UNIFORM COMMERCIAL CODE: ARTICLE 9, PART 5; RIGHTS, REMEDIES AND LIABILITIES UNDER DEFAULT

STEVEN C. TURNER*

INTRODUCTION

Article Nine of the Uniform Commercial Code[1] attempts to provide a "comprehensive scheme for the regulation of security interests in personal property and fixtures."[2] The assigned task of

* B.S., 1972, M.S. 1973, Indiana State University; J.D. *cum laude*, 1976, Creighton University. Associate, Marer, Venteicher, Strasheim, Seidler, Laughlin & Murray, P.C., Omaha, Nebraska.

1. U.C.C. §§ 9-101 to 9-507. Unless otherwise indicated, all citations to the U.C.C. will be to the 1962 official text. Where Nebraska has adopted a nonuniform provision, the Nebraska statute will be cited also.

The proposed 1972 Amendments to Article 9 contain only a few changes to the sections of Part 5. U.C.C. § 9-501(3) was amended to include the phrase "subsection (3) of section 9-504 and," and deletes the phrase "subsection (1) of." U.C.C. § 9-502 was amended by deleting the term "contract rights." U.C.C. § 9-504(3) was amended so that the secured party who disposes of collateral need only provide notice of disposition to any other secured party when the other secured party has provided written notice of his interest in the collateral. The disposing secured party is obligated to provide notice to other secured parties only if the written notice is received prior to the notification of disposition to the debtor, or before the debtor's renunciation of his rights to notice. In addition U.C.C. § 9-504(3) was amended to permit the debtor after default by means of a signed statement to renounce or modify his right to notification of sale. U.C.C. § 9-505(2) was amended in the same manner as U.C.C. § 9-504(3) concerning the debtor's renunciation of rights and notice to other secured parties. In addition the period of time for disposition after receiving notice of objection from another secured party or the debtor was reduced from 30 days to 21 days.

2. Official Comment, U.C.C. § 9-101. The term "security interest" is defined under U.C.C. § 1-201(37) thusly:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of account, chattel paper, or contract rights which is subject to article 9. This special property interest of buyer of goods on identification of such goods to a contract for sale under section 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that

Part Five of Article Nine is the regulation of the events of default, repossession and disposition of collateral.[3] Part Five provides the secured party[4] with rights and imposes liabilities upon him. In addition, Part Five recognizes the need for protecting the debtor's[5] interest in the collateral.

The secured party's conduct in a default situation is governed by Part Five; whether the secured party obeys the "rules" therein set forth bears a direct relationship to his right to collect a deficiency judgment. Further, the secured party may incur monetary liability to the debtor if his conduct is contrary to the mandates of Part Five.

This inquiry examines the seven sections of Part Five and disscusses the rights and liabilities of the parties to the secured transaction in the events of default, subsequent repossession, and disposition of the collateral.

DISCUSSION

9-501: DEFAULT

Section 9-501[6] does not define the term "default." The events

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upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

3. Collateral refers to property subject to a security interest, and includes accounts, contract rights and chattel paper. U.C.C. § 9-105(1)(c).

4. U.C.C. § 9-105(1)(i) defines secured party thusly:

"Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

Id.

5. U.C.C. § 9-105(1)(d) defines debtor:

"Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires. . . .

Id.

6. U.C.C. § 9-501. Section 9-501 provides:

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part 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. If the collateral is documents

of default are determined by the contract of the parties, usually evidenced by a security agreement.[7] The secured party who pro-

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the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in section 9-207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in section 9-207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (1) of section 9-505) and with respect to redemption of collateral (section 9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable;

(a) subsection (2) of section 9-502 and subsection (2) of section 9-50 insofar as they require accounting for surplus proceeds of collateral;

(b) subsection (3) of section 9-504 and subsection (1) of section 9-505 which deal with disposition of collateral;

(c) subsection (2) of section 9-505 which deals with acceptance of collateral as discharge of obligation;

(d) section 9-506 which deals with redemption of collateral; and

(e) subsection (1) of section 9-507 which deals with the secured party's liability for failure to comply with this part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this Part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any excution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such excution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

7. "Security agreement" means an agreement which creates or provides for a security interest. U.C.C. § 9-105(1)(h). *See* Wisenhunt v. Allen Parker Co., 119 Ga. App. 813, —, 168 S.E.2d 827, 830 (1969); Borochoff Prop., Inc. v. Howard Lumber Co., 115 Ga. App. 691, —, 155 S.E.2d 651, 654 (1967). A standard default clause might include the following events of default: (1) failure to make payment of the secured obligation; (2) failure to perform any other obligation agreed to under the security agreement; (3) the making of any materially false statement, warranty or representation; (4) dissolution of the business; (5) in the case of an individual debtor, the death of the debtor; (6) any voluntary or involuntary bankruptcy proceeding or Chapter proceeding under the present or any future bankruptcy act; (7) any assignment for the benefit of creditors; (8) any failure to discharge any tax lien, statutory lien or judgment lien within a reasonable period of time; (9) any material change in the financial condition of the debtor; or (10) any occurence of loss, theft, damage or destruction of the collateral not adequately covered by insurance containing a lender's loss payable clause.

The default clause should also include provisions providing for acceleration of any debt upon default. The absence of an acceleration clause may limit any action,

ceeds to repossess and dispose of collateral in the absence of any clearly defined default under the security agreement may incur liability.[8]

In the event of default, the secured party has the rights and remedies provided under U.C.C. Article 9, Part 5. The secured party may, however, "reduce his claim to judgment, foreclosure or otherwise enforce the security interest by any available judicial procedure."[9]

When the collateral consists of documents, the secured party has the option of proceeding against either the documents or the goods represented by those documents.[10] If the secured party is in possession prior to default, or obtains possession subsequent to default, the secured party has the rights and liabilities imposed under section 9-207.[11]

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and in the case of an installment loan, only as to the accrued installments. General Elec. Credit Corp. v. Castiglione, 19 U.C.C. Rep. 705, 710-11 (N.J. Super. Ct. 1976).

In addition, the security agreement could provide for a general "insecurity clause" permitting a declaration of default and acceleration of the debt if the secured party deems itself "insecure." Provisions in any security agreement relating to insecurity and acceleration are governed by U.C.C. § 1-208.

8. *See* In Re Levine's Boys & Mens Shop, Inc., 14 U.C.C. Rep. 254 (E.D.N.Y. 1974) wherein the secured party repossessed and disposed of the collateral when the debtor was not in default. The secured party was required in that case to turn over the proceeds of the disposition. *See also* U.C.C. § 9-507(1) discussed at notes 131-146 *infra*.

9. U.C.C. § 9-501(1). *See* Platte Valley Bank v. Kracl, 185 Neb. 168, 172, 174 N.W.2d 724, 727 (1970).

10. U.C.C. § 9-105(e). "Document" refers to documents of title as defined in the general definitions of Article 1. U.C.C. § 1-201(15) provides:

> "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an indentified mass.

11. U.C.C. § 9-207. Section 9-207 provides:

> (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.
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> (2) Unless otherwise agreed, when collateral is in the secured party's possession
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> (a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;
>
> (b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

Section 9-501(3) prohibits the waiver or modification by agreement of any rights granted to the debtor, or any duties imposed upon the secured party.[12] Specifically, the security agreement may not contain a waiver of the rights and duties contained in sections 9-502(2) and 9-504(2) relating to the accounting for any surplus upon disposition of the collateral; sections 9-504(3) and 9-505(1) relating to the disposition of collateral; and section 9-505(2) concerning acceptance of the collateral in discharge of any obligation. Likewise, waivers or modifications of a debtor's rights or a secured party's duties under section 9-506 concerning redemption of collateral, and section 9-507(1) concerning the liability of the secured party for failure to comply with the provisions of Part Five of Article Nine are proscribed.

However, exceptions are contained in sections 9-505(1), relating to compulsory disposition of collateral when that collateral constitutes consumer goods, and 9-506, relating to redemption of collateral, which permit the debtor to waive or vary the rights and duties imposed by those sections provided the waiver is made in writing and after default.

In the event that the security agreement covers both real and personal property, the secured party is provided the option of proceeding either under the Code as to the personalty or proceeding as to both the real and personal property according to the applicable state foreclosure laws. In that instance the Code is not applicable.[13]

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of

(d) the secured obligation;
the secured party must keep the collateral indentifiable but fungible

(e) collateral may be commingled;
the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

12. As discussed at notes 99-103 *infra*, the term debtor has been construed to include guarantors. Some courts have enforced waiver of notice provisions [U.C.C. § 9-504(3)] contained in the guarantee agreement. *See* First Nat'l Park Bank v. Johnson, 553 F.2d 599, 602 (9th Cir. 1977).

13. Hildner v. Fox, 17 Ill. App. 3d 97, —, 308 N.E.2d 301, 303 (1974).

If the secured party has chosen to enforce the security interest by judicial proceedings, and the claim has been reduced to judgment, the "lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral."[14] The secured party may purchase the collateral at any sale based upon the foreclosure of the security interest by judicial procedure.[15]

9-502: COLLECTION RIGHTS OF SECURED PARTY

Section 9-502[16] relates to security interests in contract rights, intangibles, accounts or chattel paper.[17] This section provides that when the parties have agreed, or at least in the case of default,

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14. U.C.C. § 9-501(5). The fact that the "lien" relates back to the date of perfection would protect any such lien obtained within four months of any bankruptcy proceeding from attack by the trustee or debtor-in-possession pursuant to section 67(a) of the Bankruptcy Act. In Re Schindler, 16 U.C.C. Rep. 252, 253 (E.D. Pa. 1974) (in bankruptcy). *See also* U.C.C. § 9-501(5), comment 6.

15. Comment 6, U.C.C. § 9-501.

16. U.C.C. § 9-502. This section provides:

> (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 realization 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, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

17. United States v. Pirnie, 339 F. Supp. 702, 710 (D. Neb. 1972), *aff'd*, 472 F.2d 712 (8th Cir. 1973). The Code defines chattel paper thusly:

> "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper. . . .

U.C.C. § 9-105(1)(b). Section 9-106 defines account, contract right and general intangibles thusly:

> "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. "Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper. "General intangibles" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments.

the secured party may notify any account debtor,[18] or other obligor of the debtor, to make payment directly to the secured party. The secured party is also authorized to take control of any proceeds to which he may be entitled pursuant to Section 9-306.

Under section 9-502(2), if the security agreement permits the secured party to charge back uncollected collateral, or if the secured party is entitled to full or limited recourse against the debtor, and if the secured party undertakes to collect from any account debtors or obligors on an instrument,[19] then the secured party must proceed in a commercially reasonable manner. Section 9-502(2) also permits the secured party to deduct reasonable expenses incurred in the collection.

If the transaction is one for security of an indebtedness, then under section 9-502(2) the secured party has the responsibility of accounting to the debtor for any surplus collections. Correspondingly, section 9-505(2) renders the debtor liable for any deficiency. If however, the transaction concerned the sales of accounts, contract rights or chattel paper, then section 9-505(2) provides that the debtor's right to any surplus or liability for any deficiency exists only if the security agreement so provides.

In an action by the secured party to collect a deficiency judgment where part of the collateral disposed of is accounts, the secured party may have the burden of proof to demonstrate that the undertaking of the collection of accounts receivable was done in a commercially reasonable manner.[20]

Although the secured party is required to proceed in a commercially reasonable manner[21] when he attempts to realize from account debtors or obligors, it is not clear whether the secured party's actions are governed by the requirements of section 9-504(3), governing disposition and notice of disposition of collateral. The notice provisions of section 9-504(3) operate in the event of any disposition of collateral. Although the term "disposition" is not specifically defined, it would at a minimum include sale or lease. It is probable that when the secured party directs a notification to the account debtor that payment should be made directly

18. "Account debtor" means the person who is obligated on an account, chattel paper, contract right or general intangible. U.C.C. § 9-105(1)(a).

19. "Instrument" means a negotiable instrument (defined in section 3-104), or a security (defined in section 8-102), or any other writing which evidences a right to payment and is not itself a security agreement or lease, and is of a type which is in the ordinary course of business transferred by delivery with any necessary endorsement or assignment. U.C.C. § 9-105(g).

20. DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 409, 243 N.W.2d 745, 751 (1976).

21. *Id.* at 409, 243 N.W.2d at 751. *See also* U.C.C. § 9-502(2).

to the secured party, or when he proceeds by legal action to collect the accounts, such conduct would not constitute a sale or disposition for purposes of section 9-504(3). The secured party's conduct would be governed only by the standard of what is "commercially reasonable" and the secured party would have no specific obligation to notify the debtor of his actions. However, section 9-502 appears not to contemplate any post-default sale or assignment of accounts receivable by the secured party; that type of transaction appears to be something more than collection by the secured party, and probably would constitute a sale or other disposition of collateral, governed by section 9-504.[22]

9-503: REPOSSESSION AFTER DEFAULT

Section 9-503[23] grants the secured party, unless otherwise agreed, the right on default to take possession of the collateral. It is not necessary for the secured party to use any judicial process in order to gain possession; he has the right of "self-help" if the repossession can be accomplished without a "breach of the peace."[24] Breach of the peace is not defined under section 9-503.[25] The term may generally be equated to repossession over the protest of the debtor or the use of actual or constructive force in the repossession.

At least one court has held that the repossession of an automobile, by driving it away from a parking lot when the keys had been left in the ignition, did not constitute a breach of the peace.[26] Nor was there a breach of the peace when an automobile was taken from an open garage, even though the garage was attached to a

22. *See* U.C.C. § 9-504(3), discussed at notes 64-109 and accompanying text *infra*.

23. U.C.C. § 9-503. This section provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.

Id.

24. *Id.*

25. The term breach of the peace probably has a broader meaning under the Code than under any applicable criminal statute. Deavers v. Standridge, 144 Ga. App. 673, —, 242 S.E.2d 331, 333 (1978). It may be necessary to resort to pre-Code or non-Code cases in order to determine what constitutes a breach of the peace. *See, e.g.*, State v. Coomes, 170 Neb. 298, 301, 102 N.W.2d 454, 457 (1960); State v. Woodworth, 234 N.W.2d 243 (N.D. 1975).

26. Thompson v. Ford Motor Credit Co., 324 F. Supp. 108, 115 (D.S.C. 1971).

house.[27]

A breach of the peace may result where the repossession is accomplished in the face of objections or protests by the debtor,[28] where the secured party's entry upon the debtor's premises is unlawful or trespassory,[29] or where the secured party uses constructive force or violence and intimidation in the repossession.[30] If the repossession constitutes a breach of the peace, then the secured party will incur liability for damages or conversion under section 9-507(1).[31]

A secured party may violate the principles of section 9-503 even without an actual breach of the peace. In *Ford Motor Credit Co. v. Byrd*,[32] the secured party requested a meeting with the debtor to discuss an apparent dispute as to whether the debtor was in arrears. While the debtor was discussing the matter at the secured party's office, the secured party's agent repossessed the automobile. Thereafter the debtor commenced an action based on conversion and wrongful taking; the jury awarded the debtor a judgment in the amount of $5,435. On appeal the secured party argued that no conversion or wrongful taking had occurred because section 9-503 granted him the right of repossession. The reviewing court dismissed that contention concluding:

> What about § 9-503? *Is self-help repossession permitted under all circumstances unless there is a concurrent breach of the peace. It is not.* We cannot interpret § 9-503 to permit obtaining possession through trick, without knowledge upon the part of the debtor. To interpret § 9-503 to allow

27. Pierce v. Leasing Int'l, Inc., 142 Ga. App. 371, —, 235 S.E.2d 752, 754 (1977). *See also* Marine Midland Bank-Central v. Cote, 351 So. 2d 750, 752 (Fla. 1977); Raffa v. Dania Bank, 321 So. 2d 83, 85 (Fla. 1975).

28. Deavers v. Standridge, 144 Ga. App. 673, —, 242 S.E.2d 331, 333-34 (1978). Morris v. First Nat'l Bank & Trust Co., 21 Ohio St. 2d 25, —, 254 N.E.2d 683, 686 (1970); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-6, at 972 (1972).

29. Henderson v. Security Nat'l Bank, 22 U.C.C. Rep. 846 (Cal. Ct. App. 1977) wherein the secured party repossessed an automobile by breaking the lock on the debtor's garage. The secured party was held liable for the conversion and the debtor entitled to compensatory damages. *Id.* at 849.

30. Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 122 (D. Neb. 1972) (the court reasoned that repossession by force and against the will of the debtor constituted a breach of the peace); Nicholson Mobile Home Sales, Inc. v. Schramm, — Ind. App. —, —, 330 N.E.2d 785, 790 (1975) (assault and battery constituted a breach of the peace); Stone Machinery Co. v. Kessler, 1 Wash. App. 750, —, 463 P.2d 651, 655 (1970) (There the secured party repossessed a tractor while accompanied by a uniformed sheriff. The sheriff had no legal authority to repossess the tractor. The court concluded that the actions of the secured party and the sheriff "amounted to constructive force, intimidation and oppression constituting a breach of the peace and conversion of the defendant's tractor."). *Id.* at —, 463 P.2d at 655.

31. *See* notes 133-142 and accompanying text *infra*.

32. 351 So. 2d 557 (Ala. 1977).

> repossession in these circumstances would encourage practices abhorent to society: fraud, trickery, chicanery, and subterfuge, as alternatives to employment of judicial processes that foster the concept of ours being a government of laws and not of men. If self-help erodes that concept then self-help must be limited as we limit it here. Condoning FMCC's conduct under the circumstances presented here would defeat the desirable and fundamental policy of discouraging extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.[33]

Constitutionality of Self-Help

The right of a secured party to repossess collateral without judicial process has been challenged on the basis that such action constitutes the deprivation of property without due process of law. The dispute has focused on whether state action within the meaning of the fourteenth amendment is involved in the repossession. Most courts have refused to find state action in the right of self-help under section 9-503, and have held that section valid and constitutional.[34]

Judical Process & The Intervention of Bankruptcy

Section 9-503, while recognizing the secured party's right to self-help, also recognizes his right to proceed by appropriate legal process to obtain the property.[35]

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33. *Id.* at 559.

34. Bosse v. Crowell-Collier & MacMillan, 565 F.2d 602, 608 (9th Cir. 1977); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 17 (8th Cir. 1974); Bichel Optical Labs., Inc. v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 121 (D. Neb. 1972).

35. *See* Platte Valley Bank v. Kracl, 185 Neb. 168, 172, 174 N.W.2d 724, 727 (1970). Although the right to proceed by judicial process is recognized, the effective availability of such procedures as replevin, attachment or garnishment would depend on the constitutionality of those procedures. The constitutionality of the Nebraska prejudgment remedies of attachment or garnishment is in doubt. In Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847 (D. Neb. 1977) the court held that the Nebraska prejudgment attachment and garnishment statutes were constitutionally defective. The court stated:

> Although certain procedures of Neb. Rev. Stat. § 25-1001 *et. seq.* are ambiguous in several material aspects which may be upheld by proper interpretation, the statutory scheme fails to properly balance the conflicting interest of the debtor and creditor by permitting a clerk of the court to issue the writ without judicial supervision and by eliminating the requirement of indemnity for a wrongful taking in certain situations. Moreover, the writ of attachment in this case is clearly unconstitutional for the reasons that it issued on a conclusive affidavit, without a bond, and with adequate judicial supervision.

Id. at 853.

The right of self-help repossession is effectively terminated by the initiation of any bankruptcy proceeding prior to repossession. Upon the filing of either a voluntary or involuntary bankruptcy petition, or any chapter proceeding, all property of the debtor or bankrupt comes within the exclusive jurisdiction of the bankruptcy court, and no interference with that possession is permitted.[36]

Further, the relevant automatic stays contained in the Bankruptcy Rules preclude the secured party from proceeding against the debtor or enforcing any liens against the debtor's property.[37] Violation of these injunctions could constitute contempt of court and result in fines against the secured party, and in some instances against his counsel.[38]

The secured party's remedy when confronted with the automatic stays is to commence an adversary proceeding in the bankruptcy court, requesting relief from the stay and return of the property.

Notice of Repossession

Section 9-503 does not require the secured party to give the debtor any notice of the intended repossession.[39] However, section 1-203[40] imposes a general obligation of good faith with respect to any actions taken pursuant to the provisions of the Code. In addition, the right to accelerate the debt under section 1-208[41] is

36. First Nat'l Bank v. Cope, 385 F.2d 404, 406 (1st Cir. 1967). In a proceeding under Chapters X and XI of the Bankruptcy Act, the bankruptcy court's jurisdiction is based not only on property in the possession of the debtor but also on the title or ownership interest of the debtor. *Id.* *In re* Copland, 391 F. Supp. 134, 144 (D. Del. 1975), *aff'd*, 531 F.2d 1195 (3d Cir. 1976); *In re* Trans-East Air, Inc., 2 Bky. Ct. Dec. 41, 45 (D. Maine 1975); Aaron Ferer & Sons Co. v. Aaron Berman, No. 74-0-482 (D. Neb. 1977) (in bankruptcy).

37. *See* 11 U.S.C. App. 1 (1976); Bankruptcy Rules 401, 601, 10-601, 11-44, 12-43 and 13-401.

38. *See* Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 52 (2d Cir. 1976).

39. Teeter Motor Co. v. First Nat'l Bank, 20 U.C.C. Rep. 1119, 1120-21 (1976); Weaver v. O'Meara Motor Co., 452 P.2d 87, 92 (Ala. 1969).

40. U.C.C. § 1-203 states: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." *Id.*

Good faith is defined under U.C.C. § 1-201(19), as meaning "honesty in fact in the conduct or transaction concerned."

41. U.C.C. § 1-208 provides:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

also subject to the "good faith" requirement. If, for example, the secured party regularly accepted late payments, then the secured party may be held to have an obligation to provide the debtor with notice of default and notice of any intended repossession.[42]

Assembling of Collateral

Section 9-503 also expressly recognizes the ability of the parties to provide in their contract that the secured party may require the debtor to assemble the collateral and "make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties."[43]

Repossession of Equipment Without Removal

Regarding equipment,[44] section 9-503 provides: "Without removal a secured party may render equipment unusuable, and may dispose of collateral on the debtor's premises under Secion 9-504." The comment to section 9-503 suggests a rationale for that provision:

Id.

An open question concerning good faith in terms of insecurity and accelaration is whether the good faith standard is a wholly subjective determination or whether the standard should be objective, that is, some reasonably founded belief concerning either impairment of the collateral or the debtor's ability to perform. *See* State Bank v. Woolsey, — Utah 2d —, —, 565 P.2d 413, 418 (1977); Farmers Coop. Elevator, Inc., v. State Bank, 236 N.W.2d 674 (Iowa 1975). These cases both hold that good faith in acceleration requires a subjective standard of honesty in fact.

Compare however, Nebraska State Bank v. Dudley, 194 Neb. 1, 2, 229 N.W.2d 559, 560 (1975), wherein the court held that an insecurity clause will not permit acceleration and repossession unless the debtor "is about to do, or has done, some act which tends to impair the security." *See also* Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369, 1371 (5th Cir. 1969); Flinn v. Fredrickson, 89 Neb. 563, 566-67, 131 N.W. 934, 935 (1911); Universal C.I.T. Credit Corp. v. Shepler, 329 N.E.2d 620, 624 (Ind. App. 1975) (all suggesting an objective or "reasonable man" standard for good faith in terms of acceleration); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.4, at 1198 (1965).

42. *See generally* Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846, 851 (3d Cir. 1964); Urdang v. Muse, 8 U.C.C. Rep. 1220, 1226 (D.C.N.J. 1971); Ford Motor Credit Co. v. Waters, 12 U.C.C. Rep. 18, 22 (Fla. Dist. Ct. App. 1973); Pierce v. Leasing Int'l, Inc., 142 Ga. App. 371, —, 235 S.E.2d 752, 754 (1977); Fontaine v. Industrial Nat'l Bank, 298 A.2d 521, 523 (R.I. 1973).

43. U.C.C. § 9-503. *See* Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 56, (5th Cir. 1970).

44. U.C.C. § 9-109 defines equipment in this manner:

> (2) Goods are "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods.

Id.

> In the case of collateral such as heavy equipment, the physical removal from the debtor's plant and the storage of the equipment pending resale may be exceedingly expensive and in some cases impractical. The section therefore provides that in lieu of removal the lender may render equipment unusable or dispose of collateral on the debtor's premises.[45]

The authorization to render equipment unusuable or to dispose of collateral without removal would not justify unreasonable action by the secured party, since under section 9-504(3), all his actions in connection with disposition must be taken in a "commercially reasonable manner." This section apparently grants the secured party a license first to enter the debtor's premises to render the equipment unusable and second, to re-enter the premises of the debtor along with the general public if a public sale is held. This limited right of entry would appear to be subject to the breach of the peace requirement set forth in section 9-503. Accordingly, if the secured party proceeded to enter over the protest of the debtor, and rendered the equipment unusable, then the secured party would probably have violated the breach of the peace standard. However, the apparent right to re-enter for purposes of disposition or sale would not appear to be "repossession," as the constructive repossession has already been accomplished, and therefore may not be specifically limited by the prohibition against breach of the peace.

If the collateral involved in any secured transaction includes equipment, the secured party should include in the security agreement a specific grant of authority for the secured party to enter the premises to render the equipment unusable, and further, to permit the secured party to use the debtor's premises for disposition of that collateral. In addition, if the debtor's premises are leased, a separate agreement between the lessor and the secured party covering the right of entry and re-entry is advisable.

9-504: Disposition of Collateral After Default

Section 9-504[46] is the most significant section of Acticle Nine,

45. Official Comment, U.C.C. § 9-503.

46. U.C.C. § 9-504 provides:

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on Sales (article 2). The proceeds of disposition shall be app;lied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extneent provided for in the agree-

Part Five. Section 9-504 contains five subparagraphs each of which warrants separate consideration.

9-504(1): Right to Disposition and Application of Proceeds

Section 9-504(1) grants the secured party the right after default to "sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing."[47] This section relates only to a dispo-

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ment and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secured 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 account, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a secutiry interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

47. U.C.C. § 9-504(1). The secured party is required, when disposing of collat-

sition by the secured party. Apparently any disposition or sale by the debtor would not be subject to the provisions of this section.[48]

As discussed earlier, the applicable automatic stays contained in the Bankruptcy Rules[49] would preclude repossession pursuant to section 9-503, subsequent to the initiation of any bankruptcy proceeding. Whether the automatic stays would preclude disposition pursuant to section 9-504 (when the secured party has repossessed prior to bankruptcy) depends upon the type of bankruptcy proceeding instituted. Bankruptcy Rule 601 governing lien enforcement in straight bankruptcy is limited to property "in the custody of the Bankruptcy Court."[50] Accordingly, if the secured party had possession prior to bankruptcy, he would probably not be precluded from any disposition of the collateral.

Under Chapters X,[51] XI,[52] XII[53] and XIII,[54] the bankruptcy court's jurisdiction extends to the debtor's property, wherever located. Jurisdiction in a chapter proceeding can be predicated upon either possession or title and ownership.[55] In addition, the automatic stays in the chapter proceedings are not limited to "possession," as is Rule 601. The debtor retains a title ownership claim to the collateral after repossession.[56] Accordingly, if the debtor seeks relief under a chapter proceeding before any disposition, the secured party is stayed from disposing of the collateral.[57]

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eral, to proceed in good faith and in a commercially reasonable manner. *See* U.C.C. § 9-507, Comment 1. In addition, the secured party has a duty to use reasonable means to see that a reasonable price is obtained upon any sale or disposition. Clark Leasing Corp. v. White Sands Forest Prod., Inc., 87 N.M. 451, —, 535 P.2d 1077, 1080 (1975).

48. Western Pa. PCA v. Suotrick, 8 U.C.C. Rep. 567, 568 (Pa. Ct. Com. Pl. 1976).

49. 11 U.S.C. App. 1 (1976); Bankruptcy Rules 401, 601, 10-601, 11-44, 12-43.

50. 11 U.S.C. App. 1 (1976); Bankruptcy Rule 601. Property is in the custody of the Bankruptcy Court if the bankrupt had actua · constructive possession of the property on the date of bankruptcy. 11 U.S.C. App. 1 (1976); Bankruptcy Rule 601 (Advisory Comm. Notes).

51. 11 U.S.C. § 511 (1976).

52. *Id.* § 711.

53. *Id.* § 811.

54. *Id.* § 1011.

55. As discussed by the authorities cited at note 36 *supra*, the enlarged jurisdiction of Chapters X and XI is predicated on the language of 11 U.S.C. § 511 (1976) (Ch. X) and 11 U.S.C. § 711 (1976) (Ch. XI). The jurisdictional language of Chapter XII (11 U.S.C. § 811 (1976), and Chapter XIII (11 U.S.C. § 1011 (1976), is identical to that of Chapters X and XI. It would appear that jurisdiction in Chapters XII and XIII is at least as extensive as the other chapters. *See generally* 9 COLLIER, BANKRUPTCY ¶ 13.01[1] (14th ed. 1978); 10 COLLIER, BANKRUPTCY ¶ 23.01 (14th ed. 1978).

56. Trans Nat'l Communications, Inc., 11 U.C.C. Rep. 238, 243-44 (S.D.N.Y. 1972) (in bankruptcy).

57. *See generally In re* Meyers, 20 U.C.C. Rep. 1420, 1422 (W.D. Va. 1976) (in bankruptcy). When confronted with any Chapter stay, the secured party's remedy at that point is to request relief under provisions of the automatic stay. The stay

After disposition, the proceeds are applied first to the reasonable expenses of retaking, holding, preparing for sale, and the actual sale. If provided in the agreement, and where not prohibited by law, reasonable attorney's fees and legal expenses are allowed.[58] In the event that the repossession and sale are accomplished by a junior secured party, the payment of any senior liens on the repossessed collateral would not be deemed an appropriate expense of resale for purposes of application of the proceeds.[59]

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against disposition would also include a stay of collection from or notification to account debtors pursuant to § 9-502. Caribbean Food Prod., Inc. v. Banco Credito, 575 F.2d 961, 964-65 (1st Cir. 1978).

58. U.C.C. § 9-504(1)(a). Prior to March of 1978 the Nebraska version of U.C.C. § 9-504(1)(a) contained the phrase "and not prohibited by law." L.B. 600 has amended U.C.C. § 9-504(1) and deleted that phrase. L.B. 600, § 2, 1978 Neb. Laws 402 (to be codified in NEB. REV. STAT. (U.C.C.) § 9-504(1)(a)). The *Introducer's Statement of Purpose* stated:

> The second portion of the bill will amend the code to provide that attorney's fees may be paid in the event of disposition of collateral after default. This question arose during the American Beef Packers bankruptcy proceedings, when the court ruled that the phrase "and not prohibited by law" precluded the allowance of attorney's fees because the general law of Nebraska in such non-bankruptcy cases was that attorney's fees would not be allowed.

Introducer's Statement of Purpose: Hearings on L.B. 600 Before the Comm. on Banking, Commerce and Ins., 85th Legis., 2d Sess. 1 (1978) (statement of Dennis L. Rasmussen).

The legislative history of L.B. 600 indicates that L.B. 600 was in direct response to Northwestern Nat'l Bank v. American Beef Packers, Inc., 548 F.2d 246 (8th Cir. 1977). On January 24, 1978, Mr. William Brandt, representing the Nebraska Bankers Association at whose request L.B. 600 was introduced, stated:

> The second part [of L.B. 600] rose out of the American Beef Industry bankruptcy where priority collateral was sold to satisfy a priority lien in the bankruptcy. The court held that because of the [*sic*] phrase, "and not permitted by law," referred to the common law treatment in Nebraska. *The original intent of the Uniform Commercial Code was to provide for reasonable attorney's fees as it states.* . . . This second portion only removes the words "and not porhibited by law" and *gives effect to the intent* providing these expenses in the case of a sale of collateral.

Proposed Amendments to the Uniform Commercial Code: Hearings on L.B. 600 Before the Comm. on Banking, Commerce and Ins., 85th Legis., 2d Sess. 2 (1978) (statement of William Brandt).

In the case of Northwestern Nat'l Bank v. American Beef Packers, Inc., 548 F.2d 246, 247-48 (8th Cir. 1977) the court held that U.C.C. § 9-504(1) did not permit the allowance of attorney's fees because Nebraska law generally prohibited recovery of such fees and that there was no legislative intent contained in § 9-504(1) to change that result.

Although the legislative intent is now clear, it is doubtful whether the original intent of § 9-504(1) was to provide attorney's fees. The phrase "and not prohibited by law" is an obvious cross reference to applicable state law concerning the allowance of attorney's fees. *See* Northwestern Nat'l Bank v. American Beef Packers, 20 U.C.C. Rep. 1418 (*Editors Note*); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.5, at 1200 (1965); Northwestern Nat'l Bank v. American Beef Packers, No. BK 75-0-17, slip op. at 2 (Bky. Ct. D. Neb. 1975).

59. First Union Nat'l Bank v. Tectamar, Inc., 33 N.C. App. 604, —, 235 S.E.2d 894, 896 (1977).

After the expenses of the secured party have been satisfied, the proceeds are then applied to the specific debt secured by the disposed collateral.[60] However, the requirements for strict application of the proceeds to the specific secured debt, may be waived or varied by agreement of the parties.[61]

Lastly, the proceeds may be applied to the satisfaction of any subordinate secured debt.[62] The proceeds would be so applied only if the subordinate security holder provides written notification of demand before the distribution of the proceeds is completed. In addition, the secured party may request that the subordinate security holder provide reasonable proof of his security interest, and if that proof is not forthcoming, the secured party is under no obligation to comply with the junior secured patry's demand.

9-504(2): Surplus or Deficiency

Section 9-504(2) requires a secured party to account to the debtor for any surplus and unless otherwise agreed, the debtor is liable for any deficiency.[63] In the event that the arrangement between the parties was, in effect, a sale of accounts, contract rights or chattel paper, then the debtor's liability for deficiency and the debtor's right to any excess proceeds exist only if the security agreement so provides.

9-504(3): Disposition of Collateral

The secured party may dispose of the collateral by either public or private proceedings and the disposition may be "by way of one or more contracts."[64] Further, the "sale or other disposition may be as a unit or in parcels and at any time and place and on any terms *but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.*"[65]

The Code does not provide any definition of "commercially reasonable" and the courts appear to have adopted a case by case

60. U.C.C. § 9-504(1)(b). *See* Wilson Leasing Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359, —, 220 N.W.2d 83, 88-89 (1974).

61. Atkins v. Citizen's and Southern Nat'l Bank, 127 Ga. App. 348, —, 193 S.E.2d 187, 189 (1972).

62. U.C.C. § 9-504(1)(c).

63. The secured party in an action to recover for a deficiency may have the burden to establish that every aspect of disposition was commercially reasonable in order to recover a deficiency. First Nat'l Bank v. Rose, 188 Neb. 362, 364, 196 N.W.2d 507, 509-10 (1972).

64. U.C.C. § 9-504(3).

65. *Id.* (emphasis added).

approach. At a minimum, the concept that the secured party must proceed in a commercially reasonable manner would impose a good faith obligation to "use reasonable means to see that a reasonable price is received for the collateral."[66]

Determining whether any specific disposition was commercially reasonable will involve analysis of a mixture of all the aspects of the transaction, including such factors as the price obtained, the price of any subsequent resale, the amount and type of advertising; if it was a public sale, whether it was conducted by a professional auctioneer under normal business practices, the weather conditions on the day of disposition, the period of time between repossession and resale, competitive bidding, any deterioration of collateral, and the expertise and knowledge of the secured party in the disposition of the type of collateral involved.[67]

1. Public or Private Sale

The secured party is given the option of disposing of the collateral by means of either a public or private sale; the choice itself is governed by the test of reasonable commercial practice.[68] The comments to section 9-504 suggest that the Code, as a matter of policy, encourages the use of a private sale, apparently on the assumption that a private disposition would result in a higher price.[69]

The term public sale is not specifically defined,[70] although the term would presuppose, at the very least, general advertising and public notice of the sale.[71] In the recent case of *DeLay First National Bank & Trust Co. v. Jacobson Appliance Co.*,[72] Judge Clinton noted in his dissent that "[u]nder ordinary law and under the

66. Clark Leasing Corp. v. White Sands Forest Prod., Inc., 87 N.M. 451, —, 535 P.2d 1077, 1080 (1975).

67. Liberty Nat'l Bank & Trust Co. v. Acme Tool, 540 F.2d 1375, 1381 (10th Cir. 1976); Connex Press, Inc. v. International Airmotive, Inc., 436 F. Supp. 51, 56-57 (D.D.C. 1977); Kobuk Eng'r & Contracting Serv., Inc., 568 P.2d 1007, 1010-12 (Alas. 1977); Clark Leasing Corp. v. White, 87 N.M. 451, —, 535 P.2d 1077, 1080-81 (1975); Chase Manhattan Bank, N.A. v. Natarelli, 93 Misc. 2d 78, —, 401 N.Y.S.2d 404, 409-10 (Sup. Ct. 1977).

68. Old Colony Trust Co. v. Penrose Indus. Corp., 280 F. Supp. 698, 715 (E.D. Pa. 1968), *aff'd*, 398 F.2d 310, 312 (3d Cir. 1968).

69. Official Comment 1, U.C.C. § 9-504.

70. *In re* Bishop, 11 U.C.C. Rep. 1071, 1075 (W.D. Va. 1972).

71. *In re* Webb, 17 U.C.C. Rep. 627, 630 (S.D. Ohio 1975). *See also* Wilkerson Motor Co., Inc. v. Johnson, 23 U.C.C. Rep. 842 (Okla. 1978) wherein that court stated: "The essence of any "public sale" is that members of the potential class of purchasers have some meaningful opportunity to become appraised of the fact the goods are to be sold." *Id.* at 848.

In this case the notice of sale was posted on two utility poles in two alleys, and on the side of one building. The court concluded that such notice was inadequate, and held the sale commercially unreasonable.

72. 196 Neb. 398, 243 N.W.2d 745 (1976).

code, public sale means sale at public auction, and perhaps by sealed bids, both, of course, after the required public notice. The distinguishing characteristic of public sale is bona fide competitive bidding."[73] In *Contois Motor Co. v. Saltz*,[74] the Nebraska Supreme Court, in the context of a section 9-504(3) disposition, suggested "a distinguishing characteristic of a public sale is competitive bidding between prospective purchasers."[75]

Similarly, the term "private sale" is not defined under section 9-504. It is important to note, however, that courts generally take the position that if the disposition was not a public sale, then it was a private sale.

2. Notice of Disposition—When Not Required

Notice of any intended disposition is not required if the collateral "is perishable or threatens to decline speedily in value."[76] Used motor vehicles, applicances or other items of that nature will probably not be considered items which are perishable or which threaten to decline in value.

Neither is notice required where the collateral "is of a type customarily sold on a recognized market. . . ."[77] This exception to the requirement of notice does not include used automobiles[78] or used mobile homes.[79] The recognized market exception is perhaps limited to regulated and widely recognized stock and commodity exchanges.[80]

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73. *Id.* at 413, 243 N.W.2d at 753. *See also* General Foods v. Hall, 39 Ill. App. 3d 147, —, 349 N.E.2d 573, 577 (1976) wherein the court relying on the comments to § 9-504 concluded that a public sale contemplated a sale by auction.

74. 198 Neb. 455, 253 N.W.2d 290 (1977).

75. *Id.* at 463, 253 N.W.2d at 295. In *Contois*, the automobile was prepared by the plaintiff and placed on a lot for sale in the ordinary course of busines s; the sale was a private one and not one made at an auction or under sealed bids where there was competitive bidding.

76. U.C.C. § 9-504(3). In United States v. Mid-State Sales Co., 336 F. Supp. 1099, 1103 (D. Neb. 1971), the court reasoned that the repossessed dairy cattle, although in need of feed, were in generally good condition at the time of the disposition, and accordingly, the secured party could not rely on the no notice exception of § 9-504(3) to justify the lack of notice of the disposition. If the secured party had presented evidence to demonstrate that the cattle were in fact declining in value, then the disposition without notice perhaps would have been sanctioned by the court.

77. U.C.C. § 9-504(3); Marine Midland Bank-Rochester v. Vaeth, 88 Misc. 2d 657, —, 388 N.Y.S.2d 548, 550 (Sup. Ct. 1976), wherein shares of stock in a public corporation constituted collateral of a type customarily sold on a recognized market, and accordingly, notice of the sale of stock was not required.

78. Beneficial Fin. Co. v. Reed, 212 N.W.2d 454, 459 (Ia. 1973); Gezon Motors v. Gould, 18 U.C.C. Rep. 1339, 1340 (Mich. Dist. Ct. 1976); O'Neil v. Mack Trucks, Inc., 533 S.W.2d 832, 836 (Tex. Civ. App. 1976).

79. Federal Deposit Ins. Corp. v. Farrar, 231 N.W.2d 602, 605 (Ia. 1975).

80. Norton v. Nat'l Bank of Commerce, 240 Ark. 143, —, 398 S.W.2d 538, 540

3. In All Other Cases Reasonable Notice is Required

In the case of a public disposition the secured party is required under section 9-503(4) to provide reasonable notice of the time and place of the public sale. The notification of a private sale or other disposition requires an indication of the time after which the disposition will be accomplished.

The term reasonable notice is not defined; as a general rule, however, reasonable notice "at a minimum . . . must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire."[81] The concept of reasonable notice includes several considerations: 1) the method of notice (oral or written); 2) the time span between the date of the notice and the date of the intended disposition; and 3) the content of the notice.

4. Timeliness of Notice

In *DeLay* the Nebraska Supreme Court stated: "To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtors would have a minimum of 3 business days to arrange to protect their interest."[82]

In *First National Bank v. Rose*,[83] the Nebraska court reasoned that:

> [T]he ordinary 3-day rule set forth in *DeLay* is a minimum requirement, and such notice is not necessarily sufficient in all cases. The purpose of giving reasonable notice to a debtor is to insure that he will have sufficient time to take appropriate steps to protect his interest.[84]

In *Contois Motor Co. v. Saltz*,[85] ten days notice of a private sale was deemed to be reasonable. In all three of these cases, however, the court appeared to address only the question of reasonable notice of a private sale and did not consider the question of reasonable notice of a public sale. It would appear, however, that the

(1966); Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534 (Fla. Dist. Ct. App. 1973).

The suggested rationale for the recognized market exception is the presumption that the market represents the fair market value and the best price obtainable. Community Management Ass'n of Colorado Springs, Inc. v. Tousley, 32 Colo. App. 33, —, 505 P.2d 1314, 1316 (1973).

81. Official Comment 5, U.C.C. § 9-504.
82. 196 Neb. at 406, 243 N.W.2d at 750.
83. 197 Neb. 392, 249 N.W.2d 723 (1977).
84. *Id.* at 397, 249 N.W.2d at 726.
85. 198 Neb. 455, 253 N.W.2d 290 (1977).

same principles concerning the sufficiency of time for the debtor to protect his interest would be applicable.

Other courts have rejected any attempt to mandate specific time requirements on notice provisions under section 9-504. In *Hall v. Owen County State Bank*,[86] the Indiana Court of Appeals noted the *DeLay* decision, and suggested that the length of time provided by any notice is merely one element in the determination of whether reasonable notification has been provided.

5. Notice: Oral or Written

Section 9-504(3) requires that notice shall be sent by the secured party. The term *send* is defined under section 1-201(38): "Send in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed. . . ."[87] In *DeLay*, the court, relying on that definition, held that written notice of any intended disposition is required.[88] However, other courts have concluded that oral notice is sufficient.[89]

A remaining question, irrespective of the form of the notice, is whether the secured party must demonstrate receipt of or actual knowledge of the notice by the debtor. In *Chase Manhattan Bank v. Natarelli*,[90] the Supreme Court of New York suggested that "while 'sent' implies notice sent by mail, all it actually requires is actual or constructive receipt of notice."[91] In *Hall v. Owen County State Bank*,[92] the Indiana Court of Appeals, attempting to functionally define the term *reasonable notification*, stated:

> Under this definition, the test is not whether or not the debtor receives the notice, but only whether the secured party made a good faith effort and took such steps as a reasonable person would have taken to give notice. Accordingly, most courts have held that there is no absolute

86. 23 U.C.C. Rep. 267 (Ind. App. 1977).
87. U.C.C. § 1-201 (38).
88. 196 Neb. at 405, 243 N.W.2d at 749. The court also stated: "The requirement of a written notice eliminates all possibility of dispute as to whether a notice was actually given. It also establishes what notice was given." *Id.*
89. Hall v. Owen County State Bank, 23 U.C.C. Rep. 267, 275 (Ind. App. 1977). Although concluding that oral notice is sufficient, the court suggested that whether the notice was oral or written is a factor to be considered in deciding whether the notice was reasonable. *See* Bondurant v. Beard Equip. Co., 345 So. 2d 806 (Fla. Dist. Ct. App. 1977); Third Nat'l Bank & Trust Co. v. Stagnaro, 25 Mass. App. 58, 4 U.C.C. Rep. 675 (Mass. Dist. Ct. 1962).
90. 23 U.C.C. Rep. 539 (N.Y. Sup. Ct. 1977).
91. *Id.* at 550 (citations omitted).
92. 23 U.C.C. Rep. 267 (Ind. App. 1977).

requirement under § 9-504 that the debtor actually received notice.[93]

6. Content of Notice

The content of the notice varies as to whether the disposition is public or private. Notice of a public sale requires notice of time and place, while notice of a private sale or disposition requires stating only the time after which the disposition will be accomplished. If the appropriate notice for the intended disposition does not satisfy the statutory requirements then it will be deemed insufficient.[94] A secured party who uses a notice effective for a private sale or disposition and then in fact disposes of the collateral by means of a public sale will have violated the requirements of the statute.[95] If the secured party intends to conduct multiple dispositions it is advisable to specify the collateral related to each disposition.

7. Imputed Notice or Notice by Estoppel

In some cases the courts have adopted a rule of imputed notice or perhaps notice by estoppel.

In *Chase Manhattan Bank v. Natarelli*,[96] the secured party had failed to direct specific notice to a guarantor of the debtor corporation. The court noted that while personal notice is the preferable rule and is generally required, the guarantor in question had received sufficient notice. The guarantor was the secretary of the corporation, the husband of the chief officer of the corporation, and was represented by the same legal counsel as her husband. Further, the time and place of the sale was published in at least two newspapers. The court concluded that notice of the disposition should be inferred and imputed.

In *Stumpf v. Autotronic Systems, Inc.*,[97] the debtor had commenced an action against the secured party. The secured party asserted the amount of deficiency as a setoff against any recovery due the plaintiff. The plaintiff filed a motion for partial summary judgment based in part on the assertion that the secured party had failed to provide written notice of any sale or retention of the collateral. The court recognized the rule set forth in *Bank of Gering*

93. *Id.* at 275. *See also* Leasing Assoc., Inc. v. Slaughter & Son, Inc., 450 F.2d 174, 177 (8th Cir. 1971).

94. Commercial Credit Corp. v. Wallgast, 11 Wash. App. 117, —, 521 P.2d 1191, 1195 (1974).

95. 196 Neb. at 407, 243 N.W.2d at 750.

96. 23 U.C.C. Rep. 539 (N.Y. Sup. Ct. 1977).

97. No. 76-0-217, (D. Neb., filed Oct. 25, 1977).

v. Glover,[98] that notice of the diposition is a condition precedent to the recovery of any deficiency. Accordingly, the court concluded that under the general rule, Autotronics would not be entitled to a deficiency. However, the court then considered additional circumstances, primarily the assertion by the secured party that the debtor had arranged for the sale of the collateral and had actual knowledge of the disposition. The court concluded:

> The policy behind the U.C.C. provision would not be served if denial of a deficiency would be ordered solely because of a lack of written notice. If Sanders [the debtor] in fact arranged the sale, he not only had notice of the transaction, but was taking action to assure the payment of a fair price for the collateral. Because of these events, this Court believes that Sanders is estopped from raising the lack of notice as a bar to the deficiency. The doctrine of estoppel is not foreign to U.C.C. cases.[99]

8. Persons Entitled to Notice

Section 9-504(3) requires that the secured party send notice to the debtor.[100] Guarantors,[101] accommodation makers,[102] endorsers,[103] and co-signers[104] have all been characterized as debtors, and thereby found entitled to notice of any intended disposition.[105] In the event the debtor files a bankruptcy petition prior to the disposition, the trustee in bankruptcy is also entitled to notice.[106]

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98. 192 Neb. 575, 223 N.W.2d 56 (1974).

99. Stumpf v. Autotronic Sys., Inc., No. 76-0-217 (D. Neb., filed Oct. 25, 1977).

100. U.C.C. § 9-105(d). Debtor refers to persons who owe payment or other performance of the obligation secured, whether or not they own or have rights in the collateral and includes sellers of accounts, contract rights or chattel paper. Where the debtors and owners of the collateral are not the same persons, the term 'debtor' there refers to owners in any provision dealing with the obligation, and may include both.

101. Rushton v. Shea, 423 F. Supp. 468, 470 (D. Del. 1976); DeLay First Nat'l Bank & Trust Co. v. Jacobson Applicance Co., 196 Neb. 398, 403, 243 N.W.2d 745, 748 (1976); Chase Manhattan Bank v. Natarelli, 23 U.C.C. Rep. 539, 546-47 (N.Y. Sup. Ct. 1977); Zions First Nat'l Bank v. Hurst, 22 U.C.C. Rep. 1071, 1072 (Utah 1977).

102. Savings Bank v. Booze, 23 U.C.C. Rep. 556, 558 (Conn. Super. Ct. 1977); Bank of Gering v. Glover, 192 Neb. 575, 578, 223 N.W.2d 56, 58 (1974).

103. Third Nat'l Bank & Trust Co. v. Stagnaro, 4 U.C.C. Rep. 675, 676 (Mass. App. 1962).

104. Washington v. First Nat'l Bank, 332 So. 2d 644 (Fla. Dist. Ct. App. 1976).

105. U.C.C. § 9-501(3) precludes any waiver provision in the security agreement concerning notice of disposition. Even though guarantors and other obligors are deemed debtors and thereby entitled to notice, the courts are split as to the effectiveness of a waiver provision in the guarantee agreement. *See* Barnett v. Barnett Bank of Jacksonville, 21 U.C.C. Rep. 329, 331 (Fla. Dist. Ct. App. 1977) (holding a waiver ineffective). *Compare* First Nat'l Park Bank v. Johnson, 553 F.2d 559, 601, (9th Cir. 1977) *and* Cessna Fin. Corp. v. Meyer, 23 U.C.C. Rep. 837, 840 (Utah 1978) (both holding waivers by guarantors to be effective).

106. *In re* Frye, 9 U.C.C. Rep. 913 (S.D. Ohio 1970) (in bankruptcy). Here the

Except in the case of consumer goods the secured party is also obligated to provide notice to "any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral."[107]

9. *Purchase by the Secured Party*

The secured party who disposes of the collateral may purchase it at a public sale.[108] A secured party may purchase at a private sale only "if the collateral is of the type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations. . . ."[109]

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secured party repossessed after the filing of the bankruptcy petition and disposed of the collateral without notice to the trustee. The court held that the trustee was the "debtor" for purposes of the Code and entitled to notice of disposition. The fialure to provide notice rendered the secured party liable to the trustee for damages under U.C.C. § 9-507(1). *Id.* at 918. However, in the case of *In re* Senters, 9 U.C.C. Rep. 922 (S.D. Ohio 1970) (in bankruptcy), the secured party repossessed prior to the bankruptcy petition. The collateral was disposed of with notice to the bankrupt but not the trustee. The court held that notice to the trustee was not required, apparently on the basis that the court believed it lacked summary jurisdiction in this situation. *Id.* at 924.

If the secured party has repossessed prior to a filing of a straight bankruptcy petition, the automatic stays contained in Bankruptcy Rules 401 and 601 probably would not preclude any dispositions. However, it is advisable to provide notice of the disposition to both the bankrupt and the trustee. The rationale of *Senter* should not be relied upon. Although the court may lack summary jurisdiction when the collateral is repossessed prior to bankruptcy, the trustee pursuant to § 70a of the Bankruptcy Act obtains all the bankrupt's rights in the collateral, and the bankrupt's rights for any improper disposition, and it would seem that notice to the trustee is required. *See In re* Levine Boys & Mens Shop, Inc., 14 U.C.C. Rep. 254 (E.D.N.Y. 1974).

See also In re Nellis, 3 Bky. Ct. Dec. 991 (E.D. Pa. 1977). Here the secured party repossessed and sold most of the collateral prior to bankruptcy. However, the secured party apparently attempted to effectuate a post petition disposition of the collateral without notice to the receiver. The court held that the failure to provide notice to the receiver rendered the sale commercially unreasonable.

107. U.C.C. § 9-504(3). *See* United States v. Mid-States Sales Co., 336 F. Supp. 1099, 1103 (D. Neb. 1971); Bank of Camilla v. Stevens, 234 Ga. 293, —, 216 S.E.2d 71, 73 (1975).

108. *In re* Bishop, 482 F.2d 381, 384-85 (4th Cir. 1973). In Jackson State Bank v. Beck, 23 U.C.C. Rep. 1099 (Wyo. 1978) the secured party in effect sold the assets to itself through the devise of a corporation formed by two officers of the secured party, for the purpose of purchasing the assets. The secured party was held to have violated the sale provisions of U.C.C. § 9-504(3). *Id.* at 1102.

109. U.C.C. § 9-504(3); Wirth v. Heavey, 508 S.W.2d 263, 268 (Mo. App. 1974). The recognized market exception is perhaps limited to regulated and widely recognized stock and commodity exchanges. Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534, 536 (Fla. Dist. Ct. App. 1973). In Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966) the court stated:

A "recognized market" might well be a stock market or a commodity mar-

9-504(4): Purchasers at the Sale

A purchaser for value receives all of the debtor's rights in the collateral; he receives the collateral discharged from the security interest related to the disposition, and any subordinate security interest or lien.[110] Even if the secured party does not comply with the section 9-504 requirements, the purchaser may still acquire good title. Section 9-504(4)(b) indicates that a good faith purchaser at a noncompilying private sale takes free of the interests of the debtor, the secured party conducting the sale and junior secured parties.[111] The purchaser at a noncomplying public sale, on the other hand, takes free of the same interests if he has no actual knowledge of the defects in the sale and does not purchase "in collusion with the secured party, other bidders or the person conducting the sale."[112]

9-504(5): Subrogation to Rights of the Secured Party

Any person who is liable to the secured party under a guarantee, endorsement, or repurchase agreement, and "who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. *Such a transfer of collateral is not a sale or disposition of the collateral under this Article.*"[113] A guarantor who pays the obligation of the debtor is subrogated to the rights and position of the secured party, including the right of repossession.[114] However, any subse-

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ket, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where the prices paid in actual sales of comparable property are currently available by quotation.

Id. at 540.

In the case of *In re* Trans Nat'l Communications, Inc., 11 U.C.C. Rep. 238 (S.D.N.Y. 1972) (in bankruptcy), the court suggested:

When the collateral is of a type sold in a recognized market and is the subject of widely distributed standard price quotation, the secured party may be the purchaser because a sale in a recognized market will itself reveal fairness and that the secured party is not obtaining a windfall.

Id. at 243-44.

110. U.C.C. § 9-504(4); Cooper v. Klopfenstein, 29 Mich. App. 569, —, 185 N.W.2d 604, 607 (1971). Presumably if the secured party disposing of its collateral is a junior security, the purchaser would not take the collateral discharged form the senior security interest.

111. U.C.C. § 9-504(4)(b). *See* Cooper v. Klopfenstein, 29 Mich. App. 569, 185 N.W.2d 604 (1971).

112. U.C.C. § 9-504(4)(a).

113. U.C.C. § 9-504(5). Reeves v. Associates Fin. Serv. Co., 197 Neb. 107, 115, 247 N.W.2d 434, 439 (1976); Krueger v. Texas State Bank, 528 S.W.2d 121, 122 (Tex. 1975).

114. Benschoter v. First Nat'l Bank, 218 Kan. 144, —, 542 P.2d 1042, 1050-51 (1975); Ertel v. Radio Corp. of America, 297 N.E.2d 446, 448-49 (Ind. App. 1973); Hillman's

quent disposition by the guarantor would be subject to the requirements of Article Nine, Part Five.

The Relationship of Notice of Disposition to the Recovery of a Deficiency

A frequently litigated issue of significance concerns the secured party's failure to provide notice, or notice which does not comply in some respect with the requirements of section 9-504(3). The courts have adopted varying and irreconcilable positions in this situation. Some courts have concluded that when notice is absent or inadequate, there is a rebuttable presumption that the value of the collateral is equal to the value of the debt.[115] The secured party then must rebut that presumption by demonstrating the fair and reasonable value of the collateral at the time of the sale.

Other courts have held the debtor is to be credited with the price that would have been realized if the sale had been conducted with proper notice.[116] A third variant articulated by the Utah Supreme Court is that inadequacy of notice does not affect the right to a deficiency, and that the debtor's remedies are limited to recovery of losses due to lack of notice under section 9-507.[117] Of course, a fourth alternative is that the failure to provide notice, or provision of unreasonable notice, results in a complete denial of any deficiency.[118]

The *DeLay* case presents an interesting extension of the no notice-no deficiency rule. There the secured party conducted several private dispositions of the collateral. The court concluded that while some of the sales could have been upheld in terms of propier notice, on balance the bank either failed to provide any notice or provided questionable notice. The court concluded that all the dispositions were to be viewed as one transaction, and accord-

Equip., Inc. v. Central Realty, Inc., 144 Ind. App. 18, —, 242 N.E.2d 522, 525 (1968), *rev'd on other grounds*, 253 Ind. 48, —, 246 N.E.2d 383, 384 (1969).

115. General Foods Corp. v. Hall, 39 Ill. App. 3d 147, —, 349 N.E.2d 573, 576-77 (1976); O'Neil v. Mack Trucks, Inc., 533 S.W.2d 832, 836-37 (Tex. Civ. App. 1975).

116. Hodges v. Norton, 29 N.C. App. 193, —, 223 S.E.2d 848, 851-52 (1976).

117. Zions First Nat'l Bank v. Hurst, — Utah 2d —, —, 570 P.2d 1031, 1033-34 (1977). *See* Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, —, 276 A.2d 402, 404-05 (1971).

118. Herman Ford-Mercury Inc. v. Betts, 251 N.W.2d 492, 494 (Iowa 1977); Federal Deposit Ins. Corp. v. Farrar, 231 N.W.2d 602, 605 (Iowa 1975); First Nat'l Bank v. Rose, 197 Neb. 392, 398, 249 N.W.2d 723, 726 (1977); Bank of Gering v. Glover, 192 Neb. 575, 579-80, 223 N.W.2d 56, 58-59 (1974); Jackson State Bank v. Beck, 577 P.2d 168 (Wyo. 1978). In *Bank of Gering*, the court concluded, "[i]f the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he cannot secure a deficiency judgment." 192 Neb. at 580, 223 N.W.2d at 59.

ingly, the failure to provide notice as to one disposition even though notice was provided as to other dispositions would result in the denial of any deficiency judgment.

9-505:[119] COMPULSORY DISPOSITION AND RETENTION OF COLLATERAL AS DISCHARGE OF THE DEBT

Compulsory Disposition—Consumer Goods

In the case of a purchase money security interest in consumer goods, where the debtor has paid sixty percent of the cash price (or in the case of any other security interest in consumer goods where the debtor has paid sixty percent of the loan) and the debtor, after default, has not signed a written waiver of his rights under section 9-505(1), the secured party must dispose of the collateral within ninety days.[120] If the secured party fails to dispose of the collateral within ninety days after he takes possession of it, the debtor may recover in conversion or under section 9-507(1). If the debtor brings an action in conversion, or for damages under section 9-507(1), the secured party may counterclaim or setoff the amount of the debt.[121]

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119. U.C.C. § 9-505 provides:

> (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 laon 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 reatain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral and who had duly filed a financing statement indexed in the name of the debtor in this state or is known by the secured party in psosession to have a security interest in it. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification or if any other secured party objects in writing within thirty days after the secured party obtains possession 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.

Id.

120. U.C.C. § 9-505(1). *See* Michigan Nat'l Bank v. Marston, 29 Mich. App. 99, —, 185 N.W.2d 47, 50 (1970).

121. Jones v. Morgan, 58 Mich. App. 455, —, 228 N.W.2d 419, 423 (1975); Charley v. Rico Motor Co., 82 N.M. 290, —, 480 P.2d 404, 407 (1971).

Acceptance of the Collateral as Discharge of the Obligation

In transactions involving either consumer goods not included in section 9-505(1) or any other type of collateral, the secured party may, after default, propose to retain collateral in full satisfaction of the debt.[122] Of course, the secured party must send written notice of such a proposal to the debtor. And other than in the case of consumer goods, the secured party must send written notice to any other party who has a security interest in the same collateral and has filed a financing statement, or whose security interest is known to the secured party in possession of the collateral. The debtor, or any other person entitled to notice, may object in writing within thirty days after the receipt of the notification. In addition, any other secured party may object in writing within thirty days after the secured party has obtained possession of the collateral. If such a written objection is tendered, the secured party then must proceed to dispose of the collateral according to the terms of section 9-504. If the secured party receives no written objection he may retain the collateral in satisfaction of the debt.

Involuntary Acceptance of Collateral

If after repossession of the collateral, the secured party makes no attempt to dispose of it, his conduct may result in an "involuntary" acceptance of the collateral in discharge of the obligation under section 9-505(2).

In *Moran v. Holman*,[123] the secured party waited four months after repossession to bring an action for deficiency. During that time, the secured party had made no effort to dispose of the collateral. The debtor argued that the collateral was "in fact" retained by the secured party in satisfaction of the obligation. The court agreed and concluded that when a secured party retains collateral which depreciates in value, and in effect uses the collateral as his own, then the secured party will be deemed to have accepted the collateral in satisfaction of the debt.

The result in *Moran*, however, is not specifically mandated by the language in sections 9-505 or 9-507. In *Jones v. Morgan*,[124] the Michigan Court of Appeals rejected any concept of involuntary acceptance, stating:

122. U.C.C. § 9-505(2).

123. 514 P.2d 817 (Alas. 1973). *See also In re* Copland, 531 F.2d 1195, 1199 (3rd Cir. 1976); National Equip. Rental v. Priority Elec. Corp., 435 F. Supp. 236 (E.D.N.Y. 1977); Schultz v. Delaware Trust Co., 360 A.2d 576 (Del. 1976).

124. 58 Mich. App. 455, 228 N.W.2d 419 (1975).

> [W]e think the better interpretation of § 9-505(2) is that it is a provision drafted for the benefit of the secured party by allowing him the option to retain collateral in satisfaction of the debt in certain specified situations and where he manifests that intent. A debtor who has been damaged by improper retention of collateral finds his remedy in U.C.C. § 9-507(1) which allows him to recover from the secured party .... If the loss experienced by the debtor equals the amount due on the note, then, of course, the secured party will be entitled to no recovery. The debtor is sufficiently protected by § 9-507(1), without employing a strange reading of § 9-505(2) to imply the retention and satisfaction where no such result was intended by the secured party.[125]

9-506: REDEMPTION OF COLLATERAL

Section 9-506[126] permits the debtor (unless after default he has otherwise agreed in writing) to redeem the collateral at any time before disposition or formation of a contract for disposition, or before the obligation has been discharged under 9-505(2). In order to redeem the collateral, the debtor must tender an amount sufficient to pay all obligations secured by the collateral and the secured party's reasonable expenses incurred 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."[127] If the secured party refuses the tender of full payment, he may then be liable for conversion of property.[128]

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125. *Id.* at —, 228 N.W.2d at 423.

126. U.C.C. § 9-506 provides:

> 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.

Id.

127. U.C.C. § 9-506. As a general proposition under Nebraska law, attorneys' fees and legal expense provisions are invalid. L.B. 600, which focused on the phrase "and not prohibited by law," modified § 9-504 so as to permit the collection of attorneys' fees when the collateral was disposed of pursuant to § 9-504. However, L.B. 600 did not amend § 9-506, and accordingly, it would appear that attorneys' fees under § 9-506 are still prohibited.

128. Owens v. Automobile Recovery Bureau, Inc., 544 S.W.2d 26, 32 (Mo. Ct. App. 1976).

"Tendering fulfillment," as used in section 9-506, is explained in the Comments to mean "more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured."[129]

In the event a secured party has proceeded under section 9-504 and disposed of the collateral in several sales, the debtor still retains the option to redeem what collateral may be left at any particular point in time.

9-507:[130] SECURED PARTY LIABILITY

Injunctive Relief

Section 9-507(1) recognizes the availability of appropriate injunctive relief when it can be established "that the secured party is not proceeding in accordance with the provisions of this Part. . . ."[131] Comment 1 to section 9-507 suggests:

> In the case where [the secured party] proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy

129. Official Comment, U.C.C. § 9-506.

130. U.C.C. § 9-507 provides:

(1) If it is established that 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 entltled 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 ckarge plus ten per cent of the principal amount of the debt or the time price differential plus ten 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 sales 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.

131. U.C.C. § 9-507(1).

> will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted.[132]

Liability for Improper Conduct

In cases involving collateral other than consumer goods, the debtor, or any other person entitled to notification of the disposition, 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 Part Five of Article Nine.[133] The problem of determining how to compensate the debtor and other persons protected by section 9-507(1) has produced conflicting judicial determinations. The analyses have taken the following forms:

1) Any loss sustained by the debtor when the secured party has not disposed of the collateral in a commercially reasonable manner, should be measured in terms of compensatory damages[134] and any such damages would be set off against any deficiency judgment.[135]

2) In the case of an improper disposition, the measure of damages is the difference between the price the collateral actually brought, and the price it would have brought had the Code requirements been met.[136]

3) Where the secured party has violated the disposition provisions of the Code, he has the burden of demonstrating that the sale proceeds were equal to the fair market value as a condition

132. Official Comment 1, U.C.C. § 9-507(1).

133. U.C.C. § 9-507(1). The liability established under § 9-507 extends to the secured party's failure to comply with any section of Article 9, Part 5. The liability is not limited to only improper sales or dispositions but would also extend, for example, to an improper repossession under § 9-503. See Northside Motors of Fla., Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973). Most of the litigation concerning § 9-507 relates to the question of commercially unreasonable dispositions.

134. Fort Knox v. Gustafson, 385 S.W.2d 196, 201 (Ky. 1964).

135. Barbour v. United States, 562 F.2d 19, 21 (10th Cir. 1977).

136. T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, —, 258 A.2d 162, 167 (1969); Farmers State Bank v. Otten, 87 S.D. 161, —, 204 N.W.2d 178, 182-83 (1973).

precedent to any deficiency.[137]

4) The secured party has the burden to establish the sale was commercially reasonable, and if the secured party does not sustain that burden, then there is a rebuttable presumption that the value of the collateral at the time of disposition was equal to the debt.[138] In order to overcome the presumption, the secured party must demonstrate the fair and reasonable value of the collateral.[139] Presumably if the secured party meets that burden, the fair and reasonable value would be credited against the debt and the deficiency determined accordingly.

5) If the sale is not commercially reasonable, then no deficiency may be recovered.[140]

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137. *In re* U.G.M. Corp., 20 U.C.C. Rep. 827, 831 (E.D. Pa. 1976) (in bankruptcy).

138. Kobuk Eng'r & Contracting Serv., Inc. v. Superior Tank & Constr. Co.-Alas., Inc., 568 P.2d 1007, 1013-14 (Alas. 1977); Granite Equip. Leasing Corp. v. Marine Dev. Corp., 139 Ga. App. 778, —, 230 S.E.2d 43, 44 (1976); Commercial Discount Corp. v. Bayer, 57 Ill. App. 3d 295, —, 372 N.E.2d 926, 929-30 (1978); Hodges v. Norton, 29 N.C. App. 193, —, 223 S.E.2d 848, 851-52 (1976).

139. The *Kobuk* court, in overcoming the presumption, reasoned that

> the secured party has the burden of either (1) obtaining a fair and reasonable appraisal at or near the time of repossession, or (2) producing convincing evidence of the value of the collateral. In order to meet the latter burden, the secured creditor is required to bring forward proof of the condition of the collateral and the usual price of items of like condition.

568 P.2d at 1013-14. *See also* Clark Leasing Corp. v. White Sands Forest Prod., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

140. Dynalectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659, 663 (W.D. Okla. 1972); Granite Equip. Leasing Corp. v. Marine Dev. Corp., 139 Ga. App. 778, —, 230 S.E.2d 43, 44 (1976). The Nebraska Supreme Court apparently has not relied upon § 9-507 in terms of determining secured party liability. The cases dealing with either lack of notice or commercially unreasonable dispositions have used § 9-504 as a basis for determining liability. However, the cases appear to vary depending on whether the issue at bar concerns notice or commercially reasonable dispositions.

In First Nat'l Bank v. Rose, 188 Neb. 362, 364, 196 N.W.2d 507, 509-10, (1977), the Nebraska Supreme Court concluded that in an action for a deficiency judgment, the secured party must establish that every aspect of the sale was commercially reasonable. The logical extension of that proposition is that if the secured party fails to sustain its burden then the secured party would be denied a deficiency judgment.

However, prior to *Rose*, in Coronet v. White Motor Co., 190 Neb. 496, 497, 209 N.W.2d 341, 342 (1973), a case concerning the commercial reasonableness of a public sale (not involving a question of proper notice) where the guarantor argued that since the disposition was not commercially reasonable no deficiency should be permitted, the Nebraska court stated:

> The direct effect of a sale that is not commercially reasonable is to alter the measure of deficiency. In such case *the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement . . . . No sound policy requires us to inject a drastic punitive element into a commercial context.*

Id. at 501, 209 N.W.2d at 344 (citations omitted).

Lastly, in Bank of Gering v. Glover, 192 Neb. 575, 223 N.W.2d 56 (1974), the court issued the following warning for secured parties: "If the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he can not

The requirements of notice and commercial reasonableness are distinct elements of section 9-504(3). However, some courts have joined the notice and disposition requirement, concluding that a sale without notice is not commercially reasonable.[141] Finally, if the debtor is awarded a money judgment pursuant to section 9-507(1), that amount is generally held to be a setoff against the debt owed to the secured party.[142]

Consumer Goods

When the secured party in disposing of consumer goods, fails to comply with the provisions of Part Five of Article Nine, the Code provides a formula for measuring recovery. The amount of the recovery is "an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price."[143] The right to collect the statutory measure of damages passes to a trustee in bankruptcy.[144]

Liability to Other Secured Parties

Section 9-507(1) renders the secured party liable for an improper disposition to other secured parties who have filed a financ-

secure a deficiency judgment." *Id.* at 580, 223 N.W.2d at 59. *Glover* concerned the failure to provide notice and the court concluded that notice was a condition precedent to the recovery of a deficiency.

Accordingly, in Nebraska, the secured party must provide notice of the intended disposition if he desires to obtain a deficiency judgment. However, based on *Coronet*, if the secured party provides notice of what in fact is not a commercially reasonable disposition, then perhaps a deficiency would be permitted after crediting the fair and reasonable value of the collateral. However, the language of *Glover* is very broad, and the court could probably conclude that any commercially unreasonable disposition results in a denial of a deficiency.

141. *In re* Nellis, 22 U.C.C. Rep. 1318 (E.D. Pa. 1977) (in bankruptcy), wherein the court concluded: "The failure to give notice to the receiver violates § 9-504(3) of the Uniform Commercial Code and any sale made without notice is not 'commercially reasonable.'" *Id.* at 1324. Beneficial Fin. Co. v. Reed, 212 N.W.2d 454, 458-59 (Iowa 1973); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, —, 415 S.W.2d 347, 351 (1966).

142. Jones v. Morgan, 58 Mich. App. 455, —, 228 N.W.2d 419, 423-24 (1975). In the event that the secured party is denied a deficiency under a *no notice no deficiency rule*, but the debtor is also awarded monetary damages, the question is open as to whether the secured party can set-off the deficiency as against the monetary award. If the denial of a deficiency is equated to an extinguishment of the debt, then no set-off would be permitted. If however, the denial of the deficiency is equated to a discharge of the debt in terms of collectability, then perhaps it should be permitted. *Id.*

143. U.C.C. § 9-507(1). *See* Atlas Credit Corp. v. Dolbow, 193 Pa. Super. Ct. 649, —, 165 A.2d 704, 708 (1961).

144. *In re* Bryan, 20 U.C.C. Rep. 571, 575 (S.D. Ohio 1976) (in bankruptcy); *In re* Webb. 17 U.C.C. Rep. 627, 633 (S.D. Ohio 1975) (in bankruptcy).

ing statement, or whose security interest is known to the disposing secured party.[145] Adequately determining the liability of the disposing secured party or the loss of the other secured party is a problem area.

In *Liberty National Bank & Trust Co. v. Acme Tool*,[146] the senior secured party disposed of collateral in a commercially unreasonable manner, although the proceeds were sufficient to pay the senior debt. The disposing secured party was held liable to a junior secured party in the amount of the junior debt; the difference between the sale price and the presumed fair market value was more than sufficient to pay the junior debt. In general terms, the disposing secured party may be held liable for the difference between the sale price and the fair market price.

Better Price Obtainable and Dispositions Presumptively Commercially Reasonable

Section 9-507(2) provides in part: "The fact that a better price could have been obtained by sale at a different time or in a different method from that selected by the secured party is not in itself sufficient to establish that the sale was not made in a commercially reasonable manner."[147] The resale price is, however, a relevant factor in the determination of whether the sale was commercially reasonable.[148] In addition, some courts impose the burden upon the secured party to affirmatively plead and demonstrate that the sale price was the fair and reasonable value of the collateral, and further "to establish that every aspect of the sale was commercially reasonable."[149]

Section 9-507(2) provides two categories of presumptively reasonable dispositions. First, if the collateral is sold in the "usual manner in any recognized market therefor, or if [the secured party] 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."[150]

The second category of presumptively reasonable dispositions concerns those "which [have] been approved in any judicial pro-

145. Bank of Camilla v. Stephens, 234 Ga. 293, —, 216 S.E.2d 71, 72-73 (1975); Farmers State Bank v. Otten, 87 S.D. 161, —, 204 N.W.2d 178, 180 (1973).

146. 540 F.2d 1375, 1382 (10th Cir. 1976).

147. U.C.C. § 9-507(2).

148. Associates Fin. Co. v. Teske, 190 Neb. 747, 750, 212 N.W.2d 572, 574 (1973).

149. 188 Neb. at 364, 196 N.W.2d at 510.

150. U.C.C. § 9-507(2). *See* First Nat'l Bank & Trust Co. v. Halston, 559 P.2d 440, 445 (Okla. 1976).

ceedings or by any bona fide creditors' committee or representative of creditors. . . 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."[151]

Comment 2 to section 9-507 suggests that the judicial approval relates to "a proposed method of disposition."[152] Accordingly, any after-the-fact determination by the court that a disposition was commercially reasonable should not be treated or considered the type of judicial proceeding as set forth within the section.

CONCLUSION

Part Five of Article Nine presents a series of duties, obligations and regulations governing most aspects of the secured party's conduct in a default situation. It is important to consider the consequences which can flow from improper conduct in the exercise of the rights provided therein, or those provided in the security agreement. This article has attempted to provide some understanding of the function of each section of Part Five, and the specific rights and duties of the secured party under those sections. Correspondingly, consideration has been given to the rights of the debtor.

Perhaps the effect and judicial interpretation of some sections of Part Five could be subject to criticism. However, that is not the purpose of this article; that task is left to other commentators. What has been demonstrated, in summary, by this article, is that a secured party confronted with a default and impending repossession and disposition, should carefully consider and plan his course of conduct. The key phrase is *commercially reasonable*. The secured party must act in a commercially reasonable manner when he proceeds in any default situation. This requirement must be satisfied in order to preserve for the secured party any deficiency judgment and avoid any liablity to the debtor.

151. U.C.C. § 9-507(2). *See* Bryant v. American Nat'l Bank & Trust Co., 407 F. Supp. 360, 363 (N.D. Ill. 1976); *In re* Zsa Zsa Ltd., 352 F. Supp. 665, 670 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. 1973).

152. Official Comment 2, U.C.C. § 9-507(2).