REEVALUATING SECTION 9-504(2) OF THE UNIFORM COMMERCIAL CODE: DEFICIENCY ACTIONS AFTER COMMERCIALLY UNREASONABLE COLLATERAL SALES

Elaine P. Lariviere

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
COMMENT

REEVALUATING SECTION 9-504(2) OF THE
UNIFORM COMMERCIAL CODE: DEFICIENCY ACTIONS AFTER COMMERCIAL
UNREASONABLE COLLATERAL SALES

I. INTRODUCTION

A. The Factual Framework

The Conrad Publishing Company borrowed $225,000 from the Bank of Burleigh County, North Dakota, in March 1968. To secure repayment of the debt, the publishing company offered certain printing equipment and real property as collateral.¹ Seven years later, the company defaulted in its payments with approximately $105,000 still due. The Small Business Administration (SBA), assignee of Conrad's promissory note, immediately repossessed Conrad's printing equipment and real property. The value of the real property was uncontested and the proceeds of its sale reduced the outstanding debt to $80,000. A sale of the company's remaining assets was scheduled for one month later.²

The SBA did not advertise the foreclosure sale in trade journals or out-of-state newspapers, the most effective means of attracting buyers, since printing equipment is marketed on a regional or national level.³ The extent of the secured party's publicity efforts was to mail letters to seven printers, distribute six hundred handbills and print a single advertisement in Bismarck and Fargo, North Dakota, newspapers.⁴ Both the district court and the United States Court of Appeals for the Eighth Circuit held that this pub-

¹. This financing arrangement created a security interest in personal property to which Article 9 of the Uniform Commercial Code applies. U.C.C. § 9-102(1)(a) (1972). Since Conrad did not acquire the collateral with value given by the secured party, and did not give a security interest in the property to the bank to secure its price, a purchase money security interest was not created. U.C.C. § 9-107 (1972). Whether or not the security interest created was a purchase money security interest, the treatment of the collateral on default is the same. See notes 20-24 infra and accompanying text.
³. Id. at 954.
⁴. Id. at 951.
licity was inadequate. The effectiveness of the advertising was reduced even further because it was disseminated much too close to the time of sale and the "right people" were not present to buy. In addition, the equipment's value was uncertain because it had not been professionally appraised and the auctioneer hired to conduct the sale, being inexperienced, was unfamiliar with the value, use and operation of the printing machinery.

Net proceeds of the sale totalled only $16,200, while the publishing company owners estimated the actual value to be $165,000. When the $16,200 proceeds were applied against the $80,000 loan balance, a deficiency of $63,800 remained which the SBA sought to collect in a suit for a deficiency judgment. The debtors objected that the secured party should not be allowed to collect the entire deficiency because the latter's own ineptness in handling the sale had reduced the collateral's resale price.

The sequence of events in United States v. Conrad Publishing Co. is typical of many foreclosure sales. The debtor defaults, the creditor conducts a foreclosure sale which is in some manner not commercially reasonable; the collateral is sold for less than the amount owed by the debtor, and less than it is purportedly worth; and the secured party seeks to recover the deficiency remaining between the amount realized from the sale and the outstanding debt.

A creditor is required by the Uniform Commercial Code (U.C.C.) to be "commercially reasonable" in disposing of collateral.

5. Id. at 954.
6. To determine whether a sale was commercially reasonable, courts look to every aspect of the sale: Amount of advertising; normal commercial practices in disposing of particular collateral; length of time elapsing between repossession and resale; whether the collateral had deteriorated; the number of persons contacted concerning the sale; and the price obtained. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077, 1081 (1975).
8. Id. at 952.
9. Gross proceeds totalled approximately $22,500. Deduction of about $6,300 in expenses resulted in net proceeds of $16,200. Id.
10. The debtors estimated that the value of the equipment was $165,000. The secured party guessed that the value was $50,000. Id. at 951. At trial it was determined that the auction brought only 50% of the amount that could have been realized at a properly handled sale. On appeal, the United States Court of Appeals found no basis in the record for the trial court's finding and remanded for a determination of the loss caused by failure to comply with Article 9. Id. at 955.
11. 589 F.2d 949 (8th Cir. 1978).
a standard which is not defined in the U.C.C.\textsuperscript{14} Two recur­
ring types of commercial unreasonableness on the part of the sec­
cured party have emerged in secured transactions case law. The
first, as illustrated in Conrad,\textsuperscript{15} arises when the sale itself is con­
ducted in a way that casts doubt on whether the collateral’s maxi­
num price was realized.\textsuperscript{15} The other occurs when a sale of the
debtor’s collateral is executed by the secured party with no noti­
fication to the debtor. For example, in Security Trust Co. v. Thomas,\textsuperscript{16}
debtors arranged to buy a tractor by borrowing $25,000 from a bank to finance the purchase and by giving the bank a secu­
ritv interest in the tractor. After defaulting, the debtor delivered
his tractor to the dealer. Notice of sale was sent to the debtor, but
it was returned marked “incorrect address.” The sale was cancelled
because only one bid, considered too low, was received. Three
weeks later, the tractor was sold at a private sale for $4,000.\textsuperscript{17} In

\begin{quote}
Disposition of the collateral may be by public or private proceedings and
may be made by way of one or more contracts. Sale or other disposition may
be as a unit or in parcels and at any time and place and on any terms but ev­
e ry aspect of the disposition including the method, manner, time, place and
terms must be commercially reasonable. Unless collateral is perishable or
threatens to decline speedily in value or is of a type customarily sold on a
recognized market, reasonable notification of the time and place of any pub­
lic sale or reasonable notification of the time after which any private sale or
other intended disposition is to be made shall be sent by the secured party
to the debtor, if he has not signed after default a statement renouncing or
modifying his right to notification of sale. \ldots
\end{quote}

\textit{Id.}

\textsuperscript{14} Though “commercially reasonable” is not defined, some tests are set out in
U.C.C. § 9-507(2) (1972):
The fact that a better price could have been obtained by a sale at a different
time or in a different method from that selected by the secured party is not
of itself sufficient to establish that the sale was not made in a commercially
reasonable manner. If the secured party either sells the collateral in the
usual manner in any recognized market therefor or if he sells at the price
current in such market at the time of his sale or if he has otherwise sold in
conformity with reasonable commercial practices among dealers in the type
of property sold he has sold in a commercially reasonable manner. The prin­
ciples stated in the two preceding sentences with respect to sales also apply
as may be appropriate to other types of disposition. A disposition which has
been approved in any judicial proceeding or by any bona fide creditors’
committee or representative of creditors shall conclusively be deemed to be
commercially reasonable, but this sentence does not indicate that any such
approval must be obtained in any case nor does it indicate that any disposi­
tion not so approved is not commercially reasonable.

\textit{Id.}

\textsuperscript{15} See generally Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87
\textsuperscript{17} \textit{Id.} at 244, 399 N.Y.S.2d at 512.
order to maintain an action for a deficiency judgment, the secured party was required to prove that both notice and sale had been reasonable. Courts hold creditors to the standard of commercial reasonableness regardless of whether the facts involve the adequacy of notice prior to sale, or the reasonableness of the sale itself.

B. The Uniform Commercial Code

Article 9 of the U.C.C. regulates secured transactions. The Code provides that upon a debtor’s default, the secured party may repossess the collateral securing the debt and sell it at a public or private sale, every aspect of which must be commercially reasonable. After the sale, the secured party is liable to the debtor for any amount realized in excess of the debt, and the debtor is likewise liable to the secured party for any “deficiency.” When the Conrad Publishing Company defaulted on its loan payments, the secured party’s repossession and subsequent resale of its printing equipment was sanctioned by the U.C.C. Had the sale been commercially reasonable, Conrad would have been liable for the full $63,800 deficiency remaining between the resale price and the debt.

Nowhere in the Code is “deficiency” defined, though its meaning is crucial to determination of the parties’ rights and liabilities on default and resale of the debtor’s collateral. Two possible methods of measuring a deficiency are: (1) Computing the difference between the outstanding debt and the collateral’s resale price at the time of the foreclosure sale; or (2) computing the difference

18. Id. at 243, 247, 399 N.Y.S.2d at 511, 514.
20. “Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . .” U.C.C. § 9-503 (1972).
21. Id. § 9-504(3).
22. Id. Article 9 does not give a specific definition of what constitutes a commercially reasonable sale. For factors considered by the courts, see generally note 6, supra.
23. U.C.C. § 9-504(2) (1972): If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.
24. 589 F.2d at 949.
between the outstanding debt and the collateral's *fair market value* at the time of the foreclosure sale. When the resale price is the result of a commercially reasonable transaction, the secured party could do nothing more to get a higher price for the collateral, and resale price represents fair market value. Following a commercially unreasonable transaction, however, defining "deficiency" as the difference between the outstanding debt and the collateral's resale price produces a harsh result. That definition of "deficiency" allows the secured party to benefit from his own unlawful behavior by forcing the debtor to absorb the cost of the creditor's errors at the foreclosure sale.

As will be discussed in part II(C),25 "deficiency" should be defined consistently as the difference between the outstanding debt and the fair market value of the collateral at the time of the foreclosure sale. In a good faith, reasonable resale of collateral, resale price should be the same as the fair market value.26 If the sale is unreasonable, resale price is presumed to be different from fair market value, and therefore resale price should not be used to measure the secured party's recoverable deficiency.

When the secured party does not comply with the foreclosure sale requirements of Article 9, it is not clear to what extent the debtor is liable for the amounts claimed by the secured party. No relationship can be drawn within Article 9 between the effect of an unreasonable sale and the debtor's liability for a deficiency.27 Some courts, referring to prior law, require strict compliance with section 9-504(3) as a condition precedent to the bringing of a deficiency action.28 Others, to resolve the uncertainty caused by the U.C.C.'s inexplicit definition of deficiency, have focused on the relationship between section 9-504(3), requiring a commercially reasonable disposition, and section 9-507(1),

---

25. See text accompanying notes 172 & 173 infra.

26. Two authorities believe that sales of similar property are evidence of fair market value, inferring that resale price of collateral is evidence of fair market value. "In case of ordinary personal property where market value is sought . . . the most obvious resort [to determine value] is to evidence of what other similar property . . . currently sold for on the market . . ." C. McCORMICK, DAMAGES 177 (1935). Even where there is no market for goods, "there may be isolated or individually negotiated sales of similar property that will furnish some evidence of value." D. DOBBS, LAW OF REMEDIES § 5.12, at 391 (1973).

27. "The relationship between the debtor's liability for a deficiency and the secured party's liability for noncompliance with the required default procedures seems to have escaped the conscious attention of the Article 9 draftsmen . . ." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1263-64 (1965).

28. See text accompanying notes 54-58 infra.
allowing the debtor to recover "any loss" due to creditor noncompliance with Article 9. These courts have sought in section 9-507(1) a defense to a secured party's deficiency action when an unreasonable sale already has been conducted. 29 Courts have grappled with the question of whether the injured debtor must allege and prove his own separate action for damages, or whether there is some mechanism within the Code ameliorating the debtor's plight when he has been wronged by an unreasonable disposition of his collateral. The results have been inconsistent. Some courts have found that section 9-507(1) is unrelated to a deficiency action, 30 others have used this section to deny the secured party's deficiency judgment completely, 31 and still others find it to be the source of the debtor's exclusive remedy, an action to recover actual damages. 32

This comment explains that the courts' inquiry into the relationship between sections 9-504(3) and 9-507(1) has been misdirected, thereby precluding study of an alternative solution to the problem of how to treat a deficiency action after a commercially unreasonable sale of collateral. The effect of commercial unreasonableness on the debtor's obligation to pay a deficiency is better revealed in the relationship between sections 9-504(3) and 9-504(2). Failure to comply with section 9-504(3)'s mandate of commercial reasonableness should not necessarily alter the debtor's method of recovering losses via section 9-507(1). Rather, the definition of "deficiency" proposed, that is, the difference between fair market value and debt, not resale price and debt, should be incorporated into section 9-504(2), and the burden of proof as to that fair market value should be put on the secured party, not the debtor.

U.C.C. section 9-507(1) provides the debtor with the right to recover "any loss" caused by the secured party's failure to comply with all of the default provisions of Article 9. 33 When the secured

32. See note 51 infra.
33. U.C.C. § 9-507(1) (1972):
   If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a
party's debt is satisfied by the proceeds of a collateral sale and he is not seeking to collect a deficiency, the secured party can still be sued by the debtor under section 9-507(1) for any action not in compliance with the Code that caused loss to the debtor. Under section 9-507(1), the debtor must prove his own damages.34

The secured party may be held liable35 for damages suffered by the debtor for personal injury as a result of forceful repossession,36 failure to perform duties properly as pledgee,37 failure to make collection from an account debtor in a commercially reasonable manner,38 any impropriety in connection with an attempt to retain the collateral in satisfaction of the debt39 or any action prejudicial to the debtor's right of redemption.40

When the debtor seeks damages affirmatively for losses caused by the secured party stemming from reasons other than a deficiency situation, the debtor has the burden of proof.41 For example, if the secured party injures the debtor's property or person in repossessioning the collateral, the debtor must affirmatively prove that damage. Section 9-507(1) has also been interpreted to require the debtor to carry his own burden of proof of damages when he asserts unreasonableness as a defense to a deficiency action. The secured party is, however, allowed to recover a deficiency regardless of his unreasonable disposition, and hence, regardless of the collateral's actual value. This unfairly burdens the debtor with the difficult task of proving the market value of used collateral for which there is no established market42 in order for him to recover damages after he has been wronged by the secured party. In the case of a commercially unreasonable sale, the debtor, by being forced to

right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.

Id.

34. Commercial Credit Corp. v. Wollgast, 84 Wash. 2d 1004, __, 521 P.2d 1191, 1196 (1974) (rule under § 9-507(1) is that burden of proof of damages is on party asserting them).


38. Id.

39. Id.

40. Id.

41. For situations in which the debtor may bring a § 9-507(1) action against the secured party, and must carry his own burden of proof, see text accompanying note 35 supra.

42. Valuation of goods for which there is no established market, such as used goods, like repossessed collateral, is difficult. See generally D. Dobbs, Law of Remedies § 5.12, at 390-92 (1973).
prove the price that the collateral should have sold for, must prove both the unfair gain of the secured party as well as his own loss. This unfair result could be avoided by shifting the burden of proof as to market value to the secured party in the wake of an unreasonable disposition.

Because the consequences of commercial unreasonableness on the recovery of deficiency judgments are not specified in the U.C.C., courts have taken great liberties in fashioning remedies when a creditor pursues a deficiency judgment after an unreasonable foreclosure sale. Courts have reached inconsistent results when the secured party himself has been commercially unreasonable in conducting the collateral sale. Judicial response to “the misbehaving creditor . . . spans the spectrum of possible results” with treatment ranging from completely denying a deficiency judgment to allowing the debtor whatever setoff he can prove in a section 9-507(1) action. Whether the Code drafters intended to leave this issue open for flexibility, or neglected to address it, or thought the U.C.C. provisions were clear, is hotly debated among courts, commentators and legal scholars.

II. APPROACHES TO DEFICIENCY ACTIONS FOLLOWING COMMERCIALLY UNREASONABLE SALES

Three major lines of authority have evolved in the controversy surrounding the granting of deficiency judgments when there has

43. Not only do jurisdictions differ, but state courts themselves are in conflict. For example, Abbott Motors, Inc. v. Ralston, 28 Mass. App. Dec. 35, reprinted in 5 U.C.C. REP. SERV. 788 (1964), holding that the debtor’s remedy was solely a § 9-507(1) action for damages, was ignored by One Twenty Credit Union v. Darcy, 40 Mass. App. Dec. 64, reprinted in 5 U.C.C. REP. SERV. 792 (1968), which completely denied the secured party a deficiency judgment.


46. See note 51 infra.


48. G. GILMORE, supra note 27.

49. The classic contrast, illustrating the division of opinion, is that two eminent authorities disagree. Compare Hogan, Pitfalls in Default Procedure, 86 BANKING L.J. 965 (1969), reprinted in 2 U.C.C. L.J. 244 (1970) (§ 9-507(1) is the debtor’s exclusive remedy) with G. GILMORE, supra note 27 (complete compliance with Part Five of Article 9 is a condition precedent to recovery of a deficiency).
been a commercially unreasonable sale. At one extreme is the debtor-oriented approach that completely denies the creditor any deficiency judgment. The other extreme allows the creditor to recoup the shortage between the resale price and the remaining debt, but leaves the debtor to prove his own damages, including those incurred because of the secured party's noncompliance with the Code, by way of counterclaim or separate action. This approach uses section 9-507(1) as the exclusive remedy.

A novel approach which some courts have adopted, moderating between these two, arises in a deficiency action by finding that the secured party's disposition of the collateral was unreasonable. A rebuttable presumption arises that the sale price of the collateral is

---


equal to the outstanding debt unless the creditor can prove the collateral’s fair market value at the time of sale. If the fair market value is established by the creditor, he can collect a deficiency. That deficiency would be determined by the difference between the fair market value, which may or may not be the same as the resale price, and the outstanding debt. This method excludes from the deficiency whatever was lost because of the secured party’s improper procedure in disposing of the collateral. No deficiency will be allowed if he cannot sustain his burden of proof as to what the collateral was really worth when sold. The merits and deficiencies of each approach warrant examination.


53. In other words, the newly established fair market value, not the sale price, is offset against the deficiency still owed by the debtor.
A. Complete Denial of a Deficiency Judgment—Pro and Con

The apparent majority holds that failure to comply with section 9-504(3) bars recovery of a deficiency judgment by the secured party. Among the justifications for this position is that the predecessor to Article 9, the Uniform Conditional Sales Act (U.C.S.A.), was consistently interpreted to exclude recovery of deficiency judgments unless there had been “literal compliance” with U.C.S.A. resale provisions. The reasoning continues that, had the Article 9 drafters intended to overthrow the old statute and its judicial interpretation, they “surely would have manifested that intent in clear and unambiguous language.” Since the U.C.C. is silent about this point, then arguably, the U.C.C. implicitly adopted the prior practices of the U.C.S.A.

The most emphatic and prevalent reason propounded by the courts for refusing to grant the secured party a deficiency judgment is that the creditor, by failing to notify the debtor of the time and place of the foreclosure sale, has deprived the debtor of his “right to redeem” the collateral guaranteed by section 9-506. To redeem the collateral, the debtor must repay in full the outstanding sum owed to the secured party. Even if the debtor does not have the money to redeem, he should at least have an opportunity to protect his interests by finding prospective buyers, or by other means. A few cases even say that section 9-504(3) was passed to protect the debtor, especially his right to redeem, and

---

54. But see Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 455, 535 P.2d 1077, 1081 (1975) (refusing to follow the “majority”).
55. The U.C.S.A. was superseded by the U.C.C.
56. C. Gilmore, supra note 27, at 1263.
58. In re Carter, 511 F.2d 1203, 1205 (9th Cir. 1975); Note, supra note 50, at 662.
59. See note 50 supra and accompanying text.
60. U.C.C. § 9-506 (1972) gives the debtor the right to redeem the collateral by tendering fulfillment of all obligations anytime before the secured party has disposed of the goods.
61. Failure to send notice also denies the right to challenge disposition before it is made, and the opportunity to find an interested buyer. [1979] 1A Bender’s U.C.C. Service § 8.06 [2], at 935.
62. DeLay First Nat’l Bank & Trust v. Jacobson Appliance, 196 Neb. 398, 402-03, 243 N.W.2d 745, 748 (1976). Without notice, the debtor is prevented from exercising the following rights: Knowing where the property is, and showing it to potential lenders who may demand a security interest in it; and attending the sale and seeing that it is conducted in a commercially reasonable manner. Randolph v. Franklin Inv. Co., 398 A.2d 340, 345 (D.C. App. 1979).
when that right is denied him, sufficient justification exists for depriving the secured party of his right to collect a deficiency judgment.\textsuperscript{63} Disallowing a deficiency judgment is considered to be the only effective deterrent to improper creditor conduct.\textsuperscript{64}

Another justification for completely denying recovery of a deficiency judgment is that the secured party's invaluable right to repossess and resell collateral without judicial intervention has been granted by Article 9 in exchange for compliance with minimal formal requirements.\textsuperscript{65} Observing the law by complying with the U.C.C.'s "simple" and "quite modest"\textsuperscript{66} conditions of sale is hardly an onerous burden to the secured party.\textsuperscript{67} The strict, no-deficiency rule is considered an appropriate debtor remedy because compliance with the U.C.C. is easy, and noncompliance substantially prejudices the debtor.\textsuperscript{68}

The no-deficiency school also substantiates its procedure of denying a deficiency judgment by the general Code provisions of Article 1 rather than those of Article 9.\textsuperscript{69} Section 1-106, allowing for a liberal administration of remedies, provides courts with the power to fashion appropriate remedies when compensatory damages are insufficient.\textsuperscript{70} Accordingly, cancellation of indebtedness is the only adequate compensation for debtors' deprivation of the right of redemption.\textsuperscript{71} In other words, in the wake of an unreasonable sale, the aggrieved party is not limited to the remedies conferred by Article 9.\textsuperscript{72} The no-deficiency rule is considered an appropriate supplement to the U.C.C.\textsuperscript{73}

\textsuperscript{63} In re Carter, 511 F.2d 1203, 1204 (9th Cir. 1975); Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, (Iowa 1977); One Twenty Credit Union v. Darcy, 40 Mass. App. Dec. 64, reprinted in 5 U.C.C. REP. SERV. 792 (1968).

\textsuperscript{64} Lakin, supra note 50, at 30-31; Note, supra note 50, at 668.

\textsuperscript{65} Lakin, supra note 50, at 30-31.


\textsuperscript{69} Davidson v. First Bank & Trust Co., Yale, 559 P.2d 1228, 1232 (Okla. 1976); Note, supra note 50, at 659.

\textsuperscript{70} Camden Nat'l Bank v. St. Clair, 309 A.2d 329, 332 (Me. 1973); Note, supra note 50, at 659.

\textsuperscript{71} Even the debtor's right to receive punitive damages has been justified by U.C.C. § 1-106 (1972). The argument goes that since the right to punitive damages exists outside the Code, they are retained through § 1-106. Davidson v. First Bank & Trust Co., Yale, 559 P.2d 1228, 1232 (Okla. 1976); Hogan, The Secured Party and Default Proceedings Under the U.C.C., 47 MINN. L. REV. 205, 241 n.170 (1962) (asserting that § 1-106 should grant the wronged debtor a remedy).

\textsuperscript{72} 4 R. ANDERSON, UNIFORM COMMERCIAL CODE 623 (2d ed. 1971).

Courts following the approach which completely bars recovery of a deficiency judgment commonly support their decisions perfunctorily. These courts mechanically cite cases in their favor or use the scant rationale that a majority of courts support their view, with little or no discussion of the merits of the various approaches. One secured transactions authority thinks that the no-deficiency rule has developed because early decisions disregarded the Code due to an inadequate understanding of its complicated statutory provisions, and subsequent cases blindly used stare decisis.

Various substantive criticisms of the no-deficiency rule militate against its continued use. The argument proposed by those who contend that the U.C.C. should follow its predecessor, the U.C.S.A., is rebutted in part by the language of Official Comment 1 to section 9-504. Comment 1 explicitly states that the Code does not follow the elaborate notice provisions of the U.C.S.A., and that the only restriction on disposition of collateral is that it must be commercially reasonable. Despite this Comment, the U.C.C. and U.C.S.A. sections regarding deficiency judgments and damages are drafted similarly. U.C.C. section 9-504(2), making the buyer liable for a deficiency, is comparable to U.C.S.A. section 22, and U.C.C. section 9-507(1), allowing the buyer to recover

---

74. See Barnett v. Barnett Bank, 345 So.2d 804, 806 (Fla. App. 1977) (noting that there is a division of authority, but deciding to follow Florida district courts and deny a deficiency judgment with no consideration of the merits of alternatives); Chrysler Credit Corp. v. Burns, 562 P.2d 233, 234 (Utah 1977) (holding that a deficiency judgment would be denied, without citing precedent).


76. Id.

77. See text accompanying notes 54-58 supra.

78. The Uniform Commercial Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. . . . The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable.


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

U.C.C. § 9-504(2) (1972).

If the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the de-
damages for creditor noncompliance with default provisions, is virtually identical to U.C.S.A. section 25.\textsuperscript{80} Most of the U.C.S.A. cases hold that perfect compliance with the Act is essential to recovery of the balance due the seller under the conditional sales contract.\textsuperscript{81} These pre-U.C.C., U.C.S.A. cases must be distinguished from those arising under the U.C.C. to determine whether the U.C.C. cases should be interpreted differently.

The U.C.S.A. resale provisions required the conditional vendor to comply with strict deadlines in notifying the debtor of intention to retake the goods,\textsuperscript{82} the number of days the goods had to be retained for buyer redemption,\textsuperscript{83} the number of days after retaking in which the sale of goods had to be held\textsuperscript{84} and the type of notification that had to be given to the buyer regarding the impending sale.\textsuperscript{85} \textit{Commercial Credit Corp. v. Swiderski}\textsuperscript{86} illustrates how precisely the courts interpreted the U.C.S.A.'s resale provisions. The seller advertised the sale of repossessed collateral in the newspaper for four instead of the requisite five days, and the court held that the seller had failed to comply with the statute. His deficiency action was denied.\textsuperscript{87}

\hspace{1cm}

\textit{U.C.S.A. § 22.}

\textsuperscript{80} \textit{Compare} U.C.C. § 9-507(1) (1972) \textit{with} U.C.S.A. § 25.

\textit{U.C.C. § 9-507(1) (1972).}

\textit{U.C.S.A. § 25.}


\textsuperscript{82} U.C.S.A. § 17.

\textsuperscript{83} \textit{Id.} § 18.

\textsuperscript{84} \textit{Id.} § 19.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} 57 Del. 76, 195 A.2d 546 (1963).

\textsuperscript{87} \textit{Id.} at 80, 195 A.2d at 548.
The judicial interpretation that compliance with the U.C.S.A. provisions was a prerequisite to bringing a deficiency action stemmed from the nature of the Act itself. Since the Act mandated the exact procedures vendors were required to follow, precise compliance was expected of them. The opportunity for error was great, since the statute set forth meticulous standards. The courts found any slight noncompliance with the statute reason for denying a deficiency judgment. The right to bring a deficiency claim on a conditional sales contract was held to be a statutory right; therefore, the statutory resale provisions had to be followed if a suit was to be maintained.

Underlying these decisions was the belief that the U.C.S.A. was drafted primarily to protect buyers from imposition by sellers. Secondarily, the courts reasoned that the U.C.S.A. notice requirements were aimed at informing the widest possible number of buyers of the impending sale of repossessed collateral. The statute required sellers to follow the Act's precise procedures so that prospective bidders would be informed of the sale and, consequently, a good price would be obtained for the goods.

The unarticulated basis for the harsh treatment of noncomplying conditional sellers seems to be that the statute's notice provisions, considered mandatory, created a scheme that would, if followed precisely, effectively protect buyers from abuse by sellers of repossessed goods. The U.C.C. expressly rejects the notion that dictating the exact conditions of sale will cause a higher realization on collateral. Rather, the general obligation of good faith, the requirement of commercial reasonableness and the U.C.C.'s own sanctions are considered appropriate standards in commercial transactions.

Denying secured parties the right to collect a deficiency judgment effectively awards the debtor the cancellation of his remain-

88. Id.
94. 57 Del. at 79, 195 A.2d at 546.
ing, validly-owed debt as damages. This is contrary to the spirit of commercial reasonableness of the Code, which should allow the injured party to be compensated, not punished.\textsuperscript{97} As the leading case of \textit{Clark Leasing Corp. v. White Sands Forest Products, Inc.}\textsuperscript{98} states, barring a deficiency "smacks of the punitive...."\textsuperscript{99} In the unreasonable collateral resale situation, the debtor is compensated for what he lost by denying the secured party the difference between the resale price of the collateral and its fair market value. This credits the debtor with the amount lost by the secured party's unreasonableness, and effectively, the secured party forfeits the sum which he was responsible for losing. Completely denying recovery of a deficiency is punitive because the secured party is denied both the amount representing the difference between resale price and fair market value, and the remaining debt which was unaffected by the unreasonable transaction.

Automatic denial not only rejects the U.C.C. policy barring punitive damages,\textsuperscript{100} but also displaces the actual Code provisions remedying the debtor's loss.\textsuperscript{101} Nothing in Article 9 "snuffs out" a creditor's right to a deficiency judgment.\textsuperscript{102} No provision of the U.C.C. explicitly denies recovery of the deficiency when there is defective notice.\textsuperscript{103} The bar rule is contrary to the Code and also is an irrational measure of damages. Usually the debtor's only loss resulting from an unreasonable sale is the failure of the collateral to bring its fair market value. There are methods of retrieving this loss as damages, including section 9-507(1).\textsuperscript{104}

Proponents of the no-deficiency rule maintain that the major loss to a debtor unnotified of the sale of collateral is the invaluable right to redeem, and that barring a deficiency recovery is the debtor's only means of recompense.\textsuperscript{105} A fallacy of this argument is that


\textsuperscript{99} 87 N.M. at 455, 535 P.2d at 1081.

\textsuperscript{100} See text accompanying notes 97 & 98 supra.

\textsuperscript{101} Pass & Walker, supra note 52, at 722.

\textsuperscript{102} Clark, supra note 50, at 319.


\textsuperscript{104} But see text accompanying notes 135-40 infra.

DEFICIENCY JUDGMENTS

debtors rarely go to collateral resales, and usually do not repurchase the collateral. Therefore, denying a deficiency judgment is too drastic a remedy.

The damage which the unnotified debtor suffers is not easily gauged. It is difficult to prove whether the debtor would have bid at the sale, arranged for someone to buy the collateral at an advantageous price or even paid off the obligation himself. Loss of the right of redemption cannot be compensated accurately. As a practical matter, barring a deficiency recovery is not a viable alternative for the debtor, and it should not be given misplaced emphasis by holding that cancellation of indebtedness is the only adequate remedy for its loss. Denying deficiency judgments for commercial unreasonableness compensates the debtor for much more than what he lost, and it contradicts the U.C.C.'s purpose of avoiding punitive damages in commercial transactions.

One commentator suggests that courts deny deficiency judgments to secured parties because of a judicial hostility toward creditors who seek them. This hostility might derive from knowledge that the resale price of second-hand property is usually low. Two cases indicate that deficiency judgments were denied because of bias against secured parties pursuing deficiency judgments. One case states that deficiencies should be denied because of "the realities of the relationships between secured creditors and debtors who have defaulted and their respective resources for prosecuting lawsuits. . . ." Another characterized failure to give notice as "the

---

106. See G. Gilmore, supra note 27, at 1216.
110. Id.
111. Note, supra note 47, at 78.
112. See text accompanying notes 97-99, supra.
115. See generally Note, supra note 47, at 62 (judge's perception of deficiency judgments as either equitable or onerous will dictate whether deficiency judgments will be granted to the secured party).
quick and easy way out. . . ."\textsuperscript{117} Regardless of whether the failure to give notice was accidental or intentional, inflicting punitive damages\textsuperscript{118} upon the secured party is inappropriate to the U.C.C.\textsuperscript{119}

Public policy arguments favor repudiation of a bar against deficiency judgments. Denying creditors recovery of the amount still owed them forces them to bear the cost of the debtor's loan. In response, lenders may choose to restrict their credit or to pass the cost on to consumers or business associates who will ultimately bear the cost of the debtor's default.\textsuperscript{120}

B. \textit{Section 9-507(1) as Exclusive Remedy—Pro and Con}

The minority view\textsuperscript{121} allows the secured party a deficiency judgment regardless of unreasonable disposition. A secured party's failure to comply with Code repossession and resale requirements affords the debtor the remedy of pursuing an action to recover any loss under section 9-507(1). The burden of proof is on the debtor,\textsuperscript{122} who, in a deficiency action, may receive damages as a matter of setoff or counterclaim.\textsuperscript{123} Not surprisingly, those courts which consider section 9-507(1) to be the debtor's exclusive remedy for losses incurred because of creditor misbehavior\textsuperscript{124} base their position on the fact that section 9-507(1) is the only specific U.C.C. provision for a penalty in the event of a defective disposition.\textsuperscript{125} The "sensible thing is to apply the Code penalty and no more."\textsuperscript{126}


\textsuperscript{118} See text accompanying notes 97-99 supra.


\textsuperscript{121} Lakin, supra note 50, at 30.

\textsuperscript{122} Id. at 26.


\textsuperscript{124} See note 51 supra.


\textsuperscript{126} Id., \textit{reprinted in 2 U.C.C.L.J.} at 257. See R. HENSON, \textit{SECURED TRANS-}
Courts which have permitted deficiency recoveries, and which have awarded the injured debtor only section 9-507(1) damages, have had to grapple with the unresolved question of whether the Code supports precluding deficiency judgments in favor of misbehaving secured parties, as the majority contends. Limitation of the debtor’s remedy to those losses which he can prove under section 9-507(1) is an option frequently chosen by the courts when balanced against the only perceived alternative of denying a deficiency altogether. In view of the section 9-507(1) remedy, one court held that the Code drafters did not intend that failure to give notice would result in forfeiture of the creditor’s right to a deficiency. Consequently, that court chose section 9-507(1). Another court found it was unlikely that section 9-507(1) would have been included in the Code or enacted by its own state legislature had the drafters intended that the secured party also lose his right to recover a deficiency.

In *Lincoln Rochester Trust Co. v. Howard*, the court held that a creditor’s failure to comply fully with section 9-504(3) was not a meritorious defense to a deficiency action because “relief of an aggrieved debtor is relegated to the rights cited in Section 9-507(1) U.C.C.” The U.C.C. does not mention denial of a deficiency judgment as a remedy. Its provision of an express remedy in section 9-507(1) for any damages the debtor suffers would appear, on the contrary, to preclude him from setting up a section 9-504(3) violation as a bar. In addition, these courts reason that section 9-507(1) offers sufficient compensatory protection to the debtor.

It is ironic that the only remedy for wrongful creditor conduct in Article 9 is seldom used by the courts as the debtor’s relief.

---

*Actions Under the Uniform Commercial Code* § 10.6, at 360 (2d ed. 1979); *Hogan*, supra note 71 (§ 9-507(1) is arguably exclusive since it is the only remedy in the Code); *Clark*, supra note 50, at 311 (author reluctantly concedes that § 9-507(1) “occupies the field” since the U.C.C. offers no other remedies).

127. See note 51 supra.


129. United States v. Whitehouse Plastics, 501 F.2d 692, 696 n.6 (5th Cir. 1974).

130. 75 Misc. 2d 181, 347 N.Y.S.2d 306 (Rochester, N.Y. City Court 1973).

131. Id. at 181-83, 347 N.Y.S.2d at 307-09.

132. Id. at 182, 347 N.Y.S.2d at 308.

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


135. See note 51 supra.
Such a sparse following may indicate an inadequacy in the rule. The courts have not articulated their dissatisfaction;\textsuperscript{136} rather, the little criticism that exists has been raised by commentators.\textsuperscript{137}

The primary fault with section 9-507(1), providing for compensation for any loss suffered by the debtor, is that it sometimes gives the debtor an insurmountable burden of proof of loss.\textsuperscript{138} Section 9-507(1) is consistent with general U.C.C. principles, offering compensatory and not punitive relief to the injured party, and is not objectionable on that ground. The difficult burden of proof required of the debtor when collateral is sold improperly, that of proving the collateral’s fair market value at the time of sale,\textsuperscript{139} has made the courts reluctant to rely on it.\textsuperscript{140}

C. \textit{Rebuttable Presumption Remedy}

Judging from the paucity of its use by the courts, the Code remedy for creditor misbehavior set forth in section 9-507(1) is inadequate. Courts are unwilling to require debtors to prove what they lost by disproving the secured party’s claim for a deficiency judgment. Courts reason that if the secured party’s misbehavior jeopardized the debtor’s right to redeem, or his right to receive the best possible price for his collateral, the creditor should have some responsibility in maintaining his action for a deficiency. Courts either can require the debtor to prove affirmatively what the secured party gained, or can require the secured party to substantiate the amount of the deficiency remaining after the improper

\textsuperscript{136} Perhaps this is because § 9-507(1) is normally chosen by the courts as the only alternative in the face of the rule barring deficiency judgments completely.

\textsuperscript{137} According to commentators, a recurring reason for applying a remedy other than § 9-507(1) is that nothing in the U.C.C. says § 9-507(1) is exclusive. Minetz, \textit{supra} note 52. Another line of reasoning is that § 9-507(1) is inadequate protection for the debtor. Note, \textit{supra} note 50, at 662.

\textsuperscript{138} Note, \textit{supra} note 47, at 78.

\textsuperscript{139} Comment, \textit{supra} note 51, at 227 (asserting nevertheless that the burden should be on the debtor because it is too onerous for the creditor).

\textsuperscript{140} After a commercially unreasonable sale, when the secured party seeks a deficiency judgment, some courts suggest that the debtor proceed via § 9-507(1) to recover his losses, with the burden of proof shifted within that section to the secured party. Two cases suggest this solution. United States v. Whitehouse Plastics, 501 F.2d 692, 696 (5th Cir. 1974), proposed that the debtor submit \textit{any} evidence in a § 9-507(1) action that he was prejudiced by lack of notice, thereby shifting the burden to the secured party to rebut such evidence by showing that the fair market value of the goods was no more than the amount received. In Associates Fin. Servs. Co. v. DiMarco, 383 A.2d 296, 302 (Del. Super. Ct. 1978), the court held that there is ample compensatory protection for debtors in § 9-507(1), so in the event of an unreasonable disposition, the debtor’s losses should be offset against the deficiency judgment, supported by a presumption favorable to the debtor.
foreclosure sale by proving fair market value. Section 9-507(1) does nothing to adjust the equities when the secured party has failed to comply with the Code's requirement of commercial reasonableness. Nothing makes the debtor's lot in proving his loss any easier.

Rather than barring a deficiency judgment entirely, or at the other extreme, forcing the debtor under section 9-507(1) to prove the fair market value of the collateral and thereby the amount of unjust gain by the secured party, the courts are increasingly adopting\(^{141}\) what they consider a fairer,\(^{142}\) more enlightened\(^{143}\) and equitable\(^{144}\) interpretation of Article 9, the rebuttable presumption.\(^{145}\) The increasing\(^{146}\) number of courts\(^{147}\) have modified the U.C.C. by switching the burden of proof as to the collateral's market value from debtor to creditor, starting with the rebuttable presumption that the price equalled the debt. In a deficiency action by the secured party, if the debtor raises a defense of commercial unreasonableness and responds that the plaintiff violated the U.C.C., the secured party must show that every aspect of the sale was commercially reasonable.\(^{148}\) Such evidence would completely exonerate the secured party. If he fails to demonstrate compliance, a rebuttable presumption arises that the sale price was equal to the debtor's remaining obligation, effectively extinguishing the debt.\(^{149}\)

To overcome the rebuttable presumption, the secured party must produce a fair and reasonable appraisal at or near the time of repossession, or other convincing evidence of the value of the collateral.\(^{150}\) If the secured party meets this burden of proof, he can

141. See note 52 supra.
142. 59 App. Div. 2d at 246, 399 N.Y.S.2d at 513.
143. United States v. Willis, 593 F.2d 247, 260 (6th Cir. 1979).
144. 59 App. Div. 2d at 247, 399 N.Y.S.2d at 514.
146. United States v. Willis, 593 F.2d 247, 258 (6th Cir. 1979) (the "great weight of authority").
147. See note 52 supra.
149. This procedure is described in Savings Bank v. Booze, 34 Conn. Super. 632, 634, 382 A.2d 226, 228 (1977).
recover the amount by which the deficiency exceeded the amount
the collateral would have brought had the Code requirements been
met. 151 The debtor's other damages, if any, are set off against this
sum. 152 This actual debtor loss is separate and distinct from the
losses incurred because of the secured party's breach of commercial
reasonableness. 153 Failure to meet the burden of proof as to fair
market value results in a forfeiture of the deficiency.

The leading case of Norton v. National Bank of Commerce 154
originated the rebuttable presumption technique. The Arkansas Su­
preme Court reasoned that simple considerations of fair play cast
the burden of proof upon the secured party after a wrongful dispo­
sition of collateral. Failing to give notice to the debtor of the collat­
eral resale made it at least difficult, if not impossible for the
debtor to prove his loss with reasonable certainty, and the secured
party should not be able to derive an advantage from his miscon­
duct. 155 As Norton illustrates, the rebuttable presumption exists
because, when a sale is not commercially reasonable, the amount
received at the sale is not evidence of the fair market value of the
collateral. The secured party, who caused the problem by his fail­
ure to obtain the best possible price for the collateral, 156 should be
responsible for proving the fair market value. A deficiency would
then be measured by the difference between debt and the estab­
lished fair market value. "It follows that he who has the duty
should also have the burden of proof." 157

The effect of the rebuttable presumption is not to eliminate
but to decrease the amount of deficiency recoverable 158 by off­
setting the fair and reasonable value of the collateral against the
balance due. 159 Justification for rearranging the burden of proof as

151. Universal C.I.T. Credit Co. v. Rone, 248 Ark. 665, 672, 453 S.W.2d 37, 41

152. Community Management Ass'n of Colorado Springs, Inc. v. Tousley, 32
Colo. App. 33, 39, 505 P.2d 1314, 1317 (1973) (secured party liable to debtor for dam­
ages); Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402, 404
(1971).

153. Walker v. V.M. Box Motor Co., 325 So.2d 905, 906 (Miss. 1976).

154. 240 Ark. 143, 398 S.W.2d 538 (1966). Norton has tremendous influence
and is cited in virtually every case adopting the rebuttable presumption.

155. Id. at 149, 398 S.W.2d at 542.

156. Vic Hansen & Sons v. Crowley, 57 Wis. 2d 106, 110, 203 N.W.2d 728,

157. Id.


159. Cornett v. White Motor Corp., 190 Neb. 496, 501, 209 N.W.2d 341, 344
(1973).
DEFCENCY JUDGMENTS

515
to the collateral's fair market value has been deemed appropriate to
the U.C.C.'s "spirit of commercial reasonableness,"160 being "more
in keeping with the scheme of the Code" than other rules.161

The Indiana Court of Appeals, in adopting the rebuttable pres­
sumption approach, considered the deficiency judgment dilemma
in the context of the entire commercial setting:162 "[W]e feel that
the UCC should function on the premise that the majority of com­
mercial transactions are carried out in good faith."163 When the se­
cured party has not proceeded in good faith, the court preferred a
flexible standard which would allow the secured party to recover
the damages caused by the debtor's default, but which would pro­
pect the debtor on a case by case basis.164

Shifting the burden of proof of fair market value to the se­
cured party reaches a middle ground between that method which
is hard on the debtor, requiring him to bear the difficult burden of
proof of his loss, and that which imposes a harsh result on the
creditor, cutting off the deficiency owed him. It is primarily the
latter which the rebuttable presumption method rejects.165

While the no-deficiency rule purportedly encourages creditors
to comply with the section 9-504(3) requirement of commercial rea­
sonableness by denying a deficiency when Article 9 has not been
followed, one commentator166 suggests that the rebuttable pre­
sumption rule achieves the same result. It discourages noncompli­
ce by exacting a penalty from secured parties. The latter
method, unlike the no-deficiency rule, does not penalize creditors
for "not doing what the Code drafters did not define and what the
courts cannot explain."167 Requiring the secured party to demon­

404 (1971).
162. Hall v. Owen County State Bank, 60 Ind. Dec. 221, _, 370 N.E.2d 918,
163. Debtor defaults, creditor repossessions, and foreclosure sales occur rela­
tively infrequently, considering the annual volume of secured transactions. Lakin,
supra note 50, at 1. Since 1945 the percentage of installment contracts delinquent
one month or more has remained at the relatively constant rate of three percent of
the total number of outstanding loans. Id. at 1 n.2.
165. The federal court in United States v. Willis, 593 F.2d 247 (6th Cir. 1979),
refused to follow established Ohio precedent barring deficiency judgments because the
justices believed "that the rebuttable presumption rule is the more enlightened
and equitable." Id. at 260.
166. Pass & Walker, supra note 52, at 722.
167. Id. at 723.
strate fulfillment of his duty under section 9-504(3) prior to recovering a deficiency judgment will encourage compliance without penalizing the creditor.\textsuperscript{168}

The only inadequacy of the rebuttable presumption approach, as it has developed, is that there has been no attempt to reconcile it with Article 9 other than by saying that it is complimentary to the spirit of the Code.\textsuperscript{169} The cases adopting the rebuttable presumption technique are at least beginning to have precedent to buttress their arguments.\textsuperscript{170} There is, however, a distinct lack of effort to find a niche for it in Article 9.

Requiring the secured party to prove the market value of collateral sold improperly must be harmonized with the pertinent Code provisions. Section 9-504(2) creates an affirmative duty on the part of the debtor to repay to the secured party any deficiency remaining from the sale of goods securing an indebtedness. The only restriction placed on the secured party's method of disposition is that it be commercially reasonable.\textsuperscript{171} The consequences of a noncomplying sale are not dealt with in section 9-504(2). Article 9's default provisions are arranged so that remedies appear in section 9-507(1),\textsuperscript{172} and that section is silent as to the effect of a commercially unreasonable sale on the secured party's right to collect a deficiency judgment.

The rebuttable presumption's function determines its relation to Article 9. The rebuttable presumption that resale price equals debt, shifting to the secured party the burden of proof of fair market value, has the effect of redefining deficiency as the difference between fair market value and debt. The rebuttable presumption rejects the definition of deficiency in an unreasonable sale as the difference between resale price and debt. By defining deficiency as the difference between fair market value and debt in section 9-504(2) and integrating the rebuttable presumption into section 9-504(2), Article 9 will be equipped to resolve all deficiency actions, whether or not the disposition of collateral was reasonable.

In a commercially reasonable sale, the collateral's resale price

\textsuperscript{168} Fedders Corp. v. Taylor, 473 F. Supp. 961, 972 (D. Minn. 1979).

\textsuperscript{169} Another criticism is that the rebuttable presumption is a highly fictional artifice and essentially a fraud. Clark, \textit{supra} note 50, at 320. Shifting the burden of proof to the creditor is criticized as an unfairly heavy burden for him to bear. Comment, \textit{supra} note 51, at 232.

\textsuperscript{170} See note 52 \textit{supra}.

\textsuperscript{171} U.C.C. \S 9-504, Official Comment 1 (1972).

\textsuperscript{172} See U.C.C. \S 9-501(3)(e) (1972).
and fair market value are the same. Deficiency, without being defined as such in section 9-504(2), means the difference between fair market value and debt. In a commercially unreasonable disposition, the definition of deficiency should remain as the difference between fair market value and debt. Resale price, however, is not evidence of fair market value because of the nature of the sale. The rebuttable presumption puts the burden of proof of establishing fair market value on the party seeking to collect the deficiency judgment.

Defining deficiency in section 9-504(2) as the difference between fair market value and debt resolves the Article 9 dilemma of what to do when a misbehaving secured party seeks a deficiency judgment. In that case, there is no evidence of fair market value; resale price is evidence of unfair market value. The rebuttable presumption places the burden of proof on the secured party. Shifting the burden in this way is an equitable solution developed by the courts to solve a statutory ambiguity.

Discussion of two areas of the U.C.C. will demonstrate that the rebuttable presumption is compatible with the U.C.C. First, the U.C.C. was designed to integrate common law remedies to unforeseen difficulties into its statutory provisions.173 Secondly, the rebuttable presumption reaches the same result as an analogous section of Article 2. Sections 2-706 and 2-708 force a debtor to forfeit the amount by which goods' resale price was reduced on resale due to the seller's commercial unreasonableness. Comment 1 to section 9-504(2) alludes to section 2-706 as its model.

III. U.C.C. PROVISIONS

U.C.C. section 1-102 requires a liberal construction of the Code so that its underlying purposes and policies are furthered. Flexibility through expansion of commercial practices and remedies is not only permitted, but also encouraged. The intent to incorporate common law remedies which conform to the Code's purposes and policies is illustrated by Official Comment 1 to section 1-102:

[Sections 1-102(1) and (2) are] intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. . . . [Courts] have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the rea-

son of the limitation did not apply. . . . Nothing in this Act stands in the way of the continuance of such action by the courts.

If shifting the burden of proving fair market value to the secured party enhances the purposes and policies of the U.C.C., then shifting that burden of proof in the Article 9 determination of the secured party's deficiency may be appropriate. Were section 1-102 the only applicable Code provision, it could also support barring deficiency judgments altogether as a supplemental remedy developed by the courts.

Crucial policies regarding remedies are found in section 1-106(1):

The remedies provided by this Act 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 but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

The drafters wanted this section to "make it clear that compensatory damages are limited to compensation." Denying the creditor money due him on a debt does not compensate the debtor for his losses. Conversely, it almost always puts the debtor in a better position than if the creditor had sold the collateral at the highest available price. Giving the debtor more than what is due to him under the commercial agreement is punitive to the secured party. It deprives the secured party of money he bargained for and which the debtor promised to pay.

The objective of placing the aggrieved party in as good a position as if the other had fully performed will be achieved in the improper foreclosure sale situation by setting off the amount which a proper sale would have brought against the debtor's remaining debt. In this way, both parties will be compensated for what they lost due to the debtor's default and the secured party's unreasonable conduct. The debtor will be credited for what he lost because of the defective disposition of his collateral; and the secured party will collect the amount still owing him, minus any sum that was lost by his getting too low a price for the collateral.

The technique of requiring the secured party to prove fair market value is also appropriate when the creditor fails to notify

---

175. R. Pass & B. Walker, supra note 52, at 723.
176. See cases, note 52 supra.
the debtor of the sale. The debtor, not having been present at the sale, cannot be sure that the price obtained or the manner in which the sale was conducted, was commercially reasonable. He also may have been able to redeem the collateral by arranging for credit if he had been notified of the time of the sale. Finally, it would be unfair to demand that the debtor prove the fair market value when it was the secured party who created the entire problem through bad faith dealing, or otherwise overlooking the debtor's rights.

Finally, analogy to the sales provisions of Article 2 is instructive. According to Official Comment 1 to section 9-504, the only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect, the Comment continues, section 9-504 follows the section 2-706 provisions on resale by a seller following a buyer's rejection of goods. Whether the authors of that Comment intended to draw a parallel between the sections respecting only the requirement of commercial reasonableness, or whether they meant that the principles of awarding damages were similar, analogy to Article 2 is useful because of its treatment of damages when the seller resells goods rejected by the buyer.

When the buyer wrongfully rejects the goods, the seller may resell them, and, when the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price. If the resale price is less than the market price, the seller can recover that entire difference. If the seller on reselling the goods fails to act properly, he is deprived of section 2-706 damages and is relegated to section 2-708 damages. These damages calculate the difference between the market price at the time and place for tender, and the unpaid contract price. The section 2-706 resale price which probably would be lower than the market price is not used. The seller forfeits the difference between what the Code presumes to be an abnormally low price obtained because of bad commercial practices, and the going market price.

Making the secured party forfeit the amount which was lost because of poor commercial practices is also the result the rebutta-

177. U.C.C. § 9-504, Official Comment 1 (1972) says that in the respect that both § 2-706 and § 9-504 sellers are required to be commercially reasonable, § 9-504 follows § 2-706.
178. U.C.C. § 2-703.
ble presumption seeks to reach. It is consistent with Article 2. The Article 9 secured party, equivalent to the Article 2 seller, may likewise resell the collateral upon default by the debtor. This is equivalent to an Article 2 rejection of the goods by the buyer. When the secured party acts in a commercially reasonable manner, he can collect the deficiency remaining between the resale price and the entire remaining amount of the debt. This is analogous to the contract price that remains unpaid in an Article 2 sale.

Article 2 and the Article 9 rebuttable presumption differ when the secured party, the seller, is not commercially reasonable. Underlying the difference is that the section 2-708 market value of goods is much easier to prove than that of collateral sold publicly or privately by section 9-504. Collateral resold under Article 9 is almost always used and difficult to value, whereas Article 2 goods are usually new. Section 2-724 also makes market quotations reported in official publications, trade journals, newspapers or periodicals admissible evidence of the price or value of goods.180

Switching the burden of proof to the secured party imposes a difficult responsibility on him. If he can produce proof of fair market value he can, like a section 2-708 seller, recover the difference between this amount and the unpaid contract price. But if proof is not produced, the deficiency is disallowed and the amount received on sale of the collateral is considered to extinguish the debt. Such a departure from the equivalent Article 2 sections is justifiable because proving market value in collateral foreclosure sales is difficult. If the creditor cannot produce proof of fair market value, his deficiency judgment cannot even be estimated, thereby precluding an award. Nor, if the creditor fails to produce evidence of the fair market value can the debtor be asked to prove it, since he is at a disadvantage, having inferior knowledge about the sale. The overall similarity between Article 2 and Article 9, when the rebuttable presumption is in effect as part of section 9-504(2), is persuasive evidence that the result Article 2 reaches is what the Article 9 drafters intended.

IV. CONCLUSION

Courts have tried continually to clarify the gap in the default provisions of Article 9 regarding the creditor's right to a deficiency judgment following his commercial unreasonableness in a collateral

180. U.C.C. § 2-708, Official Comment 1 (1972) allows proof of market price to be made by a substitute market if price is not available via § 2-723. Section 2-724 makes market quotations admissible evidence of price.
foreclosure sale. Three different approaches have developed to deal with the secured party’s right to a deficiency judgment in this situation. The majority of courts make commercial reasonableness a condition precedent to recovery of a deficiency, barring a deficiency when this condition is not met. There is a major flaw with this remedy: the cancellation of indebtedness awarded the debtor is unrelated to damages actually suffered by the debtor. The debtor, therefore, is awarded punitive damages, a remedy incompatible with the U.C.C.’s avowed philosophy of making damages compensatory and not punitive.

The second approach, which is the least followed, uses section 9-507(1) as the debtor’s exclusive remedy. It requires the debtor to prove the fair market value of the collateral in order to defeat a deficiency judgment. Section 9-507(1) has proven inadequate when commercial unreasonableness is asserted as a defense to a creditor’s deficiency action because it requires the defendant, the debtor, to bear the burden of disproving the claim of the plaintiff, the secured party. Since there is no established market for most used collateral, proving fair market value is difficult. Also, the secured party should not be able to reap the benefit of his own negligence at the foreclosure sale by imposing this difficult burden of proof on the debtor.

In the more enlightened view, a rebuttable presumption arises that the collateral as sold equals the entire remaining debt. The burden of proof of fair market value at the time of sale switches to the secured party and, unless the secured party meets his burden of proof, the resale price is considered to extinguish the debt. The underlying theory is that since the creditor proceeded in bad faith, the sale price cannot be considered as evidence of the collateral’s actual value, and that value must be substantiated by further proof.

This method of adjusting the equities between debtor and creditor is compatible with the purpose of the U.C.C. to compensate the aggrieved party. The Code explicitly provides for liberal construction of its provisions to give courts flexibility in developing their own remedies, as long as they conform to the Code’s purposes and policies. The rebuttable presumption that sale price equals debt is compatible with the Code, allowing both parties to be compensated for their losses, yet it protects the debtor in those situations in which he is vulnerable.

Defining deficiency in section 9-504(2) as the difference be-

182. U.C.C. § 1-102 (1972).
between fair market value and debt is the crucial change which the rebuttable presumption effects. This definition eliminates the loss caused by the secured party's commercial unreasonableness which would exist when deficiency is defined as the difference between resale price and debt.

Adopting this definition of deficiency effects the same result as that reached in Article 2 following a buyer's wrongful rejection of goods and resale by the seller. When resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between resale price and contract price. If the seller fails to act properly, he is relegated to damages consisting of the difference between market price and the unpaid contract price. Depriving the secured party of the amount he lost because of poor commercial practices is the exact result the rebuttable presumption reaches. Since Comment 1 to section 9-504 alludes to following section 2-706, it is tenable to extrapolate that Article 9 intended to structure recovery of deficiency judgments according to the Article 2 model.

Elaine P. Lariviere