

Consumer Liability for Deficiencies in Washington

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I. INTRODUCTION

The Article Nine security interest¹ is the Uniform Commercial Code's² device for securing the repayment of a loan of money or extension of credit.³ The purchase money security interest⁴ is a special type of security interest commonly used to

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1. Article 9 of the U.C.C. governs the creation, perfection, and enforcement of a security interest in personal property. U.C.C. § 1-201(37) defines a security interest as: "an interest in personal property or fixtures which secures payment or performance of an obligation." Although the U.C.C. gives no official name to the device itself, it is generally called "the Article Nine security interest." See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 874 (2d ed. 1980).

2. The U.C.C. has been enacted in all states and the District of Columbia; however, Louisiana has only adopted Articles 1, 3, 4, 5, 7 & 8. *UNIFORM LAWS ANNOTATED* (Master ed. 1980). All references in this article to the U.C.C. will be to the 1962 official text, which Washington adopted in 1965. *Uniform Commercial Code, 1965 Wash. Laws ex. sess. ch. 157* (effective July 1, 1967) (current version at *WASH. REV. CODE* tit. 62A (1978)).

The Washington State Bar's U.C.C. Revision Committee is currently studying the 1972 amendments and plans to introduce a bill to enact them in the next legislative session.

For a discussion of the impact of the 1972 amendments on Washington law, see Bull, *Personal Property Security Interests in Washington—Adoption of the 1972 Official Text of the Uniform Commercial Code Will Make a Good Law Better*, 3 *U. PUGET SD. L. REV.* 1 (1979).

3. According to U.C.C. § 9-102(1)(a), Article Nine applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or contract rights."

The Official Note to U.C.C. § 9-102 provides that a repeal of all existing statutes regulating security interests in personal property accompany the enactment of Article Nine.

4. U.C.C. § 9-107 defines a purchase money security interest as one:

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

finance the acquisition of consumer goods.⁵ A consumer grants a purchase money security interest either to the seller of the goods,⁶ or to a third party, such as a bank or credit union, that loans money to the consumer who uses the money to purchase the desired goods.⁷ If a consumer defaults⁸ under a security agreement, the Uniform Commercial Code (U.C.C.) gives the secured party a variety of rights.⁹ One of the remedies is to repossess the collateral, and after disposing of the collateral, and making appropriate application of the proceeds of the debt, to

The key difference between a purchase money security interest and other security interests is that the extension of credit or loan is actually used to enable the debtor to acquire rights in the collateral. *Compare* *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W.2d 1 (1972) *with* *Brodie Hotel Supply, Inc. v. United States*, 431 F.2d 1316 (9th Cir. 1970) *and* *In re Ultra Precision Indus., Inc.*, 503 F.2d 414 (9th Cir. 1974).

A purchase money security interest plays a special role in financing. For this reason, the Code affords special priority to a purchase money secured creditor. *See* U.C.C. § 9-312(3)-(4). Special perfection rules also apply. *See* U.C.C. § 9-302(1)(d) (automatic perfection of a purchase money security interest in consumer goods).

5. U.C.C. § 9-109 states: "Goods are (1) 'consumer goods', if they are used or bought for use primarily for personal, family or household purposes." The Washington Supreme Court discussed the meaning of consumer goods in *Commercial Credit Equip. Corp. v. Carter*, 83 Wash. 2d 136, 516 P.2d 767 (1973).

6. U.C.C. § 9-107(a).

7. U.C.C. § 9-107(b).

8. The Code does not define "default." Consequently, each security agreement must provide the applicable definition. A typical default clause found in a security agreement includes such items as: 1) default in any payment when due; 2) default in the performance of any obligation or covenant contained in the security agreement; 3) any warranty, representation or statement made or furnished to the creditor by or on behalf of the debtor which proves to have been false in any material respect when made or furnished; 4) loss, theft, damage, destruction, sale or encumbrance to or of any of the collateral; 5) the making of any levy, seizure or attachment on the collateral; 6) death or insolvency of the debtor; and 7) an adverse change in the financial condition of the debtor which in the creditor's opinion impairs the creditor's security or increases its risk. *See also* R. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* 115 (2d ed. 1974).

9. A secured party's rights when a debtor defaults are set forth in U.C.C. § 9-501(1) which provides in part:

When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part [Part 5 of Article Nine] and except as limited by subsection (3) those provided in the security agreement. He 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.

The section of Part 5 which relates to a deficiency reads in part:

If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency: . . .

U.C.C. § 9-504(2).

sue the debtor for the difference between the secured debt and the proceeds of the disposition (the deficiency).¹⁰

This article focuses on a secured party's right to hold a debtor liable for a deficiency when resale of the goods does not satisfy the remaining obligation. Although the State of Washington adopted the U.C.C. with relatively few changes,¹¹ it did enact a different version of section 9-501 governing consumer liability for deficiencies. Under the Washington statute a consumer debtor is not liable for a deficiency in the event of default under a purchase money security agreement when the secured party is the seller of the collateral and uses self-help to repossess.¹² This article examines Washington's version of section 9-501, and its treatment of deficiencies. This examination is particularly timely because recent litigation can result in a clear interpretation by the Washington Supreme Court of the Washington version of U.C.C. Section 9-501.¹³ Whatever the result of

10. The creditor is also entitled to recover certain costs incurred in connection with the repossession and resale. U.C.C. § 9-504(1)(a)-(c). See generally Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205 (1963).

11. For a discussion of the Washington enactment of the U.C.C. and how its version differs from the official 1962 text, see WASHINGTON REVIEW STAFF, *COLLECTED ESSAYS ON THE UNIFORM COMMERCIAL CODE IN WASHINGTON* (1967); Cosway & Shattuck, *The Uniform Commercial Code — S.B. 122*, 40 WASH. L. REV. 873 (1965).

12. The Washington version of U.C.C. § 9-501 adds the following subparagraph to U.C.C. § 9-501(1):

Notwithstanding any other provision of this Code, in the case of a purchase money security interest in consumer goods taken or retained by the seller of such collateral to secure all or part of its price, the debtor shall not be liable for any deficiency after the secured party has disposed of such collateral under RCW 62A.9-504 or has retained such collateral in satisfaction of the debt under subsection (2) of RCW 62A.9-505.

WASH. REV. CODE § 62A.9-501(1) (1966).

Sections 9-504 and 9-505 refer to the creditor's option of either conducting a sale of the collateral to satisfy the debt (§ 9-504) or retaining the collateral and declaring the debts satisfied (§ 9-505). The Washington versions of those sections are identical to the uniform text.

13. On September 22, 1980, the Washington Supreme Court heard oral argument in the case of Tacoma Telco Fed. Credit Union v. Edwards, No. 46887-7, (Wash. Sup. Ct., certification accepted March 17, 1979). The case was certified to the supreme court as a case of first impression, on appeal from Telco's suit against Edwards. Telco sued Edwards for the sum of \$1,306.73, which represented the difference between a purchase money loan it had made to Edwards and the proceeds of Telco's sale after the debtor had returned the collateral to the credit union. On cross-motions for summary judgment, Edwards argued that WASH. REV. CODE § 62A.9-501(1) (1979) barred Telco from collecting a deficiency from Edwards. The credit union defended on the grounds that the prohibition of WASH. REV. CODE § 62A.9-501(1) (1979) did not apply to a credit union because it was not a seller. The trial court granted summary judgment to Telco on its claim for a deficiency. On appeal, both parties identified the issue as being whether WASH. REV.

the litigation, however, the Washington legislature must still address the question of consumer liability for deficiencies. To understand the effect of the present Washington statute, this article first reviews the history of a consumer debtor's liability for a deficiency arising out of a secured debt. It next analyzes the rules regarding deficiencies introduced by section 9-501, compares these rules to the Washington version of that section, and examines the background of Washington's unique version of

CODE § 62A.9-501(1) (1979) prevents a secured party, that is not a seller, from obtaining a deficiency from a debtor under a purchase money security interest in consumer goods when the secured party has disposed of the collateral under WASH. REV. CODE § 62A.9-504 (1979).

The court should rule that the proper interpretation of WASH. REV. CODE § 62A.9-501(1) (1979) is that only seller/secured parties are barred from recovering deficiencies. See text accompanying notes 53-54 *infra*. However, regardless of the decision of the court in *Telco*, or any other case, the Washington legislature must address the question of consumer liability for deficiencies.

Other pending lawsuits raise the issue of proper construction of WASH. REV. CODE § 62A.9-501 (1979). *Northwestern Collection v. Miller*, No. 79-2-02205-3 (Snohomish County Super. Ct., filed June 26, 1979), is an appeal from a decision of the South District Justice Court of Snohomish County which stated that WASH. REV. CODE § 62A.9-501(1) (1979) applies "equally to the seller of collateral and to a bank which has loaned funds to purchase the collateral provided that they are both secured parties." On Oct. 27, 1980, the court held that the bank is entitled to a deficiency judgment because it was not the seller of the car.

Yet another case, *Bank of Everett v. Logan*, No. 79-2-03987-8 (Snohomish County Super. Ct., filed Nov. 13, 1979), has been stayed pending the decision of the Washington Supreme Court in *Telco*. The author has not conducted a survey of state courts to determine how many other lawsuits may be pending dealing with the construction of WASH. REV. CODE § 62A.9-501(1) (1979). The supreme court decision in *Telco* will control the outcome in those cases. The number of lawsuits on file does not reveal the scope of the deficiency problem because cases which might raise the issue are usually settled. Attorneys counsel clients to avoid raising the issue due to the uncertain state of the law.

One possible reason for the uncertainty over the application of WASH. REV. CODE § 62A.9-501 (1979) to non-sellers is that the first version of the Washington Practice Manual contained a statement to the effect that the statute applies to all purchase money secured parties. See 8 W. SHATTUCK & R. COSWAY, WASH. PRACTICE, Comment 9:1270(5) (1967). The most recent supplement to that volume corrects this error. *Id.* at Supp. 1980. Unfortunately, Division I of the Washington Court of Appeals favorably quoted the 1967 language in dicta in *Lew v. Goodfellow Chrysler-Plymouth, Inc.*, 6 Wash. App. 226, 231, 492 P.2d 258, 262 (1971). A further example of how repetition compounds an error is that the FEDERAL TRADE COMMISSION REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULE: CREDIT PRACTICES 16 CFR PART 444: PUBLIC RECORD 215-42 (1980) [hereinafter cited as CREDIT PRACTICES] lists Washington as a state that bars deficiencies, *id.* at 242, based on a statement by a Washington Legal Services attorney who, in all likelihood, relied on the Washington Practice volume and the *Lew* case. See *id.* at 241, n.193. The FTC corrected this error in FEDERAL TRADE COMMISSION, BUREAU OF CONSUMER PROTECTION, CREDIT PRACTICES, STAFF REPORT AND RECOMMENDATIONS ON PROPOSED TRADE REGULATION RULE 16 CFR PART 444: PUBLIC RECORD 215-42, 256 (1980) [hereinafter cited as FTC STAFF REPORT].

section 9-501. Finally, consumer protection problems in the area of deficiencies are explored, and possible methods of addressing those concerns are discussed.

II. PRE-CODE CONSUMER DEBTOR LIABILITY FOR DEFICIENCIES

Prior to the adoption of the U.C.C.¹⁴ contracting parties used a number of different legal devices, each with its own form and set of rules, to secure the repayment of debts incurred in connection with the acquisition of goods.¹⁵ The two devices most commonly used in consumer transactions were the conditional sales contract and the chattel mortgage.¹⁶ When a buyer purchased goods under a conditional sales contract, title passed to the buyer conditioned on his complete payment.¹⁷ If the buyer failed to complete payment, the contract was breached and the seller then had two options. The first option, which could be done without judicial intervention, was an election to treat the contract as in default and recover the goods.¹⁸ In that case, the contract was terminated when the seller repossessed the goods, and the seller had no surviving contractual rights against the buyer. Thus, the defaulting buyer under a conditional sales contract was not liable to the seller for any deficiency. The second option was election to treat the sale as a sale on general credit, and to sue the buyer for any portion of the unpaid purchase price. Under this theory the seller theoretically passed title to the goods to the buyer, and forfeited any rights to repossess the goods. Courts considered these options mutually inconsistent; election of one remedy prevented later resort to the other.¹⁹

14. For a detailed discussion of pre-Code security law, see 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 1.1-8.8 (1965).

15. These devices included, among others, conditional sales contracts, chattel mortgages, factor's liens, field warehousing, and trust receipts. For a detailed discussion of these various devices, see *id.*

16. See generally L. JONES, *THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES* (6th ed. rev. & enlarged R. Bowers 1933); 1 G. GILMORE, *supra* note 14, at §§ 2.1-3.8.

17. See generally R.S. HOAR, *CONDITIONAL SALES* (1929); A. SQUILLANTE & V. FON-SUA, *WILLISTON ON SALES* (4th ed. 1973); L. VOLD, *HANDBOOK OF THE LAW OF SALES* 280-81 (2d ed. 1959).

18. See L. VOLD, *supra* note 17, at 292-98. See also note 17 *supra*.

19. Compare the election of remedies provision of the Uniform Conditional Sales Act.

After the retaking of possession as provided in § 16 the buyer shall be liable for the price only after a resale and only to the extent provided in § 22. Neither the bringing of an action by the seller for the recovery of the whole or any part

Unlike the conditional seller, the chattel mortgagee did not have to elect remedies.²⁰ If the debtor defaulted, the chattel mortgagee had both a right to the property and a right to hold the debtor liable for any deficiency remaining on the purchase price. However, the chattel mortgagee could retake the mortgaged property only through judicial process. Thus a major difference between conditional sales contracts and chattel mortgages was the remedies available under each respective device. Consequently, under pre-Code law whether or not a consumer debtor would be liable for a deficiency depended on the form of security device used.²¹ The previous discussion of general pre-Code law reviews the basic state of the law in Washington prior to that

of the price, nor the recovery of judgment in such action nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in § 16. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attracted them, or levied upon them as the goods of the buyer.

Uniform Conditional Sales Act, § 24: Election of Remedies, *reprinted in National Conference of Commissioners, Uniform Acts Approved and Recommended* (1951 ed.)

20. In the United States, statutes exclusively created and governed the chattel mortgage. Although some state laws allowed the use of a chattel mortgage in a purchase money transaction, its use was frequently restricted to situations where the debtor already held title to the goods. See 1 G. GILMORE, *supra* note 14, at § 2.2; 2 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* § 498 (rev. ed. 1940).

21. The form of security device used sometimes depended on whether the source of funds was a seller or non-seller. In some states, such as Washington, judicial decisions restricted the conditional sale device to the use of the actual seller in the economic sense. Neither the financier nor lender of money could use the device. In *Hughbanks, Inc. v. Gourley*, 12 Wash. 2d 44, 120 P.2d 523 (1941), the court stated:

This court has held that it is not the office of a conditional bill of sale to secure a loan of money. Its purpose, rather, is only to permit an owner of personal property to make a bona fide sale on credit, reserving title in himself, for security, until the purchase price is fully paid. This particular security device, with its severe remedial incidents, is not favored in the law and its use has been restricted to situations where persons standing in the actual relation of vendor and vendee have desired to effect a credit sale. It is in such cases that it finds its only legitimate use.

Where, on the other hand, one who is the owner of a particular chattel wishes to borrow money and is willing to let the chattel stand as security for his debt, a chattel mortgage is the appropriate means for affording such protection to the creditor. And this is as true where the property mortgaged is purchased with the borrowed funds as where it has long been in the borrower's possession.

Id. at 49, 120 P.2d at 525.

In fact, due to the dual benefits of avoiding usury laws and rights to self-help repossession, many non-sellers apparently preferred the conditional sales device. See Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

state's enactment of the U.C.C.²² The Washington Supreme Court had explicitly recognized the doctrine of election of remedies with regard to conditional sales contracts.²³ At the same time Washington statutes provided two alternate methods for foreclosing on a chattel mortgage: one, a foreclosure proceeding which was fairly lengthy; the other, a more summary proceeding, where chattel mortgagee action could result in a sheriff sale of the property by informal notice and sale proceedings.²⁴ The mortgagee was not required to elect remedies, under either method, and could hold a debtor liable for any resulting deficiency. The chattel mortgagee could use neither self-help nor a power of sale clause to obtain possession of the property to avoid the burden of foreclosing.²⁵ Even the summary method of notice and sale involved the use of a court officer to obtain possession of the property and to conduct the sale. Therefore, in Washing-

22. For a general discussion of the law of conditional sales and chattel mortgages in Washington, see Starr, *Conditional Sales and Chattel Mortgages*, 9 WASH. L. REV. 143 (1934). For illustrative cases distinguishing conditional sales contracts from chattel mortgages in Washington, see *Pacific Metal Co. v. Joslin*, 359 F.2d 396 (9th Cir. 1966); *Smith v. Downs*, 48 Wash. 2d 165, 292 P.2d 205 (1956); *Lahn & Simmons v. Matzen Woolen Mills*, 147 Wash. 560, 266 P.2d 697 (1928).

23. *Eilers Music House v. Douglass*, 90 Wash. 683, 685, 156 P. 937, 938 (1916); see *Standard Fin. Co. v. Townsend*, 1 Wash. 2d 274, 276, 95 P.2d 786, 787 (1939). See also *Washington Coop. Chick Ass'n v. Jacobs*, 42 Wash. 2d 460, 463, 256 P.2d 294, 296 (1953).

24. WASH. REV. CODE § 61.12.160 (1979) (repealed Uniform Commercial Code, ch. 157, § 10-102(1)(a)(vii), 1965 Wash. Laws ex. sess.), provided that if a chattel mortgage contained an express agreement for the payment of the sum of money secured, the mortgagee who proceeded to foreclose could recover a deficiency from the debtor. WASH. REV. CODE § 61.08.010 (1979) (repealed Uniform Commercial Code, ch. 157, § 10-102(1)(a)(xiii), 1965 Wash. Laws ex. sess.), provided a method whereby the chattel mortgagee could cause the sheriff to sell the property through informal notice and sale proceedings without court action. Under this procedure as well, the mortgagee could recover any resulting deficiency.

25. In an article comparing Article 9 and pre-Code Washington law, Professor Shattuck states:

In *Roche Fruit & Produce Co. v. Vaught*, 143 Wash. 601, 255 P. 953 (1927), the court declined to enforce a mortgage clause conferring on the mortgagee a right to possession on default. This case was followed in *Carey v. Interstate Bond & Mortgage Co.*, 4 Wash. 2d 632, 164 P.2d 579 (1940), in holding a mortgagee who took possession by self-help to be a converter despite such a mortgage clause. Another step in a chain of events which precluded use of the power of sale form of chattel mortgage realization in Washington was taken in *Parks v. Yakima Valley Prod. Credit Assoc.*, 194 Wash. 380, 78 P.2d 162 (1938). There, a mortgagee in possession was held in conversion for selling the goods, despite a power of sale clause.

Shattuck, *Secured Transactions (other than Real Estate Mortgage) — A Comparison of Article 9 of the Uniform Commercial Code and The Pre-Code Washington Laws*, reprinted in *THE UNIFORM COMMERCIAL CODE IN WASHINGTON* 638, 764 n.232 (1967).

ton, a consumer debtor under either a conditional sale contract or a chattel mortgage had some degree of protection from a deficiency. In the case of a conditional sale, the debtor could either lose the property or retain the property and be liable for the contract price. Under a chattel mortgage, although the debtor would both lose the property and be liable for a deficiency, the involvement of a court officer in the repossession and resale activities provided some assurance of fairness in the computation of the deficiency.²⁶

III. THE UNIFORM COMMERCIAL CODE'S TREATMENT OF DEFICIENCIES

A. *In General*

The Uniform Commercial Code's drafters carefully considered the extent to which pre-Code law should be retained or discarded. In drafting Article Nine, they examined and analyzed the wide variety of pre-Code security devices. Their analysis revealed that these legal devices shared many common characteristics.²⁷ One important common characteristic was that each device was designed to give special rights in identifiable personal property to secure the repayment of a loan of money or extension of credit.²⁸ The drafters' analysis indicated that the differing forms and rules governing the creation of the various security devices confused creditors and that their complexity created problems that required a degree of sophistication that most creditors did not have.²⁹ The drafters found no justification for the differences between the security devices. Consequently, the

26. Cf. *Peoples Nat'l Bank of Wash. v. Peterson*, 7 Wash. App. 196, 199-200 n.2, 498 P.2d 884, 886 n.2 (1972), wherein the court states: "If anything, the debtor generally has more protection through a judicial foreclosure under direct supervision of the court than under the self-help provisions of the Uniform Commercial Code."

27. 1 G. GILMORE, *supra* note 14, at § 9.1; 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 43.1 (1965).

28. The official text to U.C.C. § 9-102 states that the "main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article."

29. For example, Grant Gilmore observed:

All of this — past, present, and future — is appalling. The direct cost — the time and expense involved in drafting the statutes and lobbying them through legislatures — is bad enough. But what is really serious is the progressive confusion which results from the yearly addition of still another eccentric piece of security legislation.

Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 L. & CONTEMP. PROB. 27, 32 (1951).

drafters explicitly abolished distinctions based on different types of transactions.³⁰ They rejected the pre-Code system and, in its place, adopted a single approach emphasizing the similarities of the different devices.³¹ They created a new, simpler, and more efficient device, known simply as an "Article Nine security interest." Concomitantly, a single scheme of creditors' remedies replaced the previous system of remedies where the form of device used had dictated the available remedy.³²

The U.C.C. Article Nine security interest completely changed pre-Code law regarding conditional sales contracts and chattel mortgages. First, these two different security devices were abolished.³³ Although parties may still use pre-Code forms, the Code emphasizes substance over form, and both devices are treated as security agreements.³⁴ Second, the Code abolished the distinction in remedies available under those different devices.³⁵ Specifically, the U.C.C. sets forth a wide range of remedies available to a secured party upon a debtor's default, and provides that those remedies are cumulative.³⁶ Among the available remedies is the right to use self-help to repossess, to resell the goods, and if the proceeds of the sale do not satisfy the remaining obligation, to hold the debtor liable for the deficiency.³⁷ In marked

30. The Official Comment to U.C.C. § 9-101 states:

The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

Under this Article the traditional distinctions among security devices, based largely on form, are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which had grown up at common law and under a hundred-year accretion of statutes.

31. The Official Comment to U.C.C. § 9-101 provides: "Under the Article distinctions based on form . . . are no longer controlling The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines."

32. For a brief summary of the Article 9 scheme of creditors' rights and an explanation of its relationship to pre-Code law, see U.C.C. § 9-504 and accompanying comments. See, e.g., 1 G. GILMORE, *supra* note 14, at § 9.1.

33. See note 30 *supra*.

34. The Official Comment to U.C.C. § 9-102 states: "The article does not in terms abolish existing security devices. The conditional sale or bailment lease, for example, is not prohibited; but even though it is used, the rules of this Article govern."

35. U.C.C. § 9-202 provides: "Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."

36. U.C.C. § 9-501(1) (last sentence).

37. See text accompanying note 9 *supra*.

contrast to pre-Code law, a creditor in the position of a chattel mortgagee may proceed through self-help directly against the collateral. Also in contrast to pre-Code law, after retaking the goods, a creditor in the position of a conditional seller may recover a deficiency.

B. *In Washington*

When the Washington legislature enacted section 9-501, it departed from the uniform text's treatment of creditors' remedies by adding a subparagraph to section 9-501(1) which provides:

Notwithstanding any other provision of this Code, in the case of a purchase money security interest in consumer goods taken or retained by the seller of such collateral to secure all or part of its price, the debtor shall not be liable for any deficiency after the secured party has disposed of such collateral under R.C.W. 62A.9-504 or has retained such collateral in satisfaction of the debt under subsection (2) of R.C.W. 62A.9-505.³⁸

The subparagraph distinguishes between sellers who retain a purchase money security interest at the time of sale (seller/secured party) and any other lender who, by making a direct loan to a consumer, finances the purchase of goods (non-seller/secured party). Seller/secured parties who use self-help to repossess collateral are barred from recovering a deficiency from a consumer debtor. Non-seller/secured parties, who use self-help to repossess collateral, are free to recover a deficiency. As a result, two consumers who purchase identical goods from the same seller, but use different financing methods, are treated differently. The consumer who finances through the seller is protected from a deficiency, but the consumer who obtains a direct loan from a third party is not.

It is noteworthy that Washington, which enacted most of the official version of the U.C.C. without change, departed from the official version's treatment of creditors' remedies and enacted its unique version of section 9-501(1). The statute does not explain why a distinction is drawn between seller/secured parties and non-seller/secured parties. It is therefore necessary to explore the legislative history to determine whether there is a logical rationale or justification for the distinction.

38. WASH. REV. CODE § 62A.9-501(1) (1979).

The legislative history of Washington's section 9-501 suggests that the legislators had two different and arguably incompatible purposes when they enacted Washington Revised Code § 62A.9-501(1). First, there was a desire to protect consumer debtors from deficiencies in purchase money secured transactions. Second, there was a desire to preserve the pre-Code rights of non-seller/secured parties to recover deficiencies. When legislators tried to raise the consumer protection issues during debate on S.B. 122, the bill that became the U.C.C., they were informed that the matter had been disposed of during consideration of an earlier draft of the bill.³⁹ It is therefore necessary to examine the earlier draft to construct the legislative history for S.B. 122.⁴⁰

The original Washington bill contained an amendment to uniform section 9-501 which, according to its sponsors, would preserve the pre-Code treatment of deficiencies. That amendment provided:

Notwithstanding any other provision of this act the debtor shall not be liable for any deficiency in the case of a purchase money security interest in consumer goods after the *secured party* has disposed of the collateral under Section 9-504 or has retained the collateral in satisfaction of the obligation under subsection (2) of 9-505.⁴¹

During debate on the H.B. 129, specific discussions consid-

39. Although commentators have suggested there is no legislative history for WASH. REV. CODE § 62A.9-501 (1979), see Bull, *supra* note 2, the legislative history may be found by tracing the legislation back through earlier drafts. The question of a consumer debtor's liability for a deficiency arose when the legislature considered S.B. 122, the bill which was ultimately adopted as the U.C.C. The legislative history shows that this question was specifically addressed:

Senator Stender: I'd like to ask Senator Petrich a question. I guess we're all questioning him as the sponsor of the bill . . . In this bill, I was advised there was a provision, under a conditional sales contract, that if the purchaser was not able to fulfill his contract and the automobile was repossessed and sold at whatever price they agreed upon, they would then garnishee [sic] the man's wages for the deficiency, is that correct?

Senator Petrich: Senator Stender, two years ago that matter was taken care of and is incorporated in this particular bill by House amendment *which eliminated deficiency judgments under private sale*.

WASH. SENATE J., 39th Leg. 305-06 (1965) (emphasis added).

40. Further research into the previous draft of the bill, and the amendment to which Senator Petrich was referring, see note 39 *supra*, reveals that in fact the amendment did *not*, as Senator Petrich suggested, eliminate deficiency judgments under private sale in all situations — rather the distinction between sellers and other lenders was drawn. See note 42 *infra*.

41. WASH. HOUSE J., 38th Leg. 576-77 (1963) (emphasis added).

ered the impact of that amendment on a consumer's liability for a deficiency.⁴² Sponsors of the amendment argued that it preserved pre-Code law, which barred conditional sellers from recovering a deficiency but allowed chattel mortgagees to do so. A review of the debate demonstrates that the proponents of the amendment to section 9-501 were concerned with protecting consumers from deficiencies in conditional sales situations. At the same time, opponents of the proposed amendment argued that the amendment changed pre-Code law, because the term "secured parties" under the Code, is broader than conditional sellers.⁴³ The opponents wished to limit the prohibition against deficiencies to persons in the position of conditional sellers, thus preserving the pre-Code rights of persons in the position of chat-

42. Mr. Litchman: Mr. Ackley, on page 223, the committee provided an amendment, I believe at your insistence. Would one be deprived of a deficiency if one defaults on a chattel mortgage?

Mr. Ackley: Mr. Litchman, it is my understanding the amendment was offered to prevent the seller from repossessing an automobile or other goods sold on terms similar to your conditional sales contract now, and then getting a deficiency judgment in addition. It is not my understanding that this would apply to anything other than the case of purchase money securities. If you go down and get a chattel mortgage, it is not my understanding that it would be any different than it is now. I think you could get a deficiency judgment on that sort of chattel mortgage but not on conditional sales contracts.

Mr. Litchman: Would it be correct to say your amendment denies deficiencies only on the conditional sales contracts?

Mr. Ackley: That is my understanding.

...

Mr. Litchman: Mr. Andersen, is that your statement too, for the record?

It is quite important.

Mr. Andersen: My understanding, I believe, is the same as Mr. Ackley's. The purpose of the amendment was to delete the deficiency judgment in purchase money transactions where such a thing could be abused in the opinion of the committee and where it was not desirable at this time without a lot of additional study to permit deficiency judgments.

Mr. Litchman: You are not trying to deny a deficiency judgment against one who has a chattel mortgage?

Mr. Andersen: I believe I have answered that as fully as I can.

...

Mr. Litchman: I think Mr. Ackley answered my question, but I wonder if others concur in it. Do you, Mr. Gorton?

Mr. Gorton: Yes, Mr. Litchman, I do.

WASH. HOUSE J., 38th Leg. 682-83 (1963).

43. The legislative debate suggests that perhaps the legislators were not sufficiently familiar with the U.C.C.'s new terminology. Note, for example, Mr. Ackley's statement that since, in his understanding, the legislation applied only to "purchase money securities", it would not apply to a chattel mortgage. *Id.* This apparent lack of familiarity is unfortunate because, if they had been aware of the scope of the initial amendment, they might have engaged in a more detailed debate of the consumer protection issues.

tel mortgagees.

Prior to the next legislative session, legislators and a number of interested parties corresponded with one another regarding the proposed version of section 9-501. Their correspondence reveals that the present statute was proposed in recognition of the opposition to a total ban on deficiencies and of the desire to preserve the pre-Code status quo.⁴⁴ The language limiting its scope to sellers preserved the pre-Code distinction between the rights of conditional sellers and chattel mortgagees to recover deficiencies. This compromise between the two conflicting purposes was apparently brought about through private correspondence and some floor debate. There was no evidence of the availability of empirical data to demonstrate either an economic basis or social policy to support the distinction between seller/secured parties and non-seller/secured parties.

IV. CRITIQUE OF THE WASHINGTON STATUTE

As a result of this legislative compromise Washington consumers receive less protection from deficiencies under Washington Revised Code § 62A.9-501 than they did under pre-Code law. Although the Washington statute prohibits a seller/secured party from obtaining a deficiency judgment when he uses self-help to repossess, thus giving a modicum of protection to consumers, it is not an improvement on prior Washington law. Lenders who are secured parties are no longer obliged to foreclose with judicial intervention but may now use self-help to repossess collateral and still recover a deficiency. Creditors' unsupervised repossession of goods has led to some of the most flagrant abuses when a creditor seeks a deficiency judgment.⁴⁵ The Washington statute does little to curb these abuses, thus affording consumers less protection than pre-Code law.

Additionally, the Washington statute causes consumer hardship because it creates a need for certain creditor disclosures, which the Federal Truth in Lending Act (TILA)⁴⁶ does not

44. Letters are on file in Law Review office.

45. See CREDIT PRACTICES, *supra* note 13, at 205-23; 2 G. GILMORE, *supra* note 27, at § 44-1; THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 28 (1972) [hereinafter NCCF CONSUMER CREDIT]; Krahmer, *Creditors, Consumers and Article 9 of the U.C.C.*, 5 TOL. L. REV. 1, 33-37 (1973).

46. 15 U.S.C. §§ 1600-1665 (1976). See generally Boyd, *The Federal Consumer Credit Protection Act — A Consumer Perspective*, 45 NOTRE DAME LAW. 171 (1970). Any comprehensive analysis of problems under the TILA must also make reference to

require. Consumers have come to rely on the TILA full disclosure requirements, which inform consumers of the terms of credit, including the amount of down payment, interest rate, and total amount paid.⁴⁷ However, the TILA does not require disclosure of a creditor's rights in the event of a debtor's default.⁴⁸ Therefore, the absence of information regarding a consumer's liability for a deficiency under the Washington statute could potentially mislead consumers to select financing from a non-seller/secured lender, thus resulting in exposure to a possible deficiency judgment in the event of default.⁴⁹

The goal of the TILA is to encourage and improve the ability of consumers to shop for credit⁵⁰ and make informed credit decisions. Given this purpose, creditors should make all relevant credit information available so that consumers may make a knowledgeable selection. Unless state law requires disclosure⁵¹ concerning creditor rights upon default, consumers will likely select a loan from a lender rather than a seller, because generally

regulations promulgated by the Federal Reserve Board pursuant to its authority under 15 U.S.C. § 1604 (1976). These regulations are cumulatively referred to as Regulation Z. 12 C.F.R. 226.1-15 (1980).

47. The Truth in Lending disclosure requirements are contained in Part B of the Act, 15 U.S.C. §§ 1631-1645 (1976). Required information includes: cash price of property or services purchased, *id.* § 1638(a)(1); down payment or trade-in value, *id.* § 1638(a)(2); finance charges, *id.* § 1638(a)(7); and description of any security interest the creditor retained, *id.* § 1638(a)(10).

48. *Cf. FRB Official Staff Interpretation* No. FC-0117 [1974-77 Transfer Binder] CONS. CREDIT GUIDE (CCH) ¶ 81,703 (1977) (consumers do not have to be told that they are not subject to a deficiency judgment if the creditor repossesses the collateral at a time when the loan balance is under \$1,250).

49. A recent critical analysis of the TILA suggests that the disclosure requirements leave out more important information than they include. Landers & Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711 (1979). The article questions TILA's basic premise that disclosures will influence consumer behavior.

50. The general purpose clause of the TILA, provides:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit practices.

15 U.S.C. § 1601(a) (1976).

51. The Act does not "annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions." *Id.* § 1610(a). The Washington Consumer Protection Act, WASH. REV. CODE § 19.86.020 (1979), does not contain such disclosure requirements.

the lender will charge a lower rate of interest.⁵² However, due to the Washington version of section 9-501, that choice could be detrimental to the consumer, because in the event of default, the consumer will be liable for a deficiency. Had the consumer granted a security interest to the seller instead of the lender, the consumer would not be liable for a deficiency. Because the TILA does not require such a disclosure, Washington's section 9-501, although attempting to protect some consumers from deficiencies, may cause a consumer to unwisely choose financing which would not have been selected upon full disclosure.

Not only does the Washington statute fail to provide adequate consumer protection, but also it creates two arbitrary classes of lenders: sellers and non-sellers. Consequently, two arbitrary classes of consumers are established: consumers who finance their purchases through sellers, and consumers who finance their purchases through non-sellers. The only difference between these consumers is their source of credit.⁵³ Thus, whether a consumer is protected from a deficiency depends on the fortuity of the consumer's method of financing.⁵⁴

52. For an empirical study which shows that consumers who finance cars with a dealer could borrow more cheaply at a commercial bank, see White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New-Car Buyers and Auto Loans*, 69 MICH. L. REV. 1207 (1971).

53. Stefen Riesenfeld criticized a similar distinction in a former California real property anti-deficiency statute:

Are there, then, any rational grounds for a differentiation between vendor and third party financing of acquisitions? . . . Hence, unless it all boils down to the case that lending institutions are able to marshal a lobby while vendors as a class are not, some other ground must be found to justify such discrimination. The main factor which rationally could be relied upon for that purpose is the proposition that vendors have the last word on the price for which they are willing to part with the property, and, therefore, should be burdened with a risk from which mere financiers remain free. It is, however, painful to determine whether this difference in influence on the terms of the bargain justifies so drastic a discrimination in the resulting rights.

Riesenfeld, *California Legislature Curbing Deficiency Judgments*, 48 CALIF. L. REV. 705, 727-28 (1960) (footnotes omitted). The California statute was subsequently amended to delete the distinction between seller and non-seller lenders.

54. There are at least two possible rationales which may be advanced to explain the distinction between sellers and non-sellers, however, both are readily rebutted. First it is said that a seller is in a better position to protect itself from the risk of loss because it is able to adjust the down payments and establish the price of the goods. Second, it is asserted that the seller is in a superior economic position in relation to the buyer which could be oppressive if the seller were permitted to assume too many remedies. Because the seller's economic position is superior to the buyer's, and the seller basically sets the terms of the bargain, the seller should not be permitted the additional advantage of a deficiency. Note, however, that lenders stand in a similarly superior economic position in

The Washington statute also ignores two important U.C.C. policies: uniformity of commercial law among the states,⁵⁵ and treating similar transactions in the same fashion.⁵⁶ The policy of uniformity demands that all states enact identical statutes governing commercial transactions. The U.C.C. is the model for the states to enact. Washington's failure to enact the uniform version of section 9-501 defeats that policy and the goal of predictability underlying it. Likewise, Washington ignores the second policy by distinguishing between the treatment of seller/secured parties and non-seller/secured parties. Despite the fact that these parties serve the same function, the Washington version of section 9-501 treats them differently. Under the uniform version, both are purchase money secured creditors. As purchase money secured creditors, both perform the same function of financing the purchase of personal property in exchange for a security interest in the goods. The U.C.C. treats both types of secured creditors and the resulting purchase money secured transactions identically. Washington ignores the similarities in substance and emphasizes the technical distinction in form, thus thwarting the Code's preference for substance over form. Another flaw in the Washington statute is the basic distinction it draws between purchase money and non-purchase money transactions. No empirical data suggests that consumers need more protection from deficiencies arising from purchase money transactions than from non-purchase money transactions. The Washington statute affords absolutely no protection to a consumer in a non-purchase money transaction. No studies of creditor abuse of deficiencies identify purchase money transactions as the sole instance of creditor abuse in the deficiency area.

Yet another problem with the Washington statute is that the liability of a consumer for a deficiency where the seller

relation to borrowers, with the same susceptibility to oppression. The same statements can be made about lenders who must be aware of the purpose of the loan and the value of the collateral before advancing any funds. Therefore, the lender has the ability to protect itself from the risk of loss by adjusting the amount of the loan to correspond to the value of the property purchased with the loan. Cf. Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld And a Proposed Salvation*, 51 OR. L. REV. 302, 332 (1972) (because the U.C.C. does not limit a lender's collateral, a consumer needs greater protection from overzealous lenders and sellers of services than from sellers of goods).

55. U.C.C. § 1-102. For a discussion of the importance of enacting a uniform commercial code, see Cosway & Shattuck, *supra* note 11, at 879-80.

56. U.C.C. § 1-102.

assigns the consumer's security agreement is unclear. Because the Washington statute's use of the word "seller" arguably excludes an assignee of the seller, the statute is unclear whether a consumer is liable for a deficiency to an assignee of the seller. The statute clearly bars a seller/secured party from recovering a deficiency from a consumer; however, it apparently allows a non-seller/secured party to recover a deficiency. An assignee is technically not a seller;⁵⁷ thus, it can be argued that a consumer will be liable for a deficiency to the seller's assignee.⁵⁸ Despite this technical argument, the statute should be interpreted to extend the prohibition against deficiencies to sellers' assignees because an assignee under common law has the same rights and obligations as its assignor.⁵⁹ Furthermore, courts should read the statutory prohibition to include sellers' assignees or else the purpose of the statute can be completely thwarted. A seller would only have to assign a contract whenever a default arose in order to permit recovery of a deficiency.⁶⁰

57. U.C.C. § 2-103(1)(d) defines a seller as "a person who sells or contracts to sell goods." U.C.C. § 2-106(1) defines sales as "consist[ing] in the passing of title from the seller to the buyer for a price."

58. It could be argued that the language of WASH. REV. CODE § 62A.9-501 (1979) prohibits only "sellers" from recovering deficiencies, and the assignee, typically a finance company or bank, is not a seller under the Code definition.

Professor Thomas D. Crandall notes that the applicability of WASH. REV. CODE § 62A.9-501(1) (1966) to assignee-lenders has never been questioned because of the "(unrecorded) legislative history of the provision." Crandall, *It is Time for a Comprehensive Federal Consumer Credit Code*, 58 N.C.L. REV. 1, 11 n.59 (1979).

59. 4 A. CORBIN, CONTRACTS § 905 (1951 & Supp. 1971); 3 S. WILLISTON, CONTRACTS § 432 (1920 & Supp. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 168 (Tent. Drafts Nos. 1-7) (1973).

60. The federal holder-in-due-course-rule also supports the argument that an assignee cannot recover a deficiency from a consumer under WASH. REV. CODE § 62A.9-501(1) (1979). Under that rule, it is an unfair or deceptive act or practice for a seller, directly or indirectly, to take a consumer contract which lacks a notice stating that any holder of the contract is subject to all claims and defenses which the debtor could assert against its seller. In addition, the same notice is required in a consumer credit contract made in connection with certain purchase money loans. 16 C.F.R. § 433.2 (1980). It should be noted, however, that presently there are some interpretative difficulties with the rule. The idea seems to be that the presence of such a notice in each consumer credit contract gives notice to assignees of potential claims and defenses and, thus, precludes holder-in-due course status. Nothing in the rule, however, seems to prohibit the assignee from being a holder in due course if the notice is not present. The case law "close-connectedness doctrine" can similarly result in subjecting an assignee to all claims and defenses that a consumer could assert against the original seller. *See, e.g., Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

V. METHODS FOR ADDRESSING THE PROBLEM

One of the purposes behind Washington's enactment of Washington Revised Code § 62A.9-501(1) was to protect consumers from deficiencies. The Washington statute may be viewed as part of a national consumer protection movement which has already resulted in the restriction or abolition of a variety of abusive credit practices.⁶¹ A careful review of the literature advocating consumer protection through abolition of deficiencies suggests that the problem being addressed is one of basic unfairness to the consumer resulting from the methods repossessioning creditors use.⁶² Specifically, empirical studies have documented the fact that many creditors resell repossessed goods twice.⁶³ The first time may be at below retail and wholesale prices and subsequently they may obtain a deficiency judgment against a debtor. The second time the creditors may resell the goods at a price that closely approximates the retail value of

61. For a recent discussion of the consumer protection movement in general, see Wallace, *The Logic of Consumer Credit Reform*, 82 YALE L.J. 461 (1973).

62. See D. CAPLOVITZ, *THE POOR PAY MORE* 161-67 (1967); 2 G. GILMORE, *supra* note 27, at 1212-13; Clark, *supra* note 54, at 310; Curran, *Legislative Controls as a Response to Consumer-Credit Problems*, 8 B.C. IND. & COM. L. REV. 409 (1967); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968).

One frequently cited case involved a woman who bought a car battery on credit for \$29.30. Her unpaid balance at the time of default was \$11.75. After all the front end charges were imposed, she still faced a \$128.80 deficiency judgment. The court denied the claim for deficiency in spite of the U.C.C. which authorized everything the creditor had done. *Imperial Discount Corp. v. Aiken*, 38 Misc. 2d 187, 238 N.Y.S.2d 269 (Civ. Ct. N.Y. 1963).

A comprehensive study by the National Commission on Consumer Finance, completed in December, 1972, concluded that the deficiency judgment should be prohibited in cases of default on a second credit sale in which the original price was \$1,765 or less, or on a loan in which the original amount financed was \$1,765 or less. The Commission believed that implementation of that recommendation would afford consumer protection in areas particularly susceptible to abuse because it would exempt most household goods purchased from deficiency judgment and put an end to deficiency judgment abuses found in some used car markets. NCCF CONSUMER CREDIT, *supra* note 45, at 30-31; Krahmer, *supra* note 45. Professor Clark suggests that an additional reason for abolishing deficiencies altogether is "the difficulty of determining the relevant market and the added burden to courts in policing deficiency judgments arising out of consumer credit transactions." Clark, *supra* note 54, at 334.

63. For empirical studies of deficiencies, see Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969); Comment, *California's Automobile Deficiency Judgment Problem*, 4 U.C.D. L. REV. 91 (1971); Note, *I Can Get It for You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081 (1975). See generally Enstrom, *Kill the Automobile Deficiency Judgment*, 56 A.B.A.J. 364 (1970); Shuchman, *Condition and Value of Repossessed Automobiles*, 21 WM. & MARY L. REV. 15 (1979).

the goods. In a number of cases, combined sales actually result in a profit rather than a loss.⁶⁴ Additionally, studies have shown that if the creditor had conducted the first resale in the retail market, the result would be few deficiencies and more surpluses for the debtor.⁶⁵ Following is a discussion of several possible solutions to the deficiency problems and an assessment of the extent to which they resolve the problem.⁶⁶

64. In some cases, the practice actually repeats itself with the creditor repossessing from the new buyer, obtaining a deficiency judgment, and proceeding with another series of resales. Each time the creditor sells the collateral for close to retail value it has a deficiency judgment against a consumer for an outstanding amount. Note, *supra* note 63, at 1081-82.

65. For example, the Schuchman study reported that of the cases studied, the "first" sale averaged 71% of *Redbook* wholesale price and 51% of *Redbook* retail price. If the first sale had been made at *Redbook* retail, the average price would have yielded 108% of the creditor's net claim. See Schuchman, *supra* note 63, at 31-32.

66. In addition to the approaches discussed in the text, still other possible approaches include: prohibiting deficiencies unless there is substantial damage to the collateral other than wear and tear from normal usage, CAL. CIVIL CODE § 2983.8 (West 1974) (mobile homes); prohibiting deficiencies in transactions involving specified types of collateral such as motor vehicles, *cf.* Enstrom, *supra* note 63; restricting the amount of deficiencies by requiring a public sale in certain situations, such as when the debtor has paid more than 60% of the purchase price, *see* D.C. CODE ENCYCL. § 28-3812(e)(3) (West Supp. 1979); prohibiting deficiencies and allowing the creditor to hold the debtor personally liable for wrongful damage to the collateral, (PROPOSAL OF NATIONAL LEGAL SERVICES PROGRAM, CONSUMER VIEWPOINTS: CRITIQUE OF THE U.C.C. BY CONSUMER RESEARCH FOUNDATION, 97-98 (R.A. Elbrecht ed. 1969)); prohibiting deficiencies when the debtor has performed a certain percentage of his obligations (for example, if debtor had paid 60% of the amount of his original contract before submitting to repossession). Homer Kripke suggests that this last approach would be similar to that underlying certain other provisions of the U.C.C. and Uniform Conditional Sales Act. Payment of that percentage would indicate the likelihood that the collateral was at least equal in value to the remaining debt and might indicate a surplus. Kripke, *supra* note 62, at 445, 476.

In cases where a secured creditor who has not complied with the U.C.C.'s requirements for repossession and resale of collateral seeks to recover a deficiency, courts have taken three approaches. Some courts take the position that a secured creditor who fails to comply is absolutely barred from recovering a deficiency. *See, e.g.,* Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 314 (Ct. App. 1972). These courts balance the creditor's rights to a deficiency under U.C.C. § 9-504 against the debtor's rights against a creditor who disregards the Code's requirements under U.C.C. § 9-507. These courts take the position that the consumer protection policies outweigh the creditor's contractual rights to a deficiency. To encourage creditors to observe the Code's requirements, the sanction of a prohibition against a deficiency is designed to force creditors to be more cautious.

Other courts balance the creditor's rights under U.C.C. § 9-504 against the consumer's rights under U.C.C. § 9-508, but fall short of creating an absolute bar on deficiencies. These courts take the position that when a creditor fails to comply with the Code's requirements there is a presumption that the debtor's collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should have been obtained through a proper resale. *See, e.g.,* United States v. White House Plastics, 501 F.2d 692 (5th Cir.), *cert. denied*, 421 U.S. 912 (1974).

The most comprehensive solution to the problem of deficiency judgments, which New Mexico⁶⁷ and California⁶⁸ have adopted, is the total abolition of deficiencies in consumer transactions. They did so in an effort to protect consumers from abusive practices of creditors who repossess without judicial intervention.⁶⁹

The "bar all deficiencies" approach to the problem, however, goes beyond the goal of consumer protection. Not all creditors abuse the U.C.C. scheme of creditors' rights. Specifically, not all creditors abuse the repossession and resale mechanism. Nevertheless, many good faith creditors are legitimately owed money after they sell repossessed goods. The absolute bar on deficiencies would not permit such a creditor to recover the benefit of its bargain.⁷⁰

A second approach is presented in the Uniform Consumer Credit Code (U3C).⁷¹ One of the purposes of the U3C is to pro-

Finally, a growing majority of courts hold that a debtor must prove damages under U.C.C. § 9-507 to offset a creditor's deficiency claim under U.C.C. § 9-504. *See, e.g., Grant County Tractor Co. v. Nuss*, 6 Wash. App. 866, 496 P.2d 966 (Ct. App. 1972), *Leasco Computer Inc. v. Sheridan Indus. Inc.*, 82 Misc. 2d 897, 371 N.Y.S.2d 531 (Civ. Ct. N.Y. 1975). Courts that take this position explain that to deprive a secured party of its rights to a deficiency would be unnecessarily punitive. Thus, they are at the other end of the spectrum from courts that take the first position.

Unfortunately, most of the cases addressing the issue of the consequences which attach to a secured party's failure to follow the Article 9 repossession and resale rules do not articulate their policy judgments with regard to deficiencies. The majority of the literature on point similarly explains what different courts do, but not why. *See* 2 G. GILMORE, *supra* note 27, at § 44.9.4; J. WHITE & R. SUMMERS, *supra* note 1, at 1127-35. *See, e.g., Buckley, The Future of Self Help Repossession Under the U.C.C.*, 81 COM. L.J. 165 (1976); Comment, *Effect of Creditor Misbehavior on Right to Deficiency Judgment under the Uniform Commercial Code*, 45 MO. L. REV. 162 (1980).

67. N.M. STAT. ANN. § 55-9-504(2) (1980) provides: "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency where the collateral involved is consumer goods."

68. The Unruh Act governing retail installment sales provides: "If the proceeds of the sale are not sufficient to cover items (1), (2), and (3) of Section 1812.4, the holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer." CAL. CIV. CODE § 1812.5 (West 1975).

69. *See James Talcott, Inc. v. Gee*, 266 Cal. App. 2d 384, 387, 72 Cal. Rptr. 168, 170 (Ct. App. 1968) (in discussing whether the anti-deficiency provisions of the Unruh Act applied to credit sales to businesses for commercial purposes, the court states: "There is no question but that the Unruh Act was designed to protect the consumer from abusive credit practices.").

70. *See Kripke, supra* note 62.

71. The UNIFORM CONSUMER CREDIT CODE [hereinafter cited as U3C] was promulgated in 1968 by the National Conference of Commissioners on Uniform State Laws. All references are to the Official Text version, with comments. As of March, 1980 the follow-

tect consumers against unfair practices by some creditors.⁷² At the same time, however, the U3C strikes a balance between consumer interests and creditors' rights. The U3C prohibits a secured creditor from recovering a deficiency against a consumer when the goods involved cost less than \$1750.⁷³ The U3C approach to deficiencies is less effective than the "bar all deficiencies" approach described previously. Although it does take into account the rights of creditors, by limiting its reach to transactions involving goods with a cash price of less than \$1750, it fails to adequately protect a large number of consumers. For example, some of the most flagrant abuses occur in the automobile industry, where the cash price of goods sold often exceeds \$1750.

A third, and more direct approach, is the proposal by the Federal Trade Commission (Revised Proposed Trade Regulation Rule on Credit Practices)⁷⁴ that would require secured parties

ing states had enacted the U3C: COLO. REV. STAT. §§ 5-1-101 to 12-105 (1973 & Supp. 1979); IDAHO CODE ANN. §§ 28-31-101 to 28-39-103 (1980); IND. CODE ANN. §§ 24-4.5-101 to 24-4.5-6-203 (Burns 1974 & Supp. 1980); IOWA CODE ANN. §§ 537.1101 to 537.7103 (West Supp. 1979); KAN. STAT. ANN. §§ 16a-1-101 to 16a-9-102 (1974 & Supp. 1979); ME. REV. STAT. ANN. §§ 9-A1.101 to -A7.127 (Supp. 1980); OKLA. STAT. ANN. tit. 14A, §§ 1-101 to -303 (West 1972); S.C. CODE §§ 37-1-101 to 6-610 (1977 & Supp. 1979); UTAH CODE ANN. §§ 70B 1-101 to 9-103 (Supp. 1979); WIS. STAT. ANN. §§ 421.101 to 427.105 (West Supp. 1980); WYO. STAT. §§ 40-14-101 to -702 (1977).

72. U3C § 1.102(2)(d), *reprinted in* SELECTED COMMERCIAL STATUTES 835, 836 (1979 ed.)

73. U3C § 5.103(1)-(2), *reprinted in* SELECTED COMMERCIAL STATUTES 835, 965 (1979 ed.) (the amount in § 5.103 varies from state to state). The original draft of the U3C applied only to credit sales of goods with cash prices of \$1,000 or less. U3C § 5.103 (1968), *reprinted in* UNIFORM LAWS ANNOTATED (West Master ed. 1978). According to Boyd the \$1,000 limitation was imposed for the purpose of restricting the election provision to those goods subject to excessive depreciation and those as to which the expenses of sale are likely to be disproportionate to the amount due. Boyd, *The Revised Uniform Consumer Credit Code as a Replacement for Piecemeal Consumer Legislation: The Arizona Context*, 18 ARIZ. L. REV. 1, 34 (1977).

It is also noteworthy that the original draft of the U3C protected consumers from deficiencies only as against sellers of goods. In response to criticism, the drafters changed the U3C to apply to loans as well as sales.

74. The Federal Trade Commission's Revised Proposed Trade Regulation Rule would make it an unfair creditor practice for a lender or retail installment seller directly or indirectly:

(a) To take or receive from a consumer an obligation which: . . . (7) Fails to contain the following provision in any security agreement in personal property:

In the event that collateral is retaken by the creditor there will be no liability for any deficiency unless the debtor is credited with the fair market retail value of the collateral as determined by a sale in an established, retail market.

FTC Staff Report Appendix A, at 3 (Proposed rule 16 C.F.R. § 444.2(a)(7)).

who repossess and resell to credit the debtor with the fair market retail value of the property, as determined by a resale in an established retail market, when computing the deficiency. This approach addresses the current problem of creditors who use an unfairly low resale price as the basis for their computation of a deficiency. The staff report states that for low value collateral where no established retail market exists, the rule would have the effect of an election of remedies, and there would be no need to determine fair market value.⁷⁵ For other collateral, reference to the price obtained in an actual retail sale would reduce current creditor abuse resulting from reference to the wholesale market. Alternatively, fair market retail value would be determined on the basis of a retail sale by a subsequent owner.⁷⁶ A noteworthy feature of the approach is that it requires each security agreement to include language giving consumers a contractual right to credit of a retail fair market value.

Because the F.T.C. proposed rule does not contemplate an absolute bar on deficiencies, a creditor who makes a good faith effort to resell the goods fairly is protected if the property is worth less than the debt. Such a creditor may subtract from the debt the fair market value of the goods, and recover the resulting deficiency from the debtor.⁷⁷

Still another approach, which the National Commission on Consumer Finance recommended⁷⁸ and the State of Wisconsin adopted, is to abolish self-help repossession.⁷⁹ This approach requires a prior court judgment that states that the debtor is in default before the creditor can exercise the right to repossess and seize the collateral. Two follow up studies in Wisconsin⁸⁰

75. FTC STAFF REPORT, *supra* note 13, at 307-08.

76. *Id.* at 323. For a discussion of the original proposed rule, see Comment, *Defaulting Debtors and the Judicial Process — The FTC's Proposed Restriction on Deficiency Judgments: § 444.2(a)(7) of the Rule on Credit Practices*, 8 CONN. L. REV. 457 (1976).

77. For criticism of the revised proposed trade regulation, see FTC STAFF REPORT, *supra* note 13. See also Division of Consumer Protection, Bureau of Economics Comments on Credit Practices Rule (Sept. 18, 1980).

78. NCCF CONSUMER CREDIT, *supra* note 45.

79. Wisconsin Consumer Act, WIS. STAT. ANN. §§ 421.101-428.106 (West 1973). For a general discussion of the Wisconsin statute, see Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334; Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3 (1973); Heiser, *Wisconsin Consumer Act—A Critical Analysis*, 57 MARQ. L. REV. 389 (1974).

80. Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607.

suggest that the legislation has been successful, despite criticism which predicted that increased creditor costs would be passed on to the consumer, thus ultimately resulting in restriction of credit. The Wisconsin statute has resulted in a great increase in the number of workouts,⁸¹ with no apparent rise in the cost of credit. Over the long term, the data indicates that the incidence of repossession has declined since the legislature enacted the Wisconsin Consumer Act. Only a modest reduction of credit availability has occurred.

Although the Wisconsin "judicialization of repossession" approach has its critics, experience suggests that it is an equitable solution to the deficiency problem. The increased controls over creditors have greatly reduced many abusive creditor practices. Consumers can be liable for deficiencies when creditors pursue defaulting debtors, but the court supervision should assure a fair resale and fair deficiency, if any. Finally, in practice, it appears that creditors and debtors alike are benefiting from the increase in the number of workouts, which also helps avoid a variety of the costs commonly associated with repossessions.

VI. CONCLUSION

This article has presented an overview of the consumer deficiency problem in Washington and, in addition, has analyzed numerous solutions to the problem proposed by national studies and adopted by other states and ways to protect consumers from abusive creditor practices. The U3C model does not appear to be desirable for Washington to follow because most creditor abuse of deficiencies takes place in industries where the cost of goods involved exceeds \$1750, the U3C limitation. Even if the F.T.C. Regulation is promulgated, action by the Washington legislature will be necessary to eliminate the arbitrary distinction the Washington statute draws between seller and non-seller/ secured parties.

As part of its efforts to revise the U.C.C., the Washington legislature should undertake an empirical study of deficiencies in Washington to ascertain whether or not the problems outlined in this article exist in the consumer credit industry in Washington. If abuses exist in only one industry, for example, the auto-

81. A "workout" is an informal out of court settlement of a debt between creditor and debtor.

mobile industry, legislation could be proposed to affect only that industry. If, however, as most commentators suggest, the problem is widespread, Wisconsin's approach appears to offer the most equitable solution to the deficiency problem. After the legislature resolves the deficiency problem, it should delete the additional language in Washington's section 9-501 so it will conform to the uniform text.*

* Editor's Note: On November 13, 1980, the Washington Supreme Court decided *Tacoma Telco Federal Credit Union v. Edwards*, 94 Wash. 2d 666, 619 P.2d 363 (1980), see note 13 *supra*, and held that WASH. REV. CODE § 62A.9-501(1) (1979) does not apply to a non-seller/secured party. Thus a third party lender may recover a deficiency judgment after the debtor's default, repossession, and resale pursuant to WASH. REV. CODE § 62A.9-504 (1979). The court expressly noted, however, that it was not deciding whether a bank that purchased a seller's contract is prohibited from seeking or obtaining a deficiency.