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The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II

By Timothy R. Zinnecker*

REVISED SECTION 9-615: APPLICATION OF PROCEEDS OF DISPOSITION; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS

Under current Uniform Commercial Code (U.C.C.) Article 9, a creditor applies proceeds received from a collateral disposition according to a four-step payment scheme.1 Revised Article 9 prescribes a five-step payment scheme that resembles—but does not mirror—its predecessor. Revised section 9-615 codifies the new payment scheme.2

Like its predecessor, revised section 9-615 initially permits a creditor to recover its reasonable expenses incurred in retaking, holding, and disposing...

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2. The payment scheme analyzed in this section is codified in revised U.C.C. section 9-615(a), which applies only to cash proceeds. A creditor that receives noncash proceeds, such as a promissory note, is under no obligation to apply the proceeds unless the failure to do so is commercially unreasonable; a creditor that applies noncash proceeds must do so in a commercially reasonable manner. See id. § 9-615(c) and cmt. 3 (1998). The duties imposed by revised § 9-615(c) cannot be waived or varied. See id. § 9-602(4). However, the creditor and the debtor may contractually agree on the application of noncash proceeds through terms that are not manifestly unreasonable. See id. § 9-615 cmt. 3; see also Timothy R. Zinnecker The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part I, 54 BUS. LAW. 1113, 1139 nn.159-67 and accompanying text (1999).

A creditor’s decision to forego applying noncash proceeds was not expressly subject to a commercial reasonableness test until late in the drafting process. Compare U.C.C. § 9-615(c) (Draft July 24-31, 1998) (“A secured party need not apply or pay over for application noncash proceeds of disposition under this section.”), with id. § 9-615(c) (Draft approved at NCCUSL Annual Meeting, July 30, 1998) (adding “unless the failure to do so would be commercially unreasonable” to the end of sentence).
of the collateral,\(^3\) such as out-of-pocket payments made to a repossession company, a storage facility, or an auctioneer. Additionally, a creditor can reimburse itself for reasonable attorneys' fees and legal expenses, but only to the extent provided for by agreement and not prohibited by law.\(^4\) A secured party should revise its loan documents accordingly.

Like current section 9-504, revised section 9-615 next permits the creditor to apply the proceeds against the debt secured by the disposed collateral.\(^5\) This permits a creditor to apply proceeds to multiple debts if those debts are secured by the disposed collateral; otherwise, the creditor cannot apply the proceeds to other obligations of the debtor.\(^6\)

In many cases the proceeds will not completely extinguish the unpaid debt, leaving the creditor with a deficiency claim against the debtor.\(^7\) Oc-
casionally, however, some proceeds remain. Under current law, these excess proceeds are applied to reduce debt of other parties, subject to several requirements. First, the debt must be encumbered by a security interest in the collateral; unsecured debts, and debts secured by an encumbrance other than a security interest, such as a judgment lien, are ineligible. Second, the security interest must be subordinate to the interest under which the disposition is made; interests that enjoy priority or share equal rank do not qualify. And third, the creditor that disposes of the collateral must receive a written demand for excess proceeds from the junior creditor before the proceeds are completely distributed.

Revised section 9-615 has adopted current section 9-504(1)(c), with some modifications. The debt to be paid with excess proceeds still must be secured by an interest in the disposed collateral, but that interest can be either a security interest or a lien. The competing property interest must be subordinate to the security interest under which the disposition is made, but the subordinate property interest must enjoy priority over the competing collateral in accordance with the rules of Article 9. See U.C.C. § 9-504(2)(1995); id. § 9-615(d)(2) (1998). An exception exists when the underlying transaction involved the sale of certain assets to the secured party. See id. § 9-504(2) (1995); id. § 9-615(e)(2) (1998).


9. But see Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code ¶ 4.06[3], at 4-99 (rev. ed. 1993 & Supp. 1998) (“It is unfortunate that §9-504(1)(c) gives junior judgment creditors no protection.”); 2 Grant Gilmore, Security Interests in Personal Property § 44.8, at 1250 (1965) (suggesting that “the reference [to ‘security interests’] should be read broadly to include ... liens”); C. Edward Dobbs, Enforcement of Article 9 Security Interests—Why So Much Deference to the Junior Secured Party?, 28 Loy. L.A. L. REV. 131, 138 (1994) (contending that the payment scheme of § 9-504(1) triggers a “palpably unfair” result for the holder of a lien that is subordinate to the security interest of the foreclosing creditor but senior to a junior security interest). Cf. U.C.C. § 9-504(4) (indicating that disposition terminates “any security interest or lien subordinate thereto”) (emphasis added).

10. See U.C.C. § 9-504(1)(c). Debts secured by subordinate security interests are eligible for payment because the disposition terminates those interests; non-junior interests survive disposition, so holders of those interests have no need of monetary protection. See id. § 9-504(4). This statutory protection may ring hollow if the senior creditor cannot locate either the purchaser or the collateral—a distinct possibility if the creditor does not receive notice of the disposition. See Dobbs, supra note 9, at 140. Under current law, a senior creditor is entitled to notice only if the foreclosing creditor has received timely written notice of the senior interest. See U.C.C. § 9-504(3).

11. See U.C.C. § 9-504(1)(c). The creditor may ignore the written demand for excess proceeds if the junior creditor fails to timely furnish the creditor with reasonable proof of the subordinate interest. Id.

12. See id. § 9-615(a)(3) (1998); see also PEB Study Group, Uniform Commercial Code Article 9, at 215 (1992) [hereinafter PEB Study Group Report] [recommending that any holder of a subordinate property interest should be entitled to receive excess proceeds if the holder has given the foreclosing creditor a timely written demand].

interest of any consignor. Although the creditor may have knowledge of the subordinate property interest and may have sent notice of the disposition to the holder of that interest, the foreclosing creditor need not disgorge excess proceeds to the holder of the subordinate property interest unless the foreclosing creditor has timely received an authenticated demand for the excess proceeds from the holder of that property interest.

As a general rule under both current and revised Article 9, the debtor is entitled to any surplus proceeds. Under current law, the debtor is not entitled to any surplus proceeds. If a consignor has an interest in the disposed collateral that is not junior to the subordinate interests of secured creditors or lienholders, then the consignor is entitled to the excess proceeds (regardless of the priority of its interest against the security interest held by the foreclosing creditor) if the foreclosing creditor has timely received an authenticated demand from the consignor. See id. § 9-615(a)(4). The statute does not require the consignor to comply with a request by the foreclosing creditor for reasonable proof of the consignor's interest unless the consignor's interest is subordinate to the interest of the foreclosing creditor. See id. § 9-615(b). This may be a drafting oversight. Fairness to all concerned parties dictates that the consignor should be entitled to demand proof of its interest (regardless of its priority) in the foreclosing collateral before disbursing excess funds to that person. Nor does the statute expressly state how excess proceeds should be applied if all of the following conditions are present: (i) a consignor has an interest in the disposed collateral that is subordinate to the interest of the foreclosing creditor or, alternatively, the consignor's interest is not subordinate but the foreclosing creditor never timely receives the consignor's authenticated demand for payment), (ii) a secured party (or lienholder) has a security interest (lien) in the disposed collateral that is subordinate to the interest of the foreclosing creditor, (iii) the consignor's interest is senior to the interest of the subordinate secured party (lienholder), and (iv) if the consignor's interest is subordinate to the interest of the foreclosing creditor, the consignor fails to timely comply with the foreclosing creditor's request for reasonable proof of the consignor's interest. The foreclosing creditor can avoid paying excess proceeds to the subordinate secured party (lienholder) under revised § 9-615(a)(3)(B), the consignor with an interest not subordinate to the foreclosing creditor's interest under revised § 9-615(a)(4), and the consignor with an interest subordinate to the foreclosing creditor's interest under revised § 9-615(b). Following the payment scheme, the foreclosing creditor should remit excess proceeds to the debtor under revised § 9-615(d)(1).

Because the interests of the subordinate security interests and liens are terminated by the disposition, see revised § 9-617(a)(3), a more equitable payment scheme would permit the foreclosing creditor to remit excess proceeds to the holders of those subordinate security interests and liens if a consignor has an interest in the disposed collateral but fails to satisfy the conditions of revised §§ 9-615(a)(4) or 9-615(b).

14. See id. § 9-615(a)(3)(B). If a consignor has an interest in the disposed collateral that is not junior to the subordinate interests of secured creditors or lienholders, then the consignor is entitled to the excess proceeds (regardless of the priority of its interest against the security interest held by the foreclosing creditor) if the foreclosing creditor has timely received an authenticated demand from the consignor. See id. § 9-615(a)(4). The statute does not require the consignor to comply with a request by the foreclosing creditor for reasonable proof of the consignor's interest unless the consignor's interest is subordinate to the interest of the foreclosing creditor. See id. § 9-615(b). This may be a drafting oversight. Fairness to all concerned parties dictates that the foreclosing creditor should be entitled to demand proof of the consignor's interest (regardless of its priority) in the foreclosing collateral before disbursing excess funds to that person. Nor does the statute expressly state how excess proceeds should be applied if all of the following conditions are present: (i) a consignor has an interest in the disposed collateral that is subordinate to the interest of the foreclosing creditor or, alternatively, the consignor's interest is not subordinate but the foreclosing creditor never timely receives the consignor's authenticated demand for payment), (ii) a secured party (or lienholder) has a security interest (lien) in the disposed collateral that is subordinate to the interest of the foreclosing creditor, (iii) the consignor's interest is senior to the interest of the subordinate secured party (lienholder), and (iv) if the consignor's interest is subordinate to the interest of the foreclosing creditor, the consignor fails to timely comply with the foreclosing creditor's request for reasonable proof of the consignor's interest. The foreclosing creditor can avoid paying excess proceeds to the subordinate secured party (lienholder) under revised § 9-615(a)(3)(B), the consignor with an interest not subordinate to the foreclosing creditor's interest under revised § 9-615(a)(4), and the consignor with an interest subordinate to the foreclosing creditor's interest under revised § 9-615(b). Following the payment scheme, the foreclosing creditor should remit excess proceeds to the debtor under revised § 9-615(d)(1).

15. See id. § 9-615(c)(3).

16. See id. § 9-615(a)(3)(A); see also id. § 9-102(a)(7) (defining "authenticate"). The foreclosing creditor is entitled to request reasonable proof of the subordinate security interest or lien. Failure by the holder of that interest or lien to timely comply with the request relieves the creditor from honoring the holder's demand for proceeds. See id. § 9-615(b).

17. Id. § 9-615(d)(1); id. § 9-504(2) (1995); see also Bill Fitts Auto Sales, Inc. v. Daniels, 922 S.W.2d 718, 720-21 (Ark. 1996) (affirming trial court's judgment awarding surplus proceeds to debtor). This duty to account for surplus proceeds is (under current Article 9) and remains (under revised Article 9) a duty that cannot be waived or varied. See U.C.C. § 9-501(3)(a) (1995); id. § 9-602(5) (1998).

Under current Article 9, if the creditor knows that a party other than the debtor owned the collateral, then the owner—rather than the debtor—is entitled to the surplus proceeds. See id. §§ 9-112, 9-504 cmt. 2 (1995). This provision is necessary because current U.C.C. § 9-
entitled to surplus proceeds resulting from the creditor's disposition of accounts or chattel paper that the creditor has purchased from the debtor unless their security agreement so provides.\textsuperscript{18} Revised section 9-615 continues this exception in modified form. As revised, the creditor need not remit to the debtor any surplus proceeds resulting from the disposition of accounts or chattel paper or—as the result of the expanded scope of revised Article 9\textsuperscript{19}—payment intangibles or promissory notes sold by the debtor to the creditor.\textsuperscript{20} Unlike current section 9-502(2), which permits the parties to contractually override the exception, revised section 9-615 does not specifically permit contrary agreement. However, revised section 9-615(c) (the statutory address for this exception) is not referenced among the numerous statutes listed in revised section 9-602 (the "anti-waiver" provision).\textsuperscript{21} Therefore, language expressly permitting parties to contract around the exception is not necessary and, in light of revised section 9-602, would be redundant.

In those instances where proceeds remain after the foreclosing creditor has paid its reasonable expenses and its debt, the payment scheme may raise questions for the foreclosing creditor that are not easily answered. How does the creditor determine whether a security interest or lien is junior to its own interest? How does it resolve the priority of multiple (but allegedly subordinate) security interests or liens? And what if the debtor disputes the amount owed to the other secured creditors or lienholders or the validity of the security interest or lien? Revised section 9-615 offers no guidance.\textsuperscript{22} Presumably a creditor would not violate its disbursement obligations by depositing the excess proceeds into court and bringing an interpleader action against all interested parties.\textsuperscript{23}

\textsuperscript{18} See id. § 9-504(2) (1995); see also id. § 9-102(1)(b) (including within the scope of current Article 9 the sale of accounts and chattel paper).

\textsuperscript{19} See id. § 9-109(a)(3) (1998); see also Donald J. Rapson, "Receivables" Financing Under Revised Article 9, 73 AM. BANKR. L. J. 133, 136-40 (1999) (discussing expansion).

\textsuperscript{20} See U.C.C. § 9-615(c)(1).

\textsuperscript{21} Cf. § 9-602(4) (referencing revised § 9-615(c)); id. § 9-602(5) (referencing revised § 9-615(d)); id. § 9-602(8) (referencing revised § 9-615(f)).

\textsuperscript{22} Cf. PEB STUDY GROUP REPORT, supra note 12, at 216 (recommending that the official comments provide a safe harbor for a secured party that disburses disposition proceeds in good faith).

\textsuperscript{23} Cf. N.C. GEN. STAT. §§ 25-9-504.1, -504.2 (1997) (permitting a secured party to tender any surplus to a court clerk who may institute a special proceeding to determine ownership).
Noticeably excluded from the current and revised payment schemes as a potential recipient is any creditor whose interest in the collateral is not junior to the interest of the foreclosing creditor. There is a reason that the payment scheme makes a priority-based distinction: the interest of a junior creditor is terminated when the collateral is disposed, but the interest of a non-junior creditor survives the disposition. Nevertheless, this point has eluded courts in the past. Revised section 9-615 should reduce, if not eliminate, this confusion. Under subsection (g), a foreclosing creditor can retain cash proceeds free of non-junior property interests (whether

24. An early draft of Article 9 expressly provided for payment of proceeds to holders of senior security interests and liens before all other interests, including the interest under which the disposition occurred, but the provision never became part of the official text. See Steve H. Nickles, Rights and Remedies Between U.C.C. Article 9 Secured Parties with Conflicting Security Interests in Goods, 68 Iowa L. Rev. 217, 242-44 (1983) (discussing drafting history of § 9-504).

25. See U.C.C. § 9-617(a)(3) (1998); id. § 9-504(4) (1995). This statutory protection offers little solace if the non-junior creditor is not informed of the disposition or cannot locate either the purchaser or the collateral. Revised Article 9 reduces this likelihood by expanding the list of parties to whom the foreclosing creditor must send its disposition notice. Compare id. § 9-611(c) (1998) (requiring notice to certain creditors that have either provided the foreclosing creditor with written notice of a competing interest or perfected the competing interest by filing a financing statement or complying with other law), with id. § 9-504(3) (1995) (requiring notice to certain creditors that have provided the foreclosing creditor with written notice of a competing interest).

26. See, e.g., Stotts v. Johnson, 791 S.W.2d 351, 352-53 (Ark. 1990) (relying on priority provisions of current Article 9 to conclude that a senior secured creditor has a claim to proceeds of a sale conducted by a junior secured creditor); Delaware Truck Sales, Inc. v. Wilson, 618 A.2d 303, 308 (N.J. 1993) (relying on U.C.C. § 9-306(2) to hold that absent countervailing considerations a senior secured creditor could require a junior secured creditor to disgorge proceeds from collection of accounts receivable); Roemer & Zeller, Inc. v. Ace Transmission Center, Inc., 454 N.Y.S.2d 377, 378 (1982) (noting that although junior creditor had right to replevy and sell inventory, senior creditor would enjoy priority in any sale proceeds); Consolidated Equip. Sales, Inc. v. First State Bank & Trust Co., 627 P.2d 432, 438 (Okla. 1981) (relying on U.C.C. §§ 9-312(5) and 9-306(2) to hold that junior secured creditor had obligation to tender sales proceeds to senior secured creditor and that failure to do so amounted to conversion). But see Continental Bank, N.A. v. Krebs, 540 N.E.2d 1023, 1026 (Ill. App. Ct. 1989) (holding senior creditor was not entitled to proceeds of disposition conducted by junior creditor); Chadron Energy Corp. v. First Nat'l Bank, 459 N.W.2d 718, 731-32 (Neb. 1990) (concluding junior secured creditor was not guilty of conversion for retaining proceeds from disposition without first applying them to debt secured by senior security interests); James J. White & Robert S. Summers, Uniform Commercial Code § 34-10, at 433-34 (4th ed. 1995) (observing that the "drafters plainly knew the difference between senior and junior claimants" and expressing disbelief that failure to reference a senior claimant's rights to proceeds in the distribution scheme was "inadvertent"); Cynthia Starnes, U.C.C. Section 9-504 Sales By Junior Secured Parties: Is A Senior Party Entitled To Notice And Proceeds?, 52 U. PITT. L. REV. 563, 583-88 (1991) (criticizing court decisions permitting senior creditors to share in sale proceeds received by junior creditor). See generally Nickles, supra note 24, at 241-56 (analyzing the propriety of a senior secured creditor's claim to proceeds).

27. The PEB Study Group recognized this confusion and recommended that § 9-504 explicitly permit a junior secured party to dispose of collateral and retain and apply proceeds without regard for any senior security interests. See PEB Study Group Report, supra note 12, at 218-19.
in the form of a security interest or a lien), is not obligated to apply the proceeds to the debt secured by those property interests, and is not required to pay any surplus proceeds to any holder of such a property interest. However, the foreclosing creditor cannot invoke subsection (g) unless it receives the cash proceeds “in good faith and without knowledge that the receipt violates the rights of the holder” of the property interest. Hopefully, courts will not conclude that the foreclosing creditor has acquired the adverse knowledge merely because evidence reveals that the creditor knew that the competing property interest existed (e.g., through the discovery of a financing statement); that conclusion is erroneous.

A related issue not expressly addressed by revised section 9-615 is whether a secured creditor, holding a security interest that is not subordinate to the security interest held by the foreclosing secured creditor, can claim that its security interest attaches to any surplus proceeds that are remitted to the debtor. A secured creditor retains a security interest in identifiable proceeds “except as otherwise provided” by revised Article 9 (and section 2-403(2)). Assuming that the proceeds remain identifiable, the secured creditor may argue that its security interest extends to the surplus in the debtor’s hands because revised section 9-615 does not, in clear language, “otherwise provide.” However, that result would seem to

29. Id.; see also id. § 9-102(a)(43) (defining “good faith”); id. § 1-201(24) (1995) (stating when a person “knows” or has “knowledge” of a fact).
30. One need only look to the definition, and rights, of a “buyer in ordinary course of business,” to recognize the distinction between knowledge of the competing property interest and knowledge of a violation of the rights of the holder of that property interest. See id. § 1-201(9) (1998) (defining “buyer in ordinary course of business” as a person “without knowledge that the sale violates the rights of another person”); id. § 9-320(a) (indicating that a buyer in the ordinary course of business acquires the goods free of a security interest even if the buyer knows that the security interest exists); id. § 9-320 cmt. 3 (clarifying the distinction between knowledge of a security interest and knowledge of a violation of third-party rights); see also id. § 9-307 cmt. 2 (1995) (making same distinction); id. § 9-402 cmt.2 (indicating that a financing statement “indicates merely that the secured party who has filed may have a security interest”) (emphasis added). Query whether a senior secured party could provide the requisite adverse knowledge by filing a financing statement that states “SECURITY INTERESTS GRANTED IN FAVOR OF, AND RETENTION OF PROCEEDS IN ANY FORM BY, ANY OTHER PARTY VIOLATE THE RIGHTS OF THE SECURED PARTY IDENTIFIED HEREIN.” See Donald J. Rapson, Default and Enforcement of Security Interests Under Revised Article 9, CHI.-KENT LJ. (forthcoming 1999) (manuscript at 24-25, on file with The Business Lawyer, University of Maryland School of Law) (discussing use of so-called “bulletin board” financing statements).
31. See U.C.C. § 9-315(a)(2) (1998); cf. id. § 9-306(2) (1995) (extending a secured party’s interest to identifiable proceeds “except where this Article otherwise provides”)
32. There is judicial and scholarly precedent for this proposition under current Article 9. See, e.g., Chadron Energy Corp. v. First Nat’l Bank, 459 N.W.2d 718, 733 (Neb. 1990) (“If the disposition of the collateral by a junior secured party produces a surplus which the debtor is entitled to receive pursuant to § 9-504(2), such proceeds are subject to the continuing security interest of the senior secured party.”); Nickles, supra note 24, at 241-42 n.86, 245 n.103, and 254; Starnes, supra note 26, at 586 n.110 and 587. Cf. 9 WILLIAM D. HAWKLAND
violate the spirit of the payment scheme of revised section 9-615, which excludes those very creditors from the list of potential recipients. It makes little sense to expressly exclude a party from a payment scheme if that same party can recover the payment via another statutory avenue. Nevertheless, a provision or comment on this issue would have been welcome.\textsuperscript{33}

Normally a foreclosing creditor has every incentive to maximize disposition proceeds. As Judge Easterbrook observed:

[W]hy shouldn't they maximize? Even if the secured party could be assured of a judgment for the full deficiency, why would it forgo a dollar today for the chance to enforce a deficiency judgment tomorrow? . . . [T]he secured party will expend every cost-justified effort because it prefers money now to judgment later. . . . Add the uncertainty of recovery in litigation and this preference for cash grows stronger. That the debtor has defaulted is an indication that it is unlikely to be good for all of any judgment the creditor is able to get.\textsuperscript{34}

What the foregoing passage fails to acknowledge is that a secured party may, after conducting a disposition that satisfies the procedural requirements of commercial reasonableness, calculate its deficiency claim by using an unreasonable sales price. For example, Seller repossesses equipment following Debtor's default on a $100,000 debt. Seller paints and cleans the equipment and advertises the disposition in all of the appropriate

\textit{et al.,} \textit{Uniform Commercial Code Series} § 9-306:03, at 37 (1997) (indicating, under the "except" clause of U.C.C. § 9-306(2), that a secured party's interest in proceeds may be subject to the interest of other parties under specific list of sections that does not include U.C.C. § 9-504).

\textsuperscript{33} Guidance on this issue was requested in the Memorandum from Timothy R. Zinnecker, Associate Professor, South Texas College of Law, to Steven L. Harris & Charles Mooney, Jr. (Sept. 2, 1998) (on file with \textit{The Business Lawyer,} University of Maryland School of Law) [hereinafter Zinnecker Memorandum]. Louisiana has addressed the issue by defining "proceeds" in a manner that excludes "receipts that are derived from the disposition of collateral by a secured party by way of public or private sale under R.S. 10:9-504 or by judicial sale pursuant to applicable law." \textit{La. Rev. Stat. Ann.} § 9-306(1) (West Supp. 1997).

\textsuperscript{34} \textit{In re Excello Press, Inc.,} 890 F.2d 896, 901 (7th Cir. 1989); \textit{see also} Huntington Nat'l Bank v. Elkins, 559 N.E.2d 456, 459 (Ohio 1990) ("Given the economic realities of the lending industry, a secured creditor will generally attempt to obtain the highest possible price for the collateral since the recovery of a deficiency judgment against a defaulted debtor is usually dubious."); Edward J. Heiser, Jr. & Robert J. Flemma, Jr., \textit{Consumer Issues in the Article 9 Revision Project: The Perspective of Consumer Lenders}, 48 \textit{Consumer Fin. L.Q. Rep.} 488, 495 (1994) (contending that a secured creditor has every incentive to maximize disposition proceeds "because every dollar sacrificed on the sale of collateral becomes an unsecured claim against a debtor who is necessarily a bad risk by virtue of his default"); Richard B. Wagner, \textit{Commentary: Proposed Consumer Changes to Article 9 of the Uniform Commercial Code Would Adversely Affect Consumer Credit}, 50 \textit{Consumer Fin. L.Q. Rep.} 92, 93 (1996) (noting "the powerful incentives that creditors have to maximize recovery from the sale of collateral given the uncertainty of collection of deficiencies").
newspapers and trade journals. Seller has the equipment appraised at $75,000, but because the equipment will be sold at foreclosure, Seller realistically expects a successful bid somewhere between $55,000 and $65,000. Seller conducts a public sale at a convenient time and place. Although all procedural aspects of the sale are commercially reasonable, no serious buyers attend the public sale other than Seller, who bids $10,000. Two weeks later, Seller sells the equipment to a dealer for $60,000. Soon thereafter, Seller sues Debtor for a $90,000 deficiency ($100,000 debt minus a $10,000 credit from the foreclosure sale). If all procedural aspects of the foreclosure sale were commercially reasonable, must Debtor accept Seller’s calculation of a $90,000 deficiency claim?

The answer is found in revised section 9-615(f), which permits a debtor (or obligor) to challenge the amount of the deficiency claim. Revised section 9-615(f) provides a special formula for calculating a surplus or deficiency resulting from selected collateral dispositions. The special formula does not subject a secured party’s disposition to judicial scrutiny if the procedures are commercially reasonable. But it does place the spotlight on the amount of proceeds used by the secured party to calculate its deficiency claim. And if the spotlight reveals that the secured party calculated its deficiency claim by using an unreasonably low amount of proceeds, the deficiency is recalculated by using the amount of proceeds that would have been realized in a commercially reasonable disposition to a party other than the secured party, a party related to the secured party, or a secondary obligor.

Focusing attention on any aspect of a collateral disposition may displease a foreclosing creditor, but several reasons should mitigate a creditor’s expected disfavor with revised section 9-615(f). First, the provision applies only if a secured party disposes of collateral to itself, a “person related to” the secured party, or a secondary obligor.  

35. “When the secured party ‘bids in’ the collateral it does not pay money; rather it just allows a credit against the outstanding debt. That is called a credit bid.” Donald J. Rapson, Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented, 75 WASH. U. L.Q. 491, 497 n.22 (1997); see also 2 GILMORE, supra note 9, § 43.2, at 1188-89 (noting that “the person who buys at the sale today, nine times out of ten, is not our hero, the good faith purchaser for value, but the holder of the security interest who pays not in cash but by a credit against the debt”).  

36. See U.C.C. § 9-615(f) (1998). This statutory provision cannot be waived or varied. See id. § 9-602(8).  

37. See id. § 9-615 cmt.6.  

38. See id. § 9-615(f). Mr. Rapson, a member of the drafting committee, is most responsible for the formula that is codified at subsection (f). He recounts his efforts to persuade the drafting committee to adopt the formula in Rapson, supra note 35, at 512-36. Already subsection (f) is being referred to as “the Rapson Rule.” See Barkley Clark & Barbara Clark, Special Report: New Article 9, 31 UCC L.J. 243, 257 (1999).  

39. See U.C.C. § 9-102(a)(62) (defining “person related to” an individual); id. § 9-102(a)(63) (defining “person related to” an organization). The definitions are patterned after
Second, the provision applies only if the secured party’s calculation utilizes an amount of proceeds that falls significantly below the range of proceeds that would have been realized from a disposition to a party outside the three classes; it does not apply merely because the disposition failed to yield a credit that approximates an amount that the debtor perceives is the approximate fair market value of the collateral. Third, the burden of proof under revised section 9-615(f) rests not on the secured party but on the party challenging the deficiency calculation. And fourth, a similar rule already exists under real estate law.

**REVISED SECTION 9-616: EXPLANATION OF CALCULATION OF SURPLUS OR DEFICIENCY**

Sometime after it has disposed of the collateral, the secured creditor will return any surplus to, or, more likely, demand payment of any deficiency from, the appropriate party. Revised section 9-616, which has no predecessor under current Article 9, imposes a duty on a secured creditor to provide that party, in selected situations, with certain information.

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40. What appears to be a disposition to a secondary obligor may not be treated as a “disposition.” See U.C.C. § 9-618, discussed infra notes 99-132 and accompanying text.

41. See U.C.C. § 9-615(l)(1).

42. History suggests that such an imprecise term encourages litigation that may not produce consistent results. For example, current § 9-302(1)(e) provides a secured party with automatic perfection of an assignment of accounts that does not constitute “a significant part” of the debtor’s outstanding accounts. Courts have used various tests to craft the contours of the nebulous phrase. See, e.g., 9 HAWKLAND ET AL., supra note 32, § 9-302:10, at 9-1336 to 9-1339 (1997); id. § 9-302:10, at 9-113 (Supp. 1998) (summarizing tests and citing cases); Kristine Cordier Karnezis, Annotation, *When Is Filing Of Financing Statement Necessary To Perfect An Assignment Of Accounts Under UCC § 9-302(1)(e),* 85 A.L.R.3d 1050 (1978); id. at 73 (Supp. 1998) (collecting and analyzing cases).

43. See U.C.C. § 9-615(f)(2).

44. See id. § 9-626(a)(5). Mr. Rapson suggests that the party challenging the deficiency calculation may satisfy its burden of proof by introducing the following evidence: (i) the actual condition of the collateral; (ii) collateral appraisals, evaluations, surveys, and the like; (iii) guidebooks with values of the kind or type of collateral at the time of disposition; (iv) any estimates of value or ranges of value made or obtained by the secured party in establishing the minimum acceptable purchase price from an unrelated purchaser; (v) prices paid at any subsequent dispositions of the collateral by the purchaser, taking into consideration the proximity of the time of such dispositions to the initial disposition and any costs incurred by the purchaser in protecting, marketing, repairing, or improving the collateral; (vi) prices paid at comparable dispositions of the kind or type of collateral; (vii) whether the purchaser regularly sells the kind or type of collateral; and (viii) market practices and conditions for dispositions of the kind or type of collateral at the time and place of the disposition. Rapson, supra note 35, at 522-23.


46. This duty cannot be waived or varied. See U.C.C. § 9-602(9).
Revised section 9-616 requires the secured party in a consumer-goods transaction to send an “explanation” to each consumer obligor liable for any deficiency or, if applicable, a debtor entitled to any surplus. The “explanation” must be sent no later than when the secured party initially demands, in writing, payment of the deficiency by the consumer obligor or, if applicable, remits the surplus to the debtor. The secured party also must send an “explanation” within fourteen days after it receives from a debtor or consumer obligor an authenticated record requesting the creditor to provide an “explanation.”

What is an “explanation”? It is a writing that provides four pieces of information. First, the writing must state the amount of the deficiency or surplus. Second, it must explain how the creditor calculated the deficiency or surplus, using the following formula:

A. aggregate debt secured by security interest in disposed collateral, calculated as of (date) $\text{__________}$

47. See id. § 9-616(b).
48. See id. § 9-616(b)(1)(A). A secured party’s oral demand for payment of a deficiency need not be accompanied (or preceded) by an “explanation.”
49. See id. § 9-616(b)(1)(B) (referencing a “request”); id. § 9-616(a)(2) (defining “request”). Alternatively, the secured party may, within 14 days after receiving the consumer obligor’s request, send to the consumer obligor a record in which the secured party waives its right to any deficiency. Id. § 9-616(b)(2).

A secured party is entitled to charge the recipient up to $25 for sending an explanation in response to the recipient’s request if the secured party has already sent an explanation to the recipient during the previous six months. See id. § 9-616(c).
50. See id. § 9-616(a)(1). As the statute elsewhere refers to an authenticated record, see id. § 9-616(a)(2), it is obvious that the reference to “writing” is intentional. What is not so obvious is why the “explanation” must be a writing, rather than an authenticated record. Perhaps consumer representatives expressed concern that consumers might fail to timely review e-mail correspondence. See Memorandum from Steven O. Weise to Timothy R. Zinnecker (Mar. 22, 1999) (on file with The Business Lawyer, University of Maryland School of Law) [hereinafter Weise Memorandum].
52. See id. § 9-616(a)(1)(B).
53. See id. § 9-616(c)(1). If the secured party took possession of the collateral after default, the secured debt cannot be calculated as of a date more than 35 days before the possession date. See id. § 9-616(c)(1)(A). For example, if the creditor repossessed collateral on July 20 (a post-default date), then the secured debt set forth in the “explanation” can be calculated as of any date after June 14 (including any date after July 20). If, however, the secured party either took possession of the collateral before default or never took possession, then the secured debt cannot be calculated as of a date more than 35 days before the date of disposition. See id. § 9-616(c)(1)(B). For example, if a default occurred on May 1, the creditor never took possession of the collateral (or, alternatively, took possession before May 1), and the collateral was sold on October 15, then the secured debt set forth in the “explanation” can be calculated as of any date after September 9 (including any date after October 15).

Presumably the purpose for requiring a creditor to select a calculation date no earlier than 35 days before a particular date is a desire to arrive at an amount of secured debt that more closely approximates the actual figure (which may change daily). If so, then one must wonder why the statute adopts a bifurcated approach in which the counting date turns on when (or
B. proceeds from disposition $________
C. "A" minus "B" $________
D. disposition expenses, and attorneys’ fees secured by the disposed collateral $________
E. credits not included in "A" $________
F. deficiency or surplus $________

Third, the explanation must state, if applicable, that the surplus or deficiency may be affected by future debits, credits, charges, rebates, and expenses. And fourth, the writing must include a telephone number or mailing address that can be used by the recipient to obtain additional information about the transaction.

The section neither proposes a model form of explanation nor mandates that an explanation include any particular language. An explanation is sufficient if it substantially complies with the content requirements of revised section 9-616(a) even if the explanation has minor errors that are not seriously misleading. Rather than rely on the nebulous flexibility afforded by the statute, a creditor should exercise care in preparing the explanation if the creditor takes possession of the collateral, rather than a single rule that applies in all situations and that measures the 35-day period from the disposition date—a date more current than the possession date (which may pre-date the disposition date by weeks or months). For a while, the statute provided a uniform rule pegged to the disposition date (see U.C.C. § 9-616(b)(2)(A) (Draft July 25-Aug. 1, 1997)), but late in the drafting process (and without explanation) the statute created two possession-sensitive rules (see U.C.C. § 9-616(c)(1) (Draft Apr. 6, 1998)). An explanation of the bifurcated approach was requested in the Zinnecker Memorandum, supra note 33, at 3.

55. See id. § 9-616(c)(3).
56. See id. § 9-616(c)(4). The expenses may be reflected by type or in the aggregate. See id. To avoid double-counting, one would think that these expenses should be a separate line item only if they are not part of the aggregate debt mentioned in "A." Cf. id. § 9-616(c)(5) (referencing credits “which are not reflected in the amount in ["A"]”). For a while, language similar to that quoted from revised § 9-616(c)(5) appeared in revised § 9-616(c)(4). See, e.g., id. § 9-616(c)(4) (Draft July 24-31, 1998). The language was deleted in a subsequent draft. See, e.g., id. § 9-616(c)(4) (Draft approved at NCCUSL Annual Meeting, July 30, 1998). An explanation for this late revision was requested in the Zinnecker Memorandum, supra note 33, at 3.
58. See id. § 9-616(c)(6).
59. See id. § 9-616(a)(1)(C).
60. See id. § 9-616(a)(1)(D).
61. See id. § 9-616(d).
62. See id. Although revised §§ 9-616 and 9-614 both describe notices to be sent in consumer-goods transactions, the two sections do not treat errors in a uniform manner. See id. § 9-614(4)-(6). Why a uniform standard does not apply to all notices sent in consumer-goods transactions is unclear. Clarification was requested in the Zinnecker Memorandum, supra note 33, at 3.
63. Several questions come to mind: What is “substantial compliance”? When is an error “minor”? Can a monetary error ever be “minor”? When is an error “seriously” misleading? Should an error not “minor” be tolerated if it is not “seriously misleading”?
explanation and adhere to the content requirements. Otherwise, the creditor may be liable for damages equal to any loss caused by its noncompliance\textsuperscript{64} plus (in some instances) $500.\textsuperscript{65}

Revised section 9-616, which applies only in consumer-goods transactions,\textsuperscript{66} "reflects the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the amount of a surplus or deficiency and the basis upon which the surplus or deficiency was calculated."\textsuperscript{67} The reason for imposing a duty on the creditor to send the required notice makes sense, and imposing a statutory duty on a foreclosing creditor to provide that basic information (which perhaps may indirectly encourage the foreclosing creditor to more carefully monitor its disposition-related conduct) makes revised section 9-616 a welcome addition to the default provisions. However, all obligors and debtors have an interest in knowing the amount of any deficiency or surplus and how the creditor calculated that amount, and the usefulness and importance of that information justifies a provision requiring the secured party to send an explanation in all transactions, not just consumer-goods transactions.

**REVISED SECTION 9-617: RIGHTS OF TRANSFEE OF COLLATERAL**

Current Article 9, through section 9-504(4), sets forth the property rights of a purchaser that acquires collateral at foreclosure. With some change, these rights are codified in revised Article 9 at section 9-617.

Current Article 9 refers to the acquiring party as a "purchaser."\textsuperscript{68} Under revised Article 9 the acquiring party is known as a "transferee."\textsuperscript{69} Revised Article 9 does not define "transferee," but a "purchaser" is a party that takes by "purchase,"\textsuperscript{70} a term that "includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift, or any other voluntary transaction creating an interest in property."\textsuperscript{71} By acquiring an interest in the foreclosed property by sale or other voluntary transaction, the successful bidder at a public or private disposition appears to be a "purchaser." The official comments expressly refute that idea by indicating that a "a buyer at a foreclosure sale does not meet the definition

\textsuperscript{64} See U.C.C. § 9-625(b). The secured party’s noncompliance will not trigger liability for minimum statutory damages calculated under revised § 9-625(c)(2). See id. § 9-625(c) ("Except as otherwise provided in Section 9-628 . . . "); id. § 9-628(d).

\textsuperscript{65} See id. § 9-625(e)(5), (6).

\textsuperscript{66} See id. § 9-616(b).

\textsuperscript{67} Id. § 9-616 cmt. 2.

\textsuperscript{68} See id. § 9-504(4) (1995).

\textsuperscript{69} See id. § 9-617 (1998).

\textsuperscript{70} See id. § 1-201(33).

\textsuperscript{71} Id. 1-201(32). The definition of "purchase" has been revised by inserting "security interest," after "lien," and a comma after "gift." Id.
of 'purchaser' in Section 1-201." The reason is that a foreclosure disposition is not a "voluntary transaction" when viewed through the eyes of the debtor, the party that created the property interest being foreclosed.

As before, the transferee acquires all of the debtor's rights in the collateral. Additionally, the transferee acquires the collateral free of the foreclosing creditor's security interest. Furthermore, the transferee takes the collateral free of any security interest or lien in the collateral that is subordinate to the security interest of the foreclosing creditor. By providing the transferee with immunity from the foregoing title claims, it is hoped that the disposition will attract additional prospective transferees and result in higher prices. In this manner the statute benefits not only the transferee but also the foreclosing creditor and the debtor.

Under current Article 9, a secured party's noncompliance with the default provisions (or, if applicable, any judicial proceeding) does not affect the rights of a purchaser at a public sale if the purchaser did not know of

72. Id. § 9-617 cmt. 2.
73. See id. One could argue that if the debtor contractually acknowledges that the secured party, upon default, enjoys all rights and remedies afforded by law (including U.C.C. Article 9), then the debtor has indeed consented to the disposition, making the disposition a "voluntary transaction."
76. See U.C.C. § 9-617(a)(3) (1998); id. § 9-504(4) (1995); see also Mastro v. Witt, 39 F.3d 238, 243 (9th Cir. 1994) (holding foreclosure sale discharged subordinate security interest); Hope v. Performance Automotive Inc., 710 So. 2d 1235, 1239-41 (Ala. 1998) (same); Food City, Inc. v. Fleming Cos., 590 S.W.2d 754, 758 (Tex. App. 1979, no writ) (same); David Frisch, The Implicit Takings Jurisprudence of Article 9 of the Uniform Commercial Code, 64 FORDHAM L. REV. 11, 23 (1995) ("As a general rule, a person who buys property at a foreclosure sale acquires the debtor's equity plus the equity created by the absence of the lien being foreclosed and all subordinate liens and interests."). Notwithstanding revised § 9-617(a)(3), the secured party and any prospective transferee should consult a lawyer familiar with the provisions of the Internal Revenue Code (particularly 26 U.S.C. § 7425 (1994)) to determine whether the disposition will terminate a subordinate federal tax lien.
77. See Robyn L. Meadows, A Potential Pitfall for the Unsuspecting Purchaser of Repossessed Collateral: The Overlooked Interaction Between Sections 9-504(4) and 2-312(2) of the Uniform Commercial Code, 44 AM. U. L. REV. 167, 177-78 (1994).
78. This reference to "any judicial proceeding" has left more than one scholar befuddled. See, e.g., 2 GILMORE, supra note 9, § 44.7, at 1248 (describing the reference as "mystifying"); 9 HAWKLAND ET AL., supra note 32, § 9-504:11, at 841 ("Exactly what is meant by 'any judicial proceeding' is not known.").
any sale defects and did not collude with the secured party.\textsuperscript{79} If the disposition is not by public sale, the purchaser must merely act in good faith.\textsuperscript{80} Revised section 9-617 changes the law in two respects.\textsuperscript{81} First, it offers protection to a transferee when the secured party fails to comply with any requirement of Article 9, not just a default provision.\textsuperscript{82} Second, the statute eliminates the "knowledge" and "collusion" tests and requires the transferee, in every type of disposition, to act in good faith.\textsuperscript{83} This revision is welcome, for it eliminates the distinction between acting in good faith and not acting in bad faith, a distinction that "has long troubled the law."\textsuperscript{84}

\textsuperscript{79} See U.C.C. § 9-504(4)(a) (1995); see also id. § 9-504 cmt. 4 (indicating that a purchaser has no duty to inquire into the circumstances of a public sale and is protected "so long as he is not actively in bad faith"); PWS, Inc. v. Ban, 285 Cal. Rptr. 598, 600-01 (Ct. App. 1991) (holding creditor that sold collateral to itself could not rely on U.C.C. § 9-504(4) as defense if debtor had sued to set aside sale when creditor-purchaser had to have knowledge of defect in sale held on July 22 where notice had indicated sale would occur on July 23); Sheffield Progressive, Inc. v. Kingston Tool Co., 405 N.E.2d 985, 988 (Mass. App. Ct. 1980) (concluding purchaser could not invoke protection of U.C.C. § 9-504(4) where evidence indicated purchaser collided with foreclosing creditor in manner that violated the Uniform Fraudulent Transfer Act). However, although the foreclosing creditor's failure to conduct a proper disposition may not prevent a transferee from acquiring the collateral free of selected property interests, the foreclosing creditor may be liable to the debtor and other interested parties under revised § 9-625 for its misconduct (which, under revised § 9-626, may adversely affect the creditor's ability to recover any deficiency).

\textsuperscript{80} See U.C.C. § 9-504(4)(b); see also Duffy v. Big Al's Autorama, Inc. (In re Duffy), 186 B.R. 503, 505 (Bankr. D. Colo. 1995) (holding debtor's rights in repossessed vehicle were extinguished by sale to purchaser, even if creditor-seller failed to comply with statutory notice requirements); Pippin Way, Inc. v. Four Star Music Co. (In re Four Star Music Co.), 2 B.R. 454, 464-65 (Bankr. M.D. Tenn. 1979) (concluding buyer at private sale was not good-faith purchaser for value as terms of sale were so highly unusual and beneficial to buyer that buyer, as merchant—and thus chargeable with knowledge and skill of merchant—could not in good faith have believed that the terms were commercially reasonable); Lichty v. Federal Land Bank, 467 N.W2d 657, 660 (Neb. 1991) (holding good-faith purchaser at private sale acquired collateral free of debtor's interest even if secured party failed to send, to debtor, reasonable notice of time after which private sale would occur).

\textsuperscript{81} Additionally, what was implied under current § 9-504(4) is now expressly stated: A transferee that does not satisfy the statutory requirements takes the collateral subject to the property interests of the debtor, the foreclosing creditor, and other secured creditors and lienholders. See U.C.C. § 9-617(c) (1998).

\textsuperscript{82} See id. § 9-617(b) (referencing noncompliance "with this article").

\textsuperscript{83} See id. § 9-617(b); see also id. § 9-102(a)(43) (defining "good faith"). This change occurred late in the revision process. During most of the process, the statute protected a transferee in a public sale only if the transferee (i) had no knowledge of any defects in the sale, (ii) did not collude with the secured party, other bidders, or the person conducting the sale, and (iii) acted in good faith. See, e.g., id. § 9-504(n) (Draft July 28-Aug. 4, 1995); id. § 9-617(b) (Draft July 24-31, 1998). Cf. id. § 9-617(b) (Draft approved at NCCUSL Annual Meeting, July 30, 1998) (deleting all requirements other than good faith). According to the official comments, no substantive change from current § 9-504(4) is intended, as a transferee's knowledge of sale defects, or its collusion with various parties, were merely "specific examples of the absence of good faith." Id. § 9-617 cmt. 3 (1998).

\textsuperscript{84} See William E. Hogan, The Secured Party and Default Proceedings Under the UCC, 47 MINN. L. REV. 205, 233 (1962); see also 2 GILMORE, supra note 9, § 44.7, at 1249 ("The distinction
When will a transferee fail to exercise good faith? The facts and circumstances surrounding the disposition will dictate the answer to that question. However, as knowledge of existing security interests is generally irrelevant when resolving priority disputes, a transferee should not violate the good-faith requirement merely because it knows of a competing, but subordinate, property interest. A contrary rule only discourages interested parties from searching the public records for property interests that might survive the transfer and, in effect, shrinks the pool of potential transferees to the detriment of both the foreclosing creditor and the debtor with no corresponding benefit to the holder of the subordinate interest.

By negative implication, the transferee obtains the collateral subject to any security interests or liens that are not junior to the security interest under which the disposition occurred. Therefore, before participating in

between the affirmative presence of good faith and the negative absence of bad faith . . . has never been a workable one."

Note, however, that the transferee's good faith only becomes an issue if the foreclosing creditor has conducted an improper disposition. The transferee's good faith, or lack thereof, is irrelevant if the disposition is proper. See Thomas v. Price, 975 F.2d 231, 238-40 (5th Cir. 1992).

See Mastro v. Witt, 39 F.3d 238, 243 (9th Cir. 1994) (holding that good-faith requirement of U.C.C. § 9-504(4)(b) does not require purchaser of collateral to lack knowledge of any pre-existing subordinate claims against the collateral); Northwest Equip. Sales Co. v. Western Co., Inc., 623 F.2d 92, 95-96 (9th Cir. 1980) (same); Landmark Land Co. v. Sprague, 529 F. Supp. 971, 981 (S.D.N.Y. 1981) (same), rev'd on other grounds, 701 F.2d 1065 (2d Cir. 1983); cf. Young v. Golden State Bank, 560 P.2d 855, 860 (Colo. Ct. App. 1977) (stating, in dicta, that purchaser's knowledge that the holder of a subordinate security interest had not been given notice of private disposition might be evidence of lack of good faith).

See Continental Bank v. Krebs, 540 N.E.2d 1023, 1026 (Ill. App. Ct. 1989); Utility Trailers v. Citizens Nat'l Bank & Trust Co., 726 P.2d 282, 285 (Kan. Ct. App. 1986); Chadron Energy Corp. v. First Nat'l Bank, 459 N.W.2d 718, 732-33 (Neb. 1990); Nickles, supra note 24, at 253 ("Upon the sale of the original collateral, the junior creditor's interest and any security interest or lien subordinate to his own are terminated, along with the debtor's rights in the property. Any senior security interest survives, however."); Luize E. Zubrow, Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives, 42 UCLA L. REV. 445, 457 (1994) ("Under Article 9 priority rules, the [senior] foreclosing creditor's claim would be superior to the ownership rights of . . . a [junior creditor's] purchaser."); see also 4 WHITE & SUMMERS, supra note 26, § 34-10, at 432 ("One thing is clear from [U.C.C. § 9-504(4)], namely, a senior secured party's interest in the collateral is not discharged by a junior's foreclosure sale, and continues to attach to the goods in the hands of the purchaser at the sale."). During most of the drafting process, revised Article 9 included a statement making this point somewhat less implied and little more express. See U.C.C. § 9-504(a) (Draft July 28-Aug. 4, 1995) ("Except as otherwise provided in this subsection or elsewhere in this article, the disposition does not discharge any security interest or other lien."). But see id. § 9-615(d) (Draft Apr. 6, 1998) (deleting sentence).

Unless a secured party has authorized a disposition of collateral free and clear of its interest, the interest generally continues after the disposition "[e]xcept as otherwise provided in this article and in Section 2-403(2)." Id. § 9-315(a) (1998); cf. id. § 9-306(2) (1995) (continuing a security interest in collateral after disposition absent consent and "[e]xcept where this Article otherwise provides"). One of the exceptions "otherwise provided" is the "buyer in ordinary course of business" exception codified in revised § 9-320(a), the successor to current
a public or private disposition of the collateral an interested party should review the public records to determine whether the collateral is encumbered by any security interests or liens that may survive the disposition, determine (if it can) the amount of debt secured by those security interests or liens, and factor that amount (together with the fair market value of the collateral) into its price deliberations. The transferee also should contact the holder of any security interest that survives the disposition in order to terminate the priority afforded to post-disposition advances funded by that holder. The transferee should be prepared to either pay off the debt

§ 9-307(1). As revised Article 9 rejects the notion that commercially reasonable dispositions are “out of the ordinary commercial course” or “peculiar,” see id. § 9-610 cmt. 11 (1998), a transferee of collateral consisting of the debtor’s inventory may, relying on the foregoing comment, invoke the “buyer in ordinary course of business” exception and argue that security interests that survive the disposition under revised § 9-617 are nevertheless terminated by revised § 9-320(a). One response is that the transferee is not a “buyer in ordinary course of business” as defined in revised § 1-201(9) because a party excluded from the broad definition of “purchaser” cannot be a “buyer.” But see id. § 9-617 cmt. 2 (referring to a “buyer at a foreclosure sale”) (emphasis added). Another response is that the transferee is not a “buyer in ordinary course of business” because a foreclosure sale does not “comport[] with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.” Cf. Nickles, supra note 24, at 254 n.146 (“Is such a buyer [at a foreclosure sale] one not in the ordinary course . . .?”); id. at 254 n.148 (stating that a buyer at a foreclosure sale is “probably a buyer not in the ordinary course”); Zubrow, supra, at 457 n.30 (“In a battle between the original secured creditor and the purchaser, the secured creditor wins because the purchaser at a foreclosure sale is not a buyer in the ordinary course of business.”). However, comment 11 to revised § 9-610 somewhat undercut that response. Perhaps a better response is that the transferee is not a “buyer in ordinary course of business” because the definition requires the transferee to buy goods from a person “in the business of selling goods of that kind.” U.C.C. § 1-201(9) (1998). But this requirement only disqualifies a transferee when the foreclosing creditor is a bank, finance company, or other party that is not in the business of selling goods like the collateral. The goods may have been sold on credit to the debtor by the foreclosing creditor, in which case the foreclosing creditor would indeed be “in the business of selling goods of that kind.” (Query whether a finance company that is closely affiliated with a merchant also could be held to be “in the business of selling goods of that kind.” See Mercedes-Benz Credit Corp. v. Lotito, 703 A.2d 288, 292-95 (N.J. Super. Ct. App. Div. 1997) (permitting consumer lessee to assert breach of warranty against financing lessor having close relationship with seller and manufacturer); U.C.C. § 2A-103(g) (1995) (defining “finance lease”); id. § 2A-103 cmt. g (stating that Article 2A “creates no special rule where the lessor is an affiliate of the supplier”).) Perhaps the best response is that even if the transferee is a “buyer in ordinary course of business,” revised § 9-320(a) offers no protection to the transferee because the statute allows a transferee to acquire collateral free of a security interest only if the security interest was “created by the buyer’s seller.” The transferee’s seller at a disposition is the foreclosing creditor, but the security interest referenced in revised § 9-320(a) was created by someone else: the debtor.

88 See U.C.C. § 9-323(d) (1998) (permitting selected buyers to acquire goods free of a security interest to the extent that the interest secures repayment of advances made after the earlier of (i) the time when the secured creditor acquires knowledge of the buyer’s purchase and (ii) the 45th day after the date of purchase); id. § 9-323(e) (protecting advances made pursuant to a commitment entered into by a secured party without knowledge of the buyer’s purchase and entered into no later than the 45th day after the purchase); id. § 9-102(a)(68)
secured by the surviving interest or surrender possession of the collateral. If the transferee is unable or unwilling to do so, it may be liable for conversion. If the transferee is unable or unwilling to do so, it may be liable for conversion. If

The transferee's recourse will be against the foreclosing creditor for breaching any title warranty given under revised section 9-610(d). If the foreclosing creditor disclaimed any title warranty and did not otherwise agree to indemnify the transferee against title claimants, the transferee may find itself without a legal remedy under revised Article 9.

Revised section 9-617 applies only to post-default dispositions. What rights are acquired by a transferee if the debtor was not in default at the time of disposition? Under pre-U.C.C. law, the transferee (if a good-faith purchaser for value) acquired the property free of the debtor's interest, even if the foreclosing creditor was liable to the debtor for conversion. By introducing a post-default requirement, Article 9 departs from pre-U.C.C. law and no longer provides the good-faith transferee with any rights in property acquired at a pre-default disposition.

(Defining "pursuant to commitment"). Current Article 9 offers similar protection. See id. §§ 9-307(3), 9-105(k) (1995).

See id. § 9-306 cmt. 3 (1998) ("[S]ince the transferee takes subject to the security interest, the secured party may repossess the collateral from him or in an appropriate case maintain an action for conversion."); Steve H. Nickles, Enforcing Article 9 Security Interests Against Subordinate Buyers of Collateral, 50 GEO. WASH. L. REV. 511, 520-36 (1982).

See U.C.C. § 9-610(d).

1. A sympathetic court might invoke equitable principles and permit the transferee to recover the purchase price from the seller. See id. § 1-103 (1995) (allowing principles of equity to supplement U.C.C. provisions). However, because the giving (and waiving) of title warranties are expressly addressed in revised § 9-610(d), and as revised § 9-617 contemplates the post-disposition survival of certain security interests and liens, equitable principles would seem to be "displaced by the particular provisions" of revised Article 9. Id.

See id. § 9-617(a) (1998) ("A secured party's disposition of collateral after default . . . .") (emphasis added); see also id. § 9-504(4) (1995) ("When collateral is disposed of . . . after default . . . .") (emphasis added).

See 2 GILMORE, supra note 9, § 44.7, at 1247 (discussing Uniform Trust Receipts Act § 6(3)(c), the forerunner of U.C.C. § 9-504(4)); see also U.C.C. § 9-504 cmt. 4 (1995) (referring to the Uniform Trust Receipts Act as its genesis).

4. The transferee may argue that revised § 9-617 and its predecessor do provide the transferee with rights in collateral acquired at a pre-default disposition. By disposing of collateral in the absence of a default, the foreclosing creditor has failed to comply with Article 9. See U.C.C. § 9-610(a) (1998) ("After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral . . . .") (emphasis added); id. § 9-504(1) (1995) ("A secured party after default may sell, lease, or otherwise dispose of any or all of the collateral . . . .") (emphasis added). Nevertheless, current and revised Article 9 both permit the transferee to acquire the property free of the debtor's interest, the interest being foreclosed, and all subordinate property interests, even if the foreclosing creditor "fails to comply with . . . the requirements" of Article 9, as long as the transferee has acted in good faith (and, in a public disposition under current Article 9, without knowledge of any defect and not in collusion with other parties). See id. § 9-617(b) (1998); id. § 9-504(4) (1995). As attractive as that argument may be, its acceptance requires one to overlook the organization and language of the statute and accompanying comments, all of which suggest that the reference to non-compliance was included to address a secured party's post-default noncompliance, such as
The Default Provisions of Revised Article 9

rights, if any, are held by the transferee are determined by other law.\textsuperscript{95} So, too, are any rights that the transferee may have against the debtor (who may demand return of the collateral) and, if the title warranty under revised section 9-610 has been disclaimed, the foreclosing creditor.\textsuperscript{96} Acknowledgment, if not closure, of this gap\textsuperscript{97} in the default provisions would have been welcome.\textsuperscript{98}

**REVISED SECTION 9-618: RIGHTS AND DUTIES OF CERTAIN SECONDARY OBLIGORS**

Consider the following typical transaction. Dealer sells a boat to Consumer pursuant to a retail installment sales contract that creates a security interest in the boat in favor of Dealer. Dealer then discounts the contract (chattel paper\textsuperscript{99}) to Finance Company, with recourse. Consumer defaults on its payment obligations and Finance Company repossesses the boat. Dealer honors its recourse obligations by paying to Finance Company an

breaching the peace while repossessing the collateral, failing to send a disposition notice to all required parties, or disposing of collateral in a commercially unreasonable manner. See id. § 9-504 cmt. 4 ("Subsection (4) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has not complied with the requirements of this Part or of any judicial proceedings.") (emphasis added); Gilmore, supra note 9, § 44.7, at 1248 (noting that U.C.C. § 9-504(4) "distinguishes between wrongful pre-default and wrongful post-default transfers" and "covers only disposition[s] by a secured party 'after default' "); id. § 42.14, at 1175-76 (observing that no section of the U.C.C. deals with the status of a transferee who acquires collateral at a pre-default disposition); Meadows, supra note 77, at 180-81; cf. U.C.C. § 9-617 cmt. 2 (1998) (making no distinction between pre- and post-default noncompliance in its statement that a disposition "has the effect specified in subsection (a), even if the secured party fails to comply with this Article").

95. Even if the transferee of goods has acted in good faith and given value, it cannot claim the protection afforded by U.C.C. § 2-403, which states: "A person with voidable title has power to transfer a good title to a good faith purchaser for value." The foreclosing creditor that makes an unauthorized disposition of collateral has void, rather than voidable, title. See Meadows, supra note 77, at 182-90. Furthermore, the transferee is not a "purchaser." See U.C.C. § 9-617 cmt. 2 (1998).

96. Unlike the transferee, the debtor enjoys certain rights under revised Article 9. For example, because a pre-default disposition is not sanctioned by revised § 9-610, the debtor's right of redemption under revised § 9-623 has not been terminated. Additionally, the debtor may collect damages under revised § 9-625. Furthermore, the debtor's liability for any deficiency may be reduced under revised § 9-626.

97. The "gap" may be more of a slight indentation than a chasm, as the issue may be more academic than practical. It is hoped that a debtor would promptly bring to the foreclosing creditor's attention its concern that a default has not yet occurred and that the creditor would only proceed with any scheduled disposition after addressing that concern.

98. For an excellent article that analyzes the problem and proposes a statutory solution, see Meadows, supra note 77, at 167.

amount equal to Consumer's unpaid debt. In return, Finance Company returns the contract (and the boat) to Dealer. Dealer then sells the boat to Purchaser and thereafter sues Consumer for a deficiency.

In the foregoing transaction, Dealer has sold the boat to Purchaser. But prior to that sale, had Finance Company "sold" the boat to Dealer when Dealer honored its recourse obligations? If so, several questions may arise. Which sale terminates Consumer's right of redemption and Consumer's interest in the collateral? Which sale requires the seller to send a sales notice to Consumer? Which sale can be scrutinized for commercial reasonableness? Which sales price is used in calculating a deficiency or surplus? Which sale is a "disposition" under the default provisions of Article 9?

Current Article 9 states that collateral is not sold or otherwise disposed when a person honoring its obligations "under a guaranty, indorsement, repurchase agreement or the like" receives a transfer of collateral from, or is subrogated to the rights of, a secured party. Revised Article 9 retains this concept, but not the language. Revised section 9-618 excludes from revised section 9-610 (and, therefore, any other disposition-related provision) (i) any “assignment of a secured obligation” from a secured party to a secondary obligor, (ii) any “transfer of collateral” from a secured party to a secondary obligor that “agrees to accept the rights and assume the duties of the secured party,” and (iii) any subrogation by a secondary obligor “to the rights of a secured party with respect to collateral.” The reason for treating transactions described in current section 9-504(5) and revised section 9-618 as non-dispositions "is to insure that the value of repossessed collateral is measured by a bona fide sale in the market place, and not by an artificial value, usually the balance due on the debtor's contract, set by a repurchase or guaranty agreement between a seller and a finance company."

100. See id. § 9-506 (1993); id. § 9-623(a), (c)(2) (1998).
102. See id. § 9-504(3) (1995); id. § 9-611(b), (c)(1) (1998).
103. See id. § 9-504(3) (1995); id. § 9-610(b) (1998).
106. See id. § 9-618(a)(1).
107. See id. § 9-618(a)(2).
108. See id. § 9-618(a)(3).
109. See Reeves v. Associates Fin. Servs. Co., 247 N.W.2d 434, 439 (Neb. 1976); see also Shields v. Bobby Murray Chevrolet, Inc., 261 S.E.2d 238, 240 (N.C. Ct. App.), affirmed without precedential value, 266 S.E.2d 658 (N.C. 1980) (indicating that the provision attempts to achieve a sales price “measured by a bona fide market value, and not by an artificial value”); 3 HOWARD RUDA, ASSET-BASED FINANCING § 28.04[3], at 28-10 to 28-11 (1993) (stating that a lender's sale of dealer's inventory to the manufacturer pursuant to the manufacturer's repurchase agreement "does not constitute a commercially reasonable sale because the price the manufacturer pays is tied to the indebtedness due the lender, not the market value of the collateral").
Revised section 9-618 is an improvement over its predecessor. The reference in current section 9-504(5) to “guaranty, indorsement, repurchase agreement or the like” suggests that its authors had sureties in mind.\footnote{110} Rather than continue to indirectly acknowledge suretyship concepts through a reference to the types of agreements that may create surety status, revised section 9-618 focuses attention on the surety status itself through its use of “secondary obligor.”\footnote{111} Hopefully, the replacement of agreement-based language with a status-based term will reduce some of the confusion that has surrounded current section 9-504(5), particularly the meaning of “repurchase agreement.”\footnote{112}

Another source of confusion has been the meaning of “transfer of collateral.”\footnote{113} The phrase, isolated in current section 9-504(5), remains in revised section 9-618, but is accompanied by language requiring the transferee to “accept the rights and assume the duties of the secured party.”\footnote{114} Additionally, new language in revised section 9-618 excludes from the disposition-relation provisions of revised Article 9 any “assignment of a secured obligation” from a secured party to a secondary obligor.\footnote{115} Together, these changes clarify which “transfers of collateral” are intended to be treated as non-dispositions. Unless the secured party has assigned the secured debt to the secondary obligor, or achieved the functional equivalent of an assignment through the secondary obligor’s agreement to step into the shoes of the secured party, the transaction between the secured party and the secondary obligor should be viewed as a sale of collateral, triggering application of all disposition-related provisions.\footnote{116} However, when evidence reveals that either the secured party has assigned its position to the secondary obligor or the secondary obligor has agreed to assume that position, then the transaction should be viewed as a purchase.


\footnote{111} Cf. Restatement (Third) of Suretyship and Guaranty § 1(1)(a) (1996) (eschewing “surety” in favor of “secondary obligor”); Homer Kripke, Practice Commentary to Section 9-504, N.Y. U.C.C. LAW § 9-504, at 611-12 (McKinney 1964), cited in Rapson, supra note 110, at 653 (using the following caption in his description of § 9-504(5): Sale of Collateral Back to Secondary Obligor) (emphasis added). Mr. Rapson describes Professor Kripke as “one of the leading architects of Article 9, past and present, and probably the most knowledgeable secured transactions lawyer in the country.” See Rapson, supra note 110, at 653.

\footnote{112} See, e.g., CLARK, supra note 9, ¶ 10.05[5], at 10-67 to 10-71; Rapson, supra note 110, at 660-66.

\footnote{113} See, e.g., CLARK, supra note 9, ¶ 4.08[8][c], at 4-171 to 4-172; Rapson, supra note 110, at 666-73.


\footnote{115} Id. § 9-618(a)(1).

\footnote{116} If revised § 9-618(a)(2) did not include language requiring the secondary obligor to agree “to accept the rights and assume the duties of the secured party,” a statutory conflict would exist between revised § 9-618(a)(2) (which would treat any “transfer of collateral” from a secured party to a secondary obligor as a non-disposition) and revised § 9-615(f) (which acknowledges that a secondary obligor can be the transferee in a collateral disposition).
of the secured debt, accompanied by the underlying security interest, rather than a purchase of the collateral.

Another clarification concerns subrogation rights. Under current section 9-504(5), collateral is not disposed when a guarantor or similar party becomes "subrogated to [the secured party's] rights."117 That statement is narrowed by revised section 9-618, which indicates that collateral is not disposed when a secondary obligor "is subrogated to the rights of a secured party with respect to collateral."118 In some transactions the secondary obligor's payment may be applied to unsecured debt.119 In such a case, the secondary obligor is subrogated to certain rights of the creditor, but, as a result of the emphasized language, revised section 9-618 is implicated only to the extent that those subrogated rights are collateral-related.120

Although current section 9-504(5) states that the guarantor or similar party will, by honoring its contractual obligations, acquire the rights and duties of the secured party, the statute does not indicate whether the secured party remains liable for any prior breach of its duties or may be held liable for any subsequent breach of a duty by the guarantor or similar party.121 Nor does the statute expressly state whether the guarantor or similar party can be held liable for the secured party's prior behavior. Revised section 9-618 clarifies the status of both parties. The statute provides that an assignment, transfer, or subrogation to which revised section 9-618 applies "relieves the secured party of further duties."122 Therefore, while the secured party may not be held liable for the secondary obligor's subsequent noncompliance (e.g., failing to send notice of a disposition to the debtor as required by revised section 9-611(b)), the secured party does remain liable for its own prior misbehavior (e.g., repossessing collateral under revised section 9-609 in a manner that breaches the peace). And because the statute states that a secondary obligor "becomes obligated to perform the duties of the secured party after the secondary obligor" has

119. In other transactions the secondary obligor may make a payment not in satisfaction of its secondary obligation but as the successful bidder at a public or private disposition. Revised Article 9 acknowledges that a secondary obligor can be the transference in a collateral disposition. See id. § 9-615(f). If a party makes a payment with the intent to buy the collateral, rather than discharge its secondary obligation, the party is not subrogated to any of the secured party's rights and revised § 9-618 is inapplicable. To avoid any confusion concerning the capacity in which the payment is made, the secured party and the secondary obligor should document the nature and circumstances of the payment accordingly. See id. § 9-618 cmt. 2.
120. See id. § 9-618 cmt. 2; cf. id. § 9-618(a)(1), (b)(1) (stating that collateral is not disposed when a secondary obligor "receives an assignment of a secured obligation") (emphasis added).
121. Cf. PEB STUDY GROUP REPORT, supra note 12, at 237 (recommending that § 9-504 "should be revised to specify the circumstances under which a secured party continues to be responsible to the debtor," notwithstanding the secured party's assignment or transfer to a recourse party under § 9-504(5)).
122. U.C.C. § 9-618(b)(2).
received an assignment, transfer, or subrogation to which revised section 9-618 applies, the secondary obligor should not inherit any liability arising from the secured party’s earlier misconduct.

Assuming that the Finance Company-Dealer transaction qualifies as an assignment, transfer, or subrogation governed by revised section 9-618, it is the Dealer-Purchaser transaction, rather than the Finance Company-Dealer transaction, to which the disposition provisions of revised Article 9 apply. As a result, Dealer inherits all of the rights afforded to, and must perform all of the obligations thereafter placed on, a secured party. Among these obligations are the duty to exercise reasonable care with respect to collateral in its possession, the duty to send to Consumer a disposition notice, the duty to conduct the disposition in a commercially

123. Id. § 9-618(a) (emphasis added).
124. See id. § 9-618 cmt. 4.
125. Of course a court must examine the true nature of the relationship between Dealer and Finance Company, and the facts and circumstances surrounding their transaction, before concluding whether revised § 9-618 applies. See, e.g., Reeves v. Associates Fin. Servs. Co., 247 N.W.2d 434, 439-40 (Neb. 1976) (concluding trial court’s reliance on U.C.C. § 9-504(5) to grant summary judgment was premature where evidence raised conflicting inferences on whether parties enjoyed principal-agent relationship or had acted pursuant to a guaranty or repurchase agreement).
126. See Stoppi v. Wilmington Trust Co., 518 A.2d 82, 85 (Del. 1986) (concluding under § 9-504(3) that realignment of collateral from bank to seller pursuant to repurchase agreement was not a collateral disposition); Weast v. Arnold, 474 A.2d 904, 912 (Md. 1984) (holding under § 9-504(5) that transfer of collateral from secured party to guarantor upon guarantor’s payment of secured debt was not a “sale” of collateral); Reeves, 247 N.W.2d at 439 (citing § 9-504(5) for the proposition that a transfer of collateral from a finance company to a dealer that has honored its obligations under a repurchase agreement or guaranty is not a sale or disposition of collateral); Bexar County Nat’l Bank v. Hernandez, 716 S.W.2d 938, 938-39 (Tex. 1986) (relying on U.C.C. § 9-504(5) to conclude that bank’s transfer of collateral to guarantor was not a disposition that required notice under U.C.C. § 9-504(3); instead, guarantor’s subsequent transfer triggered the notice requirement); cf. Shields v. Bobby Murray Chevrolet, Inc., 261 S.E.2d 238, 241 (N.C. Ct. App.), affirmed without precedential value, 266 S.E.2d 658 (N.C. 1980) (concluding U.C.C. § 9-504(5) did not apply to public sale conducted by finance company that treated non-present dealer, under terms of repurchase agreement, as successful bidder in absence of any other bids at public sale); CLARK, supra note 9, ¶ 10.05[5], at 10-67 to 10-71 (arguing that certain repurchases by a manufacturer from a floor plan financier should be treated as Article 9 dispositions).
127. See U.C.C. § 9-618(a) (stating that the secondary obligor “acquires the rights and becomes obligated to perform the duties of the secured party”); id. § 9-504(5) (1995) (indicating that the transferee has “the rights and duties of the secured party”).
128. See id. § 9-207(a) (1998); id. § 9-207(1) (1995); see also Murray v. Payne, 437 So. 2d 47, 53-54 (Miss. 1983) (concluding guarantor that succeeded to creditor’s security interest in aircraft had duty to apply profits from operating aircraft against secured debt in accordance with U.C.C. § 9-207(2)(c)).
129. See U.C.C. § 9-611(b) (1998); id. § 9-504(3) (1995); see also Stoppi, 518 A.2d at 85-86 (ruling that transfer of collateral from bank to dealer under repurchase agreement placed duty on dealer to notify debtor of sale; dealer breached duty and could not rely on notice sent by bank as bank’s transfer of collateral to dealer was not a sale); Papas v. Speizman, 511 N.E.2d 768, 769-70 (Ill. App. Ct. 1987) (holding that guarantors who paid secured debt

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reasonable manner, and the duty to remit any surplus proceeds to Consumer. Dealer’s noncompliance may trigger statutory penalties and may adversely affect its ability to recover any deficiency from Consumer.

**REVISED SECTION 9-619: TRANSFER OF RECORD OR LEGAL TITLE**

In most dispositions the transferee acquires all of the debtor’s rights in the collateral. Occasionally the debtor’s ownership interest in the collateral has been recorded on a certificate of title (e.g., a motor vehicle or otherwise registered (e.g., an airplane or copyright). The transferee and received assignment of creditor’s security interest breached duty to give notice of subsequent disposition), Joyce v. Cloverleaf Homes, Inc., 344 S.E.2d 58, 60 (N.C. Ct. App. 1986) (concluding mobile home dealer that repurchased collateral from finance company breached its duty to send notice of subsequent sale); Bexar County Nat’l Bank, 716 S.W2d at 938-39 (noting guarantor failed to give notice of disposition following transfer of collateral from bank to guarantor); Multi-Moto Corp. v. ITT Commercial Fin. Corp., 806 S.W2d 560, 564-66 (Tex. App. 1990, writ denied) (holding finance company’s transfer of dealer’s repossessed inventory to seller was not a disposition that required prior notice).

130. See U.C.C. § 9-610(b) (1996); id. § 9-504(3) (1995); see also Erickson v. Marshall, 771 P2d 68, 69-70 (Idaho Ct. App. 1989) (concluding trial court’s grant of summary judgment motion was premature where behavior of guarantor that became subrogated to secured party’s rights in collateral raised questions on commercial reasonableness of guarantor’s disposition).

131. See U.C.C. § 9-615(d)(1) (1998); id. § 9-504(2) (1995); see also Reeves, 247 N.W2d at 439 (stating that a debtor is entitled to recover surplus proceeds from a dealer, not a finance company, if the finance company has transferred its interest in the collateral to the dealer under a repurchase agreement or guaranty).

132. See U.C.C. § 9-625(b), (c) (1998) (stating noncompliance may trigger liability for actual damages and, in appropriate circumstances, statutory minimum damages); id. § 9-626(a)(3) (indicating noncompliance may reduce deficiency); cf id. § 9-507(1) (1995) (imposing liability on secured party for “any loss caused” by noncompliance and, in appropriate circumstances, statutory minimum damages).

133. See, e.g., TEX. TRANSP. CODE ANN. § 501.022(a) (West 1997) (“The owner of a motor vehicle registered in this state may not operate or permit the operation of the vehicle on a public highway until the owner obtains a certificate of title for the vehicle.”); id. § 502.002(a) (requiring the owner of a motor vehicle to “apply for the registration of the vehicle for: (1) each registration year in which the vehicle is used or to be used on a public highway”); id. § 502.152(a) (indicating that the Texas Department of Transportation will not register a motor vehicle unless the owner has obtained a certificate of title for the vehicle).

134. See 49 U.S.C. § 44101(a) (1994) (providing generally that “a person may operate an aircraft only when the aircraft is registered under section 44103 of this title”); id. § 44103(a) (indicating that, on application by the owner, the Administrator of the Federal Aviation Administration shall “register the aircraft” and “issue a certificate of registration to its owner”).

135. See 17 U.S.C. § 410(a) (stating that the Register of Copyrights “shall register the claim and issue to the applicant a certificate of registration” for copyrightable subject matter).
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may demand that the certificate or registry reflect its ownership immediately following the foreclosure. That may be difficult if a new certificate cannot be issued, or the registry cannot be revised, without the debtor's consent or cooperation, which may not be forthcoming after default. Unlike current Article 9, revised Article 9 acknowledges this predicament and provides a mechanism for obtaining record or legal title. The mechanism is codified in revised section 9-619.

The section contemplates use of a "transfer statement," a record that has been authenticated by the secured party and which states the following:

- the debtor has defaulted on an obligation secured by specific collateral;
- the secured party has exercised its post-default remedies with respect to the specific collateral;
- the transferee has acquired the debtor's rights in the collateral as a result of the secured party's exercise of its post-default remedies; and
- the name and mailing address of the secured party, the debtor, and the transferee.

Upon receipt of the transfer statement and any applicable fee, revised section 9-619 directs the official to accept the statement, revise its records accordingly, and, if applicable, issue a new title certificate in the name of the transferee.

Revised section 9-619 does not prescribe a model form, perhaps because the recipient most likely will be a public official with the authority

137. The debtor's obstinacy may not go unpunished. Title concerns may discourage potential buyers from attending the disposition or participating in the bidding process, and attendance and participation are factors that have a direct bearing on the ultimate disposition price and the amount of any deficiency for which the debtor may be liable or any surplus to which the debtor may be entitled.

Many creditors, cognizant that a debtor's post-default cooperation is unlikely, address the problem by including some variation of the following clause in the loan documents: "Debtor appoints Secured Party as its attorney-in-fact, effective upon the occurrence of a Default, with power to take such action (including the execution of documents) as Secured Party deems necessary or desirable. Debtor acknowledges that this power of attorney granted to Secured Party is irrevocable and coupled with an interest."

138. See U.C.C. § 9-619(a) (1998); see also id. § 9-102(a)(7) (defining "authenticate"); id. § 9-102(a)(69) (defining "record").

139. See id. § 9-619(a)(1).

140. See id. § 9-619(a)(2).

141. See id. § 9-619(a)(3).

142. See id. § 9-619(a)(4).

143. See id. § 9-619(b).

144. Cf. id. § 9-613(5) (providing form of notice of collateral dispositions in transactions other than consumer goods transactions); id. § 9-614(3) (providing form of notice of collateral dispositions in consumer goods transactions); id. § 9-616 (not providing form of explanation of calculation of surplus or deficiency).
to require the secured party to submit the information on (or attach it to) an “official” form. 145 Nor does revised section 9-619 address the treatment of major or minor errors that may or may not make the transfer statement seriously misleading. 146 This may not be an oversight. If the transfer statement is accepted and the records are revised to reflect the change in title, then the only error surviving the revision that could cause concern would be a typographical error in the name or mailing address of the transferee. Presumably the transferee will timely discover and report any such error to the public official, who then can take prompt remedial action to correct the certificate or registry.

If no official form is required, 147 the following proposed form (modified as necessary to fit a particular transaction) may be a useful guide:

Dear Public Official:

This letter is submitted as a “transfer form” as defined in Texas Business & Commerce Code § 9-619.

Under a security agreement dated _____, 19_____, executed by [name/address of debtor] (“Debtor”), and [name/address of secured party] (“Secured Party”), Debtor granted a security interest in “Collateral” (as defined in the security agreement) to secure payment and performance of certain obligations owed to Secured Party. The “Collateral” includes a 1996 Ford Taurus (the “Vehicle”). Debtor’s ownership of the Vehicle is

145. See id. § 9-619(b) (contemplating a standard “request form”).

146. Cf. id. § 9-613(3) (permitting minor errors that are not seriously misleading); id. § 9-614(5) (prohibiting misleading errors concerning statutory rights and deferring to non-U.C.C. law for treatment of some errors); id. § 9-616(d) (permitting minor errors that are not seriously misleading).

147. Applicable law may recognize the title-clearing problem addressed by revised § 9-619 without offering specific and exhaustive guidelines for its resolution. For example, the Texas Transportation Code provides: “If a lien [on a motor vehicle] is foreclosed by nonjudicial means, the department may issue a new certificate of title in the name of the purchaser at the foreclosure sale on receiving the affidavit of the lienholder of the fact of the nonjudicial foreclosure.” TEX. TRANSP. CODE ANN. § 501.074(b) (West 1997). Because the statute does not state with particularity the contents of the affidavit, the secured party may find the proposed transfer statement a useful form of “affidavit” in Texas and other jurisdictions with a similar law. Cf. IDAHO CODE § 49-514 (1994 & Supp. 1998) (requiring “satisfactory proof” in the form of an “affidavit” by a person “setting forth facts entitling him to possession and ownership,” together with a copy of the “instrument upon which the claim of possession and ownership is founded”); 625 ILL. COMP. STAT. ANN. 5/3-114(a) (West Supp. 1998) (requiring “proof of the transfer”); IOWA CODE ANN. § 321.47 (West 1997) (requiring “presentation of satisfactory proof . . . of ownership and right of possession to the vehicle”); OHIO REV. CODE ANN. § 4505.10(A) (Anderson 1997) (requiring “satisfactory proof . . . of ownership and rights of possession” in the form of an “affidavit” by a person “setting forth the facts entitling the person to the possession and ownership,” accompanied by a copy of the “instrument upon which the claim of possession and ownership is founded”); WYO. STAT. ANN. § 31-2-104(c) (Michie 1997) (requiring a “verified or certified statement of the transfer of the interest” that sets forth “[t]he reason for the involuntary transfer, the interest transferred, the name of the transferee, the process or procedure effecting the transfer and other information requested by the county clerk”).
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evidenced by Texas Certificate of Title no. ______ issued on ______, 19____.

Debtor has defaulted in its obligations owed to Secured Party. Secured Party has exercised its post-default remedies, including disposing of the Vehicle as permitted by Texas Business and Commerce Code § 9-610. As a result of the disposition and pursuant to Texas Business and Commerce Code § 9-615, all of Debtor’s rights in the Vehicle have been transferred to [name/address of transferee] (the “Purchaser”).

Please promptly amend your records to reflect that Debtor’s interest in the Vehicle has been transferred to Purchaser and mail a new certificate of title, issued in the name of Purchaser, to Purchaser at its address in the preceding paragraph.

Please contact me if you have questions on this matter or need additional information.

In an effort to expedite registration in the name of the successful purchaser, a secured party may attempt to obtain record or legal title prior to the foreclosure (which should improve the marketability of the collateral and, therefore, facilitate a sale). A transfer statement that is processed prior to foreclosure and transfers title from the debtor to the secured party does not of itself trigger either a “disposition” under Article 9 or an acceptance of the collateral in satisfaction of the debt. The secured party remains obligated to perform its statutory duties, such as the duty to send notice of the disposition, and the debtor still enjoys its statutory rights, including the right to timely redeem the collateral.

As the Official Comments acknowledge, revised section 9-619 is not intended to replace non-U.C.C. law that provides a means by which title records can be revised to reflect changes in ownership resulting from post-default dispositions under Article 9. Therefore a secured party and its counsel should consult other federal and state law governing title to, and registration of, the collateral being disposed before concluding that revised section 9-619 applies. But to the extent that federal and state law fail to

149. See id. § 9-620(b) (stating that a purported or apparent acceptance of collateral is ineffective unless certain conditions have been satisfied). But see Comer v. Green Tree Acceptance, Inc., 858 P.2d 560, 565 (Wyo. 1993) (holding that a strict foreclosure occurred when a creditor acquired title to a repossessed mobile home in its own name after default and before selling it). Cf. Wyo. STAT. ANN. § 31-2-504(c) (stating that a transfer, by operation of law, of an interest in a mobile home to a creditor “shall not be considered a strict foreclosure or an election to retain the collateral in satisfaction of an obligation” under U.C.C. § 9-505 “and does not affect the debtor’s right to redeem the collateral” under U.C.C. § 9-506).
150. See U.C.C. § 9-619(c).
151. See id. § 9-611(b).
152. See id. § 9-623(a), (c).
153. See id. § 9-619 cmt. 3.
provide a title-clearing mechanism, revised section 9-619 affords welcome relief.

**REVISED SECTION 9-620: ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION OF OBLIGATION; COMPULSORY DISPOSITION OF COLLATERAL**

Instead of disposing of collateral, a secured party may be willing to retain the collateral and forgive the unpaid secured debt. A secured party may find this option attractive for a variety of reasons. The creditor may have no desire to collect a deficiency for economic, social, or other reasons. The creditor may be worried that, despite its best efforts, it will trip over one or more of the procedural hurdles placed in its path by the disposition-related provisions and expose itself to potential liability for its noncompliance. The creditor may wish to avoid having its conduct scrutinized under a judicial microscope when the debtor alleges that the disposition was not commercially reasonable. And certainly the secured party may find the option attractive if it believes that the value of the collateral exceeds the unpaid debt. The debtor, too, may welcome such an offer, especially if it has no realistic hope of satisfying any deficiency or believes that a commercially reasonable disposition is not likely to produce any surplus proceeds. Recognizing that the debtor and secured party "are frequently better off without a resale of the collateral," current Article 9, through section 9-505, provides an alternative arrangement whereby the secured party may retain the collateral and forego any claim to a deficiency. Revised Article 9, through section 9-620, continues to provide the secured party with this option, known as "strict foreclosure."

154. See id. § 9-505 cmt. 1 (1995); see also GILMORE, supra note 9, § 44.3, at 1220 ("The best and simplest way of liquidating any secured transaction . . . is for the secured party to keep the collateral as his own free of the debtor's equity, waiving any claim to a deficiency judgment.").

155. See U.C.C. § 9-505(2).

Under current Article 9, a secured party may propose to keep the collateral "in satisfaction of the obligation." Whether the statute permits partial strict foreclosure—a process by which the creditor retains the collateral, forgives part of the debt, and sues the debtor for an agreed-upon deficiency—has been the subject of debate. Some interpret section 9-505(2) as an all-or-nothing proposition that requires a creditor to forgive the entire unpaid debt and forego any deficiency if the collateral is kept, rather than disposed. Others have concluded that section 9-505(2) per-

UCLA L. REV. 695, 726 (1993) ("Article 9 expressly provides for strict foreclosure, but only under the very limited circumstances of [U.C.C. § 9-505].") ; Steve H. Nickles & Edward S. Adams, Tracing Proceeds to Attorneys' Pockets (and the Dilemma of Paying for Bankruptcy), 78 MINN. L. REV. 1079, 1160 (1994) (referencing "the strict foreclosure remedy of section 9-505").

Except as provided by revised § 9-624, the rights and duties under revised § 9-620 cannot be waived or varied. See U.C.C. § 9-602(10) (1998); id. § 9-624(b) (discussed infra notes 313-19, 325-27, and accompanying text).

157. See U.C.C. § 9-505(2) (1995). Under current Article 9, a creditor may propose strict foreclosure "after default." Id. § 9-505(2). Revised § 9-620 does not expressly require a default as a condition precedent to strict foreclosure, which might suggest that the creditor may propose strict foreclosure at any time during the transaction. However, revised § 9-601 discourages any such suggestion by stating: "After default, a secured party has the rights provided in this part . . . ." Id. § 9-601(a) (1998) (emphasis added).

158. The phrase "partial strict foreclosure" also could refer to the creditor's retention of part of the collateral in satisfaction of all of the unpaid debt. The creditor's ability to do so has not been challenged. See Weiss v. Alterman, 577 N.Y.S.2d 768, 771-72 (1991) (finding "no reason" to hold that U.C.C. § 9-505(2) does not permit a creditor to retain part of the collateral in full satisfaction of the debt, but refusing to apply that interpretation in a case where the creditor's notices did not clearly manifest that intent); 2 GILMORE, supra note 9, § 44.3, at 1223 n.2 (construing the statutory reference to "the collateral" as "all or part of the collateral"); 9 HAWKLAND ET AL., supra note 32, § 9-505:08, at 865-66 (suggesting that a creditor's proposal to keep some collateral and forgive the entire unpaid debt "would seem to create little problem").

159. See U.C.C. § 9-505 cmt. 1 (1995) (indicating that a creditor may keep the collateral, "thus discharging the obligation and abandoning any claim for a deficiency") (emphasis added); LaRoche, 969 F.2d at 1303 (indicating that U.C.C. § 9-505(2) "permits the secured creditor to notify the debtor that it intends to retain the collateral in complete satisfaction of the indebtedness"); Patrick, 681 N.E.2d at 101 (stating that under U.C.C. § 9-505 "a creditor elects to retain the collateral as full satisfaction of the debtor's obligations") (emphasis added); 2 GILMORE, supra note 9, § 44.3, at 1223 n.2 (concluding that the statutory reference to "the obligation" requires discharge of "the entire obligation"); Clark & Clark, supra note 38, at 257 (suggesting that acceptance of collateral in partial satisfaction of the debt is "something that probably cannot be done under current law"); Neil B. Cohen, Credit Enhancement in Domestic Transactions: Conceptualizing the Devices and Reinventing the Law, 22 BROOK. J. INT'L L. 21, 52 (1996) ("Under current law, a secured party may propose retaining the collateral only in total satisfaction of the secured debt."); Wendell H. Holmes, Involuntary Strict Foreclosure Under Section 9-505(2) of the Uniform Commercial Code: Tarpit for the Tardy Creditor, 26 WAKE FOREST L. REV. 289, 298-99 n.50 (1991) ("The Code's language does not expressly foreclose [the creditor from proposing to retain all of the collateral as satisfaction of only part of the obligation], but surely it is beyond the policy of the statute."); Rapson, supra note 30, at 38 ("Present Article 9 makes no provision for acceptance of the collateral in partial satisfaction of the obligation.").
mits (or should permit) partial strict foreclosure. Revised Article 9 resolves the debate by permitting the creditor to accept collateral "in full or partial satisfaction" of the unpaid secured debt. This clarification, which comports with pre-U.C.C. law, benefits both parties by providing additional flexibility in a variety of situations, including when the creditor's unsecured position makes retention in full satisfaction of the debt impractical and any disposition is unlikely to result in net proceeds satisfactory to the parties. It also recognizes that a secured party already can achieve the functional equivalent of a partial strict foreclosure by buying collateral at public and, in limited situations, private dispositions and then suing the debtor for a deficiency. Whether revised Article 9 should permit partial strict foreclosure in consumer transactions was the subject of much debate during the revision process. Early drafts prohibited partial strict foreclosure in all consumer secured transactions. Later, the blanket prohibition was deleted. It

160. See Peter F. Coogan, The New UCC Article 9, 86 HARV. L. REV. 477, 520-24 (1973) (arguing that the "rights" which can be modified by a debtor under § 9-505 include the right to agree to a partial strict foreclosure); Alysse Kaplan, Partial Satisfaction Under the UCC, 61 FORDHAM L. REV. 221, 227-34 (1992) (offering statutory and policy reasons for permitting partial satisfaction under U.C.C. § 9-505(2)); WHITE & SUMMERS, supra note 26, § 34-9, at 428 ("All judges appear to agree that if the debtor has expressly agreed after default that the secured creditor may take the collateral at an agreed valuation in partial satisfaction of the debt, the secured creditor may still recover the balance owing"); see also Oraka v. Jaraysi, 486 S.E.2d 69, 71 (Ga. Ct. App. 1997) ("After default, a creditor cannot, absent express agreement of the debtor, take the collateral at a specific valuation and only give such credit against the deficiency"); S. M. Flickinger Co. v. 18 Genesee Corp., 423 N.Y.S.2d 73, 77 (App. Div. 1979) (Moule, J., dissenting) (citing Professor Coogan's article for the proposition that a debtor can agree to a partial strict foreclosure).


162. See RESTATEMENT OF SECURITY § 55 cmt. a (1941) ("The pledgor and pledgee should not be prevented from making a bargain by which the pledged chattel can be taken in whole or in part satisfaction of the pledgee's claim.").

163. See PEB STUDY GROUP REPORT, supra note 12, at 243-44.

164. See U.C.C. § 9-610(c) (1998); id. § 9-504(3) (1995); see also Zubrow, supra note 87, at 539 n.381 ("There is virtually no difference between strict foreclosure and the purchase of collateral by a creditor for its own account at a purportedly 'public' sale with only a few bidders.").

165. See U.C.C. § 9-615(d)(2) (1998); id. § 9-504(2) (1995). However, the amount of the deficiency might not be the same in both situations. One reason for a potential difference is that the debtor can attempt to negotiate the amount of the deficiency in a partial strict foreclosure before agreeing to the foreclosure. The debtor has much less control over the amount of the deficiency in a traditional disposition. A difference also could result from the presence or absence of disposition-related expenses (such as storage charges) and reasonable attorneys' fees and legal expenses.

166. See id. § 9-505(l) (Draft July 28-Aug. 4, 1995) ("In a consumer secured transaction, a secured party may accept collateral only in full satisfaction, and not in partial satisfaction, of the obligation it secures.").

subsequently reappeared as part of a compromise between representatives of consumer creditors and advocates of consumer interests.\footnote{168} As passed, revised Article 9 prohibits partial strict foreclosure in a consumer trans-

168. See id. § 9-618(h) (Draft Mar. 1998) ("In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures."). The following excerpt reflects the "consumer compromise":

During the February, 1998, meeting of the Drafting Committee in Rosemont, Illinois, the Drafting Committee approved in principle, and asked the Reporters to incorporate in this draft, a list of proposed revisions relating to consumer transactions. Most of the proposals, but not all, relate to Part 6, Default. The chair of the Drafting Committee presented the proposals as a compromise, explaining that if the package of proposals were accepted by the Drafting Committee and its sponsors, representatives of consumer creditors involved in the process would actively support, and advocates of consumer interests involved in the process would not oppose, enactment of revised Article 9. The chair explained further that the alternative would be widespread opposition, with pitched battles in the various legislatures during the enactment process. This controversy could delay or inhibit enactment of the revisions. The compromise grew out of discussions among creditor and consumer representatives, a special consumer subcommittee organized by the NCCUSL leadership, and the chair of the Drafting Committee.

Under the proposal, several provisions of the prior draft would be deleted: Sections ... 9-613(b)(3) (notice of disposition containing minor errors not seriously misleading is sufficient); 9-622 (reinstatement rights of consumer debtor or secondary obligor); 9-624(d) and (e) (reduction of secured party's liability for statutory damages by amount of loss of deficiency or actual damages awarded to consumer); 9-625, Alternative A (absolute bar rule alternative for consumer transactions); 9-627(d) (bona-fide error defense to statutory damages); 9-627(e) (limitation on recoveries in class actions); 9-628 (reciprocal attorney's fees in consumer transactions).

The proposal also calls for revision of several other provisions. Sections 9-104(f) and (g) (approving "dual status" rule and setting burden of proof) would be applicable only to non-consumer transactions, as would Section 9-625, Alternative B (rebuttable presumption rule).... Section 9-614A (post-disposition notice) would be revised to provide for a somewhat more general statement of how a deficiency or surplus was calculated. The comments to Section 9-614 would be modified to delete any statement that "price" is not a term of a disposition that is required to be commercially reasonable, and an explanatory comment would be added to the effect that a low price mandates enhanced judicial scrutiny of the terms of a disposition. Finally, Section 9-618 would be revised to prohibit partial strict foreclosure for consumer goods.

Revised Article 9, Reporters' Prefatory Note, cmt. 2 (Draft Mar. 1998).

The debate over whether (and to what extent) Article 9 should govern consumer transactions has raged since original Article 9 was drafted. See 1 GILMORE, supra note 9, § 9.2, at 293 (contending that "[t]he controversy over the consumer question was one of the most violent in the history of the Code's drafting"); Grant Gilmore, The Secured Transaction Article of the Commercial Code, 16 LAW & CONTEMP. PROBS. 27, 44 (1951) (observing that "how much or how little Article 9 should do for the consumer, or about the special problems arising in the consumer field, has caused more debate than any other single matter that has been considered in the course of drafting"). William Burke, the chair of the drafting committee, has referred to the treatment of consumer issues as "the most difficult problem" confronted by the drafting committee. See Julian B. McDonnell, Securing Consumer Credit Card Accounts With Goods Purchased: Celebration of Freedom or Exercise in Bondage?, 31 UCC L.J. 332, 343 (1999).
The reason for prohibiting partial strict foreclosures in consumer transactions may have been in response to a concern that a consumer might not understand the creditor’s proposal and accept it without realizing all of the ramifications. Rather than address the concern through a blanket prohibition, the statute could have mandated the insertion of conspicuous language in the creditor’s notice aimed at fully apprising the consumer of its rights and potential liability. In this manner, revised section 9-620 could have addressed the need to improve consumer awareness while concurrently preserving a remedy that both parties might find mutually beneficial.

A creditor may accept collateral in full or partial satisfaction of the unpaid secured debt only if four conditions are satisfied. First, the debtor must consent to the creditor’s proposal. If the creditor proposes partial strict foreclosure, the debtor consents by agreeing to the proposal in a record authenticated after default. If the creditor proposes full strict foreclosure, the debtor’s consent can be express or implied. The debtor can expressly consent in a record authenticated after default. Alternatively, the debtor’s consent is implied if (i) the creditor’s proposal is unconditional (or subject only to the condition that collateral not in the creditor’s possession be preserved and maintained), (ii) the creditor’s proposal expresses an intent to accept collateral in full satisfaction of the unpaid secured debt, (iii) the creditor fails to receive, within twenty days after sending its proposal to the debtor, the debtor’s authenticated notification of objection, and (iv) the creditor’s proposal is made in good faith.

169. See U.C.C. § 9-620(g) (1998); see also id. § 9-102(a)(26) (defining “consumer transaction”). A secured party may not contract around the prohibition. See id. § 9-602(10).
170. See Michael M. Greenfield, The Role of Assent in Article 2 and Article 9, 75 WASH. U. L.Q. 289, 301 (1997) (stating that the drafting committee elected to prohibit partial strict foreclosure in consumer transactions in recognition of “the high risk of ineffective communication in the consumer context”).
171. See U.C.C. § 9-620(a)(1).
172. See id. § 9-620(c)(1); see also id. § 9-102(a)(7) (defining “authenticate”); id. § 9-102(a)(69) (defining “record”); cf. id. § 9-505(2) (1995) (referencing the secured party’s receipt of an “objection in writing”).
174. See id. § 9-620(c)(2)(A).
175. See id. § 9-620(c)(2)(B).
176. See id. § 9-620(c)(2)(C); see also id. § 9-102 cmt. 9(b) (indicating that an authenticated notification refers to an authenticated record that contains a notification). Under current Article 9, the debtor has a 21-day objection period that starts on the date when the creditor sends its notice. See id. § 9-505(2) (1995). Early drafts of revised Article 9 continued the 21-day objection period. See id. § 9-505(d)(2)(iii) (Draft July 28-Aug. 4, 1995). The objection period lost a day in subsequent drafts for no apparent reason. See id. § 9-505(d)(2)(iii) (Draft July 12-19, 1996). Even so, the objection period remains more liberal than that currently adopted by the Kansas legislature. See KAN. STAT. ANN. § 84-9-505(2) (1996) (providing an objection period of 15 days).
Two observations on this first requirement are worth stating. First, the debtor's consent to a proposal of partial satisfaction must be express; it cannot be implied. The prohibition against implied consent to a partial strict foreclosure presumably results from a heightened concern that through mere silence a debtor should not lose its property and also remain liable for an amount of debt calculated by the creditor in its sole discretion. And second, unless the debtor receives the proposal on the date when it is sent by the creditor, the debtor does not have a full twenty days in which to object. The objection period begins running from the date when the creditor sends the notice, not the date when the debtor receives the notice.178 Furthermore, the debtor's objection must be received within that twenty-day period; an objection sent within that period but received by the creditor thereafter is not timely. Therefore, a debtor should send the notice in a manner that provides objective evidence of the date of the creditor's receipt.

The second condition to an effective strict foreclosure is that the secured party must not timely receive an authenticated notification of objection from either (i) a party to whom the secured party is required to send its proposal or (ii) a lienholder or other secured party with a subordinate property interest in the collateral subject to the proposal.179 To be timely, an objection from a party to whom the secured party is required to send its proposal must be received by the secured party within twenty days after the date when the secured party sent its proposal to that person.180 An objection from any other party is timely if the secured party receives it within twenty days after the date when it last sent its proposal to any required recipient, unless the only party to whom the secured party is required to send its notice is the debtor, in which case an objection must be received before the debtor consents to the proposal.181

As mentioned before, the usual twenty-day objection period182 begins running on the date when the creditor sends the notice, not the date when the objecting party receives the notice. Also observe that a non-recipient normally has a comparable objection period, but in those situations where the debtor is the only party to whom the secured party must send its proposal, the debtor's acceptance terminates a non-recipient's right to

178. Prior to its amendment in 1972, U.C.C. § 9-505(2) provided the debtor with a 30-day objection period that commenced on the date of the debtor's receipt of the creditor's notice. See id. § 9-505 ("Text Prior to 1972 Amendment"). Through a non-uniform amendment to § 9-505(2), Wisconsin presently provides a debtor with a 21-day objection period that runs from the date of its receipt of the notice. See Wis. Stat. Ann. § 409.505(2) (West 1995).

180. See id. § 9-620(d)(1).
181. See id. § 9-620(d)(2).
182. Cf. id. § 9-505(2) (1995) (providing a 21-day objection period); § id. 9-505(e) (Draft July 28-Aug. 4, 1995) (continuing the 21-day objection period); id. § 9-505(e) (Draft July 12-19, 1996) (shortening the period to 20 days).
object or the effectiveness of any objection sent but not yet received by the secured party. Therefore, a non-recipient should expedite the creditor’s receipt of any objection and not assume that it enjoys the normal objection period.

The third condition applies only if the collateral consists of consumer goods. A strict foreclosure of consumer goods is not effective if the debtor possesses the consumer goods when it consents to the strict foreclosure. Presumably this limitation is included to address the concern that a consumer debtor may believe that as long as it exercises physical control of the item, the creditor cannot exercise strict foreclosure. In reliance on that erroneous belief the consumer may fail to timely object to a creditor’s proposal, not realizing that silence may create implied consent. To protect the consumer against the harsh results of its own inaction the statute renders ineffective any consent by a debtor that possesses the consumer goods.

But the condition extends too far and may have unintended consequences for the party it seeks to protect, the consumer debtor. Knowing that the consumer’s consent, express or implied, to an offer of strict foreclosure is not effective if the consumer possesses the collateral, a creditor may repossess the collateral before sending its proposal. After adding the costs of repossession to the unpaid debt, the creditor may rethink its options. If the creditor foregoes strict foreclosure and decides to dispose of the collateral, the debtor not only loses its interest in the collateral but also is likely to be sued for a deficiency. The statute would better protect consumers against such litigation if it permitted debtors, in possession of consumer goods, to expressly consent to the creditor’s proposal to take the collateral in satisfaction of the unpaid debt.

The fourth condition also applies only if the collateral consists of consumer goods. A creditor cannot exercise the remedy of strict foreclosure if it possesses consumer goods and at least sixty percent of the cash price has been paid (if the security interest is a purchase-money security interest) or at least sixty percent of the principal amount has been paid (in non-purchase-money cases). Instead, the creditor must timely dispose of the

184. See id. § 9-620(c)(2).
185. See id. § 9-620(a)(4), (c); see also id. § 9-103 (discussing purchase-money concepts). Current Article 9 also prescribes a “60 percent” test. See id. § 9-505(1) (1995). Under pre-U.C.C. law, a creditor in a transaction governed by the Uniform Conditional Sales Act was required to dispose of repossessed collateral if the buyer had paid “at least fifty per cent of the purchase price at the time of the retaking.” See UNIF. COND. SALES ACT § 19, 3B U.L.A. 585 (1992).

Notice that in a purchase-money transaction the test is 60% of the cash price, which may be different from the amount financed. For example, if a debtor buys a $30,000 car by making a $3000 down payment and financing the balance of $27,000, the test is satisfied (and strict foreclosure is not an option) when the debtor has paid $18,000 (60% of $30,000), not $16,200 (60% of $27,000).
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Theoretically, a consumer debtor should benefit from this provision because a forced disposition of collateral in which the debtor has significant equity should produce surplus proceeds. But what should happen and what will happen may not mirror each other. The vagaries of market prices for used consumer goods, combined with the off-the-top payment of the creditor’s costs of repossession and other disposition-related expenses, may make the possible benefits afforded by revised section 9-620(e) less attractive to a risk-averse debtor than the certain advantages provided by an offer of strict foreclosure. Recognizing that a consumer debtor may be better off accepting the creditor’s offer of a strict foreclosure, current Article 9 permits a consumer debtor who satisfies the “60% collateral.” The creditor must dispose of the collateral within 90 days after taking possession unless the debtor and all secondary obligors agree, after default and in an authenticated agreement, to a longer period. (See U.C.C. § 9-620(f).) The statute imposes a relatively short disposition period in an effort to avoid loss of value due to excessive depreciation, a trait common to most consumer goods. See U.C.C. § 9-620(e), (f) (1998). The creditor must dispose of the collateral within 90 days after taking possession unless the debtor and all secondary obligors agree, after default and in an authenticated agreement, to a longer period. See id. § 9-620(f). The statute imposes a relatively short disposition period in an effort to avoid loss of value due to excessive depreciation, a trait common to most consumer goods. 9 HAWKLAND ET AL., supra note 32, § 9-505:02, at 854; Holmes, supra note 159, at 298.

Current Article 9 does not expressly permit the parties to extend the 90-day period. See U.C.C. § 9-505(1) (1995); cf. CAL. COM. CODE § 9505(1) (West 1990) (requiring the secured party to dispose of the collateral “within 90 days after he takes possession or within a reasonable time after such 90-day period?”); OR. REV. STAT. § 79.505(1) (1988) (providing a 180-day period). U.C.C. § 9-505(1) does permit a consumer, however, after default, to execute a statement “renouncing or modifying his rights.” One court has construed this language as permitting a debtor to agree to extend the 90-day period. See Kelley v. Commercial Nat’l Bank, 678 P.2d 620, 622-24 (Kan. 1984) (concluding creditor that possessed collateral on November 4, 1981, and sold it on August 16, 1982, did not violate § 9-505(1) where evidence revealed debtor had agreed to extension of 90-day disposition period). But see 2 GILMORE, supra note 9, § 44.3, at 1222 (“What was meant was that the debtor could waive his right to a compulsory resale and agree to let the secured party keep the collateral as his own provided the debtor was discharged from his obligation.”). The express flexibility provided by revised § 9-620(f) should benefit debtors when the market for collateral is seasonal. For example, a creditor may repossess a snowmobile from a Vermont resident in February. If the optimum market for snowmobile purchases does not fall in the 90-day period following repossession, the debtor can agree to extend the period into the fall or winter months, when the demand for snowmobiles may bring a sales price both higher than an off-season disposition and sufficient to compensate for any depreciation during the extension.

Under current Article 9, a creditor that fails to timely dispose of the collateral may be liable for conversion or other damages. See U.C.C. § 9-505(1). Under revised Article 9, the creditor remains liable for damages. See id. § 9-625(b), (c) (1998). Accompanying comments reveal an intent to continue to allow an aggrieved party to recover a different measure of damages in tort. See id. § 9-625 cmt. 3.

186. See U.C.C. § 9-620(e), (f) (1998). 187. See 2 GILMORE, supra note 9, § 44.3, at 1222; 4 WHITE & SUMMERS, supra note 26, § 34-9, at 427; James P. Nehf, Effective Regulation of Rent-to-Own Contracts, 52 OHIO ST. L.J. 751, 803 (1991); see also Kelley, 678 P.2d at 623. 188. See U.C.C. § 9-615(a)(1) (1998); id. § 9-504(1)(a) (1995). 189. See Nehf, supra note 187, at 803 (concluding that, in the absence of “extraordinary circumstances,” the possibility of a consumer receiving any surplus proceeds under U.C.C. § 9-505(1) is “remote”); see also Holmes, supra note 159, at 317-18 n.150 (suggesting that the rule is “probably perverse” because a forced sale of consumer goods that have rapidly depreciated “simply guarantee[s] a deficiency judgment”).
test” to waive his right to a forced sale. Revised Article 9 retains the same flexibility.

Under current section 9-505, a secured creditor cannot propose to accept collateral in satisfaction of the debt unless it possesses the collateral. This prevents strict foreclosure not only if the debtor possesses the collateral but also when the collateral is intangible, such as accounts and intellectual property. With the exception of consumer goods, revised section 9-620 no longer requires a secured party to possess the collateral, making this remedy an option in more post-default situations.

An issue that exists under current Article 9 is whether a secured party that possesses collateral for an unreasonable period of time without attempting to dispose of it can be deemed, as a matter of law, to have elected

191. See id. § 9-620(a)(4) (1998); id. § 9-624(b) (discussed infra notes 313-19, 325-27, and accompanying text). Not until very late in the drafting process did revised Article 9 permit this waiver. Compare id. § 9-620(a)(4) (Draft approved at NCCUSL Annual Meeting, July 30, 1998) (“subsection (e) does not require the secured party to dispose of the collateral”); with id. §§ 9-620(a), 9-624 (Draft Nov. 15, 1998) (adding “or the debtor waives the requirement pursuant to Section 9-624” to end of revised § 9-620(a)(4) and adding new revised § 9-624(b) that allows the debtor to waive its right to require a disposition under revised § 9-620(e)).
192. See id. § 9-505(2) (1995); see also Bischoff v. Thomasson, 400 So. 2d 359, 368-69 (Ala. 1981) (holding that creditor could exercise strict foreclosure of ring in its possession); Sprangers v. Fundamental Bus. Tech., Inc., 412 N.W2d 47, 48-50 (Minn. Ct. App. 1987) (concluding creditor could not exercise strict foreclosure of securities held by escrow agent where creditor was not party to escrow agreement, and holding unenforceable a provision in security agreement waiving possession requirement). But see Martin-Musumeci v. Law Offices of Herbert Hafif Pension & Profit Sharing Plan, 19 F3d 28 (9th Cir.) (unpublished opinion), cert. denied, 115 S. Ct. 79 (1994) (concluding, for limited purpose of U.C.C. § 9-505(2), that creditor had possession of equity interest in a trust, a general intangible); CLARK, supra note 9, 4.10[2], at 84-73 (“There is no policy reason why that remedy should not be available for all types of collateral. Although U.C.C. § 9-505(2) refers to strict foreclosure as the remedy of a secured party ‘in possession’ of the collateral, it does not seem unreasonable to read that phrase as ‘in possession, where possession is possible.’ ”); 2 GILMORE, supra note 9, § 44.3, at 1223 (“No satisfactory reason suggests itself why the formality of taking possession must be accomplished before the secured party can make a proposal under § 9-505(2) and set the time periods running.”); cf. PEB STUDY GROUP REPORT, supra note 12, at 239-41 (indicating that the PEB Study Group could not reach consensus on whether the possession requirement should be retained when collateral is tangible, but recommending elimination of the possession requirement when collateral is intangible).
194. See id. § 9-620 cmt. 7.
195. If all parties agree to a strict foreclosure of accounts, payment intangibles, promissory notes, or chattel paper, then the secured party’s acceptance of that collateral is treated as a “sale” by the debtor to the secured party, whose interest in the collateral will be considered a “security interest” under revised Article 9. See id. § 9-109(a)(3). The secured party and the debtor need not execute a new security agreement to evidence the security interest, nor will the secured party need to file a new financing statement (assuming that any financing statement previously filed by the secured party perfected its security interest in the collateral prior to the strict foreclosure) or take any other action to perfect its interest. See id. § 9-620 cmt. 10.
to keep the collateral, forgive the debt, and waive any right to a deficiency, even though the creditor has never sent notice of that intent to the debtor and other interested parties. Courts have taken three different approaches. Some courts refuse to find that a creditor has involuntarily elected a strict foreclosure in the absence of any notice of that intent.\(^1\) Other courts have concluded that a creditor's retention of collateral for an unreasonable period of time can trigger a strict foreclosure.\(^1\) These courts are concerned that a creditor may hold the collateral an unreasonable period of time and


197. See, e.g., Warnaco, 872 F.2d at 544-45; Jones, 228 N.W.2d at 423; S. M. Flickinger Co., 423 N.Y.S.2d at 76; see also U.C.C. § 9-504(2) (1995) (imposing liability on a debtor for a deficiency "unless otherwise agreed"). But see Moran v. Holman, 514 P.2d 817, 820 (Alaska 1973) (noting that the debtor's possible remedies under U.C.C. § 9-507 are "illusory in most cases" because of the debtor's "poor financial position" and the small amount involved); Haufler v. Ardinger, 28 U.C.C. Rep. Serv. (Callaghan) 893, 897 (Mass. Dist. Ct. 1979) ("In our opinion, a secured party should not be permitted to profit by his own failure to furnish requisite notice by both retaining the property for his own use and then seeking additional recovery from the debtor."); Schmode's, Inc. v. Wilkinson, 361 N.W.2d 557, 558 (Neb. 1985) ("We reject this view on the ground that a secured party ought not be allowed to penalize a debtor by asserting the secured party's own failure to give the notice contemplated by § 9-505(2).")

198. See, e.g., Schultz v. Delaware Trust Co., 360 A.2d 576, 578 (Del. Super. Ct. 1976) ("There must be a reasonable limit to the length of time a secured party is permitted to hold collateral before it is deemed to have exercised its right to retain that collateral in satisfaction of the obligation."); Millican v. Turner, 503 So. 2d 289, 291 (Miss. 1987) (remanding for factual determination whether creditor had elected strict foreclosure by holding vehicle for six months); H. V. Funding, Inc. v. Ernest Vakkas & Sons, Inc., 531 N.Y.S.2d 484, 486 (Dist. Ct. 1988) (finding an implied retention where creditor repossessed collateral in August 1986 and had not yet sold it at time of trial in April 1988); Service Chevrolet, Inc. v. Sparks, 660 P.2d 760, 763-64 (Wash. 1983) (holding that retention of collateral for an unreasonable period of time could create a strict foreclosure, and remanding for determination whether four-week delay in informing debtors that they could reclaim their repossessed vehicle triggered..."
then sue on the underlying obligation with unfair consequences for the debtor.\textsuperscript{199} And a third group has found a strict foreclosure if the creditor's behavior (or misbehavior) manifested an intent to accept the collateral in satisfaction of the unpaid debt.\textsuperscript{200} This approach borrows from the analogous concept of accord and satisfaction, which requires proof of the creditor's assent.\textsuperscript{201}

an implied strict foreclosure); Swanson v. May, 697 P.2d 1013, 1015-16 (Wash. Ct. App. 1985) (concluding that creditor's retention of farm equipment for over one year was not, under the facts, sufficiently unreasonable to trigger a strict foreclosure); Durdahl v. Bank of Casper, 718 P.2d 23, 28 (Wyo. 1986) (remanding for factual determination whether creditor's continued retention of collateral at time of oral argument was so unreasonable that creditor would be deemed to have exercised its remedy of strict foreclosure). Cf FDIC v. Tempest Fugat, H.L.I., Inc., 707 P.2d 81, 85 (Or. Ct. App. 1985) (failing to find an implied strict foreclosure despite 22-month delay between repossession and sale and 300 hours of unauthorized use of collateral by sales agent after "[a]ssuming that an unreasonable delay in selling repossessed collateral may imply a creditor's intent" to exercise the remedy of strict foreclosure).

199. See, e.g., Service Chevrolet, 660 P.2d at 763. See also Graff v. North Port Dev. Co., 734 N.W.2d 221, 228 (Mo. Ct. App. 1987); Schmole's, 361 N.E.2d at 558-59.

200. See, e.g., In re Durastone Co., 223 B.R. 396, 404-05 (Bankr. D.R.I. 1998) (holding creditor's post-repossession behavior—using, renting, and unsuccessfully attempting to sell boom trailer held for over six years—"clearly signaled" intent to retain collateral in full satisfaction of unpaid debt); In re Boyd, 73 B.R. 122, 124-25 (Bankr. N.D. Tex. 1987) (finding bank employee's use of repossessed boat manifested intent to keep collateral and forgive debt); In re Deephouse Equip. Co., 38 B.R. 400, 403-05 (Bankr. D. Conn. 1984) (concluding evidence did not establish creditor intended to keep collateral in full satisfaction of unpaid secured debt); Moran, 514 P.2d at 819-21 (finding implied strict foreclosure where creditor used repossessed vehicle for his own use during four-month period between repossessing and commencement of lawsuit); Nelson v. Armstrong, 582 P.2d 1100, 1107-09 (Idaho 1978) (ruling that creditor's retention of collateral for 4.5 months, without some manifestation of intent to exercise its rights under U.C.C. § 9-505(2), did not create a strict foreclosure); Haufler, 28 U.C.C. Rep. Serv. at 896-97 (affirming trial court's conclusion that creditor's continued possession and use of collateral for 38 months prior to sale created an implied strict foreclosure); Schmole's, 361 N.W.2d at 559 (holding that creditor elected to retain collateral in satisfaction of debt when, during three-year period prior to sale, it leased collateral to others who operated it for at least 204,000 miles); Wang v. Wang, 440 N.W.2d 740, 745-46 (S.D. 1989) (concluding that creditor that took collateral in July 1980, told co-maker to stay away from the storage location, and did not attempt to sell collateral until December 1984, had exercised its strict foreclosure remedy); Tanenbaum v. Economics Lab., Inc., 628 S.W.2d 769, 771-72 (Tex. 1982) (holding creditor's decision to scrap repossessed restaurant equipment amounted to strict foreclosure). Cf Wisconsins Eng'g, Inc. v. Fisher, 466 N.E.2d 745, 763 (Ind. Ct. App. 1984) (Stating that "[t]here may be circumstances in which strict compliance with the written notice provisions of § 9-505(2) are not essential to a claim that the secured party, by his unreasonable conduct, retained the collateral in satisfaction of the debt."); Winters Nat'l Bank & Trust Co. v. Saker, 419 N.E.2d 890, 893 (Ohio. Ct. App. 1979) (stating that a "creditor may, under certain conditions, be deemed to have exercised its statutory right" of strict foreclosure).

201. See also Restatement (Second) of Contracts § 281(1) (1979) (defining an "accord" as "a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty") (emphasis added). See, e.g., Lamp Fair, Inc. v. Perez-Ortiz, 888 P.2d 173, 176-77 (1st Cir. 1989); Graff, 734 S.W.2d at 228-29; Schmole's, 361 N.W.2d at 559.
The frequency with which the issue has been litigated, together with the inconsistent approaches taken by the courts, combined to make a response by revised Article 9 all but a foregone conclusion. Joining the majority of courts, and following the recommendation of the PEB Study Group, \(^{202}\) revised section 9-620 no longer permits constructive, implied, or involuntary strict foreclosures. Under revised section 9-620, a "purported or apparent" strict foreclosure is ineffective unless the secured party sends a proposal of strict foreclosure to the debtor (or otherwise consents, in an authenticated record, to a strict foreclosure) and all conditions precedent to an effective strict foreclosure are met. \(^{203}\) As with the three different approaches taken by various courts, the approach adopted by revised section 9-620 will have its fans and its critics. Proponents will rejoice that a creditor no longer can involuntarily waive its right to a deficiency, a most punitive result. \(^{204}\) Opponents will contend that the statute effectively permits the creditor to deprive a debtor of its property for an extended period of time with impunity except in those rare situations where the debtor, already in default, has the financial ability to exert pressure on the creditor. \(^{205}\) While parties may disagree on the merits of the approach taken, \(^{206}\) hopefully all will agree that the decision to statutorily confront the issue

\(^{202}\) See PEB Study Group Report, supra note 12, at 245-46.

\(^{203}\) See U.C.C. § 9-620(b) (1998).

\(^{204}\) See, e.g., William H. Lawrence et al., Understanding Secured Transactions § 18.02[A], at 350 (1997) (describing constructive strict foreclosure as "wrong" and "nothing more than a fiction that allows a court to impose what is, in effect, an absolute bar on the secured party's right to a deficiency"). However, an unreasonable delay in disposition may support a charge that the secured party has not acted in a commercially reasonable manner. See U.C.C. § 9-620 cmt. 5 (1998).

\(^{205}\) See, e.g., Gail Hillebrand, The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair To Consumers?, 75 Wash. U. L.Q. 69, 130-31 (1997) (urging the retention of constructive strict foreclosure in consumer cases where the creditor's unreasonably long delay in disposing of the collateral may prejudice a consumer's ability to quantify the resulting harm).

\(^{206}\) Most secured parties will be pleased with the approach adopted by revised § 9-620(b), whereas most debtors will be disappointed. In a rare situation, however, the secured party may argue for, and the debtor against, a forced strict foreclosure. For example, a secured party may repossess collateral, hold it for an extended period of time, and then sell it for more than the unpaid debt. Desiring to keep the surplus proceeds, the secured party will argue that it has involuntarily elected a strict foreclosure even though it never sent notice of its intent to keep the collateral in satisfaction of the debt. The debtor will contend that the creditor, in the absence of any notice, did not elect a strict foreclosure and that the debtor is therefore entitled to the surplus proceeds. How courts would resolve such a situation under current § 9-505(2) is unclear. Cf. Brown v. Baker, 688 P.2d 943, 951 n.5 (Alaska 1984) (refusing to relax the notice requirement of U.C.C. § 9-505 "where it is the creditor and not the debtor who argues that he opted to retain the collateral in satisfaction of the debt"); 4 White & Summers, supra note 26, § 34-9, at 429 ("But we would be generally less sympathetic when the creditor rather than the debtor advances an implied election argument, for here the debtor may not have had sufficient notice of the possible loss of its equity in the collateral."). Revised Article 9, through §§ 9-620(b) and 9-615(d)(1), would prompt a court to award any surplus proceeds to the debtor.
should reduce litigation, promote uniformity, and provide certainty.\(^2\) For that, the drafting committee deserves nonpartisan applause.

**REVISED SECTION 9-621: NOTIFICATION OF PROPOSAL TO ACCEPT COLLATERAL**

Current Article 9, through section 9-505(2), describes the parties to whom a secured party must send its notice of strict foreclosure. The parties to whom a secured party must send its "proposal"\(^2\) of strict foreclosure under revised Article 9 are described in section 9-621.\(^2\)

\(^2\) See Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q 549, 550 (1997) (commenting on the conventional wisdom that "certainty is justice in the commercial field"); James Chareq & Anne Fortney, *An Argument for Retaining the Uniform Commercial Code*, 51 CONSUMER FIN. L.Q REP. 315, 321 (1997) (asserting that "[t]he pillar upon which the U.C.C. rests is its promise of creating uniformity and predictability"); Corinne Cooper, *The Madonnas Play Tug of War With the Whores or Who Is Saving the UCC?*, 26 LOY. L.A. L. REV. 563, 568-69 (1993) (contending that "lawyers who have as their main goal to advance the cause of clarity, uniformity, and elegance (CUE) in commercial law ... are the keepers of the precious flame that is the UCC"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (observing that "[e]ven in simpler times uncertainty has been regarded as incompatible with the Rule of Law" and noting that predictability "is a needful characteristic of any law worthy of the name"); cf. Fred H. Miller, *Is Karl's Code Kaput?*, 26 LOY. L.A. L. REV. 703, 707 (1993) (suggesting that "rigid uniformity" is not, and probably never was, a "realistic goal" of the U.C.C.). *But see* 1 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 7, at 21 (Practitioner's 3d ed. 1988) (describing as "false or fanciful" the notion that a well-drafted code "will greatly reduce uncertainty, enhance predictability and diminish the volume of legal disputes").

\(^2\) A "proposal" is "a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to Sections 9-620, 9-621 and 9-622." U.C.C. § 9-102(a)(66) (1998); see also id. § 9-102(a)(7) (defining "authenticate"); id. § 9-102(a)(69) (defining "record"). Revised Article 9 does not propose a model form or stipulate what information must be included. At a minimum, the proposal should describe the collateral to be retained, the amount of debt to be satisfied, and any applicable conditions. See id. § 9-620 cmt. 4; 2 GILMORE, *supra* note 9, § 44.3, at 1224; see also *In re Alcom Am. Corp.*, 154 B.R. 97, 113 (Bankr. D.D.C. 1993) ("To fulfill the requirements of § 9-505(2), the secured party must explicitly inform the debtor that it is retaining the collateral in satisfaction of the indebtedness."); *In re Leeling*, 129 B.R. 637, 642 (Bankr. D. Colo. 1991) ("[W]hile it might not be necessary to use the magic words 'foreclosure' or 'retain in full satisfaction of the indebtedness' the intent to retain must be such that a reasonable person would understand that intent, and it must be clearly manifested by the secured creditor."); Patrick v. Wix Auto Co., 681 N.E.2d 98, 101 (Ill. App. Ct. 1997) ("The written notice must clearly and explicitly inform the debtor that the creditor is retaining the collateral in satisfaction of the indebtedness."). If the secured party is proposing to retain collateral in satisfaction of all of the unpaid debt, the secured party should avoid including any language in its notice that may be construed as a request for payment, which is inconsistent with the concept of full strict foreclosure and could destroy the effectiveness of the notice. See, e.g., *Alcom Am. Corp.*, 154 B.R. at 113; *Leeling*, 129 B.R. at 641-42; *Patrick*, 681 N.E.2d at 101-02.

\(^2\) The rights and duties under revised § 9-621 cannot be waived or varied. See U.C.C. § 9-602(10).
The Default Provisions of Revised Article 9

Under current section 9-505(2), a secured party must send a written notice to a debtor that has not executed a post-default waiver of its right to receive the notice.\textsuperscript{210} The debtor is nowhere to be found on the recipient list in revised section 9-621. Under revised section 9-620, however, a strict foreclosure is ineffective unless the secured party either has sent a proposal to the debtor or consents, in an authenticated record, to the debtor’s acceptance.\textsuperscript{211} It is possible, therefore, for a secured party to notify the debtor of its desire to keep the collateral and forgive all or part of the unpaid debt in a manner that is not a “proposal.” But in the absence of a proposal, the debtor must agree (in an authenticated record) to the terms,\textsuperscript{212} and the secured party must consent (also in an authenticated record) to the debtor’s agreement.\textsuperscript{213}

If the collateral consists of consumer goods, then current Article 9 does not require a creditor to send notice to anyone other than the debtor.\textsuperscript{214} This rule is sensible because the value of most consumer goods makes them attractive as security only to one creditor, a party whose interest will often enjoy purchase-money status. Occasionally, however, a high-dollar consumer good that does not rapidly depreciate (such as a grand piano) might collateralize concurrent loans, justifying notice to any other secured party. Perhaps it is for this reason that the nature of collateral does not dictate who receives a proposal under revised section 9-621.

If the collateral is not consumer goods, current section 9-505(2) requires the creditor to send notice to any other secured party from whom the creditor has received timely written notice of its interest in the collateral.\textsuperscript{215} Revised Article 9 significantly expands the list of non-debtor recipients to include four categories of parties.\textsuperscript{216} The first category includes any other


\textsuperscript{212} See id. § 9-620(c)(1), (2). Observe that the debtor’s consent cannot be implied, through silence, in the absence of a proposal. See id. § 9-620(c)(2)(A).

\textsuperscript{213} See id. § 9-620(b)(1).

\textsuperscript{214} See id. § 9-505(2) (1995).

\textsuperscript{215} See id. To be timely, written notice of the competing interest must be received by the foreclosing creditor before the foreclosing creditor has sent its notice of strict foreclosure to the debtor or before the debtor has renounced its rights to receive notice. See id.

\textsuperscript{216} The expansion is explained as part of the analysis of revised § 9-622, discussed infra notes 244-66 and accompanying text.

The PEB Study Group recommended that notice should be sent to persons who timely provide the secured party with written notice of a competing property interest. See PEB STUDY GROUP REPORT, supra note 12, at 241-43. The PEB Study Group also urged the drafting committee to “consider seriously” whether to require a secured party to send notice to persons with recorded property interests. See id.
person claiming an interest (whether statutory, judicial, or consensual) in the collateral from whom the secured party has received, before the debtor consents to the proposal, an authenticated notification of the competing interest.\footnote{1778} The second category includes any other secured party or lienholder if, ten days prior to the debtor’s consent, that party’s property interest was perfected by a financing statement that identified the collateral, was indexed under the debtor’s then-existing name, and was filed in the then-proper place.\footnote{1779} The third category includes any other secured party that, ten days prior to the debtor’s consent, held a security interest perfected by compliance with any statute, regulation, or treaty referenced in revised section 9-311(a).\footnote{1780} And the fourth category, which applies only if the proposal contemplates partial strict foreclosure, includes any secondary obligor.\footnote{1781}

Not surprisingly, the list of non-debtor parties to whom a creditor must send its proposal closely resembles the list of non-debtor parties to whom a creditor must send its notice of disposition under revised section 9-611.\footnote{1782} But three noticeable differences between revised sections 9-611 and 9-621 are worth mentioning. First, a secondary obligor is always entitled to notice of disposition,\footnote{1783} but is entitled to a proposal of strict foreclosure only if the secured party is accepting collateral in partial, rather than full, satisfaction of the unpaid debt.\footnote{1784} The reason for this different treatment is both apparent and flawed. A secondary obligor usually remains liable for any deficiency following a disposition of collateral,\footnote{1785} so it has an interest in receiving a disposition notice. But a deficiency survives a proposal

\footnote{1778}{See U.C.C. § 9-621(a)(1) (1998).}
\footnote{1779}{See id. § 9-621(a)(2). Prior to the 1972 amendments to Article 9, U.C.C. § 9-505(2) obligated a creditor to send notice to any other person with a security interest in the collateral and who had duly filed a financing statement indexed in the name of the debtor or whose security interest was known by the creditor. See id. § 9-505 (“Text Prior to 1972 Amendment”), 3B U.L.A. 353 (1992). The 1972 amendments deleted these secured creditors from the recipient list to conform to concurrent amendments made to the list of recipients of a disposition notice under U.C.C. § 9-504(3). See id. § 9-505 (“Official Reasons for 1972 Change”). Nevertheless, a handful of states that adopted the 1972 amendments have retained language requiring a secured party to send notice of its strict foreclosure to secured parties that have filed financing statements against the collateral. See, e.g., ARIZ. REV. STAT. ANN. § 47-9505B (West 1997); FLA. STAT. ANN. § 679.505(2) (West Supp. 1998); TEX. BUS. & COM. CODE ANN. § 9.505(b) (West 1992); WASH. REV. CODE ANN. § 62A.9-505(2) (West 1995); WIS. STAT. ANN. § 409.505(2) (West 1995). See also CLARK, supra note 9, ¶ 4.10[1], at 4-184 (“In any revision of Article 9, it may be wise to return to the pre-1972 rule that required notice to all secured parties of record.”).}
\footnote{1780}{See U.C.C. § 9-621(a)(3) (1998).}
\footnote{1781}{See id. § 9-621(b); see also id. § 9-102(a)(71) (defining “secondary obligor”).}
\footnote{1782}{See id. § 9-611(c).}
\footnote{1783}{See id. § 9-611(c)(2).}
\footnote{1784}{See id. § 9-620(b).}
\footnote{1785}{See id. § 9-615(d)(2); cf. id. § 9-615(e)(2) (relieving obligors of any continued liability for a deficiency, absent contrary agreement, if the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes).}
of strict foreclosure only if the creditor proposes partial satisfaction. The statute assumes that a secondary obligor will never object to a proposal of full strict foreclosure because the obligor's liability completely disappears; therefore, requiring the creditor to send a proposal of full strict foreclosure to a secondary obligor serves no purpose, and revised section 9-621(b) acknowledges this. But this reasoning fails to recognize the existence of situations where a secondary obligor might object to an offer of full strict foreclosure. For example, SubCorp borrows $1,000,000 from Bank. Repayment of the loan is secured by a security interest in SubCorp's inventory and guaranteed by ParentCorp. SubCorp then borrows $500,000 from Lender. Repayment of the loan is secured by a subordinate security interest in SubCorp's inventory and guaranteed by ParentCorp. After SubCorp defaults on the $1,000,000 loan, Bank proposes full strict foreclosure on inventory that it believes has a fair value of $1,100,000. Bank sends its proposal to SubCorp and Lender. Bank does not send its proposal to ParentCorp, a secondary obligor, because Bank is offering to keep the inventory in full, rather than partial, satisfaction of its loan. Maybe SubCorp does not object, believing that the value of the inventory is less than $1,000,000. Maybe Lender declines to object, knowing that it has recourse against ParentCorp. ParentCorp, believing that the inventory has a value of $1,100,000, wants to object to the offer of full strict foreclosure and preserve the excess $100,000 for the direct benefit of Lender and, in turn, its own benefit. But because Bank is offering full strict foreclosure, ParentCorp is not a party to whom Bank is required to send its proposal. Therefore, any objection by ParentCorp can be ignored by Bank. Second, a creditor that intends to dispose of consumer goods must send its notice only to the debtor and any secondary obligor, but a creditor that intends to keep the same consumer goods in satisfaction of the debt has a much different list of potential recipients, as the list of recipients

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225. See id. § 9-620(a)(2)(A).
226. ParentCorp can take action that will obligate Bank to send a proposal to it. ParentCorp's subrogation rights against SubCorp may provide it with a contingent property interest in the collateral. If ParentCorp timely provides Bank with an authenticated notification of this property interest, then Bank is obligated to send its proposal to ParentCorp under revised § 9-621(a)(1). Alternatively, ParentCorp can take and timely perfect a security interest in the collateral to secure SubCorp's reimbursement obligations. Without taking any further action (including sending an authenticated notification of its perfected security interest to Bank), ParentCorp becomes a party to whom Bank must send a proposal under revised § 9-621(a)(2) or (3).
227. See U.C.C. § 9-611(c)(1), (2).
under revised section 9-621 is not predicated on the nature of the collateral.\(^{228}\) The value of most consumer goods makes them attractive as security only to one creditor (the party that either sold the goods or financed their purchase), so in many transactions this difference has no practical effect. Occasionally, however, a high-dollar consumer good retains its value and, therefore, might collateralize concurrent loans. No apparent reason explains why a second creditor is entitled to a proposal of strict foreclosure of the consumer good, but not a notice of its disposition. One can debate whether non-debtors should receive notices of disposition and proposals of strict foreclosure when the collateral consists of consumer goods, but a uniform list of recipients in both situations seems best.

The third difference between revised sections 9-611 and 9-621 concerns the duty of inquiry placed on the creditor. As a result of changes made to the recipient lists in both statutes, the creditor can no longer remain passive, sending notice only to those parties that have timely informed the creditor of their competing interests.\(^{229}\) Instead, in order to ensure that its notice of disposition or proposal of strict foreclosure is sent to all required parties, the creditor must order a search report from the appropriate recording office.\(^ {230}\) No doubt some delay will arise between ordering and receiving a U.C.C. search report, which may reflect erroneous or incomplete information. Revised section 9-611 acknowledges the possibility of delay and error and places those risks on the non-notified party.\(^ {231}\) But revised section 9-621 does not provide the foreclosing creditor with similar protection. Why? As explained in the Official Comments, the reason for placing the risk of filing office delays and errors on a creditor that proposes strict foreclosure is that the non-notified parties are not independently protected by the duty of commercial reasonableness (as they are in a disposition).\(^ {232}\) This reasoning seems weak, when in a strict foreclosure any holder of competing property interest can protect itself from the risk of non-notification resulting from tardy or erroneous search reports by independently informing the foreclosing creditor of its competing property interest.\(^ {233}\)

An issue that exists under current Article 9 is whether the secured party must send written notice of strict foreclosure to parties other than the

\(^{228}\) Cf. id. § 9-505(2) (1995) (requiring a creditor to send its strict foreclosure notice only to the debtor when consumer goods will be retained).

\(^{229}\) Cf. id. § 9-504(3) (stating that the only non-debtor parties to whom a secured party must send its disposition notice are parties that have timely contacted the secured party); id. § 9-505(2) (same).

\(^{230}\) See id. § 9-611(c)(3)(B), (C) (1998); id. § 9-621(a)(2), (3).

\(^{231}\) See id. § 9-611(e).

\(^{232}\) See id. § 9-621 cmt. 2; see also Rapson, supra note 30, at 41 n.204 (explaining omission of safe harbor from revised § 9-621).

\(^{233}\) See U.C.C. § 9-621 cmt. 2.
debtor. Prior to being amended in 1972, the second sentence of section 9-505(2) read as follows:

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 has duly filed a financing statement indexed in the name of the debtor in this state or is known by the secured party in possession to have a security interest in it.234

As a result of the 1972 amendments, this sentence was revised and broken into three sentences, the first obligating the creditor to send “[w]ritten notice” to the debtor, the second excusing any other notice in the case of consumer goods, and the third requiring the creditor to send “notice” to certain other parties.235 Neither the explanation for the amendment, nor the official comments, reveal any intent to change the existing law on the form of notice. Therefore, it seems plausible that, in crafting three sentences from one, the word “written” was accidentally omitted from the third sentence.236 The issue disappears under revised Article 9 through its requirement that the creditor send a “proposal,”237 which must take the form of an authenticated record.238 Although an oral notice of strict foreclosure can accomplish its intended purpose just as easily as a notice in the form of an authenticated record, an oral notice does expose the sender to proof problems. These proof problems are reduced, if not eliminated, if the notice is an authenticated record.

As did its predecessor, revised section 9-621 emphasizes the act of sending, rather than receiving, the proposal.239 If the creditor sends its proposal to the last known address with proper postage, but discovers that a party has not received the notice, is the creditor obligated to resend the proposal?

236. But observe that the third sentence of current § 9-505(2) requires the recipient to object in the form of a “written notice,” suggesting that the authors appreciated the difference between “notice” and “written notice.” Cf. 9 HAWKLAND ET AL., supra note 32, § 9-505:06, at 861 (“Although the 1972 amendments to subsection 9-505(2) do not specifically state that the secured party’s notice of a proposal of strict foreclosure to parties other than the debtor must be in writing, it is obvious, in light of the requirement of sending a written notice of strict foreclosure to the debtor and the use of the word ‘send,’ that a written notice of a proposed strict foreclosure to any other secured party is intended.”).
237. See U.C.C. § 9-621(a), (b) (1998).
238. See id. § 9-102(a)(66); see also id. § 9-102(a)(7) (defining “authenticate”); id. § 9-102(a)(69) (defining “record”).
239. See id. § 9-621(a) (“A secured party . . . shall send its proposal . . . .”); id. § 9-621(b) (same); id. § 9-505(2) (1995) (stating written notice “shall be sent to the debtor” and “notice shall be sent” to certain secured creditors); see also Begay v. Foutz & Tanner, Inc., 619 P2d 551, 558-59 (N.M. Ct. App. 1979), rev’d on other grounds, 617 P2d 149 (N.M. 1989) (concluding that creditor complied with notice requirements of U.C.C. § 9-505 by depositing notice in mail, even though debtor never received it).
or attempt to contact the intended recipient and confirm its correct mailing address? The question remains unanswered. The same issue exists with respect to disposition notices sent under revised section 9-611, where the accompanying comments acknowledge the issue but delegate it “to judicial resolution, based upon the facts of each case.” A creditor is well-advised to utilize all information readily available to it in an effort to notify the intended recipient of its desire to pursue a strict foreclosure. Otherwise, the creditor may be liable for damages and, in the case of a partial strict foreclosure, have difficulty recovering any deficiency.

**REVISED SECTION 9-622: EFFECT OF ACCEPTANCE OF COLLATERAL**

Under current section 9-504, a disposition of collateral discharges security interests and liens that are subordinate to the security interest held by the foreclosing creditor. Surprisingly, current section 9-505 does not state the effect of a strict foreclosure on other security interests in and liens on the collateral retained by the secured party. Some scholars contend that disposition and retention are alternative methods of liquidating the relationship between the secured party and the debtor; therefore, a strict foreclosure should have the same effect on competing interests as a disposition. Others, noting the express language in section 9-504(5) and the absence from section 9-505 of similar language, have expressed concern that a creditor exercising its strict foreclosure remedy may retain the

240. *But see* Mont. Code Ann. § 30-9-505(2)(b) (1997) (stating that notice to the debtor is reasonable when sent by certified mail to the debtor’s most recent address in the loan documents or in any other writing from the debtor that is timely received by the creditor, and notice to another secured party is reasonable when sent by certified mail to the most recent address provided by the other secured party in its written notice of a competing interest in the collateral or in any other writing from the other secured party that is timely received by the creditor).


242. *See id.* § 9-625(b), (c).


245. The PEB Study Group recommended that U.C.C. § 9-505 should be revised to provide that a strict foreclosure terminates all subordinate property interests. *See PEB Study Group Report, supra* note 12, at 244-45.

246. *See W. Rodney Clement, Jr., Enforcing Security Interests in Personal Property in Mississippi, 67 Miss. L.J. 43, 105 & 109 (1997); 2 Gilmore, supra note 9, § 44.3, at 1225; 9 Hawkland et al., supra note 32, § 9-505:10, at 869; see also Holmes, supra note 159, at 301 (noting that a strict foreclosure terminates junior liens on personal property, whereas a deed absolute does not terminate junior encumbrances on real property). One state, through a non-uniform amendment, has revised its version of U.C.C. § 9-505 in a manner that expressly addresses the issue. *See Iowa Code Ann. § 554.9505(2) (West 1995) (“Retention of the collateral discharges the security interest of the secured party and discharges any security interest or lien subordinate to the security interest of the secured party.”).
The Default Provisions of Revised Article 9

Once a secured party has accepted collateral in satisfaction of the unpaid obligation, the unpaid obligation is discharged in full or, if the secured party has proposed a partial strict foreclosure, in an amount approved by the debtor. Additionally, all of the debtor's rights in the collateral are transferred to the secured party, whose security interest is terminated.

Furthermore, the strict foreclosure discharges "any subordinate security interest or other subordinate lien" and "any other subordinate interest." By negative implication, the collateral remains subject to security interests, liens, and interests that rank equally with, or enjoy priority over, the foreclosing creditor's security interest.

A party whose interest may be adversely affected by a strict foreclosure should be entitled to notice of the secured party's intended course of action. The recipient can then protect its interest by redeeming the collateral or, alternatively, objecting to the proposal of strict foreclosure and forcing the creditor to hold a commercially reasonable disposition in which the recipient (and, at its urging, other parties) may possibly participate.

Whether a recipient may find redemption or a forced disposition an attractive option, the rights and duties under revised § 9-622 cannot be waived or varied. See U.C.C. § 9-602(10) (1998).

247. See CLARK, supra note 9, ¶ 4.10[5], at 4-198 (suggesting that subordinate secured creditors have a "good argument" that their interests survive a strict foreclosure); Dobbs, supra note 9, at 142 ("While some support exists for the proposition that a strict foreclosure does extinguish junior encumbrances, there is sufficient room for doubt."); Steven O. Weise, U.C.C. Article 9: Personal Property Secured Transactions, 48 BUS. LAW. 1659, 1694-95 (1993) (suggesting, in reliance on real property law and express language in U.C.C. § 9-504(4), that "it seems likely from the absence of a discharge provision" in U.C.C. § 9-505 "that the retention in satisfaction does not discharge junior liens").


249. See id. § 9-622(a)(1).

250. See id. § 9-622(a)(2); cf. id. § 9-617(a)(1) (stating that a post-default disposition transfers "all of the debtor's rights in the collateral" to the transferee).

251. See id. § 9-622(a)(3); cf. id. § 9-617(a)(2) (stating that a post-default disposition "discharges the security interest under which the disposition is made").

252. See id. § 9-622(a); cf. id. § 9-617(a)(3) (stating that a post-default disposition "discharges any subordinate security interest or other lien"). Notwithstanding revised § 9-622(a), the secured party may wish to consult a lawyer familiar with the provisions of the Internal Revenue Code (particularly 26 U.S.C. § 7425 (1994)) to determine whether a strict foreclosure will terminate a subordinate federal tax lien.

253. See id. § 9-622(a)(4). Presumably subsection (a)(4) is needed to address the effect that a strict foreclosure has on an interest that is neither a "security interest" nor a "lien," both of which are subject of subsection (a)(3).

254. See id. § 9-623(a) (permitting "[a] debtor, any secondary obligor, or any other secured party or lienholder" to redeem the collateral); 9 HAWKLAND ET AL., supra note 32, § 9-505:05, at 859 (explaining the purpose of giving notice of strict foreclosure to the debtor); id. § 9-505:06, at 861-62 (explaining the purpose of giving notice of strict foreclosure to other secured parties); Chen v. Profit Sharing Plan, 456 S.E.2d 237, 240 (Ga. Ct. App. 1995); Herring Mining Co. v. Roberts Bros. Coal Co., 747 S.W.2d 616, 619 (Ky. Ct. App. 1988).
tractive option will depend on several factors, including the amount of debt secured by the collateral and the perceived value of the collateral. If subordinate property interests are terminated by a strict foreclosure, then the holders of those terminated property interests should be entitled to receive the secured party’s proposal of strict foreclosure. If the recipient list in revised section 9-621 was composed for the purpose of protecting the holders of interests that may be terminated, then the list is both over-inclusive and under-inclusive. The list is over-inclusive because it includes all secured parties and lienholders that have timely provided the foreclosing creditor with notice of their property interest or satisfy other statutory requirements, not just secured parties and lienholders whose security interests and liens are subordinate to the security interest of the foreclosing creditor. The foreclosing creditor would undoubtedly prefer a pared list because the number of parties with veto power would decrease, but a pared list would force the foreclosing creditor to resolve priority issues prior to sending its notice. Furthermore, and perhaps more important, a party whose property interest will not be terminated (e.g., a secured creditor with a senior security interest) still benefits from receiving a proposal of strict foreclosure because the recipient, relying on the information, can then take steps to protect itself (such as accelerating the debt after enforcing a cross-default provision in the loan documents, or objecting to a proposal that puts excess value in the pockets of the foreclosing creditor which might otherwise be applied by the debtor to reduce senior debt).

255. For example, Debtor defaults on a $1,000,000 loan from Bank. Debtor also defaults on a $250,000 loan from Lender. Both loans are secured by a security interest in Debtor’s inventory, and Bank’s interest enjoys priority. Bank proposes to retain the inventory in satisfaction of the $1,000,000 unpaid debt. In the first scenario, the inventory has a fair market value of $800,000, in the second, $1,400,000, and in the third, $1,200,000. In the first scenario, Lender will not redeem inventory worth $800,000 by paying $1,000,000 to Bank. And, under the payout scheme of revised § 9-615(a), Lender will not receive any proceeds from a forced sale of inventory worth $800,000, so it is unlikely that Lender will object to a strict foreclosure and force a sale. In the second scenario, however, paying $1,000,000 for inventory worth $1,400,000 makes redemption appealing. And because Lender may be entitled to receive proceeds under revised § 9-615(a)(3) that remain after Bank has satisfied its $1,000,000 debt and disposition-related costs, Lender may object to Bank’s proposal of strict foreclosure and force a disposition. For the same reasons, redemption and disposition are attractive options in the third scenario. The attraction is not quite as bright as under the second scenario because the value of the inventory ($1,200,000) is less than both loans ($1,250,000). Whether Lender exercises its right of redemption or forces a disposition by objecting to Bank’s proposal may turn on Lender’s perception of Debtor’s ability to pay any deficiency. If Lender opts to redeem the collateral or force a disposition, Lender can rely on excess inventory to satisfy $200,000, or 80% of the unpaid $250,000. Because Lender will lose its interest in inventory worth $200,000 if Bank keeps the inventory, Lender should either redeem the collateral or force its disposition unless Lender is confident that Debtor will pay at least 80% of Lender’s unsecured deficiency claim.

256. See U.C.C. § 9-621(a)(1).
257. See id. § 9-621(a)(2), (3).
The list is under-inclusive because it does not require the foreclosing creditor to send its proposal to all lienholders with subordinate liens. Instead, subordinate lienholders are entitled to a proposal only if they timely notify the foreclosing creditor of their interest258 or “perfect” their lien “by the filing of a financing statement.”259 “Perfection” is a term of art normally associated with consensual security interests governed by Article 9, not involuntary liens created by statute or judicial process.260 And while a lien may be evidenced by a writing filed in the public records, the writing may not qualify as a “financing statement.”261 And even if the lien filing is a “financing statement,” it may not be recorded in the same place as a financing statement filed by a secured party. The statute could have been drafted in a manner that did not apply traditional Article 9 terms and concepts to liens.262 Apparently the drafting committee concluded that this would place on secured parties an unacceptable search-and-notify burden (a burden already made heavier by revised Article 9263). Whether it is any less unacceptable to place the burden on the party whose interest will be destroyed is debatable.

Will a subordinate interest be terminated if the foreclosing creditor fails to send its proposal to the holder of that interest, even if the holder is a party entitled to notice under revised section 9-621? Revised section 9-622 answers that question affirmatively, if other conditions necessary to

258. See id. § 9-621(a)(1).
259. See id. § 9-621(a)(2). A lienholder that perfects its interest by complying with a statute, regulation, or treaty described in revised § 9-311(a) is not entitled to receive a proposal under revised § 9-621(a)(3). For some unexplained reason, that provision (unlike revised § 9-621(a)(2)) fails to reference “lienholder.” Lienholders receive the same treatment under revised § 9-611. See Zinnecker, supra note 2, at 1163-64 n.297.
260. See U.C.C. § 9-308 (indicating when a “security interest” or an “agricultural lien” is “perfected”).
261. The absence of the debtor’s signature, however, will not prevent the writing from being a financing statement. See id. § 9-502(a) (indicating that a financing statement requires the name of the debtor, the name of the secured party or its representative, and a description of collateral; cf. id. § 9-402(1) (1995) (requiring the name and address of the debtor and the secured party, a description of collateral, and the debtor’s signature).
262. For example, revised § 9-621(a)(2) could have been drafted as follows:

(2) any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, held either a security interest in the collateral perfected by the filing of a financing statement, or a lien on the collateral evidenced by a proper filing, that: (A) was indexed under the debtor’s name as of that date; and (B) was filed in the office or offices in which to file a financing statement or record a lien against the debtor covering the collateral as of that date.

Original clause (A) (“identified the collateral”) is deleted as unnecessary (a financing statement already must describe the collateral under revised § 9-502(a)(3)) and too limiting (a lien filing may not describe the collateral).
263. Compare U.C.C. § 9-505(2) (1995) (obligating a secured creditor to contact parties that have timely informed it of their competing claims), with id. § 9-621(a) (1998) (obligating a secured party to contact parties that have timely informed it of their competing claims, as well as parties that have a perfected interest).
an effective acceptance of the proposal are met. However, a person to whom the creditor is required, but fails, to send its proposal is entitled to recover damages in the amount of any loss caused by the creditor’s non-compliance. Damages may be non-existent unless the party is able to prove that an objection to the proposal would have forced a commercially reasonable disposition generating proceeds that would revert to the party under the payment scheme of revised section 9-615(a). For example, Bank proposes to accept inventory that it believes is worth $250,000 in satisfaction of a $300,000 debt. Bank fails to send its proposal to Lender, the holder of a perfected, but subordinate, security interest in the inventory. Unless Lender can introduce evidence that a commercially reasonable sale would have brought a price greater than $300,000, Lender may be unable to recover any damages for Bank’s noncompliance.

**REVISED SECTION 9-623: RIGHT TO REDEEM COLLATERAL**

Current Article 9 permits the debtor to redeem, or “buy back,” collateral under certain conditions. That right continues under revised Article 9 and is codified at section 9-623.

Current law grants the right of redemption not only to the debtor, but also to any other secured party with a security interest in the collateral, regardless of the priority or perfection of that security interest. The right of redemption, however, does not extend to nonconsensual lienholders. This omission from current section 9-506 is questionable for at least two reasons. First, at a minimum, junior lienholders should be entitled

264. See id. § 9-622(b) & cmt. 2.
265. See id. §§ 9-622 cmt. 2, 9-625(b).
266. See, e.g., McGowan v. Nebraska State Bank, 427 N.W.2d 772, 775-76 (Neb. 1988) (holding junior creditor suffered no loss from senior creditor’s failure to send disposition notice to junior creditor—even if (as junior creditor argued) collateral was worth nearly $50,000 instead of $28,956 received at auction—where amount of unpaid senior debt was $372,000); River Valley State Bank v. Peterson, 453 N.W.2d 193, 195-97 (Wis. Ct. App. 1990) (concluding junior creditor suffered no loss from senior creditor’s failure to send disposition notice to junior creditor—even if (as junior creditor argued) collateral was worth $10,000 instead of $6400 received at sale—where amount of unpaid senior debt exceeded $30,000). See also U.C.C. § 1-106 (1995) (stating that U.C.C. remedies “shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed”); Nickles, supra note 24, at 235-36 (discussing the calculation of damages under U.C.C. § 9-507(1), which provides an aggrieved party with “a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part”).
268. See id. § 9-506.
269. But see IOWA CODE ANN. § 554.9506 (West 1995) (granting redemption rights to “the debtor or any other secured party or lienor”) (emphasis added).
270. See, e.g., CLARK, supra note 9, ¶ 4.11[3], at 4-202 (proposing that “courts should treat the omission as a drafting error”); 2 GILMORE, supra note 9, § 44.2, at 1218 (suggesting that “the failure of § 9-506 to refer to other lienors must be put down to drafting inadvertence”).
to redeem the collateral because a disposition (and, perhaps, a strict foreclosure) of the collateral terminates their liens.\textsuperscript{271} Second, unless the secured party has a post-default motive other than to be made whole,\textsuperscript{272} it should not mind if the right of redemption is extended to any party with a property interest in the collateral. The PEB Study Group Report recommended that holders of judicial, statutory, and common-law liens be given the right of redemption, concluding that to do so "would not appear to work any particular hardship on secured parties whose collateral is redeemed."\textsuperscript{273} Revised section 9-623 adopts that recommendation.\textsuperscript{274}

To redeem the collateral under current section 9-506, a party must tender payment of (i) all debt secured by the collateral,\textsuperscript{275} (ii) any expenses reasonably incurred by the creditor in taking, storing, and preparing the collateral for disposition,\textsuperscript{276} and (iii) reasonable attorneys' fees and legal expenses (but only to the extent provided in the security agreement and not otherwise prohibited by law).\textsuperscript{277} Revised section 9-623 requires the same payment.\textsuperscript{278} Notice that the fair market value of the

\begin{itemize}
\item \textsuperscript{271} See U.C.C. § 9-504(4); \textit{supra} note 246 and accompanying text.
\item \textsuperscript{272} An oversecured creditor might propose strict foreclosure, hoping to make a profit on any resale of the collateral. Because the creditor's desire is frustrated if the collateral is redeemed, the creditor has an interest in limiting the number of potential redeemers.
\item \textsuperscript{273} PEB Study Group Report, \textit{supra} note 12, at 247.
\item \textsuperscript{274} See U.C.C. § 9-623(a) (1998).
\item \textsuperscript{275} See id. § 9-506 (1995).
\item \textsuperscript{277} See U.C.C. § 9-506 (1995); see also Clark v. General Motors Acceptance Corp., 363 S.E.2d 813, 817 (Ga. Ct. App. 1987) (concluding summary judgment was premature where reasonableness of attorneys' fees had not been determined); Interstate Elec. Supply Co. v. Contractors & Eng'rs, Inc., 515 N.E.2d 182, 189 (Ill. App. Ct. 1987) (noting that U.C.C. § 9-506 permits a creditor to recover reasonable attorneys' fees and legal expenses, but concluding that implicit in the statute is "the right of a redeeming party to a hearing on the reasonableness" of those fees and expenses); see also \textit{supra} note 4 (citing cases addressing ability to recover attorneys' fees).
\item \textsuperscript{278} U.C.C. § 9-623(b)(2) (1998). The secured party and the debtor should consider the merits of including a provision in the loan documents that attempts to define the "reasonableness" of fees and expenses. For example, some variation of the following might be acceptable:
\begin{itemize}
\item All reasonable costs, fees, and expenses (including, without limitation, attorneys' fees, legal expenses, and court costs) incurred by Secured Party incident to this transaction
\end{itemize}
\end{itemize}
collateral is irrelevant in calculating the redemption price. The presence (and exercise of) an acceleration clause will affect the calculation of “all obligations secured by the collateral”—a phrase that appears in both current section 9-506 and revised section 9-623(b). For example, Bank makes a $1,000,000 secured loan to Debtor, who agrees to repay the loan in five equal installments of $200,000 (excluding any interest). Before the first payment is due, Debtor fails to deliver an audited financial report, triggering a non-payment default. Alternatively, Debtor fails to pay the first installment, creating a payment default. Bank seizes collateral, incurring a repossession expense of $100. Is the redemption price (a) $100 (non-payment default), (b) $200,100 (payment default), or (c) $1,000,100 (both defaults)? The phrase “all obligations secured by the collateral” suggests $1,000,100. However, section 9-506 prefaces the phrase with “tendering fulfillment,” language that revised Article 9 substantially retains.

The official comments to revised section 9-623 shed light on the intended meaning of “tendering fulfillment”:

To redeem the collateral a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it would be necessary to tender the entire balance. A tender of fulfillment obviously means more than a new promise to perform an existing promise. It requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured. If unmatured secured obligations remain, the security interest continues to secure them (i.e., as if there had been no default).

The emphasized language reveals that unless the secured party has properly accelerated the debt, the redemption price is not $1,000,100, but shall be part of the secured obligation. Costs, fees, and expenses shall be deemed “reasonable” if, in the aggregate, they do not exceed more than 25% of the sum of unpaid principal and accrued and unpaid interest thereon.

The provision should be enforceable unless a court concludes that the agreed-upon standard of “reasonableness” is “manifestly unreasonable.” See id. § 9-603(a); id. § 9-501(3) (1995).

279. However, the collateral value does play a role in determining the redemption price in a consumer bankruptcy. The Bankruptcy Code permits an individual debtor to redeem consumer goods by paying an amount equal to the creditor’s “allowed secured claim.” 11 U.S.C. § 722 (1994). An “allowed secured claim” is not necessarily the amount of the unpaid debt. Rather, it is “the lesser of the secured debt or the value of the collateral.” DAVID G. EPSTEIN ET AL., BANKRUPTCY § 7-39, at 562 (1993). To illustrate the difference between redemption under Article 9 and the Bankruptcy Code, assume Debtor has defaulted on a $25,000 loan secured by a boat worth $20,000. Under current § 9-506 and revised § 9-623, Debtor’s redemption price is $25,000 (plus repossession and similar charges and possibly attorneys’ fees and legal expenses). Under Bankruptcy Code § 722, Debtor’s redemption price is only $20,000.


281. Id. § 9-623 cmt. 2 (emphasis added); see also id. § 9-506 cmt. (1995) (similar language).
rather only $100 (non-payment default) or $200,100 (payment default). The foregoing example illustrates the importance of including an acceleration clause in the loan documents, advice that many creditors already heed.

The phrase, “all obligations secured by the collateral,” raises another, somewhat related, interpretive dilemma. Assume Bank makes a second secured loan of $500,000 to Debtor, secured by the same collateral that secures the $1,000,000 loan. The two loans are evidenced by two separate sets of loan papers and, through oversight, the first set of loan papers does

282. See Williams v. Ford Motor Credit Co., 435 So. 2d 66, 68 (Ala. 1983) (holding that creditor’s acceleration of unmatured debt required debtor to redeem collateral by tendering amount equal to full contract price plus expenses, not the amount necessary to bring contract current); Rogers v. Associates Comm. Corp., 632 P.2d 1002, 1006 (Ariz. Ct. App. 1981) (concluding, in reliance on the official comment to U.C.C. § 9-506, that “the accelerated balance is part of the obligation secured within the meaning of the redemption provisions”); Black v. Peoples Bank & Trust Co., 437 So. 2d 26, 30 (Miss. 1983) (noting that U.C.C. § 9-506 requires a redeeming debtor “to pay the entire amount due including any accelerated obligation”); Medallion Funding Corp. v. Helen Laundromat, Inc., 34 U.C.C. Rep. Serv. 2d (West) 250, 257 (N.Y. 1997) (holding that debtors who offered to redeem collateral by paying two monthly payments, together with interest and costs, did not make valid tender offer as all amounts due under note had been accelerated); see also Zubrow, supra note 87, at 538 n.376 (“Under Article 9, so long as the security agreement contains an adequately drafted acceleration clause redemption requires repayment of the full amount of the antecedent debt.”); cf U.C.C. § 9-506 (1952 Official Text) (permitting the debtor to reclaim collateral by “tendering payment of all sums due under the defaulted agreement,” a clause explained in the official comments: “if the agreement contains a clause accelerating the entire balance due on default in one installment, the amount ‘due under the defaulted agreement’ would be the entire balance”), reprinted in XV ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 299-300 (1984).

283. If Bank sold the collateral before redemption, and the loan documents did not include an acceleration clause, any proceeds in excess of $100 (non-payment default) or $200,100 (payment default) would revert to Debtor as surplus proceeds in the absence of any subordinate property interests in the collateral. See U.C.C. § 9-504(1)(d) (1995); id. § 9-615(a), (d) (1998); see also ROBERT L. JORDAN & WILLIAM D. WARREN, SECURED TRANSACTIONS IN PERSONAL PROPERTY 235 (4th ed. 1997) (discussing adverse consequences under U.C.C. §§ 9-504(1) and 9-506 for a creditor that fails to include acceleration clause in loan documents when debt is payable in installments).

284. See 2 GILMORE, supra note 9, § 43.4, at 1195 (“For a hundred years, it may be, no security agreement has failed to include an acceleration clause.”). If the loan documents include an optional, rather than an automatic, acceleration clause, the creditor must properly exercise its option before accelerating the debt. For example, under Texas law a creditor cannot exercise an optional acceleration clause until it has presented the note, given notice of its intent to accelerate the debt, and given notice of the acceleration, unless the obligor has executed a clear and unequivocal waiver of presentment and notice. See, e.g., Shumway v. Horizon Credit Corp, 801 S.W.2d 890 (Tex. 1991) (concluding that clause waiving “prior notice or demand” did not waive right to notice of intent to accelerate, which creditor failed to give). And even if a creditor properly accelerates the debt, the accelerated part may be statutorily excluded from the redemption price. See, e.g., MISS. CODE ANN. § 75-9-506 (1981) (expressly excluding from the redemption price “any sums that would not then be due except for an acceleration provision”).
not include a cross-default clause that makes a payment default on the second loan a default under the first loan. When Debtor misses a payment on the second loan, Bank repossesses the collateral and properly accelerates the full $500,000. Can Bank set a redemption price of $1,500,000, arguing that Debtor must pay "all obligations secured by the collateral"?

Read literally, one might think so. Again, however, the official comment quoted above discourages that interpretation. Absent a default, the $1,000,000 is not "then due" or "then matured," but instead is an "unmatured secured obligation." The statutory language could have been drafted with more precision (e.g., "all obligations secured by the collateral and then due"), but hopefully the phrase will be interpreted as intended.

Under current Article 9, a debtor can waive its right to redeem the collateral only if the waiver is in writing and executed after default. Under revised Article 9, the right of redemption is one of the non-waivable rights referenced in revised section 9-602, suggesting that no party (including the debtor) can ever waive its redemption right. However, revised section 9-602 is subject to revised section 9-624, which permits redemption waivers in limited situations.

The period during which a party may redeem collateral is not statutorily prescribed in terms of a guaranteed number of days, weeks, or months.

285. See U.C.C. § 9-506 (1995); see also Kellos v. Parker-Sharpe, Inc., 263 S.E.2d 138, 140 (Ga. 1980) ("Thus, the right to redeem collateral may be waived by an agreement in writing, after default, but cannot be waived by an agreement in writing before default."); Data Sec., Inc. v. Plessman, 510 N.W.2d 361, 365 (Neb. Ct. App. 1993) ("Under § 9-501(3)(d), a debtor's right of redemption may not be waived or varied except as provided in § 9-506, which means only in writing and after default."); Medallion Funding Corp., 34 U.C.C. Rep. Serv. 2d (West) at 257 (finding waiver clause in promissory note "ineffective"); Indianapolis Morris Plan Corp. v. Karlen, 319 N.Y.S.2d 831, 834 (1971) (stating that a debtor's right of redemption may not be waived prior to default).


287. See id. § 9-602.

288. See discussion of U.C.C. § 9-624(c), infra notes 320-27 and accompanying text.

289. However, several states provide a minimum redemption period in transactions governed by retail installment sales statutes. See, e.g., Cal. Civ. Code § 1812.2 (West 1985) (10-day redemption period following giving of notice to sell or retain goods); Conn. Gen. Stat. Ann. § 36a-785(c) (West 1996) (15-day redemption period following repossession); 815 Ill. Comp. Stat. Ann. 405/26-26 (West 1993) (15-day redemption period for selected debtors following repossession); Md. Code Ann., Com. Law § 12-625(a) (1990) (15-day redemption period following giving of statutory notice); Wis. Stat. Ann. § 425.208(1) (West 1998) (15-day redemption period following creditor's exercise of nonjudicial enforcement right). Cf. Unif. Conditional Sales Act § 18, 3B U.L.A. 585 (1992) (10-day redemption period following repossession). Query whether the parties can contractually agree that the debtor's right of redemption terminates after a specific period of time. For example, the security agreement might include a provision stating: "Debtor must exercise its right of redemption under Article 9 of the Texas Business and Commerce Code, as amended from time to time, no later than the 15th day following the date on which Secured Party repossesses the collateral, after which Secured Party may properly reject any offer of redemption by Debtor in its discretion." Under current § 9-501 and revised § 9-603, the secured party and the debtor
Under current Article 9, the redemption period continues until the secured party disposes of the collateral, the secured party contracts for the disposition of the collateral, or the obligation is discharged by a strict foreclosure. Revised Article 9 retains these termination events and adds a fourth: the collection of collateral under revised section 9-607, such as the receipt of a payment created by an account, a general intangible, a promissory note, or chattel paper. The fact that third-party payments of an account or a general intangible can terminate the right to redeem that account or general intangible removes any doubt that the right of redemption extends to non-possessorial collateral.

How valuable is the right of redemption? For most debtors, the answer is "not very." A debtor, particularly a consumer debtor, may not be aware that it has a right of redemption. Neither current section 9-504 nor current section 9-505 requires the secured party to inform the debtor of its redemption right in the notice of disposition or offer of strict foreclosure.

One author believes that such a provision is enforceable if the agreed-upon period is not manifestly unreasonable. See 9 HAWKLAND ET AL., supra note 32, § 9-506:05, at 795-96. But a provision that effectively terminates the debtor's redemption rights prior to the statutory termination events appears to be a partial waiver of the redemption right, rather than an attempt to agree on permissible standards of conduct, and should not be enforceable in the absence of a statutory provision permitting the debtor to waive its redemption right. For a provision permitting waiver-of-redemption clauses in limited situations, see revised § 9-624(c), discussed infra notes 320-27 and accompanying text.

290. See U.C.C. § 9-506 (1995); see also Willis v. Healthdyne, Inc., 382 S.E.2d 651, 653 (Ga. Ct. App. 1989) (finding debtor's demand for redemption "untimely" when made after collateral had been sold); Korogluyan v. Chicago Title & Trust Co., 572 N.E.2d 1154, 1161 (Ill. App. Ct. 1991) (observing that debtor's redemption request "came too late" when made after court had confirmed creditor's prior sale of collateral); Data Sec. Inc., 510 N.W.2d at 365 ("Under § 9-506, the debtor has a right to redeem collateral at any time before the secured party has disposed of collateral or entered into a contract for its disposition unless otherwise agreed in writing after default."); Cordova v. Lee Galles Oldsmobile, Inc., 668 P.2d 320, 322 (N.M. Ct. App. 1983) ("Under § 9-506 plaintiff had a right to redeem the car at any time before disposition.").

291. See U.C.C. § 9-623(c)(2) (1998) (disposition or disposition contract), (3) (strict foreclosure). If a secured party terminates the debtor's right of redemption under revised § 9-623(c)(2) by selling the collateral at a disposition, and the secured party failed to send a disposition notice to the debtor as required by revised § 9-611(c)(1), the debtor is entitled to recover "damages in the amount of any loss" caused by the secured party's noncompliance. See id. § 9-625(b). Query how a debtor quantifies damages for the loss of its redemption right. Is the debtor required to prove that it could (and would) have redeemed the collateral? If the debtor offers such proof, minimum damages might equal (i) the fair market value of a similar item in comparable shape, minus (ii) the redemption price. But what if a replacement item cannot be purchased because the item was unique?

292. See id. § 9-623(c)(1).

293. One of the stated purposes of requiring notice of a disposition or a strict foreclosure is to permit the debtor to protect its interest in the collateral by exercising its right of redemption. See, e.g., Fremont Fin. Corp. v. Izzo (In re Rack Eng'g), 212 B.R. 98, 103 (Bankr. W.D. Pa. 1997); Friendly Fin. Corp. v. Bovee, 702 A.2d 1225, 1227 (Del. 1997); Chen v.
Revised Article 9 improves the awareness of a consumer debtor by requiring a disposition notice in a consumer-goods transaction to refer to the redemption right. A disposition notice sent in a non-consumer-goods transaction may improve the cognizance of other debtors by informing them that they are entitled to an accounting of the unpaid debt. However, revised Article 9 does not require a creditor to reference the redemption right in any proposal of strict foreclosure. Of course, the creditor may, on its own volition, inform the debtor of this right. But even if a debtor knows, or is informed, that it has a right to redeem the collateral, it is unlikely that the right will be exercised. A party already in default on its payment obligations is unlikely to have the financial resources to pay the statutory ransom, especially if the creditor has accelerated unmatured payments. Recognizing this concern, revised Article 9, during much of the drafting process, included a section permitting selected consumer obligors to reinstate the debt and cure a payment default


295. See id. § 9-613(1)(D).


297. Professor Gilmore wrote that a defaulting debtor “never” cures a default by redeeming collateral. Whether prompted by levy, third-party comments, second thoughts, or otherwise, he modified his declaration with a footnote: “Well, almost never.” See 2 GILMORE, supra note 9, § 44.2, at 1216 n.2 and accompanying text; see also Leonard Lakin, Default Proceedings Under Article 9: Problems, Solutions, and Lessons to be Learned, 8 AKRON L. REV. 1, 40 (1974) (observing that while “redemption is a right ‘devoutly to be wished’ by the debtor, most debtors . . . are usually unable to pay the full amount of the [accelerated] debt”); James J. White, Representing the Low Income Consumer in Repossessions, Resales and Deficiency Judgment Cases, 70 NW. U. L. REV. 808, 821 n.40 (1970) (referring to the number of cases in which debtors could (and would) redeem as “de minimus”); cf. Barkley Clark, Default, Repossession, Foreclosure and Deficiency: A Journey to the Underworld And a Proposed Salvation, 51 OR. L. REV. 302, 315-16 (1972) (criticizing the permitted use of acceleration clauses, which, in consumer transactions, discourage redemption and encourage deficiency judgments).
by tendering an amount that excluded any accelerated payments.298
But this limited right of reinstatement fell victim to heavy criticism299 and

4, 1995). At the time of its deletion in early 1998, the section read as follows:

SECTION 9-622. REINSTATEMENT OF OBLIGATION SECURED WITHOUT 
ACCELERATION.

(a) A debtor or a secondary obligor who is a consumer obligor may cure a default con-
sisting only of the failure to make required payment and may reinstate the secured ob-
ligation without acceleration if:
(1) 60 percent of the cash price has been paid in the case of a purchase money se-
curity interest in consumer goods; or
(2) 60 percent of the principal amount of the obligation secured has been paid in 
the case of another consumer goods secured transaction.

(b) To cure a default under subsection (a), a person must tender:
(1) the unpaid amount of the secured obligation due at the time of tender, without 
acceleration, including charges for delinquency, default, or deferral; and
(2) reasonable expenses and attorney's fees of the type described in Section 9-
614(b)(1).

(c) A tender of payment under subsection (b) is ineffective to cure a default or reinstate 
a secured obligation unless made before the later of:
(1) 21 days after the secured party sends a notification of disposition under Section 
9-611(b) to the debtor and any consumer obligor who is a secondary obligor; and
(2) the time the secured party:
(A) disposes of collateral or enters into a contract for its disposition under Sec-
tion 9-610; or
(B) accepts collateral in full or partial satisfaction of the obligation it secures 
under Section 9-618.

(d) A tender of payment under subsection (b) restores to the debtor and a consumer 
obligor who is a secondary obligor their respective rights as if the default had not occurred 
and all payments had been made when scheduled, including the debtor's right, if any, to 
possess the collateral. Promptly upon the tender, the secured party shall take all steps 
necessary to cause any judicial process affecting the collateral to be vacated and any pend-
ing action based on the default to be dismissed.

(e) A secured obligation may be reinstated under this section only once.

U.C.C. § 9-622 (Draft Mar. 1998); cf. id. § 7-607(2) (Draft May 1949) ("Unless default oc-
curred by reason of impairment of the value of the collateral or by reason of removal or 
or other disposition of the goods the performance due shall be deemed to be the performance 
due as if no acceleration of the obligation had occurred."); reprinted in VIII KELLY, supra 
note 282, at 163-64; UNIF. CONSUMER CREDiT CODE § 5.111 (1974 Act), 7A U.L.A. 175-
76 (1985) (providing consumers with a limited cure period).

299. See, e.g., Fred H. Miller, Consumers and the Code: The Search for the Proper Formula, 75 
WASH. U. L.Q. 187, 213 (1997) (suggesting that the provision may actually harm consumers 
because it will increase the cost of credit transactions and prompt the tightening of credit 
standards); id. at 215-16 (contending that the provision does not represent a consensus position 
as evidenced by present state laws, harms all consumers at the expense of the few, and 
delay enactment of revised Article 9); see also Chareq & Fortney, supra note 207, at 320 
(declaring that states have adequately addressed redemption and reinstatement concerns in 
consumer transactions through legislation that removes any need for including a reinstatement 
 provision in Article 9); Alvin C. Harrell, UCC Article 9 Drafting Committee March 1996 
Meeting Considers Consumer-Related Collateral, 50 CONSUMER FIN. L.Q. REP. 95, 98 (1996) (ar-
A secondary obligor also may not redeem the collateral very often. A secondary obligor may have no objection to a disposition or a partial strict foreclosure, realizing that its potential liability for any remaining deficiency will be less than the redemption price. Alternatively, it may rely on its ability to protect its interest in the collateral by attending and participating in a public disposition or contacting the secured party and expressing a desire to participate in a private disposition. One situation where a secondary obligor may find redemption attractive is if the collateral offers sentimental value or the potential for long-term appreciation and the redemption price is less than the collateral’s fair market value.

How frequently a secured party or lienholder will redeem collateral is unknown. These parties may be in the best position to obtain the necessary funds on an expedited basis. However, not all secured parties and lienholders are entitled to a disposition notice or a strict foreclosure proposal reducing the likelihood that those non-recipients will redeem the collateral. Additionally, security interests and liens not subordinate to the security interest of the foreclosing creditor survive a disposition and a strict foreclosure, decreasing the probability that holders of those security interests and liens will redeem the collateral. For holders of security interests and liens that will not survive a disposition or a strict foreclosure, redemption may be attractive if the value of the collateral exceeds the redemption price and the excess is more than the amount likely to be collected by the holder from the debtor in a lawsuit. Realistically, however, that attraction may be nothing more than a faint glimmer, as the senior creditor is much more likely to be undersecured, rather than over-collateralized.

guing that a right of reinstatement is “likely to increase the cost of a default to the lender, thereby raising overall the cost of consumer credit”); Heiser & Flemma, supra note 34, at 490 (referring to the reinstatement provision as “social engineering” that reflects a public policy decision best addressed in the broad context of all consumer credit transactions and not in Article 9); cf. Hillebrand, supra note 205, at 169 (observing that the “limited but useful” right of reinstatement may not be available until late in the loan period).

300. See supra note 168 and accompanying text.

301. Examples include rare coin collections, sports memorabilia, and other unique items.

302. See U.C.C. § 9-611(c) (1998) (failing to include among the parties entitled to a disposition notice any lienholder (other than a lienholder from whom the creditor has received timely notice of the lien and any lienholder that has perfected its lien by filing a financing statement in the proper place) and any unperfected secured party (other than a secured party from whom the creditor has received timely notice of the security interest)).

303. See id. § 9-621(a) (failing to include among the parties entitled to a strict foreclosure proposal any lienholder (other than a lienholder from whom the creditor has received timely notice of the lien and any lienholder that has perfected its lien by filing a financing statement in the proper place) and any unperfected secured party (other than a secured party from whom the creditor has received timely notice of the security interest)).

304. See id. § 9-617(a)(3).

305. See id. § 9-622(a)(3).
REVISED SECTION 9-624: WAIVER

Under current section 9-504, a secured party usually is required to send a disposition notice to a debtor, a right that the debtor cannot waive except in writing and after default. Under revised section 9-611, a secured party usually is obligated to send an authenticated notification of disposition to a debtor and any secondary obligor. Unlike current section 9-504, revised section 9-611 does not address the ability of a debtor or secondary obligor to waive its right to notice. Revised section 9-611, however, is included among the statutes listed in revised section 9-602 that create rights and duties that cannot be waived or varied, suggesting that, in a departure from current law, a debtor and secondary obligor may never waive their right to a disposition notice. But revised section 9-602 is subject to revised section 9-624, a section that permits a debtor or secondary obligor to waive its right to notification “only by an agreement to that effect entered into and authenticated after default.” This provision will change the result in cases that have upheld the enforceability of the typical waiver-of-notice clauses in guaranty agreements and other loan papers executed by a secondary obligor before default.

In an effort to protect a consumer debtor with significant equity in the collateral, a creditor under current Article 9 must forego its remedy of strict foreclosure and timely dispose of consumer goods in its possession if the consumer debtor has paid at least sixty percent of the cash price (or, if applicable, the principal amount). Recognizing that the consumer

307. See id.; id. § 9-501(3)(b); see also In re Huffman, 204 B.R. 562, 564 (Bankr. W.D. Mo. 1997) (stating that “a debtor’s right to written notice cannot be waived or varied by any pre-default agreement”); Canadian Community Bank v. Ascher Findley Co., 280 Cal. Rptr. 521, 534 (Ct. App. 1998) (“California interpretive law is quite clear that pre-disposition notice may only be waived in writing by a debtor after default.”); Caterpillar Fin. Servs. Corp. v. Wells, 651 A.2d 507, 520-21 (N.J. Super. Ct. Law Div. 1994) (relying on U.C.C. § 9-504(3) to conclude that waiver-of-notice provision in guaranty was ineffective); In re Collins, 132 B.R. 491, 493 (Bankr. M.D. Fla. 1991) (observing, under North Carolina law, that a non-guarantor debtor may waive its right to a disposition notice only in writing after default, but upholding a waiver-of-notice clause in a guaranty).
309. See id. § 9-602(7).
310. Id. § 9-602 (“Except as otherwise provided in Section 9-624 . . . .’’).
311. Id. § 9-624(a).
312. See, e.g., Chrysler Credit Corp. v. Curley, 753 F. Supp. 611, 613-14 n.6 (E.D. Va. 1990) (citing cases enforcing waiver clauses); Gambo v. Bank of Maryland, 648 A.2d 1105, 1111 n.9 (Md. Ct. Spec. App. 1994) (same); Harry C. Sigman, Guarantor’s Pre-Default Waivers of Article 9 Debtors’ Rights to Notice and Commercially Reasonable Disposition Should Be Effective, 29 Idaho L. Rev. 627, 628 n.6 (1992-93) (same). But see Chrysler Credit Corp., 753 F. Supp. at 614 n.7 (citing cases invalidating waiver clauses); Gambo, 648 A.2d at 1111 n.8 (same).
debtor may benefit from an offer of a strict foreclosure, current Article 9 permits the debtor to waive this right to a forced sale if the waiver is in writing and executed after default.314 Revised Article 9 imposes similar constraints on the creditor through subsections (e) and (f) of revised section 9-620,315 neither of which suggests that the debtor retains the ability to waive its right to a forced sale.316 As revised section 9-620 is referenced in revised section 9-602 as a statute that creates rights and duties that cannot be waived or varied,317 one might conclude that the current law will change. But revised section 9-602 is subject to revised section 9-624,318 a section that permits a debtor to waive its right to a forced sale under revised section 9-620(e) "by an agreement to that effect entered into and authenticated after default."319

Under current section 9-506, a debtor can waive its right to redeem collateral only if the waiver is in writing and executed after default.320 Revised section 9-623 codifies the right of redemption but, unlike current section 9-506, is silent on whether a debtor or secondary obligor may waive that right. However, revised section 9-623 is referenced in revised section 9-602 as a statute that creates rights and duties that cannot be waived or varied,321 suggesting a change in current law. But revised section 9-602 is subject to revised section 9-624,322 a section that permits a debtor or secondary obligor to waive its redemption right in a transaction "only by an

315. See id. § 9-620(e), (f) (1998).
316. Cf. id. § 9-620(a)(4) (indicating that a secured party may accept collateral and forgive all or part of the debt if "subsection (e) does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to Section 9-624") (emphasis added).
317. See id. § 9-602(10).
318. See id. § 9-602 ("Except as otherwise provided in Section 9-624 . . . ").
319. Id. § 9-624(b). As noted earlier, this waiver did not appear in revised Article 9 until very late in the drafting process. See supra note 191.
322. See id. § 9-602 ("Except as otherwise provided in Section 9-624 . . . ").
agreement to that effect entered into and authenticated after default."\(^{323}\)

However, in a departure from current section 9-506, a debtor or a secondary obligor may never waive its right of redemption in a consumer-goods transaction.\(^{324}\)

To be effective, waivers permitted by revised section 9-624 must be authenticated.\(^{325}\) In many transactions the creditor will satisfy this requirement by introducing a writing signed by the debtor or the secondary obligor.\(^{326}\) As parties (particularly consumers) occasionally sign writings without reading or understanding them, one may question whether enforceability should turn on proof of authentication alone. The statute could have required the creditor to prove that the signatory "expressly agreed" to the waiver,\(^{327}\) but that would likely create difficult, if not impossible, evidentiary hurdles. The approach taken by the Drafting Committee seems a fair compromise.

A minor quibble with revised section 9-624 is the placement of its substance apart from revised section 9-602. Revised section 9-602 provides a list of statutes that create rights and duties that cannot be waived or varied.\(^{328}\) Revised section 9-624 permits limited waivers of selected rights and duties created by statutes referenced in revised section 9-602. Rather than draft a "rule" in one section (revised section 9-602) and, through a cross-reference, direct the reader to the "exception" codified in another section located nowhere nearby (revised section 9-624), the "exception" could have been strategically grafted into the "rule."\(^{329}\) In this manner all waiver-related provisions would have been embodied in a single section.

\(^{323}\) Id. § 9-624(c).
\(^{324}\) See id. ("Except in a consumer-goods transaction . . . ").
\(^{325}\) See id. § 9-624(a), (b).
\(^{326}\) See id. § 9-102(a)(7)(A).
\(^{327}\) Early drafts contemplated such proof. See id. § 9-504(i) (Draft July 28-Aug. 4, 1995) (including bracketed language requiring a creditor to prove that a party "expressly agreed" to waive its right to a disposition notice); id. § 9-505(m) (requiring a creditor to prove that a party "expressly agreed" to waiving selected strict foreclosure rights); id. § 9-506(i) (requiring a creditor to prove that a party "expressly agreed" to waive the right to redeem collateral in a consumer secured transaction).
\(^{328}\) Revised § 9-624 itself is one of those statutes. See id. § 9-602(12) (1998).
\(^{329}\) For example, revised § 9-602(7) could have been drafted to read: "(7) Sections 9-610(b), 9-611, 9-613, and 9-614, which deal with disposition of collateral, except a debtor or secondary obligor may waive the right to notification of disposition of collateral under Section 9-611 by authenticating an agreement to that effect after default." Similarly, revised § 9-602(10) could have been written to read: "(10) Sections 9-620, 9-621, and 9-622, which deal with acceptance of collateral in satisfaction of obligation, except a debtor may waive the right to require a disposition under revised § 9-620(e) by authenticating an agreement to that effect after default." And revised § 9-602(11) might have read: "(11) Section 9-623, which deals with redemption of collateral, except a debtor or secondary obligor may waive the right to redeem collateral in a transaction, other than a consumer-goods transaction, by authenticating an agreement to that effect after default."
Revised section 9-624 permits debtors and secondary obligors in consumer-goods transactions to waive their right to a disposition notice but not their right to redeem collateral. This approach is questionable. Many debtors and secondary obligors in consumer-goods transactions are individuals who either are not aware that they enjoy a right to redeem collateral or are not in a financial position to exercise that right. In an effort to improve the awareness of these individuals, revised Article 9 requires a secured creditor to include redemption information in the disposition notice.3

Why an individual should be able to waive its right to a disposition notice that may inform the individual of its redemption right, but not waive the very right mentioned in the waivable notice, is unclear. In fact, of the four possible statutory approaches that could have been adopted with respect to the waiver of notice and redemption rights in consumer-goods transactions—(i) prohibit waiver of each right, (ii) prohibit waiver of the right to notice but permit waiver of the redemption right, (iii) prohibit waiver of the redemption right but permit waiver of the right to notice, and (iv) permit waiver of each right—the approach selected arguably makes the least sense.

The enforceability of waiver clauses in standard guaranty agreements and other loan papers executed by a secondary obligor before default was an issue considered by the PEB Study Group. The PEB Study Group received thoughtful comments from both "pro-waiver" advocates and "anti-waiver" proponents, but ultimately declined to offer a recommendation favoring one side. Through revised section 9-602 and revised section 9-624, the drafting committee has adopted the "anti-waiver" view, a choice that will be well-received by some and criticized by others. Nevertheless, by confronting the issue and resolving it statutorily the drafting committee has improved Article 9 by removing from potential litigation a frequently contested issue that courts have failed to resolve in a uniform manner.

Freedom-of-contract proponents may be disappointed that revised sections 9-602 and 9-624 continue to limit the ability of parties to waive or

331. See id. § 9-614(1)(C); see also id. § 9-614(3) (paragraph of model form beginning “You can get . . . .”).
333. The “anti-waiver” view was specifically adopted during a floor vote at NCCUSL’s 1997 annual meeting. See Weise Memorandum, supra note 50.
334. See supra note 312 and accompanying text. Occasionally the secured debt is evidenced by a negotiable instrument governed by U.C.C. Article 3. If the instrument is executed by a guarantor and includes a typical provision by which the guarantor waives suretyship defenses, a potential conflict appears to exist between U.C.C. § 3-605(i) (permitting suretyship waivers) and revised §§ 9-602 and 9-624 (prohibiting pre-default waivers and many post-default waivers). This conflict is resolved in favor of the Article 9 provisions. See U.C.C. § 3-102(b) (1995); see also id. § 3-605 cmt. 8 (acknowledging Article 9 limitations); PEB Commentary No. 11 (Issue 11), 3B U.L.A. 120, 125 (Supp. 1998) (same).
modify the rights and duties created by Part 6. The disappointment may be justified, absent any empirical evidence that the majority of today's creditors engage in post-default predatory tactics. Possibly the better reason for adopting a somewhat paternalistic approach is to address the concern that the debtor's "freedom" to contract may be nonexistent in many secured transactions.335 Usually the loan papers are drafted by creditors and their counsel, who often adopt a "take it or leave it" approach at the bargaining table. Debtors, desperate for the creditor's funds, goods, or services, may either fail to read what they sign or may read but not comprehend the significance of the legal jargon without the assistance of counsel (the cost of which may frustrate the ability to consummate the transaction).336 Perhaps when "freedom of contract" is illusory the statutory limitations on waiver and variance are necessary to level the playing field for the various participants.

Some may criticize the contractual limitations in revised sections 9-602 and 9-624 for being too broad. The limitations in revised section 9-602 apply to all debtors and obligors, not just those without bargaining strength.337 Some debtors and obligors are quite sophisticated and knowledgeable in commercial matters. They can adequately protect themselves against any attempted overreaching and intimidation by their creditors and have no need to be rescued from their own errors by a statutory white knight. These parties should be permitted to waive or vary their rights and the duties imposed on their creditors if they so desire.

Redrafting revised sections 9-602 or 9-624 in a manner that extends protection only to those parties in need of it is a noble goal, but drafting language that furthers that goal is a daunting challenge. How does one discern whether a party can adequately handle its commercial affairs?

335. See, e.g., 2 GILMORE, supra note 9, § 44.3, at 1221 ("No one will deny that the consumer security agreement is a contract of adhesion or that the consumer needs protection."); Miller, supra note 299, at 187-88 (offering several reasons why "freedom of contract" in a consumer context is "a license for the unscrupulous to take unfair advantage of the consumer"); Philip Shuchman, Profit on Default: An Archival Study of Automobile Repossession and Resale, 22 STAN. L. REV. 20, 52-53 (1969) ("Contract theory has long since run the full circle. The consumer's freedom to contract is a lie. The consumer needs freedom from such flexibility.").

336. See, e.g., Clark, supra note 297, at 303 (noting that a consumer "is as likely to read [let alone understand] [a security agreement] as he is to run windsprints in Red Square"); Greenfield, supra note 170, at 300 (contending that a consumer's waiver of a statutory right at the time of contract formation "is highly suspect" and that the "small-print boilerplate" language of the waiver makes a consumer's assent "a fiction"). But see Heiser & Flemma, supra note 34, at 493 (contending that "[t]he idea that a consumer debtor is unsophisticated and completely at the mercy of secured parties ignores reality"); James J. White, Work and Play in Revising Article 9, 80 Va. L. Rev. 2089, 2095 (1994) (urging the drafting committee to "purge the idea of the noble consumer who borrows in ignorance, who is surprised by repossession and deficiency judgment, and who claims incredible promises by his creditor" because "the consumer class overflows with liars and cheats").

Should Article 9 create the term, "sophisticated party"? And if so, how should the term be defined? What factors should dictate the inclusion of natural persons? Education? Net worth? Adjusted gross income on the most recent tax return? And when is a business entity a "sophisticated party"? If its capital stock is traded on a national exchange? If it is audited by a "Big Five" accounting firm? If it has had net income of at least "x" dollars for at least "y" consecutive years? Should the term include some built-in exclusions (e.g., the term excludes all natural persons and any party to a transaction involving principal of less than "x" dollars)? One may criticize revised sections 9-602 and 9-624 for limiting the contractual freedom of parties that can take care of themselves, but the criticism pales in comparison to the drafting nightmares triggered when one contemplates how and where to statutorily draw the line between those parties who need its protection and those who do not.

**REvised SECTION 9-625: REMEDIES FOR SECURED PARTY'S FAILURE TO COMPLY WITH ARTICLE**

A secured party may breach the peace while repossessing collateral, forget to send a disposition notice to the debtor, fail to dispose of collateral in a commercially reasonable manner, or otherwise falter in carrying out its statutory obligations. Under current Article 9, the secured party's liability for noncompliance is addressed in section 9-507(1). Revised Article 9 deals with the same concern in section 9-625.

Current law provides injunctive relief by authorizing a court to order or restrain a disposition if the secured party "is not proceeding in accordance with the [default] provisions of this Part [Five]." For example, if a secured party has held collateral for an unreasonable period of time without attempting to sell it or offering to keep it in satisfaction of the debt, a court may order a disposition. And if a secured party has repossessed collateral prior to a default, a court may restrain any scheduled disposition.

Revised section 9-625 makes two modifications to this remedy. First, the remedy applies when the secured party fails to comply with any provision of Article 9, not just the default provisions. Therefore, injunctive relief may be available if the secured party is breaching its statutory duties

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338. Federal securities laws have adopted a similar approach, excluding from coverage selected transactions involving "accredited investors." See, e.g., 15 U.S.C. § 77b(a)(15) (1994) (defining "accredited investor"); id. § 77d (exemption); id. § 80a-6(a)(5)(A)(iii) (exemption).
340. The rights and duties under revised § 9-625 cannot be waived or varied. See id. § 9-602(13) (1998).
342. See id. § 9-625(a) (1998) ("If it is established that a secured party is not proceeding in accordance with this article . . . ").
that arise under a section of revised Article 9 other than those sections in
Part Six, such as the statutory duty to release collateral in its control343 or
to file or send (or cause to be filed or sent) a termination statement.344 And
second, the remedy has been expanded to permit a court to order or
restrain "collection" and "enforcement" of collateral, in addition to its
disposition.345 For example, a court may enjoin a secured party from col-
lecting payments from account debtors346 if a default has not occurred
and the secured party is not otherwise contractually permitted to collect
the payments. Also, a court might order a hesitant secured party to initiate
litigation to protect the debtor's interest in intellectual property against
unlawful infringement347 if the loan documents prohibit the debtor from
initiating the litigation.

The introductory phrase in both current section 9-507(1) and revised
section 9-625(a) is identical: "If it is established . . . ."348 This language
places the burden of establishing noncompliance on the party seeking
injunctive relief. Neither statute, however, indicates who is eligible to seek
relief. Elsewhere both statutes permit recovery of damages by specific par-
ties.349 Presumably the absence of any prescribed list of potential litigants
permits a court to grant injunctive relief at the request of any party that
establishes that the creditor is failing to comply with Article 9 and other-
wise convinces the court that injunctive relief is warranted.350

Other remedies for noncompliance are available in addition to injunc-
tive relief. Under current Article 9, a secured party is liable for "any loss"
caused by its noncompliance.351 However, the loss must be caused by the
secured party's noncompliance with the default provisions, and no loss is
recoverable until the collateral has been disposed.352 Parties eligible to

343. See id.
344. See id. § 9-513.
345. See id. § 9-625(a).
346. A secured party enjoys this post-default remedy under current and revised Article 9.
347. Under revised Article 9, a secured party enjoys the statutory right to initiate litigation
aimed at protecting and preserving collateral consisting of intellectual property against un-
349. See id. § 9-501(1) (1995) (permuting "the debtor or any other person entitled to no-
tification or whose security interest has been made known to the secured party prior to the
disposition" to recover damages); id. § 9-625(c)(1) (1998) (awarding damages to "a person
that . . . was a debtor, was an obligor, or held a security interest in or other lien on the
collateral").
350. At least one source suggests that the normal conditions for injunctive relief need not
be satisfied, as the relief is statutorily authorized. See LAWRENCE ET AL., supra note 204,
§ 19.01[A], at 377.
352. See id. Because § 9-507(1) permits recovery of any loss only if "the disposition has
occurred," the reader may conclude that an aggrieved party has no remedy under § 9-507(1)
if the secured party has breached its duties under the strict foreclosure provision of § 9-505.
recover damages include the debtor, any person entitled to notification of a disposition, and any party whose security interest in the collateral was known by the secured party before disposition. The priority rank of the security interest held by an injured party is irrelevant. Noticeably absent from the list of parties entitled to damages are parties holding liens in the collateral (including subordinate liens destroyed by the disposition).

Under revised Article 9, a secured party is liable "for damages in the amount of any loss" caused by its noncompliance with any provision of revised Article 9, whether or not the collateral has been disposed. The revised list of potential claimants includes any debtor, any obligor (whether primary or secondary), and any party holding a security interest in or other lien on the collateral (regardless of priority and whether or not the party was entitled to receive a disposition notice or the secured party knew of the party’s property interest). However, the party must enjoy that status "at the time of the failure."

A secured party’s failure to comply with a provision of Article 9 may create an obvious loss. For example, a creditor may repossess equipment from a debtor that is not in default, forcing the debtor to lease replacement equipment until it can persuade the creditor (or a court) that the original equipment should be returned. At a minimum, the debtor has sustained a loss equal to the amount of its lease expense. In other instances, a

However, comment 2 to § 9-505 reveals that a party can recover damages under § 9-507(1) caused by a secured party’s failure to comply with § 9-505. See also 4 WHITE & SUMMERS, supra note 26, § 34-19, at 463-64 n.2.

353. See U.C.C. § 9-507(1); see also id. § 9-504(3) (indicating which parties are entitled to a disposition notice).

354. See id. § 9-504(4).

355. Id. § 9-625(b) (1998). The ability to recover these damages is “[s]ubject to subsections (c), (d), and (f).” Id. Subsection (c) places limits on who can recover damages and incorporates the limitations of revised § 9-628, discussed infra notes 453-73 and accompanying text. Subsection (d) is discussed infra notes 377-82 and accompanying text. Subsection (f), not discussed herein, applies when a person fails to comply with revised § 9-210.

356. See U.C.C. § 9-625(b), (c)(1) (1995); cf. PEB STUDY GROUP REPORT, supra note 12, at 205-06 (recommending that U.C.C. § 9-507(1) be revised to provide a remedy to all junior claimants, not just junior claimants entitled to a disposition notice or whose property interest is known by the secured party before disposition).


358. An aggrieved party may claim a different measure of damages in tort. See id. § 9-625 cmt. 3. Query whether a party should have the option to pursue a tort remedy for a creditor’s breach of an Article 9 provision. Comment 3 to § 9-625 references § 1-103, which permits principles of law (e.g., tort law) to supplement the U.C.C. provisions “unless displaced by the particular provisions of this Act.” Is § 9-625 not a remedy provision? If so, is a tort remedy not displaced by a particular provision? If one overlooks this tension between § 1-103 and comment 3 to § 9-625 and concludes that an aggrieved party can pursue a tort remedy, then the party should determine whether a tort remedy will provide a greater recovery than an action under § 9-625 for actual damages. For example, after Debtor defaults, Lender unlawfully repossesses equipment with a fair market value of $100,000 and sells it in a commercially unreasonable manner for $70,000. Evidence reveals that a commercially
party in whose favor the breached duty runs may suffer no loss. For example, a senior secured party with an unpaid debt of $100,000 may sell collateral without sending the requisite disposition notice to a subordinate secured creditor. The collateral is sold for $75,000. Unless the subordinate creditor can prove that the value of the collateral was worth more than $100,000, it has suffered no loss as a result of the senior secured creditor's noncompliance. Why? Because the subordinate secured party is entitled to receive proceeds only after the senior secured creditor has recouped its reasonable expenses and satisfied its debt.

In many consumer transactions, the financial resources of the debtor, the costs of litigation, and little (if any) actual damage collectively permit a creditor to breach its statutory duties with impunity. Recognizing that potential liability for actual damages may not adequately discourage creditor misconduct, current Article 9 imposes a minimum penalty in selected transactions. The penalty, equal to "an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price," can be recovered by any debtor that has granted a security interest in consumer goods. The same minimum award is available under revised section 9-625 to a party that was a debtor or a secondary obligor at the time of noncompliance. A party need not prove any actual damages in order

reasonable sale should have rendered a bid of $80,000. Under statutory principles, Debtor is entitled to a credit of $80,000 (the sales price at a commercially reasonable sale). In a conversion action, Debtor is entitled to a credit of $100,000 (the fair market value of the collateral at the time of the unlawful repossession). Suing in tort permits Debtor to recover an additional $20,000. Debtor also may be able to recover punitive damages. See, e.g., Chrysler Credit Corp. v. Turner, 553 So. 2d 64, 67 (Ala. 1989); Truck Center of Tulsa, Inc. v. Autrey, 836 S.W.2d 359, 365-66 (Ark. 1992); Star Bank, N.A. v. Laker, 637 N.E.2d 805, 807 (Ind. 1994); Zimprich v. Harvestore Sys., Inc., 461 N.W.2d 425, 430-31 (N.D. 1990).

Some courts have held that the bankruptcy trustee inherits the debtor's cause of action. See, e.g., Jones v. Star Bank (In re Angel), 142 B.R. 194, 198 (Bankr. S.D. Ohio 1992); In re Reed, 102 B.R. 243, 246 (Bankr. E.D. Okla. 1989).

Three stylistic changes have been made to the statutory language: the revised statute references "10 percent" rather than "10 per cent" or "ten per cent," "obligation" rather than "debt," and "time-price differential" instead of "time price differential."
to recover the minimum award\(^{363}\) (which, in some cases, has significantly reduced, if not completely eliminated, the debtor’s liability for any deficiency\(^{364}\)). A party, however, that can prove its actual damages exceed the statutory minimum can collect the greater amount.

Whether the “credit service charge” formula or the “time-price differential” formula applies to a particular transaction is unclear. The statute offers no direction, and the accompanying comments leave “construction and application to the court.”\(^{365}\) Case law and scholarly commentary reveal that application depends on whether the debtor received credit from the seller or a third-party financer. If the seller extended credit to the buyer, then the statutory minimum equals the time-price differential plus ten percent of the cash price. If the debtor received credit from a third-party financer, such as a bank, then the minimum award equals the credit service charge plus 10% of the principal.\(^{366}\) A simple example may be helpful. Consumer desires to buy a piano, but cannot pay the $5000 cash price.

This minimum award can be recovered only when the secured party has “failed to comply with this part [6]” (as contrasted with “this article”). \(^{Id.}\)


\(^{365}\) U.C.C. § 9-625 cmt. 4.

\(^{366}\) See 9 HAWKLAND ET AL., supra note 32, § 9-507:06, at 901-02; LAWRENCE ET AL., supra note 204, § 19.03, at 384-85; see also Angel, 142 B.R. at 198-99 (using “credit service charge” formula to calculate damages recoverable from third-party financer); Gulf Homes, 676 F.2d at 640 (using “time-price differential” formula to calculate damages recoverable from seller); Jacobs v. Healey-Ford Subaru, Inc., No. CV 900031301S, 1996 WL 87600 (Conn. Super. Ct. Feb. 7, 1996) (using “time-price differential” formula to calculate damages recoverable from seller after noting that “it appears to be more appropriate to interpret [the third sentence of U.C.C. § 9-507(1)] as requiring a ‘credit service charge’ calculation when there is a third party creditor, such as a bank, and to require a calculation of the ‘time-price differential’ when the original seller demands a premium representing the difference between the cash and credit price”); Kruse, 648 N.E.2d at 819 (using “credit service charge” formula to calculate damages recoverable from third-party financer); Western Nat’l Bank v. Harrison, 577 P.2d 635, 642 (Wyo. 1978) (using “credit service charge” formula to calculate damages recoverable from third-party financer).
Seller agrees to sell the piano to Consumer on credit if Consumer agrees to make twelve monthly payments of $500. Alternatively, Bank agrees to finance the purchase if Consumer agrees to pay $5750 on the one-year anniversary date of the loan. If Seller finances the purchase and breaches a statutory duty, Consumer can recover $1500 (time-price differential of $1000 [total payments of $6000 minus cash price of $5000] plus $500 [10% of $5000 cash price]). If Bank finances the purchase and breaches a statutory duty, then Consumer is entitled to recover $1250 (credit service charge of $750 [total payment of $5750 minus borrowed amount of $5000] plus 10% of the $5000 principal).

Is the “cash price” (as that term is used in the “time-price differential” formula) reduced by any down payment paid by Consumer out of its own funds? The same term also appears in the redemption statute, where it is distinguished from the amount financed. If the term is intended to have a uniform meaning throughout the default provisions of Article 9, then a Consumer’s down payment has no impact on the damages calculation. However, three reasons for a contrary interpretation could trump the desire for a uniform meaning. First, the redemption statute uses “cash price” in a calculation that attempts to preserve the debtor’s equity in the collateral; the damages statute uses “cash price” in a calculation that attempts to penalize a creditor for breaching its statutory duty. As the term appears in statutes that accomplish different purposes, then perhaps the term need not be interpreted in a uniform manner. Second, ignoring the effect of a down payment seems to result in a windfall for a debtor that has funded the down payment with third-party funds rather than its own money. In fact, in the unlikely (but not impossible) event that a seller and a third-party lender both finance part of the purchase and breach their statutory duties, failure to subtract the down payment from the cash price results in an inflated aggregate penalty. Third, failing to reduce the cash price by any down payment may elevate form over substance. Debtor wants to buy a new car that costs $25,000. Debtor will make a $5000 down payment. Both Dealer and Bank have offered to finance the $20,000 balance on terms requiring Debtor to repay the loan in 60 equal payments (each of which includes a “time-price differential” or “credit service charge” component). From Debtor’s perspective, the two proposals are identical. The only discernible difference is whose name appears on the payee line of the monthly check. But if the “cash price” component is $25,000 rather than $20,000, Debtor may recover additional damages of $500 (10% of

368. See LAWRENCE ET AL., supra note 204, § 19.03, at 385.
369. For example, the third-party financer may receive full payment of the funded down payment but fail to timely file a termination statement (a breach of U.C.C. § 9-513(a) (1998)), and the seller, after a default, may dispose of the collateral in a manner not commercially reasonable (a breach of U.C.C. § 9-610(b)).
the $5000 down payment) by accepting Dealer's offer. No persuasive reason justifies different penalties for substantively identical credit transactions.

Certainly some guidance on whether the "cash price" excludes any down payment would have been welcome. But that is not the only question that arises under revised section 9-625(c). Why does the statute permit only secondary obligors to recover the statutory penalty when any obligor is allowed to recover actual damages? And if the minimum statutory penalty is a form of consumer protection, should not the penalty provision be both expanded to apply when a consumer debtor grants a security interest in any collateral (rather than just consumer goods) and modified to protect, in addition to debtors, all (but only) consumer obligors?

The minimum statutory penalty may have the unintended consequence of providing consumer creditors with an extra incentive to proofread their notices for accuracy and otherwise scrutinize their compliance with the provisions of Article 9. Although a creditor's noncompliance may not trigger a material statutory penalty in any single transaction, noncompliance that is widespread (e.g., a wrong telephone number on a standard,

371 Guidance was requested in the Zinnecker Memorandum, supra note 33, at 5. Another, less troublesome, issue is whether the "principal amount" as referenced in the "credit service charge" formula is measured at the inception of the loan or the time of noncompliance. Most, if not all, sources have concluded that the term refers to the original amount of the loan. See, e.g., 9 HAWKLAND ET AL., supra note 32, § 9-507:06, at 901 ("The principal amount of the debt, of course, means the original amount of the debt without any additions for interest or deductions for payment made."); 4 WHITE & SUMMERS, supra note 26, § 34-19, at 465 (observing that "the penalty is computed on the basis of the original principal amount"). See also Fidelity Fin. Servs., Inc. v. Wilson, 635 N.E.2d 92, 95 (Ohio Mun. Ct. 1994); Knights of Columbus Credit Union v. Stock, 814 S.W2d 427, 432 (Tex. App. 1991, writ denied); Garza v. Brazos County Fed. Credit Union, 603 S.W2d 298, 300-01 (Tex. Civ. App. 1980, no writ). The specific reference to "at the time a secured party failed to comply" elsewhere in revised § 9-625(c)(2), and the omission of the same or similar language in the formula itself, further supports the conclusion reached by scholars and the case law. Furthermore, using the amount of the loan principal at the time of the noncompliance, which frequently will be less than the amount originally borrowed, effectively punishes the borrower and rewards the third-party financer through a reduced penalty.

372 See U.C.C. § 9-625(c)(2).

373 See id. § 9-625(c)(1). The official comments attempt to limit the breadth of the statute by stating that "a principal obligor who is not a debtor may recover damages only for noncompliance with Section 9-616, inasmuch as none of the other rights and duties in this Article run in favor of such a principal obligor." See id. § 9-625 cmt. 3. For much of the drafting process, only secondary obligors were allowed to recover actual damages. See id. § 9-507(b) (Draft Nov. 15, 1995). But see id. § 9-625(c)(1) (undated draft marked to reflect changes to the ALI Proposed Final Draft dated Apr. 15, 1998) (changing reference from "a secondary obligor" to "an obligor").

374 The reference to "consumer obligor" in subsection (e) suggests that the use of "secondary obligor" in subsection (c)(2) was a deliberate choice.
computer-generated, disposition notice\(^{375}\)) could prompt one or more class actions with significant and adverse financial consequences.\(^{376}\) Query whether consumer creditors will attempt to mitigate this risk by increasing the cost, or limiting the availability, of consumer credit.

A debtor continues to enjoy the ability to pursue damages for the loss of any surplus proceeds.\(^{377}\) However, if its deficiency is reduced or eliminated under revised section 9-626, revised section 9-625 prevents a debtor or secondary obligor from recovering any actual damages (other than damages for loss of surplus proceeds) triggered by the secured party's failure to comply with default provisions relating to collection, enforcement, disposition, or acceptance.\(^{378}\) The goal of awarding damages is to restore the aggrieved party to the position it occupied before the secured party breached its statutory duties.\(^{379}\) The limitation found in subsection (d) attempts to further that goal by eliminating the possibility of double-recovery or over-compensation.\(^{380}\) Yet, the limitation on recovery may frustrate the goal of restoration if the aggrieved party proves damages in an amount that exceeds that portion of the deficiency reduced or eliminated under revised section 9-626. For example, Creditor fails to send the requisite disposition notice to Debtor. Under local law, Creditor's noncompliance bars recovery of a $2000 deficiency. Debtor can prove actual damages resulting from Creditor's noncompliance. Debtor has improved its position by $2000, less its actual damages. If those damages are not greater than $2000, then a court can deny recovery of actual damages and yet place Debtor in a position no worse (and probably better) than it would have enjoyed if Creditor had sent a disposition notice.\(^{381}\) If actual dam-

375. See U.C.C. § 9-614(1)(C), (D) (1998) (requiring a secured party in a consumer-goods transaction to include in its disposition notice a telephone number from which the recipient can discover the redemption price and additional information about the disposition and the secured obligation).

376. For a while, a proposed provision capped the aggregate statutory penalty payable by a secured party in one or more class actions prompted by the same noncompliance, but the provision was deleted as part of the "consumer compromise." See infra notes 472-73 and accompanying text.

377. See U.C.C. § 9-625(d).

378. See id. The relevant provisions presumably include at least revised §§ 9-607 to 9-616, 9-620, and 9-621. These statutes, or their substantive counterparts codified at a different address, were expressly referenced before being deleted and replaced with "the provisions of this part relating to collection, enforcement, disposition, or acceptance." See id. § 9-624(d) (Draft Apr. 6, 1998). If the secured party fails to comply with a provision not concerning collection, enforcement, disposition, or acceptance, then an injured party whose deficiency is reduced or eliminated under revised § 9-626 should pursue damages under revised § 9-625.

379. See id. § 9-625 cmt. 3; id. § 1-106(1) (1995).

380. See id. § 9-625 cmt. 3.

381. See, e.g., Coones v. FDIC, 894 P2d 613, 615-16 (Wyo. 1995) ("Since the amount of Coones's alleged damages did not exceed the amount of the deficiency, a judgment for damages would be an impermissible double recovery.").
ages, however, exceed $2000 (for example, $2400), then a court should permit recovery of the amount ($400) by which the damages ($2400) exceed the discharged deficiency ($2000). Only by doing so can Debtor be restored it its proper place. To best advance the restoration goal of damage awards, revised section 9-625(d) should be interpreted in a manner that prohibits recovery of actual damages only to the extent that (rather than if) the deficiency is reduced or eliminated.382

Because revised section 9-626 does not apply to consumer transactions,383 the limitation in revised section 9-625(d) also does not apply to consumer transactions.384 If the aggrieved party in a consumer transaction seeks to recover actual damages, then the restoration goal is best achieved if those damages are netted against any unadjusted deficiency claim or reduced, dollar for dollar, by that part of the creditor’s deficiency claim reduced or eliminated under local law for noncompliance. Should the same relationship exist between a reduced or eliminated deficiency claim and the minimum civil penalty? Some cases have held that a creditor must pay the minimum civil penalty to the injured consumer even if noncompliance bars or reduces the deficiency claim,385 while other cases have concluded that an injured consumer cannot recover minimum damages if those damages are less than the discharged deficiency.386 During most of

382. This concern was raised in the Zinnecker Memorandum, supra note 33, at 5. Revised § 9-625(d) would advance the proposed interpretation if the second sentence were revised to read as follows: “However, a debtor or secondary obligor may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance to the extent that its deficiency is eliminated or reduced under Section 9-626.”

383. See U.C.C. § 9-626(a) (1998) (stating that the rules therein apply “[i]n an action arising from a transaction, other than a consumer transaction”) (emphasis added).

384. See id. § 9-625(d) (stating that the first sentence applies only if a “deficiency is eliminated under Section 9-626” and the second sentence applies only if a “deficiency is eliminated or reduced under Section 9-626”).


386. See, e.g., Northwest Bank & Trust Co. v. Gotshall, 274 N.W.2d 713, 718-19 (Iowa
the drafting process, the secured party could offset against the minimum statutory penalty that part of its deficiency claim reduced or eliminated under revised Article 9, together with any other damages payable to the aggrieved party.\textsuperscript{387} However, these offsets fell by the wayside as part of the "consumer compromise."\textsuperscript{388} Whether the end result is favorable depends on one's perspective of the minimum civil penalty. If the formulaic damage award bears no relationship to the nature of the misconduct or the actual harm suffered, the award should be viewed as a penalty, not an attempt to make the injured party whole, and should be fully recoverable even if the creditor's noncompliance reduces or eliminates its deficiency.\textsuperscript{389} But if statutory damages exist solely as a substitute for actual, but non-quantifiable, damages, and the creditor's noncompliance also reduces or eliminates its deficiency claim, then the dollar amount of that reduction or elimination should serve as the debtor's "actual damages" and render unnecessary any award of statutory damages (at least if the "actual damages" exceed the statutory damages).

Some statutes impose on a secured party a duty (such as releasing collateral in its control after the transaction has concluded,\textsuperscript{390} filing or sending a termination statement after the transaction has ended,\textsuperscript{391} or sending an explanation of the calculated deficiency or surplus\textsuperscript{392}) that, if breached, may not result in quantifiable damages. To provide the obligated party with an incentive to carry out specific duties, revised section 9-625 permits

1979) (holding discharge of $1078.32 deficiency precluded debtor from recovering statutory damages of either $394.03 or $514.75); Topeka Datsun Motor Co. v. Stratton, 736 P.2d 82, 84 (Kan. Ct. App. 1987) (concluding debtor could not recover statutory damages of $3192.66 after court discharged $3083.51 deficiency under Kansas version of Uniform Consumer Credit Code); Bank of Chapmanville v. Workman, 406 S.E.2d 58, 65 (W. Va. 1991) (indicating that a hypothetical debtor cannot recover minimum damages of $10,000 if the court denies a $50,000 deficiency). \textit{See also} LAWRENCE ET AL., supra note 204, § 19.03, at 385 (contending that awarding penalty damages after a deficiency has been reduced or eliminated "would violate the spirit of the Code" and "would be adding a penalty on top of a penalty"). 387. \textit{See, e.g.}, U.C.C. § 9-507(g) & cmt. 10 (Draft July 28-Aug. 4, 1995); \textit{id.} § 9-624(d) & cmt. 7 (Draft Jan. 1998).

388. \textit{See id.} § 9-624(c)(2) (underlined as new language), (d) (lined through as deleted language), and "Changes from Prior Draft" (Draft Mar. 1998); \textit{supra} note 168 (discussing "consumer compromise").

389. In a jurisdiction that follows this approach and yet reduces actual damages by the amount of any forfeited deficiency claim, a debtor that incurs actual damages greater than the minimum statutory damages may find it economically attractive to forego the larger claim and pursue the smaller claim. For example, assume Creditor's noncompliance bars recovery of a $5000 deficiency claim, Debtor's actual damages are $3500, and its minimum statutory damages are $2000. If Debtor attempts to recover its actual damages, it improves its position by $1500 ($5000 deficiency claim minus $3500 actual damages). But if Debtor opts for the statutory minimum, it improves its position by $3500 ($5000 deficiency claim minus $3500 actual damages plus $2000 statutory damages).


391. \textit{See id.} § 9-513.

392. \textit{See id.} § 9-616.
a party for whose benefit the duty exists to recover $500 for each breach of that duty.\textsuperscript{393} This $500 is a supplement to, not in lieu of, any other damages awarded under revised section 9-625\textsuperscript{394} and is not reduced or eliminated if, as a result of the breach, a deficiency claim is reduced or eliminated.\textsuperscript{395}

**REVISED SECTION 9-626: ACTION IN WHICH DEFICIENCY OR SURPLUS IS AN ISSUE**

Whether intentionally or through oversight, a secured party may dispose of the collateral in a commercially unreasonable manner, fail to send a disposition notice to a debtor, or otherwise breach one of its statutory duties. Current Article 9 does not expressly state the effect that noncompliance has on a secured party’s ability to pursue a deficiency claim.\textsuperscript{396} As a result, three judicial responses have emerged: (i) a secured party’s noncompliance absolutely bars recovery of a deficiency claim, (ii) a secured party’s noncompliance creates a rebuttable presumption that the value of the collateral equals the amount of unpaid debt, effectively negating a deficiency claim absent contrary proof by the secured party that a deficiency would remain even if the secured party had complied with its duties,\textsuperscript{397} and (iii) a secured party’s noncompliance permits the aggrieved party to recover damages under section 9-507(1) that can be applied against the secured party’s deficiency claim. A legion of cases and articles have analyzed the various approaches, lauding the merits and criticizing the defects of each.\textsuperscript{398} As one can readily surmise, the existing law on this issue is anything but consistent.

\textsuperscript{393} See id. § 9-625(e).
\textsuperscript{394} See id. ("In addition to any damages recoverable under subsection (b) . . . . ").
\textsuperscript{395} See id. § 9-625(d) (limiting recovery "under subsection (b)" but not other provisions).
\textsuperscript{396} Professor Gilmore noted that the effect of a secured party’s noncompliance on the debtor’s continuing liability for a deficiency "seems to have escaped the conscious attention of the Article 9 draftsmen." 2 GILMORE, supra note 9, § 44.9.4, at 1264.
The PEB Study Group acknowledged the present nonuniformity and recommended adoption of the rebuttable presumption rule. The drafting committee accepted that recommendation. Revised section 9-626 states, in relevant part, that if a secured party fails to comply with the default provisions pertaining to collection, enforcement, disposition, or acceptance, then the liability for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of: (A) the proceeds of the collection, enforcement, disposition, or acceptance; or (B) the amount of proceeds that would have been realized if the secured party had complied with the relevant provisions.

The decision to adopt the rebuttable presumption rule should not come as a surprise, as it is the law in the majority of states. The rebuttable presumption rule also represents a fair compromise of the two other positions, both of which suffer from serious flaws. The absolute bar rule often renders a punitive result that bears no relationship to the actual harm caused by the noncompliance and also provides the defaulting debtor with


399. See PEB Study Group Report, supra note 12, at 199-201.

400. The rights and duties under revised § 9-626 cannot be waived or varied. See U.C.C. § 9-602(13).

401. Id. § 9-626(a)(3). The amount of proceeds that would have been realized in the absence of the secured party's noncompliance "is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum." Id. § 9-626(a)(4).

If the secured party has failed to comply with a provision not pertaining to "collection, enforcement, disposition, or acceptance" (e.g., repossessing a motor vehicle prior to default), then revised § 9-626 does not apply. Instead, the secured party is liable for damages under revised § 9-625. See id. § 9-626 cmt. 2.

a windfall. And while the setoff rule strives to measure the actual harm triggered by the creditor's noncompliance, it places the burden of proof not on the creditor, but on a party that may have neither the financial resources nor the access to information necessary to pursue its remedy.

403. See Aronowitz, supra note 398, at 377 ("The absolute bar approach may frequently be 'harsh and punitive' because it is not premised on the debtor's actual loss caused by the creditor's noncompliance."); Formanek, supra note 398, at 176 (criticizing the absolute bar rule for "inflicting direct harm on the secured party and awarding an unjustified benefit to the debtor"); Foss, supra note 398, at 238-39 ("Especially when the debtor is not damaged by the secured party's noncompliance or is damaged less than the amount of the deficiency, it is argued that the absolute bar approach will result in a windfall to the debtor and a penalty to the secured party."); Heiser & Flemma, supra note 34, at 491 (criticizing the rule for allowing a debtor "to escape a valid obligation on the basis of a harmless infraction" and encouraging a debtor "to look for technical violations of the law . . . where the alleged infraction had no adverse impact on the debtor whatsoever"); Lloyd, supra note 156, at 701 (contending that the absolute bar rule "encourages the waste of resources," is "unjust," and "results in higher deficiencies for most debtors while giving an undeserved windfall to a lucky few"); Mancino, supra note 398, at 662 ("On the negative side, denial of any deficiency may give a 'windfall' to the debtor."); Robert S. Minetz, May a "Wrongdoer" Recover a Deficiency Judgment, or Is Section 9-507(1) a Debtor's Exclusive Remedy?, 6 UCC L. J. 344, 363 (1974) (concluding that the absolute bar rule "may punish a secured party guilty of only a technical harmless error and unjustly reward certain debtors"); Page, supra note 398, at 553 (contending that the absolute bar rule "is a harsh, punitive, and unwarranted measure"); Rowe, supra note 398, at 192 (observing the "penalizing effect of the absolute bar rule when the debtor's damages do not equal or exceed the amount of the deficiency"); Sigman, supra note 312, at 631 (describing the absolute bar rule as "arbitrary, unfair and wasteful"); Weinberg, supra note 398, at 392 (concluding that "the absolute bar rule often arbitrarily deprives creditors of the deficiency"); see also Community Church of N.Y. v. Del Monte, Inc., 415 F.2d 227, 237-38 (9th Cir. 1969) (affirming application of absolute bar rule to deny deficiency of $1,303,827.78 to secured party that failed to send disposition notice to guarantor-debtor); In re Excello Press, Inc., 890 F.2d 896, 904 (7th Cir. 1989) (observing that the absolute bar rule "produces a penalty out of line with the gravity of the omission"); Siemens Credit Corp. v. Marvik Colour, Inc., 859 F. Supp. 686, 692 (S.D.N.Y. 1994) ("The absolute bar rule is disproportionately harsh to the creditor because it deprives the creditor of money to which it is entitled, often as punishment for a relatively minor oversight. . . . An absolute bar can result also in a windfall for the debtor, who is relieved of the obligation to pay a legitimate debt."); Bank of Chapmanville v. Workman, 406 S.E.2d 58, 64 (W. Va. 1991) (describing the absolute bar rule as "a judge-made punitive provision" that imposes a penalty in the amount that "bears no relation to the degree of commercial unreasonableness of the secured creditor's conduct, but depends solely upon the amount of the deficiency").

404. See Aronowitz, supra note 398, at 381 (observing that the setoff approach penalizes the debtor for the creditor's misbehavior by placing on the debtor "the very onerous task of proving the debtor's actual loss, which may be impossible to perform"); Lloyd, supra note 156, at 723 (noting that "the setoff rule gives the secured party an unfair advantage" because "[i]f the facts necessary to prove the debtor's damage claim are much more readily available to the secured party than they are to the debtor"); Page, supra note 398, at 553 (contending that the setoff rule is "an inequitable solution because it requires the debtor to submit evidence proving a loss"); Rowe, supra note 398, at 198-99 (arguing that the setoff approach "is the least popular of the three approaches because the debtor bears the burden of proof"); Weinberg, supra note 398, at 394 ("The problem inherent in this approach is that it places the burden of proving damages upon the debtor, often the party least able to prove such damages."); see also Commercial Credit Equip. Corp. v. Parsons, 820 S.W.2d 315, 324 (Mo. 1991).
By permitting the noncomplying secured party to recover a deficiency only after proving that a commercially reasonable disposition would have generated proceeds in an amount less than the unpaid debt, the rebuttable presumption rule balances the interests of both parties without penalizing either.\(^4\)

Another issue not expressly addressed by current Article 9 concerns the allocation of the burdens of pleading and proving compliance with the statutory requirements associated with collecting, enforcing, disposing of, or accepting collateral. In the absence of a roadmap, courts have traveled different paths. Some require the secured party to plead and prove compliance,\(^4\) others require the debtor to raise an issue in its pleadings as a counterclaim or a defense before the secured party is required to prove compliance,\(^4\) and a few treat noncompliance as an affirmative defense.\(^4\)

Revised Article 9 provides clarity on the burden of proof.

Under revised section 9-626, a secured party need not prove compliance unless a debtor or a secondary obligor places the secured party’s compliance in issue.\(^4\) If the creditor’s compliance is placed in issue, then the secured party bears the burden of establishing its compliance.\(^4\) If the secured party disposed of the collateral to itself, a person related to itself, or a secondary obligor, then a debtor or an obligor wishing to contest the

CT. App. 1991) ("The impediment of this [setoff] rule is that the burden to prove damages rests on the debtor."); Bank of Chapmanville, 406 S.E.2d at 64 ("The main problem with this [setoff] rule is that the debtor has the burden of proving his losses under U.C.C. § 9-507, and will usually have a hard time proving that the fair market value was higher than what the collateral actually sold for at the repossession sale.").

But the rebuttable presumption rule is not without its critics. See, e.g., Clark, supra note 297, at 320 (describing the presumption as "highly fictional"); Comment, Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the UCC, 44 U. COLO. L. REV. 221, 232 (1972) (observing that "there seems to be no basis under the language of the Code for placing the burden on the creditor to prove [the fair market value of the collateral]"); see also Wilmington Trust Co. v. Conner, 415 A.2d 773, 779-80 (Del. 1980) (rejecting the rebuttable presumption rule and adopting the absolute bar rule after noting the "minimal" burdens placed on the creditor and the "very onerous" results that noncompliance may place on the debtor); Randolph v. Franklin Inv. Co., 398 A.2d 340, 347-48 (D.C. 1979) (rejecting the rebuttable presumption rule and adopting the absolute bar rule after noting "the substantial prejudice to debtors in the absence of notice of resale, especially when compared to the ease with which any creditor can comply with the notice requirements"); Tanenbaum v. Econs. Lab., Inc., 628 S.W.2d 769, 772 (Tex. 1992) (contending that the rebuttable presumption rule can "rob the debtor" of "express protections the Code provides"); cf Zubrow, supra note 87, at 529 ("Ordinarily, in tort or contract cases alleging a similar failure to perform a duty of care, the burden of proof is placed on the injured party to establish the violation of duty and the resulting loss sustained.").


See id. at 174-75 n.5 (citing cases).

See id. at 175 n.6 (citing cases).


See id. § 9-626(a)(2).
propriety of such a sale has the burden of establishing that the amount of proceeds yielded at the actual disposition is significantly below the range of prices that a proper disposition to a party outside those three categories would have yielded.\textsuperscript{411}

This allocation of proof is reasonable, although not free from debate. The secured party’s compliance may not be disputed in a deficiency suit. To require proof of compliance in such a case would be, as one court observed, “an unreasonable burden on the judicial process.”\textsuperscript{412} Revised section 9-626 avoids a waste of judicial resources by requiring a secured party to prove that it has satisfied its statutory obligations only when a debtor or a secondary obligor challenges the secured party’s conduct.\textsuperscript{413}

But once the creditor’s compliance is challenged, the appropriateness of placing the burden of proof on the creditor, rather than the party challenging the compliance, is debatable. Some may argue that revised section 9-626 departs from established legal principles that place the burden of proof on the injured party, not the wrongdoer.\textsuperscript{414} If a debtor or a secondary obligor alleges that the secured party has failed to satisfy its obligations, and that allegation is true, then the challenger receives a benefit (no deficiency) through the statutory presumption. Why not place the burden of proving noncompliance on the party that benefits from the truth of its allegation?\textsuperscript{415} There are two likely responses. First, a creditor’s noncompliance should not go unpunished; the law should provide the creditor with an incentive to satisfy its statutory obligations.\textsuperscript{416} Revised section 9-

\textsuperscript{411}. See \textit{id.} \S 9-626(a)(5). The reason for placing the burden of proving low proceeds on the objecting party, rather than the secured party, is to discourage price challenges every time the collateral is disposed to one of the suspect parties. See \textit{id.} \S 9-626 cmt. 5.

\textsuperscript{412}. See \textit{Greathouse}, 851 S.W.2d at 176.

\textsuperscript{413}. See U.C.C. 9-626(a)(1). This will change the law in jurisdictions that presently require a secured party to prove compliance if its pleadings are specific, rather than general. Texas is such a jurisdiction. See \textit{Greathouse}, 851 S.W.2d at 77.

\textsuperscript{414}. See \textit{Restatement (Second) of Contracts} \S 360 cmt. b (1981); W. Page Keeton \textit{et al.}, \textit{Froster and Keeton on the Law of Torts} \S 30, at 165 (5th ed. 1984); 2 \textit{McCormick on Evidence} \S 337, at 427 (4th ed. 1992) (“In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well.”); Zubrow, \textit{supra} note 87, at 529.

\textsuperscript{415}. See Michael P. Donaldson, \textit{The Commercially Reasonable Disposition of Collateral Under Article 9 of the UCC: The Question of the Burden of Proof}, 20 UCC L.J. 307, 325 (1988) (proposing that whichever party benefits from the truth of a proposition of fact should bear the burden of proof as to that proposition); see also \textit{Gilmore, supra} note 9, \S 44.5, at 1235 (“Allegations of fraud or of failure to exercise a required degree of diligence are easily made; the burden of bringing forward convincing proof should be on the party who makes the allegations.”).

626 creates that incentive by requiring the creditor to prove its compliance when challenged by a debtor or a secondary obligor. Second, evidence of compliance is more accessible to the secured party than others; therefore, the burden of proof should be placed on the secured party. To each response is a plausible reply. The rebuttable presumption (which becomes relevant only after the secured party's noncompliance has been established) provides a secured party with an adequate incentive to comply with its statutory obligations through the denial of a deficiency absent proof by the secured party that rebuts the presumption. Therefore, the creditor's noncompliance does not necessarily go unpunished. Additionally, while the secured party may have better access to some evidence (e.g., whether, and to whom, a disposition notice was sent and its contents), other evidence may be easier for a debtor or a secondary obligor to access, especially when the secured party did not sell the collateral to the debtor.

And so the arguments go, back and forth, like tennis balls at Wimbledon. Revised section 9-626 brings the argument to a close by placing the burden of proof on the secured party. Mindful of the statutory allocation, a creditor should anticipate the possibility that its conduct will be questioned and, as a result, carefully monitor and document its post-default behavior with a view towards litigation.

The effect of a secured party's noncompliance on its ability to recover a deficiency in a consumer-goods transaction was the subject of much thought during the drafting process. An early draft proposed a modified absolute bar rule that permitted a noncomplying creditor to recover only that part of its deficiency claim that exceeded a statutory (but undetermined) dollar amount. The same draft also either mandated or allowed a court to award reasonable attorneys' fees and the costs of the action to a consumer debtor or consumer obligor that prevailed on the issue of noncompliance. A subsequent draft proposed two alternatives if the

417. See Aronowitz, supra note 398, at 371; Dalton, supra note 398, at 834; Foss, supra note 398, at 246; see also Greathouse, 851 S.W.2d at 176.
418. See Zubrow, supra note 87, at 529.
420. The PEB Study Group invited discussion of this issue through a "teaser" recommendation. See PEB Study Group Report, supra note 12, at 201 ("The Drafting Committee should consider defining one or more special classes of transactions to which the 'absolute bar' rule would be applied (e.g., those in which the collateral is consumer goods or those in which the secured debt is less than a specified amount). . . . The Committee reached no consensus on the appropriate scope of this special class.").
421. See U.C.C. § 9-507(c)(2)(i) & cmt. 4 (Draft July 28-Aug. 4, 1995). The proposed rule only applied if no other collateral remained to secure the obligation. See id. The same draft barred a deficiency claim, even if the secured party satisfied all of its statutory obligations, if the secured party took possession of collateral consisting of consumer goods and the secured debt did not exceed a statutory (but undetermined) dollar amount at the time of default. See id. § 9-504A.
422. See id. § 9-507(h).
secured party failed to comply with the relevant statutes. Under the first alternative, the absolute bar rule would apply in consumer secured transactions (and the rebuttable presumption rule would apply in all other transactions). Under the second alternative, the rebuttable presumption rule would apply in all transactions, including consumer secured transactions. The same draft retained the provision mandating or allowing a court to award reasonable attorneys’ fees and the costs of the action to a consumer debtor or consumer obligor that prevailed on the issue of non-compliance. As with other consumer-oriented provisions, the first alternative (favoring consumers through adoption of the absolute bar rule), together with the provision permitting consumers to recover legal fees and expenses, was deleted near the end of the drafting process as part of the “consumer compromise.” Ultimately, a decision was made to exclude consumer transactions from the coverage of revised section 9-626.

So which rule applies in consumer transactions? The absolute bar rule? The rebuttable presumption rule? The setoff rule? And who bears the burden of pleading and proof on compliance issues in consumer transactions? The answers (or lack thereof) are found in subsection (b), which states:

The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

Whether the rules of revised section 9-626 should apply to consumer transactions, whether a different set of rules applicable to consumer transactions should have been drafted, or whether a court should apply, or depart from, the rules of revised section 9-626 in consumer transactions are all questions worthy of debate to a degree greater than the confines

423. See U.C.C. § 9-625 (Alternative A) (Draft Oct. 1996). Under Alternative A, the absolute bar rule would apply in a consumer secured transaction only if no other collateral remained to secure the obligation. See id. If other collateral remained, the secured party’s sole recourse would be to that collateral, and a consumer obligor would have no personal liability for any deficiency. See id.
424. See id. § 9-625 (Alternative B).
425. See id. § 9-628.
426. See id. § 9-625 (deleting Alternative A); id. § 9-628 (deleting provision); see also supra note 168 (discussing “consumer compromise”).
427. See U.C.C. § 9-626(a) (1998) (stating that the rules apply “[i]n an action arising from a transaction, other than a consumer transaction”) (emphasis added).
428. Id. § 9-626(b) (emphasis added); see id. § 9-102(a)(26) (defining “consumer transaction”); Rapson, supra note 30, at 57-59 (discussing drafting evolution of revised § 9-626(b)).
Suffice it to say that nonuniformity is a foregone conclusion. That may be a not-so-small (but nevertheless acceptable) price to pay, if the inclusion of rules governing deficiency claims in consumer transactions would delay enactment of revised Article 9 by state legislatures.

**REVISED SECTION 9-627: DETERMINATION OF WHETHER CONDUCT WAS COMMERCIAL REASONABLE**

Current Article 9 does not define "commercially reasonable." Although the term "is a vague and fluctuating one, which cannot be meaningfully

429. Some authors already have fueled the debate. See, e.g., CLARK, supra note 9, ¶ 4.12[5][d], at 4-224 (suggesting that courts apply the absolute bar rule in cases involving consumer goods); Gail Hillebrand, *The Redrafting of UCC Article 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 208-11 (1994) (advocating an anti-deficiency rule for all consumer goods other than well-defined luxury goods); Lloyd, supra note 156, 701 n.33 (declining to take a position on whether the absolute bar rule should be retained in consumer cases but offering several reasons for its retention); James J. White, *UCC Proposals Concerning Consumer Transactions*, SC36 ALI-ABA 253, 256 (1997) ("What policy requires the rebuttable presumption rule for all commercial transactions but would allow states to adopt the absolute bar rule for consumer transactions?").

430. Even if revised Article 9 adopted a rule applicable to consumer transactions, some nonuniformity would likely result from the enactment of nonuniform amendments enacted by state legislatures unhappy with the rule selected by the Drafting Committee. Cf. Alvin C. Harrell, *Commentary: The Case for Nonuniformity in State Law*, 51 CONSUMER FIN. L.Q. REP. 294, 327 (1997) (suggesting that "it serves the interests of the uniform law process to steer clear of uniform rules for issues that are subject to widespread disagreement"); *Discussion, Uniform State Laws: A Discussion Focused on Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257, 269 (1997) (Julianna J. Zekan, panelist) (observing that "the paramount goal should be to improve the law, not to maintain perfect uniformity"); Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 727 (1998) (asserting that adding consumer protection provisions to the Code increases the risk of delayed enactment and nonuniformity); see also Richard A. Elbrecht, *The NCCUSL Should Abandon Its Search for Consensus and Address More Difficult and Controversial Issues Applying"Process" Concepts*, 28 LOY. L.A. L. REV. 147, 152 (1994) (contending that "NCCUSL is not serving the interests of either the business community or the consumers" when it "focus[es] on writing statutes that will have the consensus needed to guarantee their adoption in almost every state").

431. Cf. Julian B. McDonnell, *The Code Project Confronts Fundamental Dilemmas*, 26 LOY. L.A. L. REV. 683, 688 (1993) (observing that drafters "must produce a product that has a good chance of being sold to all of the state legislatures" if the goal of uniformity is to be advanced); Memorandum of Article 9 Drafting Committee, Consumer Issues Subcommittee (May 29, 1996), reprinted in Fred H. Miller, *UCC Proposals Concerning Consumer Transactions (Article 2 and 9)*, SC36 ALI-ABA 185, 201 (Dec. 11, 1997) ("A major goal in the revision process is maintenance of uniformity and quick acceptance of Revised Article 9 and the final decision regarding the extent of special consumer provisions in Article 9 must take into account enactability of the statute."); William J. Woodward Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511, 1522 (1997) (observing that "[c]onduct operates as the great leveling agent in the reform process").
described except in terms of particular fact situations,"\textsuperscript{432} a secured party can avoid the peril often associated with the term by sailing into one of several safe harbors in current section 9-507.\textsuperscript{433} Similar safety exists under revised Article 9 and is codified at section 9-627.\textsuperscript{434}

Under current section 9-507(2), the mere fact that a better price could have been achieved if the secured party had sold collateral at a different time or in a different method will not, by itself, establish that the secured party failed to sell the collateral in a commercially reasonable manner.\textsuperscript{435} Revised section 9-627 retains the same concept and expands it beyond just collateral sales to also include collateral acceptance, collateral collection, collateral disposition, and collateral enforcement.\textsuperscript{436} Rarely, if ever, will post-default activity yield maximum proceeds, making this safe harbor "necessary to prevent every disgruntled debtor from making a jury case by talking price."\textsuperscript{437} Although the rule suggests that the court should shine

\textsuperscript{432} See Gilmore, supra note 9, § 44.5, at 1234-35.


\textsuperscript{434} In addition to the protection afforded by revised § 9-627, a secured party is advised to take advantage of revised § 9-603(a), which permits parties to adopt standards defining "commercial reasonableness" if the standards are not manifestly unreasonable. See id. § 9-603(a) (1998).

\textsuperscript{435} See id. § 9-507(2) (1995); see also id. § 9-504(3) (requiring all aspects of a collateral disposition to be commercially reasonable); see also FDIC v. Lanier, 926 F.2d 462, 467 (5th Cir. 1991) (refusing to infer commercial unreasonableness of private sale that yielded $100,000—an amount $400,000 less than the distributor's cost and approximately $80,000-$150,000 less than an independent distributor alleged he was willing to pay—absent proof of "procedural irregularities, allegations of bad faith, or other reasons to explain the allegedly low price"); Leasing Serv. Corp. v. Diamond Timber, Inc., 559 F. Supp. 972, 979 (S.D.N.Y. 1983) ("Commercial reasonableness of a sale depends on the procedures employed in the sale, not on the proceeds it generates."); In re Marshall, 219 B.R. 687, 690 (Bankr. M.D.N.C. 1997) (ruling that foreclosure sale of motor home for $2650, a price much less than the fair market value of $5500 estimated by the creditor's expert, did not make the sale commercially unreasonable); In re Whatley, 126 B.R. 231, 236 (Bankr. N.D. Miss. 1991) (holding creditor's foreclosure sale of collateral to itself for $25,000 was not rendered commercially unreasonable merely because creditor subsequently sold same collateral at auction for $39,748.29); Daniel v. Ford Motor Credit Co., 612 So. 2d 483, 485 ( Ala. Civ. App. 1992) (declining to rule that dealer's wholesale auction was commercially unreasonable solely because vehicle sold for $3500, instead of $5775 as suggested by national appraisal guidebook); Commercial Credit Equip. Corp. v. Parsons, 820 S.W.2d 315, 322 (Mo. Ct. App. 1991) (noting the disparity between the $6600 sales price and the $27,000 value ascribed to collateral by expert "is a factor important, but not decisive, to commercial reasonableness").

\textsuperscript{436} See U.C.C. § 9-627(a) (1998); see also id. § 9-607(c) (obligating the secured party to proceed in a commercially reasonable manner in its collection and enforcement efforts); id. § 9-608(a)(3) (requiring a secured party to apply noncash proceeds in a commercially reasonable manner); id. § 9-610(b) (stating every aspect of a collateral disposition must be commercially reasonable).

\textsuperscript{437} Nadler v. Baybank Merrimack Valley, N.A., 733 F.2d 182, 184 (1st Cir. 1984); see also Hall v. Owen County State Bank, 370 N.E.2d 918, 929 (Ind. Ct. App. 1977) (observing that the first sentence of U.C.C. § 9-507(2) recognizes that "only on rare occasions will a repossession sale bring the highest bids or the highest value for the collateral and therefore such
its spotlight on the procedures followed by the creditor, rather than the amount of proceeds yielded by those procedures, it would be imprudent for a creditor to believe that a court will completely ignore allegations of an inadequate price when reviewing the propriety of the creditor's actions.\footnote{438}

Under current section 9-507(2), a secured party can claim a conclusive presumption of commercial reasonableness by selling collateral of a type customarily sold on a recognized market either in the "usual manner" or at "the price current in such market at the time of his sale."\footnote{439} Revised section 9-627 retains the same rule.\footnote{440} The reason for this rule is not hard to glean. Market forces independent of the secured party's behavior dictate the price of collateral sold on a recognized market. If the creditor disposes of such collateral in its usual manner, then any disparity between the market price and the disposition price did not result from creditor mis-

\footnote{438} See, e.g., Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797, 801 (E.D. Pa. 1968) (noting that a discrepancy between a price received and a price obtainable, "if substantial, is relevant to a determination of whether a challenged sale is 'commercially reasonable' "); McMillian v. Bank South, N.A., 373 S.E.2d 61, 63 (Ga. Ct. App. 1988) (reducing deficiency judgment by $150, the difference between the $500 appraised value at repossession and the $350 yielded at the foreclosure sale); FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 953-55 (1981) (concluding that proof of discrepancy between original sale price of $85,200 and foreclosure sale price of $8393.14 was sufficient to deny creditor's motion for summary judgment even though no issues existed on adequacy of notice or sales procedures); Meadows, supra note 77, at 2446-47 ("While the Code does not require the price to be maximized, the creditor is expected to make choices regarding the conduct of the sale with the expectation that they will result in a fair price.") (footnotes omitted); Miller, supra note 431, at 224-25 (contending that if evidence suggests that the price obtained by the creditor is unreasonable in light of information concerning prices generally obtained for similar property, then the creditor should be required to introduce a commercially reasonable justification for carrying out the sale as it did and accepting the particular price); see also U.C.C. § 9-627 cmt. 2 ("While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.").

\footnote{439} U.C.C. § 9-507(2) (1995); see Zinnecker, supra note 2, at 1155-56 (discussing "recognized market"); see also Ford Motor Credit Co. v. DeValk Lincoln-Mercury, Inc., 600 F. Supp. 1547, 1551 (N.D. Ill. 1985) (finding sale of vehicle at dealers-only auction—a well-recognized market for automobiles in the Chicago metropolitan area—to be commercially reasonable); Washburn v. Union Nat'l Bank & Trust Co., 502 N.E.2d 739, 742-43 (Ill. App. Ct. 1986) (concluding creditor was entitled to summary judgment on issue of commercial reasonableness after selling Ginnie Mae bonds in usual manner on recognized market); Ford Motor Credit Co. v. Russell, 519 N.W.2d 465-66 (Minn. Ct. App. 1994) (affirming trial court's grant of creditor's motion for summary judgment on issue of commercial reasonableness where creditor sold vehicle at wholesale, dealers-only, auction—a "well-recognized market"); Ford Motor Credit Co. v. Potts, 548 N.E.2d 223, 228 (Ohio 1989) (finding public sale of repossessed vehicle was conducted "in the usual manner in any recognized market therefor").

conduct. And if the creditor disposes of collateral at its then-current market price, the commercial reasonableness of procedures followed by the creditor is irrelevant.

Current Article 9 states that the sale of collateral sold "in conformity with reasonable commercial practices among dealers in the type of property sold" is a commercially reasonable sale.\(^{441}\) The same principle continues under revised section 9-627.\(^{442}\) The premise is that, in the absence of a recognized market, the collateral will bring a fair (if not the best) price if it is disposed by reasonable commercial practices through normal channels,\(^{443}\) thus negating any need to review the commercial reasonableness of the secured party's actions. However, the reasonableness of a dealer's commercial practices remains subject to judicial scrutiny.\(^{444}\)

A disposition of collateral under current Article 9 that has been approved (i) in a judicial proceeding, (ii) by any bona fide creditors' committee, or (iii) by any representative of creditors is commercially reasonable\(^{445}\) (although the absence of such approval does not necessarily prevent

\(^{441}\) See id. § 9-507(2) (1995); see also Piper Acceptance Corp. v. Yarbrough, 702 F.2d 733, 735 (8th Cir. 1983) (holding creditor's sale of aircraft in accordance with industry practice was commercially reasonable); Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F. Supp. 813, 835 (E.D. Pa. 1993) (concluding sale of dealer's motor vehicle inventory at wholesale, dealers-only, auction was commercially reasonable in absence of any evidence that method utilized did not conform to reasonable commercial practices in auto dealership industry); Daniel v. Ford Motor Credit Co., 612 So. 2d 483, 484-85 (Ala. Civ. App. 1992) (concluding sale of vehicle at wholesale dealer auction—"the usual manner of sale of repossessed automobiles . . . in conformity with the reasonable commercial practices among dealers in repossessed automobiles"—was commercially reasonable); Davis v. Concord Commercial Corp., 434 S.E.2d 571, 576 (Ga. Ct. App. 1993) (affirming trial court's directed verdict on issue of commercial reasonableness in favor of creditor that retained expert dealer to dispose of used heavy equipment); McMillian, 373 S.E.2d at 62-63 (upholding trial court's conclusion that method and manner of vehicle sale was commercially reasonable where vehicle was sold at private auction by recognized automobile auction company according to standard practice and procedures followed weekly for eleven years); Carter v. First Fed. Savs. & Loan Ass'n, 347 S.E.2d 264, 268 (Ga. Ct. App. 1986) (concluding creditor's sale of repossessed motor home by same method and manner followed by similar creditors was commercially reasonable).


\(^{443}\) See id. § 9-507 cmt. 2 (1995); 2 GILMORE, supra note 9, § 44.5, at 1236.

\(^{444}\) See U.C.C. § 9-507 cmt. 2 ("Such a method of sale, fairly conducted, is recognized as commercially reasonable . . . .") (emphasis added).

a disposition from being commercially reasonable\textsuperscript{446}. Other than extending the conclusive presumption to dispositions approved by an assignee for the benefit of creditors, the law remains unchanged under revised Article 9.\textsuperscript{447} One court explained the purpose of this principle as follows:

\begin{quote}
[A] judicial approval of a disposition of collateral is given conclusive effect not because the tribunal necessarily scrutinized all aspects of the disposition and found them reasonable, but because the hearing allowed the parties to voice their objections and to comment upon the proposed transaction. If the parties have had an opportunity for thorough discussion of the sale's terms, it is appropriate to give the court's determination of reasonableness a conclusive effect.\textsuperscript{448}
\end{quote}

Although the time and expense necessary to qualify for the presumption may limit the frequency of its use, a secured party may overlook those impediments if the collateral is atypical or the monetary risks of failing to act in a commercially reasonable manner are great. Once the necessary approval has been obtained, the secured party should adhere to the pre-approved procedures; a departure may result in a loss of the presumption.\textsuperscript{449}

Noticeably absent from revised section 9-627 (and its predecessor) is a safe harbor for dispositions of collateral of a type that is the subject of widely distributed standard price quotations.\textsuperscript{450} The same reasons that justify a conclusive presumption of commercial reasonableness when collateral is disposed on a recognized market support enactment of a similar presumption when collateral subject to widely distributed standard price quotations is disposed. In many instances collateral subject to such quotations also is sold on a recognized market, so the need for an additional

\textsuperscript{446} See U.C.C. § 9-507(2) (1995).
\textsuperscript{447} See id. § 9-627(c), (d) (1998).
\textsuperscript{448} Bryant, 407 F. Supp. at 364; see also In re Zsa Zsa Ltd., 352 F. Supp. 665, 672 (S.D.N.Y. 1972).
\textsuperscript{449} See, e.g., Leasing Serv. Corp. v. Appalachian Pocohontas Coal Co. (In re Appalachian Pocahontas Coal Co.), 31 B.R. 579, 580-81 (S.D. W. Va. 1983) (concluding that even if bankruptcy court order was "judicial approval" under U.C.C. § 9-507(2), creditor that failed to comply with express terms and implied provisions of order could not invoke conclusive presumption that disposition was commercially reasonable). Cf Carlton Mfg., Inc. v. Bauer, 429 S.E.2d 329, 331 (Ga. Ct. App. 1993) (holding creditor could not invoke conclusive presumption as bankruptcy court order "merely authorized plaintiff to conduct a commercially reasonable sale; it did not declare the manner in which plaintiff ultimately conducted the sale to be commercially reasonable").
\textsuperscript{450} An explanation was requested in the Zinnecker Memorandum, \textit{supra} note 33, at 5.
safe harbor may not be as great as it seems. Nevertheless, the statutory references to both "recognized market" and "widely distributed standard price quotations" discourage any suggestion that collateral subject to the latter will always fall within the former. Therefore, an additional safe harbor would provide some benefit. The desired result could be accomplished if revised section 9-627(b) were revised in a manner that created a conclusive presumption of commercial reasonableness for any disposition of collateral "at the price current at the time of disposition of property subject to widely distributed standard price quotations."

**REVISED SECTION 9-628: NONLIABILITY AND LIMITATION ON LIABILITY OF SECURED PARTY; LIABILITY OF SECONDARY OBLIGOR**

Revised section 9-628 has no predecessor under current Article 9. Through its five provisions, revised section 9-628 limits a secured party’s liability for noncompliance in specific situations.

As noted earlier, a secured party owes no duty to a debtor or an obligor (or a secured party or a lienholder that has filed a financing statement against a debtor) unless the secured party knows (i) that the person is either a debtor or an obligor, (ii) the identity of the person, and (iii) how to communicate with the person. If a secured party owes no duty to a person in the absence of the requisite knowledge, then it seems only fair that the secured party’s acts or omissions should neither trigger liability to, nor reduce or eliminate any deficiency claim against, such a person. An exculpatory clause to that effect is codified in revised section 9-628.

Many of the duties created by the default provisions of revised Article 9 require a secured party to determine whether the transaction is a con-

451. A secured party disposing of such collateral also might avail itself of revised § 9-627(b)(3), as collateral subject to widely distributed standard price quotations is likely to be disposed by dealers.

452. *See, e.g.*, U.C.C. § 9-504(3) (1995) (excusing disposition notice if collateral is sold on recognized market but not excusing disposition notice if collateral is subject to widely distributed standard price quotations; also permitting secured party to buy at private sale if collateral is sold on recognized market or the subject of widely distributed standard price quotations); *id.* § 9-610(c)(2) (1998) (permitting secured party to purchase at private disposition if collateral is sold on recognized market or the subject of widely distributed standard price quotations); *id.* § 9-611(d) (excusing disposition notice if collateral is sold on recognized market but not excusing disposition notice if collateral is subject to widely distributed standard price quotations).


454. *See U.C.C.* § 9-628(a). A casual reading of subsections (a)(1) and (b) may prompt the reader to question whether any substantive difference exists between the two provisions. Subsection (a)(1) exculpates the secured party from liability for failing to comply with Article 9. Subsection (b) relieves the secured party from liability for breaching a duty arising under other law (e.g., suretyship or tort law) if that duty is imposed on the secured party in its capacity as such. Regrettably, this difference is not explained in revised § 9-628, but in revised § 9-605. *See id.* § 9-605 cmt. 2 (last sentence).
sumer-goods transaction or a consumer transaction or if the collateral includes consumer goods.\textsuperscript{455} A secured party may breach its duty only because its determination is erroneous. For example, a secured party may erroneously conclude that all collateral offered by an individual is a consumer good (whereas it may be something else, such as equipment or investment property) or any secured loan made to an individual creates a consumer-goods transaction or consumer transaction (when it may be a loan not incurred primarily for person, family, or household purposes). Revised section 9-628 relieves a secured party from liability to, and preserves its deficiency claim against, any person for any breach predicated on a reasonable (but erroneous) belief concerning the type of transaction or collateral.\textsuperscript{456} The protection is available to a secured party whose reasonable belief is based on its "reasonable reliance" on either "a debtor's representation concerning the purpose for which collateral was to be used, acquired, or held" or "an obligor's representation concerning the purpose for which a secured obligation was incurred."\textsuperscript{457} Accordingly, a secured party's standard loan documents should include representations concerning the use of collateral and the purpose of the debt. And the provisions of revised Article 9 should be applied as if the facts reasonably believed and reasonably relied upon by the secured party were true.\textsuperscript{458}

To provide the secured party with some incentive to comply with its statutory obligations, revised section 9-625(c) permits a debtor or a secondary obligor to recover minimum statutory damages in an amount equal to "not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price" when the collateral consists of consumer goods.\textsuperscript{459} Revised section 9-628 limits a secured party's liability for minimum statutory damages in two instances. First, minimum statutory damages cannot be awarded to punish a secured party that breaches its duty under revised

\textsuperscript{455} See, e.g., \textit{id.} § 9-611(c)(3) (requiring secured party to send disposition notice to parties other than the debtor and any secondary obligor only if collateral is other than consumer goods); \textit{id.} § 9-612(b) (indicating disposition notice sent after default and no less than ten days before disposition is timely; rule applies only if transaction is not consumer transaction); \textit{id.} § 9-613 (describing contents and form of disposition notice to be sent in transaction other than consumer-goods transaction); \textit{id.} § 9-614 (describing contents and form of disposition notice to be sent in consumer-goods transaction); \textit{id.} § 9-616(b) (obligating secured party to send written calculation of surplus or deficiency in consumer-goods transaction); \textit{id.} § 9-620(a)(3) (prohibiting secured party from accepting collateral in full or partial satisfaction of unpaid debt if collateral is consumer goods not in debtor's possession when debtor consents to acceptance); \textit{id.} § 9-620(e) (forcing secured party to dispose of consumer goods in its possession if significant payments have been made); \textit{id.} § 9-620(g) (prohibiting secured party from accepting collateral in partial satisfaction of unpaid debt in consumer transaction).

\textsuperscript{456} See \textit{id.} § 9-628(c).

\textsuperscript{457} See \textit{id.}

\textsuperscript{458} See \textit{id.} § 9-628 cmt. 2.

\textsuperscript{459} \textit{Id.} § 9-625(c)(2). This provision is discussed \textit{supra} notes 361-89 and accompanying text.
section 9-616 to timely send a written calculation of a surplus or deficiency to a debtor or a consumer obligor. However, the secured party remains liable for “damages in the amount of any loss” caused by its noncompliance and, in appropriate situations, may be assessed a $500 penalty.

Second, a secured party cannot be liable for the minimum statutory penalty “more than once with respect to any one secured obligation.”

For example, if a secured party fails to send a disposition notice to the debtor and a secondary obligor and then sells the collateral in a manner not commercially reasonable, it cannot be required to pay the minimum statutory penalty four times (two breaches, two parties). But can the secured party be forced to write two checks—one to the debtor and another to the secondary obligor? Probably not. (So who is entitled to the single check?) The language in the statute (“once with respect to any one secured obligation”) and the relevant comment (“Subsection (e) ensures that a secured party will incur statutory damages only once in connection with any one secured obligation”) suggests that a secured party is liable “once per transaction” rather than “once per person per transaction.” Furthermore, the phrase “not liable to any person” in the preceding subsection strongly implies that the drafting committee appreciated the difference in meaning between “once per transaction” and “once per person per transaction.” Nevertheless, that interpretation seems wrong, especially if a debtor and a secondary obligor can establish a violation unique to itself for which actual damages do not exceed the statutory penalty. To adequately compensate multiple parties that each suffer unique injuries, while also providing the secured party with an incentive to comply with its statutory duties, subsection (e) should be interpreted in a manner that obligates a secured party to pay the statutory penalty no more than “once per person per transaction” rather than “once per transaction.” And if the statutory language of revised section 9-628 and its accompa-

460. See U.C.C. § 9-628(d); see also id. § 9-625(c) (stating that minimum statutory damages may be awarded “[e]xcept as otherwise provided in Section 9-628”).
461. Id. § 9-625(b).
462. See id. § 9-625(e)(5), (6).
463. Id. § 9-628(e).
464. See id. § 9-611(c)(1), (2) (obligating a secured party to send a disposition notice to the debtor and any secondary obligor).
465. See id. § 9-610(b) (requiring all aspects of a disposition to be commercially reasonable).
466. This question was posed in the Zinnecker Memorandum, supra note 33, at 5.
467. To avoid answering that question, the secured party may wish to deposit the appropriate amount with the court and bring an interpleader action against all potential claimants.
468. U.C.C. § 9-628 cmt. 4.
469. See id. § 9-628(d).
470. For example, the secured party may breach the peace while repossessing a vehicle from the debtor (creating a cause of action under revised § 9-609 in favor of the debtor) and then may fail to send a disposition notice to the guarantor (creating a cause of action under revised § 9-611(c)(2) in favor of the guarantor).
nying comments discourage such an interpretation, legislatures may wish to consider the following non-uniform amendment (new language italicized): “(e) A secured party is not liable to any person under Section 9-625(c)(2) more than once with respect to any one secured obligation.”

At one time or another, the drafting committee considered two additional exculpatory provisions. One proposed provision relieved a secured party from liability for the minimum statutory penalty if the secured party established that its noncompliance resulted from an unintentional good-faith error. Another provision capped a secured party’s liability for the minimum statutory penalty in a class action or series of class actions arising out of the same noncompliance (e.g., its standard disposition notice sent to multiple parties in numerous transactions contains a seriously misleading error). Unfortunately for secured creditors, neither provision survived the final cut; both were deleted as part of the “consumer compromise.”

**CONCLUSION**

Professor Elizabeth Warren once wrote: “[d]efault is a distasteful idea. . . . Getting the money paid is a matter of course, or of honor, or—if it should come to that—of grubby technical steps.” Distasteful or not, defaults do occur. For that reason, secured parties, debtors, other obligors, and their respective counsel should be familiar with the revised default provisions (which often are “technical” and, in places, perhaps even “grubby”).

471. See id. § 9-627(d) (Draft Oct. 1996). The proposed provision read as follows (brackets in original):

(d) A secured party is not liable to any person under Section 9-624(c) if the secured party meets the burden of establishing that its failure to comply with this [part] [article] was not intentional and resulted from a good-faith error notwithstanding the secured party’s maintenance of procedures reasonably adapted to avoid the failure. [Examples of a good-faith error include clerical, calculation, computer malfunction and programing, and printing errors, except that an] [An] error of legal judgment concerning the secured party’s rights and duties under this [part] [article] is not a good faith error.

472. See U.C.C. § 9-627(e) (Draft Aug. 7, 1997). The proposed provision read as follows:

(e) The total recovery under Section 9-624(c) in a class action or a series of class actions arising out of the same noncompliance by the same secured party shall not be more than the lesser of $500,000 or one percent of the net worth of the secured party.

473. See id. § 9-627 (Draft Mar. 1998) (deleting the good-faith error defense to statutory damages and the limitation on recoveries in class actions); see also supra note 168 (discussing the “consumer compromise”).

Although the revised default provisions may not be embraced with unbridled enthusiasm by all interested parties in every post-default situation, the provisions do constitute a notable improvement in the law. The provisions specifically address many current concerns, provide detailed procedures that should provide clarity and reduce litigation, expand the post-default rights available to the secured party, and attempt to fairly balance the desires of foreclosing creditors and the interests of debtors and third-party claimants. Because the provisions are quite extensive and introduce several new terms (or utilize current, but redefined, terms), the significance of the improvement may best be appreciated by taking an exhaustive statutory journey. Hopefully this Article will serve as a welcome traveling companion.