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**ARTICLE 9 OF THE REVISED COMMERCIAL CODE: AN IN-DEPTH LOOK AT THE  
DEFAULT PROVISIONS OF CHAPTER 6 AND ITS DIFFERENCES AND SIMILARITIES TO THE  
CURRENT DEFAULT PROVISIONS OF CHAPTER 5**

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**Introduction**

Article 9 of the Uniform Commercial Code (UCC) created “ a compressive scheme for the regulation of security interests in personal property and Fixtures.”<sup>1</sup> The goal of Article 9 was to “provide a simple and united structure within which the immense variety of present day secured financing transactions can go forward with less cost and greater certainty.”<sup>2</sup> Article 9 did not delve into the intricacies and inconsistencies of trust receipts, chattel mortgages, field warehousing, sales or assignments of accounts, or conditional sales.<sup>3</sup> Instead Article 9 created the non-possessory security interest, and allowed the holder of the security interest to enforce its interest without reliance of the courts.

The default provisions of Article 9 endeavor to provide “flexible, effective, and efficient realization procedures”.<sup>4</sup> Unfortunately the default statutes do not contain provisions with a great degree of rigidity and detail, but instead are loosely organized and informal.<sup>5</sup> As with any loosely knit structure several items have fallen into the cracks and have been over looked, and these statutory gaps have prompted litigation

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<sup>1</sup> UCC §9-101 Comment 1

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> William E. Hogan, The secured Party and Default Proceedings under the UCC, 47 Minn. L. Rev. 205, 253 (1962).

<sup>5</sup> Grant Gilmore, Security Interests In Personal Property §43.1, at 1183 (1965).

that has been “wasteful, expensive, inefficient, unfair and detrimental to secured financing.”<sup>6</sup> With such a backdrop, in 1990 the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) began to look into revising Article 9 of the UCC<sup>7</sup>. Such revision work began in 1993 when the drafting committee was created, and the ALI and the NCCUSL approved the final version of the revision in 1998.<sup>8</sup>

The Revised Version of Article 9<sup>9</sup> represents a marked overhaul of the current version of article 9. In sheer numbers alone, Revised article 9 has 134<sup>10</sup> provisions as compared to the 55<sup>11</sup> provisions of the current version of the code, and the default provisions of revised article 9 has grown to 28<sup>12</sup> from a mere 7<sup>13</sup> that are contained in the current version of Article 9. The goal of the drafters in the revision of article 9 was to bring about greater certainty to secured transactions, and this was accomplished with substantial changes to the scope, procedures, and substantive law<sup>14</sup>. “[C]ertainty should reduce both transactional costs and the cost of credit. The revised Article 9 seeks greater certainty through two primary techniques: Expanding the scope of property and

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<sup>6</sup> Donald J. Rapson, Symposium on Revised UCC Article 9 Article: Default and Enforcement of Security Interests under Revised Article 9. 74 Chi.-Kent L. Rev. 893.

<sup>7</sup> George A. Nation, III, Revised Article 9 of the UCC: The Proposed Revisions Most Important to Commercial Lenders. 115 Banking L.J. 212.

<sup>8</sup> I.d.

<sup>9</sup> The current version of Article 9, U.C.C. §9-\_\_\_\_ (1995) will be here in after referred to as “Current article 9” or the “current version of article 9” and the revised version of Article 9, U.C.C. §9-\_\_\_\_ (1998) will here in after be noted by using “revised article 9” or “revised version of article 9”.

<sup>10</sup> UCC Secured Transactions Table of Contents (1999).

<sup>11</sup> UCC Secured Transactions Table of Contents (1995).

<sup>12</sup> UCC Secured Transactions Table of Contents (1999).

<sup>13</sup> UCC Secured Transactions Table of Contents (1995).

<sup>14</sup> Steven O. Weise, *The Emerged and Emerging New Uniform Commercial Code: Materials on the Revised Uniform Commercial Code-Article 9*, SE37 A.L.I.-A.B.A. 15,17 (November 11, 1999).

transactions covered by article 9,<sup>15</sup> and simplifying and clarifying the rules for creation, perfection,<sup>16</sup> priority,<sup>17</sup> and enforcement of a security interest.”<sup>18</sup>

While each section of article 9 is important, the real lynch pin of the article 9 is the chapter on default.<sup>19</sup> After all, the beauty of the secured transaction is the ability to collect on the obligation by more than just on the contract, but also on the underlying collateral. As such, the focus of this paper will be the changes that revised article 9 has created in the default avenue of collection, and some of the reasons why such changes were implemented and what such changes may mean to the people who deal with article 9 secured obligations.

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<sup>15</sup> Under the provisions of revised article 9, a security interest can now be created in deposit accounts, commercial tort claims, non-assignable general intangibles, and payment intangibles used as the original collateral. In-depth analysis of the topic is beyond the scope of this article, but for an introduction and analysis of the topic see; George A. Nation, III, Revised Article 9 of the UCC: The Proposed Revisions Most Important to Commercial Lenders, and Weise, *supra* note 14.

<sup>16</sup> The highlights of the changes of the perfection rules include, First Under revised article 9, a secured party may perfect its interest in instruments and investment property by way of either possession or filing. Under the current version of article 9, perfection of such types of property could only be accomplished through possession. Second under the current version of article 9, the filing of the financing statement for a goods was with the central state authority where the goods were located. When dealing with general intangibles, the proper place to file the financing statement was the state of the debtor's chief executive offices. Revised UCC §9-307 redefines the term location. The location for an entity created by a filing with a state (such as a corporation or a LLC) is considered to be the state in which the filing occurred. When dealing with an entity not created by a filing with a state, the entity's location is the place where the chief executive offices are located. An individual's location is still defined by his or her principal residence. The revised article 9 still requires that the financing statement include the name of the debtor, but unlike its predecessor, proffers the rule to determine when a mistake in submitting the debtor's name renders the financing statement ineffective. A good overview and description of the new provisions can be found in Weise, *supra* note 14.

<sup>17</sup> Revised Article 9 continues to promulgate the rule that the first secured party to file or to perfect its security interest has priority, but there are some changes that deal with the method of perfection. These areas include priority when the party may perfect by either filing or control, perfect by either filing or possession, filing that occurs automatic versus other methods of perfection, and when two secured parties each have control of the investment property and are of equal rank, and issues dealing with purchase money security interests. Again for a more in-depth analysis of such provisions on priority under the provisions of revised article 9 see Weise, *supra* note 14.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> Under the current version of the U.C.C. Article 9, the default provisions are found in article 5, but under the revised version of the U.C.C. Article 9, the default provisions are found in chapter 6.

## DEFINITION OF DEFAULT

The most logical place to start when dealing with the topic of default and a secured transaction is: What constitutes a default? Revised Article 9 §9-601 like its predecessor §9-501, leaves the determination of what is a default to the parties to determine in their agreement. But always remember that the determination that if a default has or has not occurred is always considered under the underlying policies of article 9<sup>20</sup> and also those contained in Article 1 of the UCC.<sup>21</sup>

## RIGHTS AND DUTIES BEFORE DISPOSITION OF COLLATERAL

Even though revised article 9 did not change the definition of default, it does change and supplement several rules found in §9-501 that deal with the sphere of time between the actual default and the disposition of the collateral. Revised §9-601(e) provides that a claim reduced to a judgment relates back to the filing date or the date of perfection which ever is earlier. Under the current law the judgment would relate back to the date of perfection, even if the date of filing was earlier.<sup>22</sup> Revised §9-602 expands the list of rights of the debtor or obligor and duties of the secured party<sup>23</sup> found in current §9-501,<sup>24</sup> which can not be waived or modified by the debtor or the obligor.

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<sup>20</sup> UCC §9-601 comment 3

<sup>21</sup> UCC §1-102(3). "Obligations of good faith, diligence, reasonableness and care proscribed by this act may not be disclaimed." Id.

<sup>22</sup> UCC §9-501(5).

<sup>23</sup> UCC 9-602 (1998). The new duties and rights that can not be waived are those found in: 1) 9-207(b)(4)(c) and deal with the use and operation of the collateral by the creditor. 2) 9-607 and deal with collection and enforcement of the collateral. 3) §9-210 which deals with the right of a debtor to request and receive an accounting, a statement of account, and/or a list of collateral. 4) 9-608(a) and 9-615(d) that deal with payment or accounting of surplus proceeds of the collateral. 5) §9-609 that imposes a duty on the creditor not to breach the peace when taking possession of collateral. 6) §9-615(f) which deals with the calculation of a surplus of deficiency if the disposition was to certain related parties to the transaction. 7) 9-616 and the explanation of how the surplus of deficiency was calculated; and 8) 9-624 which deals with permissible waivers.

<sup>24</sup> The rights and duties that can not be waived and or modified that are the same under both the current and revised versions of article are: 1) The requirement of an accounting of the surplus proceeds of the collateral, found in §9-504 and §§9 9-608(a) and 9-615(d) respectively. 2) Duties and rights that

The first totally new rule created by the revised Article 9 is found in section 9-605. This new section relieves the secured party from the obligation of any duty that is owed to a debtor or obligor that is unknown to the secured party,<sup>25</sup> and from duties owed to a secured party of a lien holder that is unknown to the original secured party.<sup>26</sup>

Under current §9-502 the secured party may notify an account debtor or an obligor of an instrument that is being used as collateral, and collect payment from such parties. The revised code still allows such activities and expands the scope of such obligations that such demands can be made upon.<sup>27</sup> The creditor may now also demand any performance based upon the collateral to be rendered to or for the benefit of the secured party.<sup>28</sup> The secured creditor now also has the right to enforce any right that the debtor would have that has arisen from the underlying collateral against a third party.<sup>29</sup>

Even though current §9-502 allowed a secured creditor to collect payment-deriving from the collateral, the section contained little guidance on how such proceeds were to be used. The only statutory guidance is that such activities must "proceed in a commercially reasonable manner" and the secured party may "deduct his reasonable expenses of relation from the collections."<sup>30</sup> Revised article 9 sets out how cash proceeds are to be applied: First to the reasonable expenses of collection of

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accompany the disposition of collateral as found in §§ 9-504 (1) and 9-505 of the current code and §§ 9-610(b), 9-611, 9-613, and 9-614 of the revised code. 3) The duties and rights that accompany the acceptance of collateral as discharge of the obligation as found in § 9-505 of the 1995 Article 9 and §§9-620,9-621, and 9-622 of the 1998 version of article 9. 4) The duties and rights that accompany the redemption of collateral as contained in §9-623 of the revised article and §9-506 of the current article 9. And 5) which deals with the secured party's liability for failure to comply with the rules of the default chapter under current §9-507 and failure to comply with the rules of the entire article 9 under §§ 9-625 and 9-626 of the revised article 9.

<sup>25</sup> UCC 9-605(1998) comment 2.

<sup>26</sup> Id.

<sup>27</sup> UCC 9-607 (1998).

<sup>28</sup> Id.

<sup>29</sup> Id. at Comment 3.

<sup>30</sup> UCC 9-502(2) (1995).

enforcement.<sup>31</sup> Second, the proceeds are to be applied to the debt under which the collection or enforcement was made.<sup>32</sup> Third, the proceeds should go to any other holder of a junior interest in the collateral as long as the secured party received an authenticated demand for such proceeds.<sup>33</sup> Lastly, the surplus proceeds should be returned to the debtor, and account for all proceeds.<sup>34</sup> But in the case of non-cash proceeds a secured party does not have to apply or pay over such proceeds unless not doing so would be commercially unreasonable.<sup>35</sup>

#### **RIGHTS AND DUTIES THAT ACCOMPANY THE DISPOSITION OF COLLATERAL**

##### ***A: Forms of Disposition***

Under the revised Article 9<sup>36</sup>, the creditor still retains the right to sell, lease, or otherwise dispose of any or all collateral after default that is provided for under the current version of article 9.<sup>37</sup> §9-610(a) goes one step farther by explicit allowing the secured party the right to also license any collateral after default.

##### ***B: Pre-Disposition Preparation and Processing of Collateral***

Both the current version of article 9<sup>38</sup> and the revised version<sup>39</sup> state that the collateral may disposed of in the condition that it was in when the secured party took possession or the secured party may perform any commercial reasonable pre-sale preparation of processing. Some courts interpreted the language in 9-504(1) to mean that the secured party had a choice as to dispose of the collateral in its then condition or

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<sup>31</sup> UCC 9-608(a)(1)(A)

<sup>32</sup> UCC 9-608(a)(1)(B)

<sup>33</sup> UCC 9-608(a)(1)(C)

<sup>34</sup> UCC 9-608(a)(4)

<sup>35</sup> UCC §9-608(a)(3)(1998)

<sup>36</sup> UCC §9-610(a)(1998)

<sup>37</sup> UCC§9-504(1)(1995)

<sup>38</sup> UCC §9-504(1)(1995)

<sup>39</sup> UCC §9-610(a)(1998)

after some form of preparation.<sup>40</sup> Other Courts read the “commercially reasonable standard” of 9-504(3) into §9-504(1) and in certain situations required the secured creditor to perform pre disposition preparations.<sup>41</sup> The Revised Version of Article 9 resolves the dispute in favor of the position of reading the requirement of commercially reasonableness in to the decision to undertake predisposition preparations.<sup>42</sup> When deciding if such preparations are commercially reasonable the parties should be ‘taking into account the costs and probable benefits of preparation of processing and the fact that the secured party would be advancing the costs at its risk’.<sup>43</sup>

### ***C: Commercial Reasonableness***

Revised Article 9, like its current forerunner, continues to demand that every aspect of the disposition of collateral must be “commercially reasonable.”<sup>44</sup> The revised Article 9 also keeps the tradition alive by not defining exactly what is commercially reasonable<sup>45</sup>. Revised §9-610 makes it clear that proof that a higher price could have been attained by disposing of the collateral at a different time or in a different manner, by itself does not prove that a disposition was commercially unreasonable,<sup>46</sup> but a low price is warning to the courts to give the disposition careful scrutinization.<sup>47</sup> The drafters of revised Article 9 may not have defined commercial reasonableness, but they did provide several safe harbor dispositions that are defined by the code to be conducted

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<sup>40</sup> UCC 9-610(1998) comment 4.

<sup>41</sup> Id.

<sup>42</sup> Id., and see Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 Of the Uniform Commercial Code*, 54 Bus. Law 1113, (1999).

<sup>43</sup> UCC 9-610(1998) comment 4.

<sup>44</sup> See UCC §§9-610(b) and 9-627 and also see UCC §9-504(1)(1995).

<sup>45</sup> Id.

<sup>46</sup> UCC §9-627(a)(1998).

<sup>47</sup> Id., at Comment 2.

in a commercially reasonable manner.<sup>48</sup> These dispositions that have acquired advanced approval of commercial reasonableness include dispositions made; a) on any recognized market;<sup>49</sup> b) for a price that is equal to that on a recognized market at the time of the disposition;<sup>50</sup> c) in conformity with the commercial practices of a dealer of such collateral;<sup>51</sup> and d) is approved on behalf of the creditors by a judicial proceeding, a creditor's committee, a representative of the creditor, or an assignee for the benefit of the creditor.<sup>52</sup>

#### **D: Notification**

Under the current version of article 9, a debtor must receive reasonable notification of the time and place of any public foreclosure sale, or reasonable notification of the time of a private disposition.<sup>53</sup> The code's reasonableness requirement for such notification covers both the timing and the content of the notification<sup>54</sup>, but the code does not define reasonable notification.<sup>55</sup>

Revised article 9, unlike its contemporary brother, gives a little more guidance on timing and content of a notice of sale sent to a debtor. The notice sent must include: a) the time and place of public sale or the time after which a private sale will take place<sup>56</sup>, b) the method of disposition<sup>57</sup>, c) the collateral that is going to be sold<sup>58</sup>, d) the

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<sup>48</sup> *Id.*, at (b).

<sup>49</sup> UCC §9-627(b)(1)(1998).

<sup>50</sup> UCC §9-627(b)(2)(1998).

<sup>51</sup> UCC §9-627(b)(3)(1998).

<sup>52</sup> UCC §9-627(c)(1998).

<sup>53</sup> UCC 9-504(3)

<sup>54</sup> UCC §9-611 Comment 2 (1998).

<sup>55</sup> UCC 9-504 comment 5. Reasonable notification is not defined in this article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire. *Id.*

<sup>56</sup> UCC §§9-613(1)(E)(1998) and 9-614(1)(a)(1998).

<sup>57</sup> UCC §§9-613(1)(C)(1998) and 9-614(1)(a)(1998).

<sup>58</sup> UCC §§9-613(1)(B)(1998) and 9-614(1)(a)(1998).

name of the debtor and the secured creditor<sup>59</sup>, and e) that the debtor is entitled to an accounting of the unpaid indebtedness and the charge, if any for an accounting.<sup>60</sup> In addition to the requirements just outlined, if the foreclosure process is to conclude a consumer-goods transaction, Revised article 9 also requires that the notice of sale must also include; 1) a description of any liability for a deficiency of the person to whom notice is sent<sup>61</sup>, 2) a telephone number form which the amount required to redeem the collateral may be secured<sup>62</sup>; and 3) a telephone number or mailing address form which additional information concerning the description and the obligation secured may be obtained<sup>63</sup>. §§ 9-613 and 9-614 do not require any particular verbiage to fulfill its notification mandates, but the drafters of the code did provide safe harbor notification forms for both a commercial transaction<sup>64</sup> and a consumer-goods transaction<sup>65</sup>.

<sup>59</sup> UCC §§9-613(1)(A)(1998) and 9-614(1)(a)(1998).

<sup>60</sup> UCC §§9-613(1)(D)(1998) and 9-614(1)(a)(1998).

<sup>61</sup> UCC §9-614(1)(B)(1998).

<sup>62</sup> UCC §9-614(1)(C)(1998).

<sup>63</sup> UCC §9-614(1)(D)(1998).

<sup>64</sup> UCC §9-613(5) contains the following notification form, and states that when completed it provides sufficient information.

{Beginning of Form}

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: "[Name of debtor, obligor, or other person to which the notification is sent ] ]

From: "[Name, address, and telephone number of secured "party ]

Name of Debtor(s): " [Include only if debtor(s) are not an addressee ] ]

[For a public disposition: ]

We will sell [or lease or license, as applicable ] the " [describe collateral ] ] [to the highest qualified bidder] in public as follows:

Day and Date:

Time:

Place:

[For a private disposition: ]

We will sell [or lease or license, as applicable ] the "[describe collateral ] ] privately sometime after "[day and date ]].

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable ] [for a charge of \$ ] [for a charge of]. You may request an accounting by calling us at "[telephone number ]]

{End of Form}

§9-613 also states that a notice of sale to a commercial debtor is effectual even if it “contains minor errors that are not seriously misleading<sup>65</sup>”, but §9-614 does not contain and such mandate for notice to a debtor in a consumer goods transaction. “The failure to include a minor-errors protection for the consumer goods notice, suggests that any error, no matter how slight, will make the notice inadequate and subject the creditor to substantial statutory damages recoverable for failure to comply with the Article 9

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<sup>65</sup> UCC §9-614(3) contains the following notification form, and states that when completed it provides sufficient information.

{Beginning of Form}

NOTICE OF OUR PLAN TO SELL PROPERTY

"[Name and address of any obligor who is also a debtor ] ]

Subject: " [Identification of Transaction ] ]

We have your "[describe collateral ]], because you broke promises in our agreement.

[For a public disposition: ] We will sell "[describe collateral ] ] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date:

Time:

Place:

You may attend the sale and bring bidders if you want.

[For a private disposition: ]

We will sell "[describe collateral ]] at private sale sometime after "[date ]]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you "[will or will not, as applicable ]] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at "[telephone number ] ] .

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at "[telephone number ] ] [or write us at "[secured party's address ] ] ] and request a written explanation. [We will charge you \$ ] ] and request a written explanation. [We will charge you for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at "[telephone number ] ] ] [or write us at "[secured party's address ] ] ] .

We are sending this notice to the following other people who have an interest in "[describe collateral ] ] or who owe money under your agreement:

[Names of all other debtors and obligors, if any ]]

{End of Form}

<sup>66</sup> UCC §9-613(1998)

foreclosure rules even in the absence of actual harm.<sup>67</sup> Such a result seems to be harsh especially in the light that the debtor may not have been harmed in any way. Due to the fact that applying such a rule in each and every case will have such a substantially different effect depending upon the facts and circumstances of each instance, the actual application and effect of §9-614 will most likely be different under varying circumstances of each transaction.

In addition to solidifying the criteria for what is commercially reasonable as for the contents of the notice of sale, Revised article 9 also provides guidelines for what is reasonable as far as the timing of such notice<sup>68</sup>. It should be noted that just as with the content requirement, what is reasonable as to the timing of such notice is dependant upon the underlying transaction being either a commercial transaction or a consumer goods transaction. §9-612 provides that in a situation dealing with a commercial debtor, a notice of sale sent 10 days before the earliest time of disposition "is sent within a reasonable time."<sup>69</sup> When dealing with a consumer goods transaction, there is no safe harbor rule, and each situation is to be judged by the individual facts and circumstances. With the fact that the 10 day notice rule was not installed into §9-614 and the provision does not state that such an absence should not be used as an inference of the courts as to the reasonableness of 10 days notice, this might lead courts to conclude that 10 days notice in a consumer goods transaction is unreasonable, or at least it shall be a good argument for a debtor in such a situation.

Revised article 9 also created a new requirement that notice must be given if a debtor is entitled to a surplus or is liable for a deficiency after the foreclosure sale, but

<sup>67</sup> See Zinnecker, note 42.

<sup>68</sup> UCC §9-612 comment 3 (1998).

only in the case of consumer goods transactions<sup>70</sup>. The notice must be sent before or at the time the creditor pays over any surplus or makes written demand for payment of any deficiency or within 14 days after receiving a request for such notice from the debtor or consumer obligor<sup>71</sup>. The post sale notice must include the following information; 1) the price received at the sale<sup>72</sup>, 2) the total debt secured by the security interest<sup>73</sup>, 3) the total outstanding amount of the obligation after the proceeds have been applied to the debt<sup>74</sup>, 4) the various expenses including repossession, preparation, and attorneys fees incurred that relate to the disposition,<sup>75</sup> the aggregate amount of credits to which the debtor is entitled,<sup>76</sup> and the total amount of the surplus or deficiency.<sup>77</sup>

***E: Consumer Protection and a Consumer goods transactions***

In the previous section on notification there were several rules that were different if a party was dealing with a consumer-goods transaction or a regular commercial transaction. Both the revised article 9 and the current version of article 9 have special consumer protection rules<sup>78</sup>, but revised article 9 has changed the landscape of the consumer protection provisions and as such special consideration must be given to the topic<sup>79</sup>.

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<sup>69</sup> Id.

<sup>70</sup> UCC §9-616(1998).

<sup>71</sup> Id.

<sup>72</sup> UCC §9-616(c)(2)(1998).

<sup>73</sup> UCC 9-616(c)(1)

<sup>74</sup> UCC 9-616(c)(3)

<sup>75</sup> UCC 9-616(c)(4)

<sup>76</sup> UCC 9-616(c)(5)

<sup>77</sup> UCC 9-616(c)(6)

<sup>78</sup> See Zinnecker, note 42.

<sup>79</sup> Several of the provisions that have special rules for transactions that deal with consumer goods have already been detailed in the previous section on Notice, and also several more will be discussed throughout the remaining pages of this article.

Under the current version of article 9 a “consumer good” is a good bought or used primarily for personal, family, or household use<sup>80</sup>. With in the parameters of the current version of article 9, there are a handful of consumer protection rules that apply only when the underlying collateral securing the obligation is considered to be a consumer good<sup>81</sup>. Revised article 9 has expanded the number of consumer protection rules throughout the chapter, and one of the foundationally changes is the new categorization of consumer goods or consumer transactions<sup>82</sup>.

Under the Revised Version of article 9, there are now three categories of consumer type transactions, and the definition is important because some of the newly added consumer protection rules only apply to a certain category of consumer transactions. Revised article 9 defines a “consumer transaction” as one for which credit secured is for a personal, family, or household purpose and the collateral is a personal, family, or household asset<sup>83</sup>. While a “consumer goods transaction”<sup>84</sup> is defined as an agreement where the credit is extended for a personal, family, or household purpose, but the underlying asset used as collateral is a consumer good<sup>85</sup>. There are also some provisions of revised article 9 that apply to a transaction entered into for a commercial purpose, but the underlying collateral that secures the debt is in consumer goods. So when a section of revised article 9 uses the term ‘consumer transaction’ or ‘consumer goods transaction’ it is used within these very structured definitions and the reader and practitioner must pay special attention to determine the scope and effect of such provisions. Due to the fact that this categorization is new for revised article 9, and a

*incomplete  
revised*

<sup>80</sup> UCC 9-109(1)

<sup>81</sup> See UCC §9-102 Comment 5(1995).

<sup>82</sup> See generally UCC §9-102(22)-(27)(1998).

<sup>83</sup> UCC §9-102(26)(1998).

distinction is based upon the purpose of such security, the coverage of such terms will vary and be subject to interpretation in the several jurisdictions.

***F: Failure to Give Notification***

Under the current §9-504(3), the secured party must send “reasonable notification” of the time and place of the sale of the collateral to the debtor. What is reasonable notification is not defined in the UCC, but at the minimum it must give the parties entitled to receive such notification the time to protect their interest in the collateral by taking part in the disposition process if they chose to.<sup>86</sup> Now as can be expected from such a provision what is “reasonable notification” has been the subject of litigation, but the most interesting problem is what is the proper solution or remedy when a creditor failed to comply with the “reasonable notification” requirement.

The remedies for the failure to comply with the requirements provided for in current Article 9 are created in UCC §9-507. When dealing with notification “the debtor or any person entitled to notification... has a right to recover from the secured party any loss caused by a failure to comply with the provisions of [Article 9 Part 5].”<sup>87</sup> But the question then becomes what was the extent of the loss perpetrated on the debtor, or more importantly how do you measure that loss when the sale has already occurred and there is no way to determine what kind of effect that notification of the debtor would have played on the outcome of the disposition process? In dealing with the question of damages the courts have come up with three different approaches to deal with the lack of notice of disposition of collateral.

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<sup>84</sup> UCC §9-102(24)(1998).

<sup>85</sup> A ‘Consumer transaction’ includes a ‘Consumer goods transaction’. UCC §9-102(26)(1998).

<sup>86</sup> UCC §9-504 Comment 5.

<sup>87</sup> UCC §9-507(1)

The first approach is what is called the absolute bar rule. If the debtor was not given reasonable notification of the disposition, then the creditor is absolutely bared from obtaining a deficiency judgement against the debtor for the unsatisfied amount of the debt.<sup>88</sup> One court justified the use of such a sweeping and powerful remedy this way:

The purpose of the reasonable notification requirement is threefold: 1) to give the debtor opportunity to exercise his redemption rights under §9-506; 2) to afford the debtor the opportunity to bid at sale or to encourage others to bid on the property so as to help assure a fair sale price; 3) to allow the debtor to oversee every aspect of the disposition so as to maximize the price obtained. The setoff and rebuttable presumption approaches do not assure that the debtor or guarantor will have the advantage of these protections. Their effect is to shift the burden of proof by putting the debtor in the difficult position of refuting the creditor's evidence that the sale he did not attend was commercially reasonable. It is thus likely, were we to adopt either of these approaches, that in many cases the secured party would have the freedom to disregard the mandatory notice requirement of §9-504(3) with little practical impediment to recovering a deficiency judgment.<sup>89</sup>

The second approach is the rebuttable presumption rule. The presumption is that the value of the collateral equals the amount of outstanding debt, thus not allowing a claim for a deficiency judgment unless the creditor can bring forth evidence that establishes a deficiency would remain even if the creditor had complied with the requirements of 9-504(3).<sup>90</sup>

The rationale for endorsing the rebuttable presumption approach has been stated and explained by many different courts. (1) Section 9-504 allows a deficiency claim

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<sup>88</sup> Absolute bar rule definition

<sup>89</sup> *Honor Bank v. Timber Construction*, 151 Mich. App. 681, 687 (1986).

<sup>90</sup> See, e.g., *Hoch v. Ellis* (Alaska 1981), 627 P.2d 1060; *Universal C.I.T. Credit Co. v. Rone* (1970), 453 S.W.2d 37; *Zimmerman v. Cook* (Colo. App. 1982), 651 P.2d 910; Cf. *Poti Holding Co. v. Piggot* (1983), 444 N.E.2d 1311

by its express terms and says nothing about eliminating the claim because of creditor misbehavior, in sharp contrast to §2-706, which strongly suggests that a seller of goods must give notice of resale to a defaulting buyer as a condition of obtaining any deficiency.<sup>91</sup> (2) Snuffing out the deficiency claim conflicts with the policy of §1-106, which allows full compensation to the aggrieved party but seeks to avoid penal damages.<sup>92</sup> (3) The drafters of the UCC intended to do away with the rigid rules of law designed to govern in all situations in favor of more fluid guidelines that allow a case by case analysis.<sup>93</sup> (4) Probably the most persuasive argument for allowing a secured party to proceed with an action for a deficiency judgment is the fact that the UCC has already provided the debtor with a remedy in §5-507. Under the latter section, if a secured party is not proceeding properly, the debtor may either restrain the creditor from proceeding further, or may recover from him any loss that the debtor may have suffered due to the secured parties failure to comply with the provisions of article 9.<sup>94</sup>

The third approach is what is known as the setoff rule. The court mandates that the debtor prove the damages that the noncompliance of the secured party has caused upon the debtor, and then that sum is setoff against the deficiency from the sale of the collateral.<sup>95</sup>

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<sup>91</sup> Westgate State Bank v. Clark, 642 P.2d 961, 968 (Kansas 1982)

<sup>92</sup> Id. at 968.

<sup>93</sup> Valley Mining Corporation, Inc. v. Metro Bank, 383 So.2d 158, 163 (Alabama 1980).

<sup>94</sup> Id. at 163.

<sup>95</sup> Chapman v. Field, 602 P.2d 481, 485-86 (Arizona 1979).

This nonconformity was remedied by Revised Article 9. The drafters of revised article 9 followed the majority of the jurisdiction of the United States and have adopted the rebuttal presumption rule.<sup>96</sup>

The rebuttable presumption rule represents a fair compromise of the two other positions, both of which suffer 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 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. By permitting the non-complying 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.<sup>97</sup>

So it is clear from 9-626(a)(3) that we have seen the last of the absolute bar rule and the setoff rule, or have we? Upon further inspection of §9-626, part b starts the whole debate over for consumer transactions. "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."<sup>98</sup> So that begs the question why would the drafters differentiate between a consumer transaction and the typical article 9 transaction? The factors that persuaded the drafters to establish the rebuttable

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<sup>96</sup> Revised Article 9 UCC §9-626(a)(3). The amount of the proceeds from the sale that was conducted without reasonable notice "is equal to the sum of the secured obligation, expenses and attorneys fees unless the secured party proves that the amount is less than that sum."

<sup>97</sup> Timothy R. Zinnecker The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II. 54 Bus. Law. 1737 at 1811-13.

<sup>98</sup> UCC 9-626(b).

*this is idiosyncratic!*

presumption rule are the same for both types of transactions so why the left turn away from a standard rule that applies to all article 9 transactions?

The reason for such non-uniform treatment was the strong insistence by the Consumer Subcommittee for strong consumer protections when dealing with the foreclosure process<sup>99</sup>. One of the major goals of the subcommittee was the implementation of the absolute bar rule for creditors that fail to comply with the provisions of the code when dealing with a consumer transaction.<sup>100</sup> The NCCUSL and the ALI were unwilling to make such a decision, so the compromise was made to let the individual states decide how best to protect its own consumers.<sup>101</sup>

While the rebuttable presumption rule was explained above in the context of the notice requirements of the UCC, the rebuttable presumption rule is invoked in a situation where the commercial reasonableness of any "collection, enforcement, disposition, or acceptance" provided for under Article 9 has been put at issue<sup>102</sup>.

**RIGHTS AND DUTIES THAT ARISE CONCURRENTLY OR PROSPECTIVELY UPON  
THE DISPOSITION OF COLLATERAL**

***Warranty of Title***

Under Article 2 of the Uniform Commercial Code a creditor who sells collateral at a foreclosure sale does not warrant the title transferred to the purchaser and thus the buyer takes at their own peril.<sup>103</sup> Due to the fact that the buyer assumed the risk of a wrongful conveyance, the seller could retain the proceeds of the sale, even if the seller contributed to the imperfect title, while the buyer must turn over the goods to the party

<sup>99</sup> Marion W. Benfield, Jr. Symposium on Revised UCC Article 9: Consumer provisions in Revised Article 9, 74 Chi.-Kent L. Rev. 1255, 1257.

<sup>100</sup> Id. at 1256-58.

<sup>101</sup> Id. at 1266.

that holds such superior title<sup>104</sup>. Scholars have indicated that such lack of accountability in the creditor at a foreclosure sale, leads to lower sales prices and thus greater liability than necessary to the debtor.<sup>105</sup>

Revised Article 9 rejects the notion that commercially reasonable dispositions of collateral by a creditor after default are sales out of the “ordinary commercial course or peculiar”.<sup>106</sup> Because the disposition of collateral is now treated as an ordinary sale of goods, “a contract for sale, lease, license, or other disposition includes warranties relating to title, possession, quiet enjoyment, and the like which by operation of the law accompany a voluntary disposition of property of the kind subject to contract.”<sup>107</sup> So the drafters of revised article 9 have incorporated the warranties of sale provided for in article two of the UCC into the provisions of article 9, thus giving protection to the buyer at the foreclosure sale. But the drafter’s gift and the drafter’s taketh away. Also included in § 9-610 is the ability of the creditor to disclaim all warranties of title<sup>108</sup>.

The creditor is able to disclaim the warranty “in a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition.”<sup>109</sup> So the validity of such disclaimer is also to be assessed under the warranty jurisprudence of article 2<sup>110</sup>. But the drafters also included a safe harbor disclaimer in § 9-610. §9-610(b) states that a record is sufficient to disclaim the warranties conferred on such transaction by the context of §9-

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<sup>102</sup> See generally UCC §9-626(1998).

<sup>103</sup> UCC 2-312

<sup>104</sup> Robyn L. Meadows, Warranties of Title, Foreclosure Sales, and the Proposed Revision of U.C.C. §9-504: Has the Pendulum swung to Far? 65 Fordham L. Rev. 2419.

<sup>105</sup> *Id.*

<sup>106</sup> UCC 9-610 comment 11(1998).

<sup>107</sup> UCC 9-610(d)(1998).

<sup>108</sup> *Id.*

<sup>109</sup> UCC 9-610(e)(1)(1998).

610(a) if it states; “There is no warranty relating to title, possession, quiet enjoyment or the like in the disposition.”<sup>111</sup> “This record need not be written, but an oral communication would not be sufficient.”<sup>112</sup>

So the code now grants warranties of title on the disposition of collateral as its default position<sup>113</sup>. In theory this should increase the proceeds brought in at the sale, because the purchaser is now protected from any defect in the title to such goods. But the code also allows the creditor to disclaim and modify all such warranties<sup>114</sup> and if they do, this should push the proceeds of the sale down due to the increase risk that the purchaser has to undertake due to the disclaimer. So this begs the question if the creditor pushes down the proceeds of the sale by disclaiming the warranties of title, does the creditor conduct such a sale in a commercially reasonable manner in light of such actions?

Under the both the current and revised versions of article 9, every disposition of collateral must be made in a commercially reasonable manner<sup>115</sup>, and the requirement of such level of activity can not be waived by the debtor either pre<sup>116</sup> or post<sup>117</sup> default. So when a creditor disclaims the warranties of title and thus lowers the proceeds of the sale, does the course such a sale to be commercially unreasonable. Both versions of the Code State that just because a higher price could have been obtained at the disposition

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<sup>110</sup> UCC 9-610 Comment 11(1998).

<sup>111</sup> UCC §9-610(b)(1998).

<sup>112</sup> UCC §9-610 comment 11(1998).

<sup>113</sup> UCC 9-610(d)(1998).

<sup>114</sup> UCC 9-610(e)(1)(1998).

<sup>115</sup> UCC §9-610(b)(1998) and UCC §9-504(3)(1995).

<sup>116</sup> UCC §9-602(7) and UCC §9-501(3)(b)(1995).

<sup>117</sup> Id.

sale is not sufficient by itself to cause such a sale to be declared commercially unreasonable<sup>118</sup>, but price does play a part in the analysis.

The code states that a creditor has an option to sell the collateral in the condition that he found it, or the creditor may do any thing commercially reasonable to prepare the collateral for the upcoming sale<sup>119</sup>. The code also states that a creditor has the option to either sell the collateral at either a public or private sale<sup>120</sup>. Both of these choices are still held up to the measuring stick of commercial reasonableness, and the main concern of such scrutiny is the return achieved upon the sale of the collateral.<sup>121</sup> In the case of pre-sale preparations, the question is how much did the presale preparations cost as compared against how much of an increase in the sales price such preparations achieved<sup>122</sup>. Thus the end evaluation is based upon the price differential realized at the foreclosure sale. When dealing with the situation of deciding the commercial reasonableness of a public versus a private sale and vice versa, the main guideline is the ability to achieve a fair price for the goods at the sale<sup>123</sup>. So again the guidelines for deciding if such a decision was commercially reasonable falls to the price achieved at the disposition. The disclaimer of warranties sets up the same type of scenario with the ability to effect price, and should then be measured like the other two options on the price differential. It is difficult at this point to predict what type of analysis the court will use when determining the commercial reasonableness of the

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<sup>118</sup> UCC §9-627(a)(1998) and UCC §9-507(2)(1995).

<sup>119</sup> UCC §9-611(1998).

<sup>120</sup> *Id.*

<sup>121</sup> See Christine A. Ferris & Bennett H. Goldstein, *Disposition of Repossessed Collateral Under the Uniform Commercial Code §6.3* (1990), James J. White & Robert S. Summers, *Uniform Commercial Code §25-10(c)* (4<sup>th</sup> edition supplement 1999), and also 1 Barkley Clark, *The Law of Secured Transactions Under the Commercial Code §4.08[8][b]* (Revised edition 1999).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

disclaimer of warranties, but two things are for certain. First of all the courts will get a large number of chances to flesh out there analysis for such a circumstance, and second that there will be more than one line of thinking to emerge from the several jurisdictions to deal with the problem of commercial reasonableness and the disclaimer of warranties at a foreclosure sale.

### CONCLUSION

In conclusion the task of converting from the 1995 version of the UCC to the Revised Version promulgated in 1998, will be a challenging task, but it will be manageable. Hopefully the information and analysis contained in this article will provide a level of understanding and be a tool used in planning how to confront the new version of the UCC.

As for the rumor that the revision of the UCC that was promulgated in 1998 is going to be scrapped; the reports of its death are greatly exaggerated. Upon calling John McCabe, a member of the NCCUSL and their contact person for any errors or problems people run across in reading the proposed modification of Article 9, he stated the only substantive changes made to the proposed Revision of Article 9 article are to be found in the transition rules. McCabe reported the only changes that are or were to be made to the first six sections are to correct grammar, typos, and cross referencing errors. McCabe stated that most of these changes to the first six sections were made in the comments, and the substance of the rules found in the proposed revision are still intact. Which is a good thing considering that The Revised Version of Article 9 has been adopted in 22 states thus far, and is up for debate this very week in the Michigan legislature.