transaction).

92. 440 N.W.2d 740 (S.D. 1989).

93. *Id.* at 746. *Wang* is one of a number of cases that are difficult to classify because of the lack of detail and precision in the court's analysis. The court shows no awareness of the split of authority nationally and cites only a prior case, *First Bank v. Haberer Dairy & Farm Equipment*, 412 N.W.2d 866 (S.D. 1987), which refused to apply involuntary strict foreclosure because the secured party sued on the debt, attempted to sell the collateral, and notified the debtors that it was not accepting the collateral in full satisfaction. The only salient facts cited in *Wang* to distinguish *Haberer*, however, were the longer delays in filing suit and making the sale. Thus, the court does not appear to be basing its determination of "intent" upon anything other than temporal factors.

Of course, the case could easily have been disposed of on the basis of the rebuttable presumption rule that the court adopted for violations of § 9-504. See *supra* notes 34-39 and accompanying text. For procedural reasons, however, the court chose to allow the jury verdict on this issue to stand.

94. 756 P.2d 1022 (Colo. Ct. App. 1988).

satisfaction under section 9-505(2).⁹⁵ The appellate court reversed on this basis, holding in a case of first impression that section 9-505(2) is triggered only where the secured party gives the prescribed notice. The court then, however, analogized unreasonable retention of collateral to failure to give notice, and decided that the rebuttable presumption rule that Colorado had adopted with respect to the latter should be applied:

[W]e hold that a secured party in possession of the collateral who neither disposes of it, nor elects in writing to retain it in satisfaction of the obligation and is determined to have retained the collateral in a commercially unreasonable manner, must overcome the presumption that the value of the collateral equals the amount of the debt and unless rebutted, the obligation of the debtor has been satisfied.⁹⁶

Finding support for the trial court's decision that the length of the delay was unreasonable, the court remanded for determination of whether the creditor could rebut the presumption.⁹⁷

Since there will frequently be extensive delay in disposition of the collateral, the *Alamosa National Bank* approach offers courts a means for denying a deficiency without encountering the technical difficulties in applying section 9-505(2). While it is too early to tell whether other courts will follow suit, the development of the law in this area bears watching.⁹⁸

B. "Delay Plus Facts" Cases

Although a number of jurisdictions have now embraced the "delay plus facts" approach, perhaps the most fully developed line of authority for illustrative purposes comes from Texas. The leading case is *Tanenbaum v. Economics Laboratory, Inc.*⁹⁹ The opinion is brief and, in some respects, confusing. The secured party, Economics Laboratory, sold commercial laundry equipment to the debtor, Tanenbaum, taking a security interest by virtue of two conditional sales contracts.¹⁰⁰ The equipment was nonfunctional, and after two years Tanenbaum tendered the equipment to Economics, asking that his account be fully credited. The secured party repossessed, but deeming repair of the equipment prohibitively expensive, scrapped it and sued for a deficiency. Tanenbaum received no notice prior to this action.¹⁰¹ The trial court entered a summary judgment for the debtor on the basis that the secured party's action in retaining the collateral barred the recovery of a deficiency. The Texas Court of Civil Appeals, however, reversed that decision, holding that the rebuttable pre-

95. *Id.* at 1026.

96. *Id.*

97. *Id.* at 1027. The court also noted that the debtor could recover damages under § 9-507(1) to the extent they could be proved. *Id.* at 1026.

98. As of this writing, *Alamosa National Bank* has been followed in only one case (from the same court), *Tajalli v. Gharibi*, 758 P.2d 190 (Colo. Ct. App. 1988).

99. 628 S.W.2d 769 (Tex. 1982), noted in 34 BAYLOR L. REV. 605 (1982); 14 TEX. TECH L. REV. 513 (1983).

100. *Tanenbaum*, 628 S.W.2d at 770.

101. *Id.*

sumption rule¹⁰² under section 9-504 should be applied where the secured creditor retains the collateral with neither disposition under section 9-504 nor proposal to retain under section 9-505(2), but merely gives credit for the value of the collateral.¹⁰³ The effect, of course, was still to deny the deficiency judgment unless the secured party could overcome the presumption, but presumably this was a more palatable alternative than being kicked out of court altogether by invocation of the involuntary strict foreclosure doctrine.

The Supreme Court of Texas reversed and instituted the trial court's judgment.¹⁰⁴ In its view, section 9-504 and 9-505 were conceived as complete alternatives: The legislative intent was to force the creditor to make "an election to either sell the repossessed collateral pursuant to section 9-504 or to retain the collateral in complete satisfaction of the debt pursuant to section 9-505."¹⁰⁵ In so doing, the court rejected the rebuttable presumption rule and adopted the absolute bar rule as the law of Texas.¹⁰⁶

On the issue of the secured party's retention in the case at hand, though, the court's holding was fairly narrow. Rather than simply adopting the implied strict foreclosure principle wholesale, the court limited the result to the circumstances of the cause: "By *destroying* the collateral [Economics Laboratory] elected to be governed by section 9-505, and therefore is not entitled to a deficiency judgment."¹⁰⁷

Tanenbaum was a short and strange opinion that evinced little understanding of the subtleties of the 9-505(2) issue. Indeed, it is not at all clear that the court was basing the result solely on section 9-505(2), given its express holding that a creditor who disposes of collateral under section 9-504 must give notice or forfeit his deficiency rights.¹⁰⁸ It was at least possible, though, that *Tanenbaum* could be read as imposing a 9-505(2) "election" only on a secured party who destroys the collateral, otherwise confining the statute to its literal place in the statutory scheme.

Predictably, that has not consistently been the course of subsequent cases. Rather, lower courts have read *Tanenbaum* as sanctioning the involuntary strict foreclosure doctrine, so long as facts, of variable degrees

102. *Economics Lab., Inc. v. Tanenbaum*, 620 S.W.2d 839 (Tex. App. 1981), *rev'd*, 628 S.W.2d 769 (Tex. 1982). For an explanation of the rebuttable presumption rule, see *supra* notes 34-37 and accompanying text.

103. *Id.* at 841.

104. *Tanenbaum*, 628 S.W.2d at 772.

105. *Id.* at 771-72.

106. *Id.* at 772 (in order for creditor to sue for deficiency after disposition of the collateral in a commercially reasonable manner, he must comply with notice requirements of § 9-504).

107. *Id.* (emphasis added).

108. *Id.* The court might have viewed scrapping the collateral as a form of "disposition" under section 9-504(3), thus providing an alternative basis for its decision. In any event, it seems that this part of the opinion is basically surplusage to the core holding and serves mainly to announce prospectively the adoption of the absolute bar rule under § 9-504. For further discussion of the ambiguities in the opinion, see 34 *BAYLOR L. REV.* 605, 628-33 (1982).

of strength, indicate an intent on the part of the secured party to have elected to retain the collateral in satisfaction of the debt.¹⁰⁹

For example, in *Burton v. National Bank of Commerce of Dallas*,¹¹⁰ the debtor alleged that, after default, he was induced to deliver the collateral (a truck) voluntarily to a bank officer by virtue of a representation that the bank had found a buyer for the truck who would extinguish the debt. The debtor argued waiver, estoppel, and accord and satisfaction in defense of the deficiency action.¹¹¹ In reversing a verdict for the secured party, the court placed the case within the rule of *Tanenbaum*: Jury findings for the debtor on the issues of waiver and estoppel "conclusively establish an election by bank to take the collateral in satisfaction of Burton's debt, and . . . became final and irrevocable upon Burton's delivery of the collateral security to the bank."¹¹²

The secured party fared better in *Piney Point Investment Corporation v. Photo Design, Inc.*,¹¹³ a case involving delay in disposition. The secured parties sold a graphic design business to the debtors, reserving a security interest in the assets to secure a purchase money note. After default, the secured parties repossessed the business on February 1, 1982, and on March 30 their attorney notified the debtors by letter that a private sale would be made on or after April 15, 1982.¹¹⁴ No sale was made at that time, though, because the secured parties reestablished the business. Two assets¹¹⁵ were sold in September 1982 to meet expenses, but no other sales had been made at the time of trial, which occurred two years after repossession, nor were any efforts to have such a sale made.

Nonetheless, the court rejected the debtor's implied strict foreclosure argument.¹¹⁶ It read *Tanenbaum* narrowly as imposing the forfeiture of the deficiency because the destruction of the collateral had deprived the debtor of any opportunity to rebut the creditor's subjective valuation of the collateral. In *Piney Point*, however, the secured parties gave notice of the sale, and the property was at all times available for appraisal.¹¹⁷ Thus, the court was unwilling to apply section 9-505(2), since the secured parties had given express notice of sale. According to the court, the mere fact that the secured parties "repossessed the equipment and may have remained in possession of a substantial part of it, does not, standing alone,

109. Prior to *Tanenbaum*, the only reported Texas appellate court case on the issue had held that § 9-505(2) was triggered only by express notice. See *Roylex, Inc. v. E. F. Johnson Co.*, 617 S.W.2d 760 (Tex. Ct. App. 1981) (disapproved in *Tanenbaum*).

110. 679 S.W.2d 115 (Tex. Ct. App. 1984).

111. *Id.* at 116.

112. *Id.* at 119. Candidly, it must be said that the court's opinion on § 9-505(2) is at best vague and confusing; indeed, it is not clear whether the debtor was given notice of the ultimate sale (which does seem to have been made) and whether any material delay in making the sale occurred.

113. 691 S.W.2d 768 (Tex. Ct. App. 1985).

114. *Id.* This complied with the requirements of § 9-504(3) for private sales.

115. No other identification of the property sold was made. *Id.* at 769.

116. *Id.* at 770.

117. *Id.* at 769.

constitute an election to retain the collateral in full satisfaction of the indebtedness."¹¹⁸

A more conventional "delay plus facts" approach was taken in *In re Boyd*.¹¹⁹ There, the secured party repossessed, after default, a boat, motor, and trailer. Two months later, the debtor filed his petition in bankruptcy.¹²⁰ In response to the bank's motion to lift the automatic stay, the court held that the bank had taken the collateral in satisfaction of the debt. Although no section 9-505(2) notice had been given, the debtor alleged (and the court believed) that he had seen bank personnel using the boat. The court concluded that the bank's failure to sell the boat within a reasonable time, coupled with its conversion of the boat to its own use, resulted in an election to satisfy the debt under section 9-505.¹²¹

An even broader interpretation of *Tanenbaum* is found in *Texas National Bank v. Karnes*,¹²² which appears to align itself with the "delay is enough" line of cases. There, the bank repossessed a van owned by one of the debtors, David Karnes (a minor), and attempted to set off the balance of the note against a savings account of his parents, one of whom (Alice) was a co-signor of his note. The parents thereafter sued the bank for "conversion" of the credit balance from their account and for exemplary damages. At the time of trial, five years later, for unexplained reasons, the van had never been sold.¹²³

In an opinion that should have a rather jarring effect on secured lenders, the court held that the delay in disposition of the collateral barred a deficiency by operation of law *and* upheld an award of exemplary damages (though reducing them from \$50,000 to \$20,000).¹²⁴ On the issue of involuntary strict foreclosure, the court's pronouncements were exceedingly brief:

If the bank, or any secured creditor, retains collateral for the length of time, as was done in this case, such secured creditor is not entitled to recover deficiencies. Since the bank retained the collateral, it, by operation of law, elected to take the collateral in full satisfaction of the debt.¹²⁵

Thus, the court seemed to require nothing beyond excessive delay to trigger section 9-505(2).

On its facts, this is probably unremarkable; five years is a long time,

118. *Id.* at 770. Moreover, the court upheld the award of a deficiency judgment. Although the failure to sell the collateral was not commercially reasonable, the secured parties met the burden of proving that the value of the collateral was less than the debt, and the debtor received full credit for that amount. *Id.*

119. 73 Bankr. 122 (N.D. Tex. 1987).

120. *Id.* at 124.

121. *Id.* at 124-25. It might be noted that the bankruptcy judge in *Boyd* did not cite *Tanenbaum*.

122. 711 S.W.2d 389 (Tex. Ct. App. 1986).

123. *Id.* at 392.

124. *Id.* at 396.

125. *Id.* at 392 (citing *Tanenbaum*).

and the bank curiously offered no explanation for its failure to act. More ominous, though, was the court's holding on *tort* liability. On the bases that (1) the van was repossessed in May 1979; (2) \$3,474.41 was deducted from the account of the parents, Dewey and Alice, in July 1979; (3) the parents learned of the deduction in December 1979; and (4) the bank had possession of the van at trial, in July 1984, the court reached this conclusion:

We hold the following to be torts, or certainly of a tortious nature, on the part of the bank:

1. In failing to make a reasonable disposition of the collateral;
2. In keeping possession of the collateral beyond a reasonable time;
3. In taking or converting the money out of the savings account after losing its right to offset;
4. In failing to timely notify Dewey and Alice of the deduction from their savings account;
5. In concealing the fact from Dewey and Alice that the bank had deducted from their savings the sum of \$3,474.41 for the period of time from July, 1979, to December, 1979;
6. In failing to return the certificate of title to the van while having possession of the van from May, 1979, to July, 1984; and,
7. In failing to establish the value of the collateral in a commercially reasonable manner and within a reasonable time after repossessing the same.¹²⁶

The court concluded that each of these acts or omissions was a separate and independent tort, and that cumulatively the actions justified the imposition of exemplary damages.¹²⁷

In deeming a commercially unreasonable disposition of collateral under article 9 to be a new species of tort, *Karnes* is certainly a case that bears watching, although in this respect it may fit more comfortably within the burgeoning field of lender liability.¹²⁸ That, however, is beyond the scope of this article. The more immediate question is whether *Karnes* foreshadows a shift among lower Texas courts towards an expansive view of *Tanenbaum's* involuntary strict foreclosure theory.

In any event, Texas is far from the only jurisdiction to embrace the "delay plus facts" interpretation of section 9-505(2). A substantial number of cases have held, at least in effect, that some facts evidencing "intent" to retain the collateral in satisfaction of the debt must augment the proof of mere delay before section 9-505(2) can be involuntarily imposed.¹²⁹ Indeed, it seems likely that this (like the rebuttable presump-

126. *Id.* at 396.

127. *Id.* at 396-97.

128. See generally Note, *The Doctrine of Lender Liability*, 40 U. FLA. L. REV. 85 (1988); Comment, *Lender Liability: Good Faith and Demand Notes*, 64 TUL. L. REV. 187 (1989).

129. In addition to the Texas cases already cited, see *United States v. Excellair, Inc.*, 637 F. Supp. 1377 (D. Colo. 1986); *In re Deephouse Equip. Co.*, 38 Bankr. 400 (Bankr. D. Conn. 1984) (useful survey of three-part split in case law); *National Equip. Rental, Ltd. v. Priority Elec. Corp.*, 435 F. Supp. 236 (E.D.N.Y. 1977); *Moran v. Holman*, 514 P.2d 817

tion rule under section 9-504) will become, if it is not already, the "majority" rule, if for no other reason than the appeal that compromise or intermediate positions always have for courts.

Perhaps most noteworthy is that adoption of the "delay plus facts" approach is much more likely to augur well for the secured party, since the court may conclude that the debtor has not marshalled sufficient proof to establish the necessary (and, of course, fictitious) "intent." A well reasoned case in point is *Nelson v. Armstrong*.¹³⁰ Armstrong, an equipment dealer, repossessed a tractor after default and, pursuant to a stipulation with Nelson made four and one-half months thereafter, sold the equipment. Nelson sued Armstrong for fraudulent misrepresentation, and Armstrong counterclaimed for a deficiency judgment.¹³¹ The trial court awarded Nelson damages and denied the deficiency on, *inter alia*, the grounds that Armstrong's delay in selling barred recovery under section 9-505(2).¹³²

The Idaho Supreme Court reversed on the issue of implied retention. The court refused, however, to hold that section 9-505(2) applies only where the statutory proposal is made. Rather, the court left open the possibility of involuntary strict foreclosure, preferring to base its conclusion on the weakness of the debtor's proof:

While strict compliance with the written notice provision of [section 9-505(2)] may not be essential where the debtor is claiming that the secured party has retained the collateral, we think that the creditor must in some way have manifested an intent to accept the collateral in full satisfaction of the debtor's obligation

As we view it, [section 9-505(2)] is not a device for policing the conduct of secured parties *vis-a-vis* their debtors, but rather a statutory analogue to the common law concept of accord and satisfaction While the proverbial meeting of the minds is not essential under [section 9-505(2)], a debtor seeking to avail himself of the statute's reciprocal protections must still establish that the secured party intended to retain the collateral in lieu of selling it for the debtor's account.

The determination of what will sufficiently manifest a secured party's intent to retain collateral in satisfaction of the obligation must await development in the context of future cases. It is enough for the

(Alaska 1973) (use of collateral by secured party as well as delay); ITT Terryphone Corp. v Modems Plus, Inc., 171 Ga. App. 710, 320 S.E.2d 784 (1984) (question of fact); *Wisconics Eng'g, Inc. v. Fisher*, 466 N.E.2d 745 (Ind. Ct. App. 1984); *Schmode's, Inc. v. Wilkinson*, 219 Neb. 205, 361 N.W.2d 557 (1985); *Winters Nat'l Bank & Trust Co. v. Saker*, 66 Ohio App. 2d 31, 419 N.E.2d 890 (1979); *FDIC v. Tempest Fugat, H.L.I., Inc.*, 75 Or. App. 536, 707 P.2d 81 (1985), *rev. denied*, 300 Or. 546, 715 P.2d 93 (1986); *Durhahl v. Bank of Casper*, 718 P.2d 23 (Wyo. 1986). *See also* *Deutsche Credit Corp. v. Woodard*, 719 S.W.2d 514 (Mo. Ct. App. 1986) (fact question as to whether secured party agreed to accept surrender of collateral in satisfaction of debt; § 9-505 not cited); *First Nat'l Bank of Pa. v. Cole*, 293 Pa. Super. 791, 435 A.2d 1283 (1981) (assuming *arguendo* that implied election is possible under § 9-505, no such evidence presented).

130. 99 Idaho 422, 582 P.2d 1100 (1978).

131. *Id.* at 425, 582 P.2d at 1103.

132. *Id.*

present to hold that Armstrong's mere failure to attempt resale of farm equipment for a period of four and a half months does not adequately manifest his intent to retain it.¹³³

The court's candid remark that section 9-505(2) is not a policing tool is telling, for clearly there is nothing in the history of the provision to suggest that the drafters envisioned it to operate in the fashion espoused by the debtor.¹³⁴ On the other hand, the refusal of the court to reject outright the implied application of section 9-505(2) may also evince an unstated uneasiness with the effectiveness of the express remedial provisions of part 5 of article 9. That tension is clearly exposed in the final class of cases.

C. "Damages Only" Cases

While the courts of New York have not been uniform in their approach to section 9-505(2), perhaps the leading case nationally in rejecting involuntary strict foreclosure is *S.M. Flickinger Company, Inc. v. 18 Genesee Corporation*.¹³⁵ The plaintiff, Flickinger, subleased property to Genesee to operate a "Super Duper Food Market" and loaned it \$230,000. Upon default, the plaintiff by agreement took possession of the store, fixtures, and inventory. It then sued for a judgment on the note.¹³⁶

The court found the defendants bound to their agreement regarding the disposition and valuation of the inventory. The agreement did not, however, address fixtures, and no attempt was made to dispose of them. The New York Supreme Court, Appellate Division held that failure to comply with section 9-504 would require the secured party to prove the fair market value of the collateral and the resulting deficiency (the rebuttable presumption approach).¹³⁷ In so doing, however, the court rejected the position that section 9-505(2) could be imposed involuntarily:

By its terms the statute makes the election to retain the collateral in full satisfaction and discharge of the debt optional with the creditor and it provides that the option is to be exercised by written notice to the debtor. There was no communication between the parties to this action, however, which may be construed as an election by the creditor to take the collateral in full satisfaction of the debt, and *an election*

133. *Id.* at 430, 582 P.2d at 1108. The court remanded, however, for determination of whether the delay rendered the ultimate sale commercially unreasonable and what legal effect the trial court's findings on this issue would have on Armstrong's deficiency rights. *Id.* at 432, 582 P.2d at 1100.

134. For a discussion of the history of § 9-505(2), see *supra* notes 50-53 and accompanying text.

135. 71 A.D.2d 382, 423 N.Y.S.2d 73 (N.Y. App. Div. 1979). Two earlier cases (one federal) took a different tack. See *National Equip. Rental, Ltd. v. Priority Elec. Corp.*, 435 F. Supp. 236 (E.D.N.Y. 1977) ("delay plus facts" case holding that creditor whose agent converted property and prevented resale was barred from deficiency); *Northern Fin. Corp. v. Chatwood Coffee Shop, Inc.*, 4 U.C.C. Rep. Serv. 674 (N.Y. Sup. Ct. 1967) ("delay is enough" case).

136. *18 Genesee*, 71 A.D.2d at 383-84, 423 N.Y.S.2d at 74-75.

137. *Id.*

should not be implied when the means for certainty are spelled out in the statute. The concern, of course, is that the creditor, having proceeded without notifying the debtor of his intention, may act to the debtor's disadvantage. *But section 9-505 was not designed to protect the debtor from a wrongful sale If the secured party fails to comply with the provisions of Article 9, the debtor may protect his rights by the remedies available pursuant to section 9-507.* He may restrain or compel disposition of the collateral, or if the disposition has already occurred, he may charge the creditor with any loss occasioned by its unauthorized conduct. Neither the provisions nor the purposes of the Code require that plaintiff forfeit its entire claim, however, and the Code should not be interpreted to permit the uncertainty of a jury trial on that issue here.¹³⁸

18 *Genesee* thus states, in clear and forceful terms, a seemingly overpowering textual rebuttal to the involuntary strict foreclosure doctrine. Its strength has been such that subsequent New York cases have consistently followed it,¹³⁹ and certainly a respectable number of other jurisdictions have reached the same conclusion.¹⁴⁰ Indeed, in a recent decision, *Warnaco, Inc. v. Farkas*,¹⁴¹ the United States Court of Appeals for the Second Circuit aligned itself with 18 *Genesee*. In *Warnaco*, the seller of a

138. *Id.* at 384, 423 N.Y.S.2d at 76 (emphasis added).

139. *Bank of Boston Int'l of Miami v. Arguello Tefel*, 644 F. Supp. 1423 (E.D.N.Y. 1986); *In re Emergency Beach Corp.*, 48 Bankr. 341 (S.D.N.Y. 1985); *Hanam, B.V. v. Kittay*, 589 F. Supp. 1042 (S.D.N.Y. 1984); *Chrysler Credit Corp. v. Mitchell*, 94 A.D.2d 971, 464 N.Y.S.2d 96 (1983); *Marine Midland Bank v. Connelly*, 79 A.D.2d 1102, 435 N.Y.2d 850 (1981).

140. *See, e.g., Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173 (1st Cir. 1989) (alternative holding); *In re Amador*, 596 F.2d 428 (10th Cir. 1979); *In re Nardone*, 70 Bankr. 1010 (D. Mass. 1987); *Fletcher v. Cobuzzi*, 499 F. Supp. 694 (W.D. Pa. 1980); *Everett v. Parts, Inc.*, 4 Ark. App. 213, 628 S.W.2d 875 (1982); *Florida First Nat'l Bank at Pensacola v. Martin*, 449 So. 2d 861 (Fla. Ct. App. 1984) (failure to give § 9-505(2) notice obliged secured party to sell under § 9-504); *Ayares-Eisenberg-Perrine Datsun, Inc. v. Sun Bank*, 455 So. 2d 525 (Fla. Ct. App. 1984); *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Commercial Fin., Ltd. v. American Resources, Ltd.*, 6 Haw. App. 667, 737 P.2d 1120 (1987); *Stensel v. Stensel*, 63 Ill. App. 3d 639, 380 N.E.2d 526 (1978) (failure to give notice not § 9-505(2) election); *Harris v. Bower*, 266 Md. 579, 295 A.2d 870 (1972); *FDIC v. Air Atlantic, Inc.*, 389 Mass. 950, 452 N.E.2d 1143 (1983); *Priggen Steel Bldg. Co. v. Parsons*, 350 Mass. 62, 213 N.E.2d 252 (1966); *Jones v. Morgan*, 58 Mich. App. 455, 228 N.W.2d 419 (1975) (dictum); *American Parts Sys. v. T & T Automotive, Inc.*, 358 N.W.2d 674 (Minn. Ct. App. 1984) (§ 9-505 applies only where statutory notice is given); *Total Equip. Leasing Corp. v. LaRue Inv. Corp.*, 357 N.W.2d 347 (Minn. Ct. App. 1984) (rejecting implied application of § 9-505); *Stensvad v. Miners & Merchants Bank*, 163 Mont. 409, 517 P.2d 715 (1973) (secured party notifies debtors of intent to enforce security interest, debtors cannot rely upon § 9-505 to contend that there is a "recision and satisfaction" of debt); *Brownstein v. Fiberonics Indus.*, 110 N.J. Super. 43, 264 A.2d 262 (1970); *Clark Leasing Corp. v. White Sands Forest Prods., Inc.*, 87 N.M. 451, 535 P.2d 1077 (1975); *Winters Nat'l Bank & Trust Co. v. Saker*, 66 Ohio App. 2d 31, 419 N.E.2d 890 (1979) (secured party should be able to sue on debt without recourse against collateral); *Farmers State Bank of Parkston v. Otten*, 87 S.D. 161, 204 N.W.2d 178 (1973); *IFG Leasing Co. v. Gordon*, 776 P.2d 607 (Utah 1989) (dictum). *Cf. Vogel v. Carolina Int'l, Inc.*, 711 P.2d 708 (Colo. Ct. App. 1985) (unreasonable delay in sending § 9-505(2) notice can give rise to damages in conversion).

141. 872 F.2d 539 (2d Cir. 1989).

business licensed trademarks to the buyer, with the agreement that upon full payment the trademarks would be transferred for one dollar. The court analogized the arrangement to a lease of equipment with a nominal purchase option and held that the trademarks were obviously collateral. When the buyer defaulted, the seller terminated the licensing agreement, and the debtors claimed that this was a repossession that constituted acceptance in full satisfaction under section 9-505(2).¹⁴²

The court of appeals, however, predicted that the courts of Connecticut would reject the involuntary strict foreclosure doctrine of *Millican v. Turner* and follow *18 Genesee*.¹⁴³ It stated its rationale as follows:

We believe that [*Millican* and like cases] depart from the scheme of the UCC regarding repossessions of collateral and predict that Connecticut would not follow them. If, after repossession of collateral, a creditor does nothing it may be compelled by the debtor to make some disposition under section 9-507. Even if a debtor does not seek such an order, however, the creditor must deduct the value of the collateral at the time of repossession from the outstanding balance of the debt. In that scheme, there is no role for an extra-statutory rule that contemplates repossession of collateral in full satisfaction of the debt where the creditor fails to give the requisite notice and the value of repossessed collateral is less than the debt. Such a rule is not needed to protect debtors because the value of the collateral must be deducted from the outstanding balance whether or not the creditor acts to dispose of the collateral. We therefore predict that Connecticut would not hold that Warnaco accepted the collateral in satisfaction of the debt.¹⁴⁴

It is difficult to fault the court's analysis in terms of statutory construction. Given the prominence of the Second Circuit in commercial matters, it is quite possible that this decision will be an influential one. Nonetheless, while I largely agree with the court's statutory analysis, I believe that its conclusion falls short of a workable solution to the overall problem of creditor inaction. In effect, the *18 Genesee/Warnaco* approach simply shifts the dispute to another battlefield, that of commercially reasonable disposition under section 9-504. The court in *Warnaco* implicitly admitted as much, as it ultimately remanded the case for fact findings on that question, noting the split of authority as to the appropriate sanction for a "misbehaving creditor."¹⁴⁵

As already noted, however, there is no more clear-cut answer from the statute on the issue of burden of proof of value and the right to a deficiency than on the implied application of section 9-505(2).¹⁴⁶ By framing the issue as one governed by sections 9-504 and 9-507, the courts in *18*

142. *Id.* at 543.

143. *Id.* at 544. Although the case arose in New York, the contract stipulated that Connecticut law would govern.

144. *Id.* at 544-45.

145. *Id.* at 545.

146. For a discussion of the implied application of § 9-505(2), see *supra* notes 29-43 and accompanying text.

Genesee and *Warnaco* simply make all-important the individual state's interpretation of the deficiency issue under those provisions. Thus, while indisputably correct from an interpretative perspective, these decisions beg the ultimate question of who must prove what to win, thus contributing little or nothing to the quest for uniformity, certainty, and predictability in this area. It is not the jurisprudence to which one can turn for solutions; article 9 itself must be amended to eliminate its ambiguities on creditors' rights and debtors' protections, and to embrace a more realistic approach to debtor relief.

CONCLUSION

Few would question that the Uniform Commercial Code was, collectively, a magnificent accomplishment. By the same token, article 9 is generally conceded to be the crown jewel of the Code, its greatest achievement on both the theoretical and practical levels.

The light of experience, however, has more than once shown that the luster of article 9 has faded. The 1972 amendments corrected many of the first generation of defects, but clearly others remain. It is hardly a new insight that the resale and deficiency provisions of article 9 have worked less than satisfactorily, and there have been recent calls to amend section 9-504 and 9-507 on this account.¹⁴⁷ This article has attempted to reinforce this need for revision by reference to the related, but conceptually separate, problem of involuntary strict foreclosure under section 9-505(2).

The little commentary that this issue has heretofore attracted has generally been critical of the involuntary strict foreclosure doctrine.¹⁴⁸ It is but a covert tool and, as Karl Llewellyn accurately observed, covert tools are not reliable ones.¹⁴⁹ By the same token, however, it is unrealistic to think that a court will eschew covert tools unless it is given efficient overt tools with which to operate.

Clearly, change is mandated. It is my belief that, given the state of the case law and its limited practical significance, the notice of retention procedure in section 9-505(2) should be abandoned. In its place, the Code should simply empower the debtor and secured party to enter into, after default, any agreement regarding the settlement of the obligation that they desire as an alternative to disposition under section 9-504.¹⁵⁰ Such

147. See, e.g., Donaldson, *The Commercially Reasonable Disposition of Collateral Under Article 9 of the UCC: The Question of Burden of Proof*, 20 U.C.C. L.J. 307 (1988).

148. See, e.g., R. ANDERSON, *supra* note 12, § 9-505:14, at 806-07; W. HAWKLAND, R. LORD & C. LEWIS, *supra* note 12, § 9-505:09; but see J. WHITE & R. SUMMERS, *supra* note 12, § 25-8, at 1212 (indicating agreement with "delay plus facts" approach). Commonly, discussions of § 9-505 either ignore the issue altogether or mention it only in passing without critical analysis. See, e.g., Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 523-24 (1973); Garner & Alber, *Disposition Of Repossessed Goods Under Article 9 of the Texas U.C.C.*, 11 TEX. TECH L. REV. 563 (1980).

149. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939).

150. Elimination of § 9-505 would not, of course, prevent a court from invoking the common law doctrine of accord and satisfaction, which would presumably be preserved under § 1-103. As previously noted, however, the facts of most involuntary strict foreclosure

an agreement can be adequately policed on typical contract law bases, including the specific Code provisions on good faith¹⁵¹ and unconscionability.¹⁵²

In order to eliminate all vestiges of the involuntary strict foreclosure doctrine as well as to resolve the existing split of authority on deficiencies generally, section 9-504 should be amended to impose on the secured party seeking a deficiency in all cases the burden of proof that he has in every respect acted in a commercially reasonable manner.¹⁵³ Only such a rule can remove the temptation for judicial tinkering with the statute; likewise it is the only realistic approach to the problem, given the almost universally superior resources of the secured party. Courts have more than adequately demonstrated their lack of patience with a statutory scheme that on its face offers debtors only a right to damages for creditor misconduct. For purposes of symmetry, however, it likewise seems fair to impose the burden of proof upon the debtor seeking affirmative relief under section 9-507(1) (either compulsory disposition or damages), as opposed to a debtor who is asserting a defense to a deficiency action.¹⁵⁴

Of course, no such changes will create a world in which all creditors act commercially reasonably, any more than all debtors will act fairly and responsibly with respect to collateral after default. What is hoped, however, is that these changes would be a significant step towards more honest, rational, and predictable decisionmaking in an area where disputes are not only common but, like death and taxes, inevitable.

Pending such statutory revisions, counsel for repossessing creditors should advise their clients, in any case in which disposition of the collateral might be significantly delayed, to give written notice to the debtor expressly disclaiming any decision to retain in satisfaction under section 9-505(2). Affirmative communication with the debtor would seem the best means of avoiding the involuntary strict foreclosure tarpit, since it is cer-

cases would not satisfy the accord and satisfaction doctrine, if it is properly applied. See *supra* notes 6, 90.

While the special consumer goods rule in § 9-505(1) may have been intended as a means of consumer protection, I likewise believe that it serves little purpose. As previously noted, the rule is probably perverse in requiring a sale where 60% of the price has been paid; given the rapid depreciation of most consumer goods, this would simply guarantee a deficiency judgment. See text at *supra* note 48.

151. U.C.C. § 1-203 (1987).

152. *Id.* § 2-302.

153. *Cf. id.* § 3-307(3) (1987) (upon proof of defense, holder of negotiable instrument must prove he is in all respects holder in due course). See also J. WHITE & R. SUMMERS, *supra* note 12, § 25-16, at 1238-39 (noting that some courts have read in this requirement).

154. See Donaldson, *supra* note 147, at 325-26 (suggesting this approach to § 9-507). But see LA. REV. STAT. ANN. § 10:9-507(1) (Supp. 1990) (statutorily adopting "damages only" approach to violations of § 9-504); J. WHITE & R. SUMMERS, *supra* note 12, § 25-16, at 1239 (recognizing this view but expressing skepticism that the burden of proof has much effect). Whether shifting the burden of proof will, in fact, change the results of many cases is a matter that cannot easily be empirically established. Nonetheless, there seems to be little sense in terms of a normative standard in imposing the burden on the party for whom proof costs are clearly disproportionate and who has inferior access to the basic facts at issue.

tainly difficult for a court to infer an intent that is inconsistent with the creditor's own declared one. Written notice can serve as no guarantee, though, since actions ultimately speak more loudly than words.