

The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks—Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*

I. Introduction

It is not surprising debtors want the statute of limitations applicable to creditors' actions to recover unpaid indebtedness to be as short as possible. Equally unsurprising is creditors wanting the statute of limitations period to be as long as possible. Courts typically resolve this issue fairly easily by applying the appropriate statute of limitations for the type of lawsuit involved, e.g., written contract, promissory note. It is not difficult for courts to determine the applicable statute of limitations for most types of legal actions. They simply fit the action into one of the statutes of limitation enacted by the legislature. One action is not an easy fit. It is the suit that stems from a default by a buyer in a transaction that combines a sale of goods with a purchase-money security interest:¹ a suit brought by a secured party to recover the deficiency remaining after its repossession and sale of the collateral.² Should the statute of limitations for this action be the statute applicable to a breach of a contract for the sale of goods or that for a default in a security interest transaction? Sales of goods and contracts for the sale of goods are regulated by Article 2 of the Uniform Commercial Code. Security interests are regulated by Article 9 of the Uniform Commercial Code. It would seem that recovery of a deficiency remaining after repossession and resale of goods is a remedy connected to a security interest transaction and thus the applicable statute of limitations would be that for a secured transaction. Most courts, however, have applied the Article 2 statute of limitations, four years, rather than the statute of limitations that would apply to an action on a secured transaction.³ This result has surprised the creditors who commenced an action to recover a deficiency more than four years after the deficiency arose.⁴

* Professor of Law, Louis D. Brandeis School of Law at the University of Louisville.

¹ Parties create a purchase-money security interest when a creditor extends credit to enable the debtor to acquire rights in the collateral. See U.C.C. § 9-103(a), (b)(1) (2001). A purchase-money security interest can be taken in goods, including livestock that are farm products, and software that is integral to the goods acquired in a purchase-money transaction. U.C.C. §§ 9-103(b)(c), 9-324(d) (2001).

² A "deficiency" is the amount owed on a secured debt after the sale of the collateral fails to yield sufficient proceeds to cover the outstanding debt. See BLACK'S LAW DICTIONARY 433 (7th ed. 1999).

³ "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." U.C.C. § 2-725 (2001). Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations. For various statutes of limitations see, *infra* text and notes 196, 197. For courts applying the Article 2 statute of limitations see, e.g., D.A.N. Joint Venture, III v. Clark, 218 S.W.3d 455 (Mo. Ct. App. 2006); DaimlerChrysler Services North

I assert that the appropriate statute of limitations for recovery of a deficiency arising after the repossession and sale of personal property collateral is that applicable to actions originating from a secured transaction, not the Article 2 statute of limitations. There are four reasons for my assertion. First, Article 2 recognizes that it is not the sole governing law of a transaction that combines a sale and a purchase-money security interest. Second, early case law, prior uniform acts, and the early drafts of the Article 2 indicate that an action for the recovery of a deficiency arising from the buyer's default in a combination sale and purchase-money security transaction was governed by laws pertaining to security transactions, not laws pertaining to sales of goods. Third, Article 2 does not indicate an intention to change the policy expressed in prior uniform laws and the early drafts of Article 2 that cede governance of remedies connected to a security transaction to laws governing such transaction. Fourth, the characteristics of a deficiency action make it a remedy that is connected to the security interest part of a sale/purchase money security transaction.

A court has various sources to consult in determining the applicable statute of limitations: the relevant sections of Articles 2 and 9, the Official Comments to those sections, prior uniform acts, the origin and nature of the remedy, and decisions of other courts. Neither Articles 2 or 9 or their Official Comments provide a definitive statement that the Article 2 statute of limitations regulates or does not regulate the action. Most courts deciding the issue have focused solely on determining whether a deficiency action is an aspect of the sale component or the security interest component of a purchase-money security transaction. Not surprisingly given their caseload and resources, courts have largely ignored the legislative history of Article 2. More surprising is that only a few courts have analyzed the comment that is instructive on the issue, the Official Comment to section 2-102, the scope section of Article 2.⁵ But even without considering those sources, the attributes of a deficiency action make it more fitting to connect it to a security interest than to a sale. I will rely on all these sources to support my assertion that the statute of limitations for recovery

America, LLC v. Ouimette, 830 A.2d 38, 42 (Vt. 2003); Barnes v. Community Trust Bank, 121 S.W.3d 520 (Ky. Ct. App. 2003); Ford Motor Credit Co. v. Arce, 791 A.2d 1041, 1042 (N.J. Super. Ct. App. Div. 2002); Action Mgmt. Inc. v. Fratello, No. 743 S 1999, 2000 WL 1865005 (Pa. Com. Pl. 2000); Scott v. Ford Motor Credit Co., 691 A.2d 1320 (Md. 1997); First of America Bank v. Thompson, 552 N.W.2d 516 (Mich. Ct. App. 1996); First Nat'l Bank in Albuquerque v. Chase, 887 P.2d 1250 (N.M. 1994); Worrel v. Farmers Bank of the State of Delaware, 430 A.2d 469 (Del. 1981); Indus. Valley Bank & Trust Co. v. Sharpe, 30 U.C.C. Rep. Serv. 1295 (Pa. Ct. Com. Pl. 1980).

⁴ Using the Article 2 statute of limitation is appropriate when the creditor uses an Article 2 remedy to recover the debt. For example, a seller who sues the buyer to recover the purchase price of the goods in accordance with U.C.C. 2-709(1) is bound by the Article 2 statute of limitations. As I discuss *infra* at 24, some courts believe that is precisely what the creditor in this situation does.

⁵ For cases discussing the § 2-102 Official Comment see Scott v. Ford Motor Credit Co., 691 A.2d 1320 (Md. 1997); First of America Bank v. Thompson, 552 N.W.2d 516 (Mich. Ct. App. 1996); Worrel v. Farmers Bank of the State of Delaware, 430 A.2d 469 (Del. 1981); and North Carolina Nat'l. Bank v. Holshouser, 247 S.E.2d 645 (N.C. Ct. App. 1978).

of a deficiency is the statute of limitations applicable to a secured transaction, not the Article 2 statute of limitations.

Before examining those sources, I describe the factual setting of this article. The cases I review involve a buyer and seller who agree to an installment sale of goods with the unpaid purchase price secured by a security interest in the goods purchased. This transaction combines a sale of goods with a purchase-money security interest. A frequent contractual vehicle for this transaction is a “retail installment contract and security agreement.”⁶ I will shorten this title throughout this article to “installment sale contract,” always meaning a transaction that combines an installment sale of goods with a purchase-money security interest in the goods sold. Using Article 9 terms, the seller of the goods is also a “secured party” because the buyer grants the seller a security interest.⁷ Likewise, the buyer of the collateral is also both “debtor” and “obligor” because the buyer is the owner of the goods and the person who owes payment of the obligation.⁸ When a debtor defaults, the typical Article 9 remedy employed by a secured party is to repossess the collateral from the debtor.⁹ After obtaining the collateral the secured party will either dispose of the collateral or accept it in total

⁶ Black’s Law Dictionary defines a “retail installment contract” as a “contract for the sale of goods under which the buyer makes periodic payments and the seller retains title to or a security interest in the goods.” BLACKS LAW DICTIONARY 324 (7th ed. 1999). The effect of a seller’s retention of title of goods delivered to the buyer is limited to a security interest. U.C.C. §§ 1-201(35), 2-401(1) (2001). The combination sale and security interest is also named a “conditional sale.” Black’s Law Dictionary defines a conditional sale as a “sale in which the buyer gains immediate possession but the seller retains title until the buyer performs a condition, especially payment of the full purchase price.” BLACK’S LAW DICTIONARY 1337 (7th ed. 1999).

⁷ U.C.C. § 9-102(a)(72) (2001). In several cases the seller/secured party assigns the installment sale contract to a financier, thus the financier becomes the secured party. See, e.g., *Assocs. Disc. Corp. v. Palmer*, 219 A.2d 858 (N.J. 1966); *North Carolina Nat’l. Bank v. Holshouser*, 247 S.E.2d 645 (N.C. Ct. App. 1978). Although the assignment might seem to strengthen the argument that the Article 2 statute of limitations does not apply, it has not and should not be a factor in the outcome of the cases.

⁸ “‘Debtor’ means: (A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor . . .” U.C.C. § 9-102(28) (2001). “‘Obligor’ means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation.” U.C.C. § 9-102(59) (2001). Other than this footnote, I will use the labels “buyer,” “debtor” and “obligor” interchangeably in this article unless I denote otherwise. In all the cases I reviewed for this article the debtor was both the obligor and the person who initially purchased the collateral. However, the debtor is not always the obligor. If, for example, the original buyer sells the collateral to a person who does not assume liability for the debt, the original buyer is the obligor while the debtor is the owner of the collateral.

⁹ U.C.C. § 9-609 (2001) lists the various means a secured party has for obtaining possession of the collateral. The typical ways a secured party obtains collateral are the debtor voluntarily relinquishes the collateral or the secured party repossesses it. Article 2 grants no right to a seller to repossess goods from a buyer except for the limited right to reclaim goods received by an insolvent buyer, and an unpaid cash seller’s right to reclaim delivered goods for which it has not received payment. U.C.C. §§ 2-702, 2-507(2) (2001), respectively. For a discussion of the cash seller’s right see P.E.B. Commentary No. 1, March 10, 1990.

or partial satisfaction of the debt.¹⁰ Frequently, a deficiency remains after the secured party chooses to dispose of the collateral.¹¹ In such case, Article 9 makes the obligor liable for the deficiency, although unless the obligor voluntarily pays the secured party must bring an action against the obligor to recover the deficiency.¹² That suit raises the issue of the applicable statute of limitations. Because the secured party has been using its Article 9 remedies to obtain repayment of the obligation, the secured party reasonably would think that the statute of limitations for bringing the deficiency action would be the applicable statute for a suit on a money obligation, credit obligation or suit on a contract.¹³ As I noted previously, however, most courts have applied the Article 2 statute of limitations holding that a deficiency suit is more closely related to the sales aspect of a combination sale and security interest than to the security aspect.¹⁴

My first assertion, discussed in Part II, is that Articles 2 and 9 both govern a combination sale/purchase-money security interest transaction. My second assertion, discussed in Part III, is that early case law, prior uniform acts, and the early drafts of the Article 2 indicate that an action to recover a deficiency arising from a combination sale and purchase-money security transaction is governed by laws pertaining to security transactions, not laws pertaining to sales of goods. My third assertion, discussed in Part IV, is that Article 2 does not change the policy of prior uniform laws or the early drafts of Article 2 that cede governance of remedies connected to a security transaction to laws governing such transaction. Part V discusses the cases addressing this issue. Part VI discusses my fourth assertion that the characteristics of a deficiency action make it a remedy that is connected to the security interest part of a purchase-money security transaction. I present alternate solutions to this issue in Part VII.

If I had to label my method for interpreting UCC sections I suppose I would be an intentionalist: I ascertain the meaning of the section based on the words of the statute and the intent of the drafters. I attempt to discover what the drafters

¹⁰ Disposition can take many forms—sale, lease, license. U.C.C. § 9-610 (2001). Acceptance of the collateral is authorized by U.C.C. § 9-620 (2001). When the collateral is consumer goods and the debtor has paid at least 60% of the cash price or 60% of the principal amount owed to the seller must dispose of the collateral. U.C.C. § 9-620(e) (2001). Likewise when the transaction is a consumer transaction security interest, the secured party is not authorized to accept the collateral in partial satisfaction of the obligation. U.C.C. § 9-620(g) (2001).

¹¹ A deficiency also exists if the seller chooses to accept the collateral in *partial* satisfaction of the obligation. See U.C.C. § 9-622 (2001).

¹² U.C.C. § 9-615(d)(2) (2001). Several states have enacted the Uniform Consumer Credit Code provision that bars a secured party from recovering a deficiency in consumer credit sales where the cash sale price is below a stated minimum, typically \$1000 or less. Unif. Consumer Credit Code § 5.103 (1968), 7 Pt III U.L.A. 477 (2002). See, COLO. REV. STAT. ANN. § 5-5-103; ID. CODE ANN. § 28-45-103; IND. CODE ANN. § 24-4.5-5-103; KAN. STAT. ANN. § 16a-5-103; 9-A Me. REV. STAT. ANN. §5-103; 14A OKL. STAT. ANN. § 5-1-3; S.C.CODE ANN. 37-5-103; UT. CODE ANN. § 70C-7-1-1; WIS. STAT. ANN. § 425.209; and WYO. STAT. ANN. § 40-14-503.

¹³ Article 9 has never included a statute of limitations for bringing an action to recover a deficiency, or any other statute of limitations. For various statutes of limitations see *infra* text and notes 196, 197.

¹⁴ See *supra* note 3.

meant, as well as what they said. With a lush menu of aids to help discover the drafters' intent, e.g., Official Comments, early drafts of the UCC, and prior uniform acts, I favor the "intentionalist" approach over the "textualist" approach which typically seeks to determine the meaning of the statute solely from what it says.¹⁵ Since it is impossible to convene a panel of the drafters of the first official text of Article 2 to inquire whether they intended for Article 2 to fix the statute of limitations for a suit to recover a deficiency under an installment sale contract, we must deduce their answer from the signals they gave, starting of course with the UCC sections.

II. The Relevant UCC sections, 9-102 and 2-102, Authorize Articles Two and Nine to Govern an Installment Sale Contract

The Articles 2 and 9 sections defining each article's scope are the most likely place for the drafters to answer the question of whether Article 2, Article 9, or both apply to a transaction that combines a sale with a purchase-money security interest. Section 9-109 sets out the scope of Article 9. Its foundational subsection states that "this article applies to . . . a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract"¹⁶ A combination sale and purchase-money security interest is within the scope of Article 9 because it is a transaction that creates a security interest. Consequently, Article 9 governs an installment sale contract. No Article 9 section addresses the issue of whether Article 2 and Article 9 can co-regulate the combination sale and security interest.

Official Comment 2 to section 9-109 states that Article 9's scope provision "derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended."¹⁷ Section 9-102 of the 1962 and 1972 Official Texts of Article 9 provided a more detailed statement regarding Article 9's scope.

This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, *conditional sale*, trust receipt, other lien or title retention contract and lease of consignment intended as security."¹⁸

The comment indicates Article 9 was designed to encompass a conditional sale. A conditional sale was a pre-Article 9 security device through which a credit seller retained title while allowing the buyer to possess the goods sold.¹⁹ The

¹⁵ I recognize there are those who differ. See *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992)(Scalia, J., dissenting).

¹⁶ U.C.C. § 9-109(a)(1) (2001).

¹⁷ U.C.C. § 9-109, cmt. 2 (2001).

¹⁸ U.C.C. § 9-102(2) (1962) and U.C.C. § 9-102(2) (1972) (emphasis added).

¹⁹ Black's Law Dictionary defines a conditional sale as a "sale in which the buyer gains immediate possession but the seller retains title until the buyer performs a condition, especially payment of

laws that regulated conditional sales are a meaningful source in determining the statute of limitations for a deficiency action. I examine them *infra* Part III.

Article 9 includes a section that answers whether Article 2 or Article 9 governs the three security interests that arise under Article 2.²⁰ Section 9-110 declares that although such security interests are subject to Article 9, Article 9 expressly cedes to Article 2 the governance over the rights of a secured party arising after the debtor defaults in a security interest created by Article 2. Of particular relevance is the security interest created pursuant to section 2-401 when a seller reserves title to the goods sold because some installment sale contracts that create a consensual security interest nevertheless include a term reserving title to the goods in the seller.²¹ Does section 9-110 indicate the drafters' intent that Article 2 governs all security interests arising in sale/purchase-money security interest transactions? It does not. Section 9-110 declares that the secured party's post-default rights are governed by Article 2 "until the debtor obtains possession of the goods."²² The buyer/debtor had obtained possession of the goods in all the deficiency actions I examined. Article 9 does not waive its governance in cases where the debtor possesses the goods. In fact, I can argue that section 9-110 supports my assertion that Article 2 does not govern an action to recover a deficiency because a logical implication from section 9-110 is that Article 9 governs all aspects of security interests, including those that arise under Article 2, other than the limited situations listed in section 9-110.

Section 2-102 defines the scope of Article 2. The section provides: "this Article applies to transactions in goods" The combination sale and purchase-money security interest is a transaction in goods because it is the parties' agreement for sale of the goods. Consequently, Article 2 governs the agreement.

However, section 2-102 provides further that Article 2 "does not apply to any transaction although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction"²³ Although neither the section nor the comment elaborates on what type of transaction the drafters were contemplating, the exclusion ostensibly reiterates

the full purchase price." BLACK'S LAW DICTIONARY 1337 (7th ed. 1999). In Article 9, the effect of a seller's retention of title to goods delivered to the buyer is limited to a security interest. U.C.C. §§ 1-201(35), 2-401(1) (2001).

²⁰ The Article 2 security interests arise in specific factual settings, not by the agreement of the parties. They are: section 2-401 (seller's retention of title), section 2-505 (seller's shipment of goods under bill of lading), and section 2-711(3) (buyer's rightful rejection or revocation of title).

²¹ See *North Carolina Nat'l Bank v. Holshouser*, 247 S.E.2d 645 (N.C. Ct. App. 1978). Section 2-401 declares that a seller's reservation of title in goods shipped or delivered to the buyer is "limited in effect to reservation of a security interest." The security interest definition in section 1-201(35) contains identical language.

²² U.C.C. § 9-110 (2001).

²³ U.C.C. § 2-102 (2001).

the “substance over form” rule: a transaction in form of sale but in substance only a security transaction is not governed by Article 2. For example, Article 2 would not govern a purported *sale* of goods where a debtor borrows money from a creditor and to provide security for the loan authenticates a writing that purports to evidence a sale of goods from the debtor to the creditor. Although the parties to an installment sale contract intend for it to serve a security purpose, they do not intend it to operate *only* as a security transaction. Their intent is that the agreement functions partly to supply the terms pertaining to the sale of goods. Therefore, the exclusionary clause in section 2-102 does not operate to thwart the governance of Article 2 over the sales components of an installment sale contract.

The scope sections of Articles 2 and 9 justify the conclusion that both Articles apply to an installment sale contract. Neither Article includes a provision that precludes both Articles from applying to the same transaction. In the absence of a statutory preclusion, each Article should apply to the components of an installment sale contract that are within the scope of the Article.

The comment to section 2-102 is the best evidence that the drafters’ intended for Articles 2 and 9 to apply to the same transaction. Although the comments are not law, they indicate the drafters’ intent and are a valuable aid to interpreting the UCC.²⁴ The comment to section 2-102 has not changed since the approval of the first Official Draft of the UCC in 1952. It provides in relevant part:

*The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions.*²⁵

Coupling the italicized clause with the underlined clause shows the drafters’ policy that different laws could apply to different parts of a transaction. The italicized clause expresses the drafters’ policy that the Article 2 was not to have a substantial effect on laws relating to purchase-money security. The

²⁴ The National Conference of Commissioners on Uniform State Laws (hereinafter NCCUSL) and the American Law Institute drafted the comments. “To aid in uniform construction these Comments set forth the purpose of various provisions of the Act to promote uniformity, to aid in viewing the act as an integrated whole, and to safeguard against misconception.” U.C.C., Cmt. U.L.A. LXIII (1962). Courts frequently utilize the comments. See, e.g., *Wakefield v. Crawley*, 6 S.W.3d 442, 447 (Tenn. 1999); *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 324 n.4 (N.M. 1993); *Jefferson v. Jones*, 408 A.2d 1036, 1039 (Md. 1979). A few states have included a section implementing use of the comments in their U.C.C.. E.g., TENN. CODE ANN. § 47-1-102(1); KY. REV. STAT. § 355.1-110. The 1952 Official Draft of the U.C.C. included § 1-102(3)(f) which provided that the comments could be consulted in the construction and application of the U.C.C., but the text controlled where code and comment conflict. 14 Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 44 (F.B. Rothman 1984). That section was deleted by the 1956 Recommendations of the Editorial Board for the U.C.C. after the New York Law Revision Commission objected to it. 18 Kelly, *supra* at 26-27

²⁵ U.C.C. 2-102, cmt. (2001)(emphasis added).

comment's use of "conditional sale" and "chattel mortgage," (both are predecessors of the Article 9 security interest), as examples of purchase-money security is simply a continuation of terminology used in the early drafts of Article 2, before the drafters developed the concept of security interest.²⁶ Because this comment accompanies Article 2's scope section, the italicized clause could imply that laws other than Article 2 exclusively govern a transaction that links sale of goods with security for the unpaid price of the goods, e.g., a purchase-money security interest. If that were the case, Article 2 would not apply at all to purchase-money security transactions. The underlined clause negates that implication. It expresses the drafters' policy that Article 2 would nevertheless apply to sales components of a purchase-money security transaction. As a whole, the comment implies two policies. First, is the drafters' recognition that a purchase-money security transaction could include sales aspects. Second, and more important, is that different laws could apply to different aspects of the same transaction: Article 2 would govern issues relating to the sale of goods, while Article 9 or other applicable law would govern issues pertaining to the security interest.

Although the comment seems to prove my first assertion that Article 2 recognizes that it is not the sole governing law of an installment sale contract, disappointingly, the text of section 2-102 addresses a different subject than the comment. The text, which of course is the law, provides a broad scope declaration—Article 2 covers "transactions in goods," as well as an exclusionary provision—except transactions that "operate only as a security transaction." The comment expresses the policy that Article 2 leaves the law of personal property security substantially unaffected, implying that other applicable law regulates security aspects of the combined sale and security interest and Article 2 governs the sale aspects of the transaction. It is not problematical that this expression of policy comes from the comment, although a section expressing the policy is preferable. Whether Articles 2 and 9 can both govern a transaction is a policy issue, collateral to Article 2's foundational scope, and not an issue necessarily requiring a rule of law. The comment's declaration should suffice.²⁷ The early drafts of Article 2 indicate that the reason why section 2-102 and its comment address different subjects results from the drafters' consolidation and condensation of their previous drafts of section 2-102 and its comment, not a change in policy. I examine those drafts in Part III.

Section 2-725, the Article 2 statute of limitations, does not help in determining whether it should regulate a deficiency action under an installment sale contract. The section simply establishes a four-year limitation period for an

²⁶ See *supra* text accompanying note 18. To update the comment to conform to Article 9 terminology a drafter would simply delete the phrase "such as conditional sale or chattel mortgage."

²⁷ Of course, as I have noted, most courts have applied the Article 2 statute of limitations to the deficiency action, consequently an Article 2 section expressing the policy espoused in the comment would be welcome. I discuss the cases *infra* page 24.

action for “breach of any contract for sale” without indicating whether a sale/security interest transaction is a contract for sale.²⁸ The comment concurs, declaring the purpose of the section is to set a statute of limitations for “sales contracts.”²⁹ One could argue that section 2-725 does not govern a deficiency action because the deficiency results from enforcement of the security interest, not from an action for breach of a contract for sale. Notwithstanding the logic of that argument, most courts have decided the action is an aspect of the sale of goods.³⁰ Those decisions are not indisputably incorrect because an installment sale contract does include provisions relating to the sale of goods and thus it can be characterized as a contract for sale.

III. A Deficiency Action Was Connected to Law Governing Security Devices under Early Case Law, Prior Uniform Laws, and the Early Drafts of Article 2

Sellers of goods had been combining a sale of goods and security for the purchase price into a single transaction long before the Uniform Commercial Code was approved.³¹ Case law and pre-UCC uniform acts addressed the issues resulting from such transactions. Those cases and uniform acts are relevant to determining the applicable statute of limitations for deficiency actions because there is no indication the UCC drafters intended to change the policy of those laws that an action to recover a deficiency after repossession and sale of collateral was a remedy connected to the security aspect of the transaction. Additionally, the provisions of the Uniform Sales Act and the Uniform Conditional Sales Act, the statutory predecessors of many sections of Articles 2 and 9,³² respectively, exhibit the drafters’ policy that sales law not be the sole governing law of a security transaction. In this part I examine first the policy of the cases and prior uniform laws and then review in more depth the prior uniform laws and the early drafts of the Article 2.

Early Case Law and Prior Uniform Laws

A sale of goods transaction in which the seller delivered possession of the goods to the buyer, but conditioned its transfer of title to the goods on buyer’s payment of the purchase price was an early purchase-money security

²⁸ U.C.C. § 2-725(1) (2001).

²⁹ U.C.C. § 2-725(1), cmt. (2001).

³⁰ See cases cited *supra* note 3.

³¹ An early example of such a transaction is the conditional sale in *Dederick v. Wolfe*, 9 So. 350, (Miss. 1891).

³² See Uniform Commercial Code, Table of Sections of Prior Uniform Acts, xxxv (1962); U.C.C. § 2-102, cmt.; U.C.C. § 9-101, cmt.; U.C.C. § 9-102 and cmt. (1962). Although chattel mortgages were a personal property security device there was no uniform act pertaining to it. Most states enacted statutes governing chattel mortgages. See LEONARD A. JONES, LAW OF MORTGAGES ON PERSONAL PROPERTY §§ 190-235 (Houghton, Mifflin 1881).

transaction. These sales were commonly labeled “conditional sales.”³³ The “security” aspect of a conditional sale was that the seller was able to retake the goods if the buyer defaulted because title to the goods remained in the seller. This type of sale was so common that the ordinary meaning of “conditional sale” was the sale with conditional title, although sales of goods subject to other types of conditions were not unusual.³⁴

The advantage of retaining title was offset by courts imposing an election of remedy on the conditional seller when the condition did not occur, e.g., buyer defaulted in paying the purchase price. Courts enforced a conditional seller’s contract right to retake possession of the goods if the buyer defaulted.³⁵ Many courts were not as generous, however, when a conditional seller who had retaken the goods attempted to recover a judgment for the unpaid purchase price.³⁶ They deemed a seller’s exercise of its right to retake the goods a rescission of the contract, consequently allowing no further action on it, e.g., recovering the purchase price.³⁷ Alternatively, a conditional seller could elect to bring an action against the buyer to recover the purchase price. However, courts held that the effect of that action was to “affirm” the sale and consequently prevent retaking the goods.³⁸ Thus, the seller’s utilizing one remedy could preclude it from other remedies consequently preventing it from receiving full payment unless the buyer satisfied the judgment or the resale of the goods produced sufficient proceeds to pay the debt. Although the conditional sale provided security to the conditional seller, it did not guarantee that a seller would be able to recover the entire purchase price from the buyer or through resale of the goods.

³³ See, e.g., *White v. A.W. Gray’s Sons*, 89 N.Y.S. 481 (N.Y. App. Div. 1904). The Uniform Conditional Sales Act was not approved by the NCCUSL until 1918.

³⁴ SAMUEL WILLISTON, *WILLISTON ON SALES* § 7, at 7 (Baker, Voorhis 1909).

³⁵ GEORGE G. BOGERT, *COMMENTARIES ON CONDITIONAL SALES*, 2A U.L.A. 138-39 (1924) and cases cited therein. Bogert is named as the “Draftsman” of the Uniform Conditional Sales Act. *Id.* at iii. Some courts even held the right to retake was implied in the contract in cases where the buyer in a conditional sale defaulted in making payment. BOGERT, at 140 and cases cited therein. However, other courts refused to recognize an implied right to retake for other types of default. BOGERT, at 140-41 and cases cited therein.

³⁶ *White v. A.W. Gray’s Sons*, 89 N.Y.S. 481 (N.Y. App. Div. 1904); *Keystone Mfg. Co. v. Casselius*, 76 N.W. 1028 (Minn. 1898); *Nashville Lumber Co. v. Robinson*, 121 S.W. 350 (Ark. 1909); *Jefferson v. Sawyer*, 89 So. 168 (Ala. 1921).

³⁷ WILLISTON, *supra* note 34, § 579, at 962. Some courts upheld deficiency liability of the buyer. See *Christie v. Scott*, 94 P. 214 (Kan. 1908); *Matteson v. Equitable Mining & Milling Co.*, 77 P. 144 (Cal. 1904); and *Dederick v. Wolfe*, 9 So. 350, (Miss. 1891).

³⁸ *Butler v. Dodson*, 94 S.W. 703 (Ark. 1906); *Waltz v. Silveria*, 145 Pac. 169 (Cal. Ct. App. 1914); *Orcutt v. Rickenbrodt*, 59 N.Y.S. 1008 (N.Y. App. Div. 1899); *Sioux Falls Adjustment Co. v. Aikens*, 142 N.W. 651 (S.D. 1913). See 2 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 43.6 at 1202 (Little, Brown & Co. 1965); UNIF. CONDITIONAL SALES ACT § 24, Commissioners’ Note, 2 U.L.A. 37 (1922) (“The prevailing view is that the commencement of an action for the entire price prevents a retaking of the goods at a later time.”).

No provision of the Uniform Sales Act (USA), one of the first uniform acts approved and a predecessor of Article 2, changed that result.³⁹ The scope of the act was over sales of goods and contracts to sell goods.⁴⁰ Section 20(1) of the USA validated a seller's right to reserve the "property," i.e., the title, in the goods until occurrence of a condition, e.g., paying the purchase price.⁴¹ And although no section of the act expressly referred to conditional sales in which the seller reserved title to delivered goods, courts held that the act recognized the validity of that type of conditional sale.⁴²

One remedy the act granted an unpaid seller in possession of the goods was a lien on the goods sold for their price.⁴³ Granting a lien indicated that the title, or in the words of the USA, the "property," to the goods has passed from seller to buyer because a person cannot hold a lien on her own property.⁴⁴ That of course is the opposite of the ordinary conditional sale where the seller retains the property in the goods. The lien empowered an unpaid seller in possession of the goods to sell them to recoup the unpaid purchase price.⁴⁵ If the resale did not produce sufficient proceeds to cover the unpaid purchase price, the seller could recover "damages for any loss" from the buyer.⁴⁶ The damages caused by the buyer's breach were typically the difference between the contract price and the resale price.⁴⁷ The effect of the remedy was that an unpaid seller in possession of the goods could resell the goods and recover any deficiency remaining from the buyer. However, the act cancelled the lien when the seller

³⁹ The Uniform Sales Act was approved by the NCCUSL in 1906.

⁴⁰ UNIF. SALES ACT § 1(1)-(2), 1 U.L.A. 36 (1950) (hereinafter U.S.A.).

⁴¹ "Where there is a contract to sell specific goods . . . the seller may, by the terms of the contract . . . reserve the right of possession or property in the goods until certain conditions have been fulfilled . . ." U.S.A. § 20(1), 1 U.L.A. 363 (1950). See also U.S.A. § 1(3), 1 U.L.A. 37 (1950). See *infra* note 44 for a definition of "property."

⁴² *E.g.*, *Dinsmore v. Maag-Wahmann Co.*, 89 A. 399 (Md. 1914); *Gottzman v. Jeffrey-Nichols Co.* 167 N.E. 229 (Mass. 1929); *Brown v. Woods Motor Co.*, 39 S.W.2d 507 (Ky. 1931).

⁴³ "Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—(a) lien on the goods or right to retain them for the price while he is in possession of them . . ." 1A U.L.A. § 53(1) 130 (1950). An "unpaid seller" included situations where the price had not been paid or tendered or a negotiable instrument received as conditional payment had not been honored. U.S.A. § 52(1), 1A U.L.A. 129 (1950).

⁴⁴ "Property" means the general property in goods . . ." U.S.A. § 76(1), 1A U.L.A. 420 (1950). In the era of the Uniform Sales Act the word "property" was generally used as to connote ownership rights whereas the Uniform Commercial Code uses the word "title" to connote ownership rights. See U.C.C. § 2-401 (2001). Section 2-401(1) includes the parenthetical "(property)" after "title" in reference to a seller's retention of title as being limited in effect to a security interest.

⁴⁵ U.S.A. § 60(1), 1A U.L.A. 142 (1950).

⁴⁶ "He [the seller] . . . may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale." *Id.* The seller may charge all reasonable expenses of the resale against the buyer. *WILLISTON, supra* note 34, § 552 at 953.

⁴⁷ See, e.g., *Obrecht v. Crawford*, 2 A.2d 1,7-8 (Md. 1938). Undoubtedly U.S.A. § 60(1) is the predecessor of the seller's Uniform Commercial Code Article 2 remedy of contract price minus resale price of U.C.C. § 2-706.

allowed the buyer to lawfully obtain possession of the goods.⁴⁸ Consequently, the unpaid seller had no right under the act to repossess the goods after buyer obtained lawful possession.⁴⁹

The USA did add one new right for an unpaid seller: the unpaid seller did not lose its lien solely because it had obtained a judgment for the price of the goods.⁵⁰ This right averted an election of remedy by a seller who obtained judgment for the price of the goods. An unpaid seller with a lien on the goods and a judgment for the purchase price could still resell the goods and credit the proceeds of resale against the judgment for the price.⁵¹ However, this retention of the lien did not create a lien for a seller who had relinquished possession of the goods. The USA provided no means for an unpaid seller who allowed the buyer to possess the goods to regain possession other than a buyer's voluntary return of the goods.⁵² The remedy for that seller was to bring an action for the price of the goods or recover the difference between the market price and the contract price.⁵³

In summary, the USA affected a conditional sale in several ways. First, it validated sales that included conditions. Second, it granted a lien to an unpaid seller of goods in possession of the goods. Third, it prevented a forfeiture of a seller's lien solely because the seller obtained a judgment for the price of the goods. What the act did not change was the judicially-imposed election of remedy by a seller who retook the goods after allowing the buyer to possess them. That omission would have disappointed a conditional seller because in the ordinary conditional sale the seller delivers possession of the goods to the buyer. Equally disappointing would have been the act's failure to provide a means for an unpaid seller who had lost its lien to retake the goods. What a conditional seller needed was the right to retake the goods from the buyer and recover a deficiency from the buyer.

⁴⁸ "The unpaid seller of goods loses his lien thereon . . . (b) When the buyer or his agent lawfully obtains possession of the goods . . ." U.S.A. § 56(1)(b), 1A U.L.A. 134 (1950). See *In re Friend*, 278 F. 153 (2d Cir. 1921); *Daine v. Price*, 63 A.2d 767 (D.C. 1949); *But see*, *Holmes v. Schnedler*, 223 N.W. 908, 910 (Minn. 1929) (delivery of goods to buyer under conditional sales contract did not extinguish the unpaid seller's lien because actual control of property pursuant to reservation of title contract provision is sufficient to retain lien).

⁴⁹ Courts created a limited exception to that rule. If the parties' agreement contemplated payment for the goods concurrent with delivery, an unpaid seller was allowed to act promptly to retake the goods from a buyer who failed to pay. See *Lamb v. Utley*, 110 N.W. 50 (Mich. 1906); *Frech v. Lewis*, 67 A. 45 (Pa. 1907); and *Drake v. Scott*, 33 So. 873 (Ala. 1903).

⁵⁰ U.S.A. § 56(2), 1A U.L.A. 134 (1950).

⁵¹ See *D'Aprile v. Turner-Looker Co.*, 147 N.E. 15 (N.Y. 1925); *Urbansky v. Kutinsky*, 84 A. 317 (Conn. 1912).

⁵² Note the judicial exception to this rule outlined *supra* note 49.

⁵³ U.S.A. §§ 63 and 64, respectively, 1A U.L.A. 154, 188-89 (1950).

The Uniform Conditional Sales Act (UCSA) changed the common law of conditional sales in many respects.⁵⁴ The act defined a conditional sale to include “any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part of all of the price, or upon the performance of any other condition or the happening of any contingency”⁵⁵ In accordance with the common law rights granted a conditional seller, the act authorized a conditional seller to retake possession of the goods when a buyer was in default under the contract, irrespective of any such contract right.⁵⁶ After repossessing the goods the seller was obligated to resell the goods if the buyer had paid at least fifty percent of the purchase price and had the option to resell in other cases.⁵⁷ The buyer was liable for any deficiency.⁵⁸ Moreover, the remedy the UCSA granted to the conditional seller was not limited to retaking the goods. The act declared that the buyer was liable for the purchase price of the goods regardless whether the property had passed to the buyer.⁵⁹ The Commissioners’ Note stated that the conditional seller’s remedies were an action for the price, the retaking of the goods, or both.⁶⁰

The availability of *both* remedies recognizes that there was no election of remedies. Ending election of remedies was a significant change from the common law. This change was made emphatically in UCSA section 24. “Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in Section 16”⁶¹ The effect of that section was that a suit to recover, or the recovery of, a judgment for the purchase price was not deemed the seller’s affirmation of the contract and was not inconsistent with the conditional seller’s retention of title and later retaking of the goods.⁶² Both were complementary acts to collect the obligation owed by the buyer.⁶³ The seller’s

⁵⁴ The Uniform Conditional Sales Act was approved by the NCCUSL in 1918. Many states had adopted statutes governing conditional sales before NCCUSL approved the uniform act. See, UNIF. CONDITIONAL SALES ACT, 2 U.L.A. app. (1922), (hereinafter U.C.S.A.) for a compilation of those statutes.

⁵⁵ U.C.S.A. § (1), 2 U.L.A. 1 (1922). Leases and bailments of goods were conditional sales if they satisfied statutorily prescribed elements. *Id.* In the U.C.S.A. “property” and “title” seem to be interchangeable terms. See BOGERT, *supra* note 35, at 3, (commentary on U.C.S.A. definition of “conditional sale” refers to seller’s “retention of title”).

⁵⁶ U.C.S.A. § 16, 2 U.L.A. 27 (1922). See BOGERT, *supra* note 35, at 140, discussing the implied right of a seller to retake goods upon buyer’s failure to pay.

⁵⁷ U.C.S.A. §§ 19, 20, 2 U.L.A. 30-31, 34 (1922).

⁵⁸ U.C.S.A. § 22, 2 U.L.A. 35 (1922).

⁵⁹ U.C.S.A. § 3, 2 U.L.A. 5 (1922).

⁶⁰ U.C.S.A. § 3, Commissioners’ Note, 2 U.L.A. 6 (1922).

⁶¹ U.C.S.A. § 24, 2 U.L.A. 36 (1922).

⁶² The U.C.S.A. did include a provision validating a contract right of rescission in favor of a seller if the buyer defaulted, provided the seller credited the buyer with the full purchase price of the goods. U.C.S.A. § 26, 2 U.L.A. 39 (1922).

⁶³ See BOGERT, *supra* note 35, at 180. The conditional seller was foreclosed from retaking the goods after he had collected the entire purchase price. U.C.S.A. § 24, 2 U.L.A. 36 (1922).

implementation of the remedy of retaking the goods was likewise not a rescission of the contract or an election of remedy. The buyer was still liable for the purchase price.⁶⁴

A seller's decision to retake the goods did limit, in one respect, its right to recover the obligation from the buyer. Before the seller could enforce the buyer's personal liability, the seller first had to sell the repossessed goods and apply the proceeds to the obligation.⁶⁵ If the proceeds were insufficient to pay the debt, the seller could obtain a judgment against the buyer for the deficiency.⁶⁶ In that respect, a seller's decision to repossess before suing the buyer on its obligation operated as an election of the *order* of remedy, but not the relinquishing of a remedy. It was an election to proceed against the goods as the seller's primary security, with the buyer secondarily liable.⁶⁷

In summary, the UCSA had a significant impact on the rights of the seller. The act rejected the common law decisions that held a conditional seller's choice of one remedy resulted in loss of other remedies. Instead, the act authorized a seller to recover a judgment for the obligation and also retake the goods, or retake the goods and also obtain a judgment for any deficiency from the buyer. Moreover, it added a remedy for conditional sellers that was not available from the USA: the seller could retake the goods it had sold and delivered to the buyer.

Because the USA validated contracts with conditions, including reservation of the property or title in the goods, the scope of the USA and the UCSA overlapped somewhat in governing conditional sales.⁶⁸ However, the UCSA focused exclusively on the conditional sale transaction in which the seller retained title, while the USA focused on sales and contracts to sell and had no provisions specific to the UCSA conditional sale.⁶⁹ Despite the overlap, the UCSA refers rarely to the USA. However, one reference to the USA is probative of my assertion that an installment sale contract should be governed by multiple laws. The reference pertained to buyer's remedies. The UCSA endorsed liability of the seller to the buyer for seller's breach of promises and warranties: "The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the

Similarly, a seller forfeited its right to retake the goods if it claimed a lien on, attached, or levied on the goods. See BOGERT, *supra* note 35, at 180. Those acts of the seller manifested the intent that buyer had title to the goods and thus extinguished the seller's right to retake the goods. See BOGERT, *supra* note 35, at 177-80..

⁶⁴ U.C.S.A. § 3, 2 U.L.A. 5 (1922).

⁶⁵ U.C.S.A. § 24, 2 U.L.A. 36 (1922).

⁶⁶ "If the proceeds of the resale are not sufficient to defray the expenses . . . and the balance due upon the purchase price, the seller may recover the deficiency from the buyer . . ." U.C.S.A. § 22, 2 U.L.A. 35 (1922).

⁶⁷ U.C.S.A. § 24, Commissioners' Note, 2 U.L.A. 37 (1922).

⁶⁸ See U.S.A. § 20(1), 1 U.L.A. 363 (1950). The U.C.S.A. was approved twelve years after the U.S.A.

⁶⁹ Compare U.C.S.A. § 1, 2 U.L.A. 1 (1922) with U.S.A. § 1, 1 U.L.A. 36 (1950).

property in the goods has passed to the buyer.”⁷⁰ But the UCSA included no remedies for such breaches. Nevertheless, the Commissioners’ Note to the section states that the remedies “common to all buyers of goods, whether the contract be conditional or unconditional are left to the Uniform Sales Act or prevailing common law.”⁷¹ The section and the Commissioners’ statement are a noteworthy recognition of the dual-status of a conditional sale—part sale, part security. More importantly the Notes recognize that such dual status results in different aspects of the transaction being governed by different laws.

The remedies granted by each act are relevant to answering the question whether a deficiency action is more closely connected to the sale of the goods or enforcement of the security interest. Comparing the remedies of the USA and the UCSA shows that recovery of a deficiency after retaking goods sold was a remedy deriving solely from laws applicable to a security transaction. The UCSA adopted remedies for the seller that were specific to the conditional title aspect of the transaction and not available elsewhere—repossession and deficiency recovery from the buyer.⁷² The USA had nothing comparable. Consequently, recovery of a deficiency is not a remedy connected to the sales aspects of a sale/security transaction. Its genesis is from conditional sales remedies.

Prior Uniform Laws and Early Drafts of Article 2

The Official Comment to section 2-102, Article 2’s scope section, identifies section 75 of the Uniform Sales Act as the “Prior Uniform Statutory Provision.” The drafters explain in the comment that section 75 was “rephrased . . . To make it clear that: The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions.”⁷³ Section 75’s role as a predecessor of section 2-102 makes it a source aiding in the determination of whether Article 2 should regulate recovery of a deficiency. Section 75 provided:

Provisions Not Applicable to Mortgages. —The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract

⁷⁰ U.C.S.A. § 2, 2 U.L.A. 5 (1922).

⁷¹ U.C.S.A. § 2, Commissioners’ Note, 2 U.L.A. 5 (1922).

⁷² The rights and remedies accorded the conditional buyer by the U.C.S.A. focused on the conditional aspect of the title and protection of the buyer after the seller repossessed the goods. See U.C.S.A. §§ 2, 16, 17, 18, 19, 20, 21 and 22, 2 U.L.A. 5, 27-35 (1922). For example, the U.C.S.A. granted the conditional buyer the right to possession of the goods and to acquire the “property” in the goods upon its performance of the condition, *e.g.*, paying the obligation. U.C.S.A. § 2, 2 U.L.A. 5 (1922).

⁷³ U.C.C. § 2-102 (2001). As discussed *supra* at 8, the comment and the text relate to different scope subjects so the text of § 2-102 does not clarify the comment neither does the comment clarify the text.

to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.⁷⁴

Comparing UCC section 2-102 and USA section 75 shows they are similar in restricting each act from applying to transactions in form relating to sales of goods but which are actually security transactions.⁷⁵ But neither section addresses the questions of whether the drafters intend for different laws to govern a transaction that combines sale and security and whether a deficiency action under an installment sale contract is aligned with sale or security. The Commissioners' Note to section 75 is consistent with the text and instructs that: "Though the draft [the Uniform Sales Act] does not generally purport to deal with the peculiar rules of mortgage law, there are a few places in which mortgage relations or similar ones are covered, e.g., sections 20(2), 22(a)."⁷⁶ Section 75 is of limited value in determining whether Article 2 governs the remedies of a seller under an installment sales agreement because neither the text nor the Commissioners' Note address the issues of which law should govern a deficiency action or whether both laws can govern a transaction combining sale and security. However, the Note expresses the policy of not affecting the law of chattel mortgages, which, at the time of the USA, was the prevailing type of security transaction for personal property.⁷⁷ This indicates a policy that sales law governed sales but not security transactions. It is the origin of the policy that still prevails.

Although the USA was the last uniform law governing sales transactions approved before UCC Article 2, a Revised Uniform Sales Act (RUSA) was drafted but never approved by the National Conference of Commissioners on Uniform State Laws because of the advent of the UCC. The similarity of current section 2-102 with RUSA section 5(1) indicates it is directly descended from that section:

Section 5. Certain Security Transactions Excluded from this Act.

Unless otherwise explicitly provided

(1) This Act shall not apply to any transaction which although in the form of an unconditional contract to sell or present

⁷⁴ U.S.A. § 75, 1A U.L.A. 419 (1950).

⁷⁵ In 1906, when the U.S.A. was approved, the mortgage law referenced in the Commissioners' Note would be the chattel mortgage statutes many states had adopted. Chattel mortgages were not the subject of a uniform act. See *supra* note 32

⁷⁶ U.S.A. § 75, Commissioners' Note, 1A U.L.A. 419 (1950). U.S.A. §§ 20(2) and 22(a) involved transactions in goods wherein the seller reserved "the property" in the goods. Section 20(2) deemed a seller's reservation of property in goods shipped pursuant to a bill of lading to be for only the purpose of securing performance of the buyer's obligations in certain situations. Section 22(a) places risk of loss for certain transactions on buyer although seller reserved property. "Property" means the general property in goods, and not merely a special property." U.S.A. § 76, 1A U.L.A. 420 (1950).

⁷⁷ See JONES, *supra* note 32, § 190. The U.C.S.A. was approved twelve years after the U.S.A. was approved.

sale is intended to operate only by way of mortgage, deed of trust, pledge, charge or other security transaction.⁷⁸

Additionally, the Official Comment to section 2-102 ostensibly originates from RUSA section 5(2). Subsection (2) expresses the rule that the RUSA was not to alter remedies arising under conditional sales law.⁷⁹

(2) This Act shall not alter such rights and remedies of either seller or buyer as are peculiar to the law of conditional sales or any requirements of form, filing or the like peculiar to such sales.⁸⁰

The words of subsection (2) expressly convey a policy similar to that of the section 2-102 comment: the act does not affect the rights and remedies pertaining to the security aspects of a transaction combining a sale and security; in the words of the RUSA, the remedies “peculiar” to conditional sales. *Peculiar* implies that a party could utilize remedies that are not peculiar; the remedies not associated with the conditional sale component of the transaction and that exist under other law, e.g., the RUSA remedies for a seller.

The RUSA drafters’ “Comment on Section 5” is also a source of the section 2-102 comment. The RUSA comment states:

The policy of the original Act [USA], though nowhere explicit, was to *leave the peculiar aspects of the law of conditional sales substantially unaffected* This Act here and in Section 54(1) continues these policies.⁸¹

The section 2-102 comment states in part: “The Article leaves substantially unaffected the law relating to purchase money security such as conditional sales or chattel mortgage.”⁸² Comparing the italicized words of the RUSA with the underlined words of the section 2-102 comment shows they employ similar words to express the same meaning: the act was not intended to supplant existing law regulating security transactions.

The RUSA drafters left no doubt to their intention in a subsequent passage in the same paragraph of the Comment.

Moreover, Original Act, [USA] Sec. 20 (1) explicitly allowed reservation by the seller of the property in the goods “until certain conditions have been fulfilled.” The *general intention* [of the USA] *ran to recognition of what may be called purchase-money security in the particular goods bought, but involved no attempt to regulate such detailed incidents as*

⁷⁸ Revised Uniform Sales Act § 5, cmt. *in 2 Kelly, supra* note 24, at 14. (hereinafter R.U.S.A.).

⁷⁹ When the R.U.S.A. was being drafted in 1940, the U.C.S.A. had been approved and adopted by eleven states. 2 U.L.A. 9 (Cum. Supp.1967). The NCCUSL withdrew the U.C.S.A. from the list of Uniform Acts recommended for adoption in August 1943. *Id.*

⁸⁰ R.U.S.A. § 5, cmt. *in 2 KELLY, supra* note 24, at 14.

⁸¹ R.U.S.A. § 5, cmt. *in 2 KELLY, supra* note 24, at 97 (emphasis added).

⁸² U.C.C. § 2-102, cmt. (2001) (emphasis added).

the seller's peculiar remedies, or any filing or recording documents.⁸³

The italicized quote also demonstrates the drafters' awareness that the USA did not regulate the remedies of a conditional seller notwithstanding that the act did affect some aspects of a conditional sale. The comment contains two acknowledgements: 1) that different bodies of law can govern different aspects of the same transaction and 2) that the seller's remedies arising from the law of conditional sales remain under the jurisdiction of that law, and not part of sales law. Their appreciation of those possibilities is even more apparent later in the same comment.

*[C]onditional sales continued to be governed by the ordinary applicable incidents of contracts for sale The provisions 'saved' as 'peculiar to the law of conditional sales' include not only matters relative to the security and the seller's remedies, but any legislation requiring a minimum down payment, or the explicit statement of the financing charges, or the like.*⁸⁴

The italicized passage shows the RUSA policy that sales law governed general sales aspects of a conditional sale. The underlined passage expresses the policy that the sales law does not affect seller's remedies peculiar to conditional sales law—the right to retake the goods and recover a deficiency.⁸⁵ Together those passages represent the first explicit statement by the drafters of a uniform law that the different aspects of a transaction could be subject to different bodies of law and that conditional sales law would govern a conditional seller's remedies. This statement of policy in the RUSA is significant because the RUSA was a model for Article 2, and there is no indication that the Article 2 drafters intended to change the policy.⁸⁶

IV. Early Drafts of UCC Article 2 Exhibit No Intent to Change Policy That Article 2 Not Apply to Remedies for Conditional Sellers

When Article 2 of the Uniform Commercial Code was being drafted, the UCSA had been approved and adopted by eleven states.⁸⁷ The RUSA had been drafted. As I discussed in Part III, the RUSA recognized the continued viability of

⁸³ R.U.S.A. § 5, cmt. *in 2* KELLY, *supra* note 24, at 97 (emphasis added).

⁸⁴ *Id.* at 98 (emphasis added).

⁸⁵ Those were the remedies created by the U.C.S.A.. Those remedies did not exist under the U.S.A..

⁸⁶ "The Institute and the National Conference of Commissioners on Uniform State Laws have undertaken to cooperate in the production of a Uniform Revised Sales Act . . . Should our organizations proceed to prepare a Commercial Code the Revised Sales Act will constitute the Sales Chapter." R.U.S.A. Proposed Final Draft No. 1, Letter of Transmittal, *in 2* KELLY, *supra* note 24, at 3.

⁸⁷ Eleven states had adopted the U.C.S.A. before NCCUSL withdrew it in 1943. U.L.A., Uniform Commercial Code, Foreword LVIII (1962). New Hampshire, in 1945, became the twelfth state to adopt the U.C.S.A. *Id.*

the remedies for a conditional seller created in the UCSA and that the RUSA would govern sales aspects of conditional sales, while leaving remedies to the law of conditional sales.⁸⁸ Karl Llewellyn was the primary architect and drafter of both the RUSA and Article 2 of the UCC, and the RUSA was the model for Article 2.⁸⁹ Yet, the final draft of Article 2 omitted any express relinquishment of governance over the remedies for a seller in a security transaction. Did the drafters of Article 2 change their minds about ceding governance over remedies? The early drafts of Article 2 show no change of policy, although admittedly they do not express a definitive answer. However, the drafts show the intent of the drafters to retain the policy of the USA and the RUSA that the sales laws were to leave unaltered the peculiar remedies of the conditional sales law, and, as the security device changed from conditional sale to security interest, leave unaltered the remedies of purchase-money security transactions. Their intent supports my assertion that a deficiency action after repossession and resale of collateral is not regulated by the Article 2 statute of limitations.

The first published draft of Article 2 is the May 1949 draft. Section 2-102(b) provides: “Unless otherwise explicitly provided . . . This Article shall not alter such rights and remedies of either the seller or the buyer as are peculiar to the law of conditional sales or any requirements of form, filing or the like peculiar to such sales.”⁹⁰ Although the comment to the May 1949 section 2-102 denotes Section 75, USA as the prior statutory provision and that “paragraph (b) is new,” the words of section 2-102(b) are exactly the same as section 5(2) of the RUSA except for a minor word change.⁹¹ Section 2-102(b) continues the policy that sales law does not affect the remedies of a conditional seller created by conditional sales law. In the section’s comment the drafters reiterate their policy that conditional sales law, not Article 2, regulates the remedies of a conditional seller, but Article 2 regulates the general sales aspect of a conditional sale.

This Article leaves substantially unaffected the peculiar aspects of the law of conditional sales, though it of course regulates the general sales aspects of such transactions. The provisions of the conditional sales law intended to be saved by paragraph (b) of this section include matters relative not only to the security and the seller’s remedies in regard thereto, but also to any legislation requiring a

⁸⁸ The R.U.S.A. section 5 provided that it would not “alter such rights and remedies of either seller or buyer as are peculiar to the law of conditional sales.” R.U.S.A. § 5, *in 2 KELLY, supra* note 24, at 14. The comment to section 5 approved the dual governance of the R.U.S.A. and the U.C.S.A. R.U.S.A. § 5, cmt. *in 2 KELLY, supra* note 24, at 97-98.

⁸⁹ See R.U.S.A. Proposed Final Draft No. 1, Letter of Transmittal, *in 2 KELLY, supra* note 24, at 3; U.C.C. § 2-101, cmt. (Draft May 1949), *in 6 KELLY, supra* note 24, at 49.

⁹⁰ U.C.C. § 2-102 (Draft May 1949), *in 6 KELLY, supra* note 24, at 50. Section 2-102(a) states the rule that Article 2 does not apply to transactions in the form of unconditional contract to sell but intended to operate as security. *Id.*

⁹¹ U.C.C. § 2-102, cmt. (Draft May 1949), *in 6 KELLY, supra* note 24, at 50. Article 2 uses “Article” and R.U.S.A. uses “Act.” After proceeding through several drafts, the drafters stop working on the R.U.S.A. because they undertook the project to develop the U.C.C.. Consequently, the R.U.S.A. never became a “prior” uniform law.

minimum down payment, the explicit statement of the financing charges, or the like.⁹²

Both the section and its comment express the same policy as do the USA, RUSA and UCSA and thus show the drafters' intent to retain the prior policies. Under the May 1949 Draft, Article 2 would govern general sales aspects of a conditional sale and conditional sales law would govern security aspects and remedies.

The next draft of Article 2 was the Spring 1950 draft. The only change to the text was the insertion of the words "any purchase money security transaction" in place of the words "the law of conditional sales." Section 2-102(b) stated: "This Article shall not alter such rights and remedies of either the seller or the buyer as are peculiar to *any purchase money security transaction* or any requirements of form, filing or the like peculiar to such sales."⁹³ The change likely reflects the fact that prior to the Spring 1950 draft the Article 9 subcommittee had circulated a tentative draft of Article 9 that would cover all security transactions, including conditional sales, and would change a seller's security device from conditional sale to purchase-money security interest.⁹⁴ Nothing in the Spring 1950 Draft indicates the drafters changed their policy that Article 2 would not govern security aspects of a sale/security transaction. The drafters changed the comment to correspond with the revised text: "This article leaves substantially unaffected the peculiar aspects of the law relating to purchase money security such as conditional sale or chattel mortgage"⁹⁵

⁹² U.C.C. § 2-102, cmt. 2 (Draft May 1949), in 6 KELLY, *supra* note 24, at 50. The comment is essentially a condensed version of the Commissioners' Notes to R.U.S.A. § 5. See *supra* text accompanying notes 79-85.

⁹³ U.C.C. § 2-102 (Draft Spring 1950), in 10 KELLY, *supra* note 24, at 80. The word "sales" in § 2-102(b) seems inappropriate because "purchase money security transaction" was substituted for "conditional sales." The word "transaction" should have been substituted for "sales."

⁹⁴ Tentative Draft No. 1—Article VII, which subsequently would be renumbered as "Article 9," was promulgated April 21, 1948. 4 KELLY, *supra* note 24, at 265.

⁹⁵ U.C.C. § 2-102, cmt. 2 (Spring 1950), 10 KELLY, *supra* note 24, at 80. The drafters could have, and probably should have, deleted the phrase in section 2-102, "such as conditional sale or chattel mortgage."

It seems the drafters neglected to discover a scrivener's error in the Spring 1950 Comment that changed "and" to "of." All previous comments in both the U.C.C. and the R.U.S.A. had declared that the provisions of conditional sales law intended to be saved include matters relative not only to the "security and the seller's remedies in regard thereto" See U.C.C. § 2-102, cmt. (Draft May 1949), in 6 KELLY, *supra* note 24, at 50 and Revised Uniform Sales Act § 5, cmt. in 2 KELLY, *supra* note 24, at 98 (emphasis added). The Spring 1950 Draft comment provided: "intended to be saved by paragraph (b) of this section include matters relative not only to the security of the seller's remedies" U.C.C. § 2-102, cmt. 2., (Draft Spring 1950), in 10 KELLY, *supra* note 24, at 80-81 (emphasis added). "[S]ecurity and the seller's remedies" is consistent with the words of § 2-102 and previous commentary and much more likely the word the drafters intended to use. Possibly the drafters could have intended the change because the phrase "security of the seller's remedies" could mean the general protection gained by having remedies. Assuming the drafters intended the change, it nevertheless does not change their policy.

In September of 1950, the drafters proposed revisions to the Spring 1950 Draft.⁹⁶ The revisions “represent (1) the discussion at the May meeting and (2) an indefinite number of conferences among interested persons thereafter.”⁹⁷ The Revisions changed section 2-102 significantly by deleting section 2-102(b).⁹⁸ After the revisions, section 2-102 would provide:

This Article does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating such sales to consumers, farmers or other specified classes of buyers.⁹⁹

Section 2-102 would no longer declare that Article 2 did not alter the rights and remedies of seller or buyer peculiar to purchase money security transaction. Unfortunately, the drafters provided no explanation for any of the changes.¹⁰⁰

The important query is what did the drafters intend by the change? Did they intend that Article 2 now governs all security aspects of sale/security transactions? That would have been a major change from the policies of the USA, the RUSA, and the previous drafts of Article 2. Switching to Article 2 governance of the security part of a sale/security interest transaction is not logical because the security aspects of a purchase-money security transaction have no connection with the sales aspect of such transaction beyond the fact that the goods sold serve as collateral. Additionally, Article 2 has no provisions covering perfection of a purchase-money security interest.¹⁰¹ For example, the perfection of a purchase-money security transaction is entirely unrelated to the sales aspects of the transaction and Article 2 has no provisions to regulate perfection. Similarly, there is no logic in having Article 2 govern the remedies of a secured party/seller merely because Article 2 includes remedies for a seller of goods. The Article 2 remedies do not insure full recovery of the obligation when the seller decides to repossess and sell the goods because Article 2 grants no

⁹⁶ The revisions stem from discussion of the Spring 1950 draft at the May 1950 joint meeting of The American Law Institute and the NCCUSL. Foreword to U.C.C., (Draft Spring 1950), *in* 10 KELLY, *supra* note 24, at 3.

⁹⁷ Letter of Herbert F. Goodrich, Chairman of the Editorial Board and Director of the American Law Institute, September 8, 1950, *in* 11 KELLY, *supra* note 24, at 347.

⁹⁸ September 1950 Revisions, *in* 11 KELLY, *supra* note 24, at 352.

⁹⁹ U.C.C. § 2-102 (Proposed Final Draft No. 2, Spring 1951), *in* 12 KELLY, *supra* note 24, at 42. The prohibition against repeal of statutory law regulating sales to consumer, farmers, and other protected classes first appeared in, Commercial Law—Sales, Council Draft No. 1, February 1944, § 5(3), *in* 1 ELIZABETH S. KELLY AND ANN PUCKETT, UNIFORM COMMERCIAL CODE *CONFIDENTIAL DRAFTS* 264-65 (F. Rothman 1995.)

¹⁰⁰ Although the Revision also noted: “Comment to be changed to conform to text,” the drafters provided no comment with the revisions. September 1950 Revisions, *in* 11 KELLY, *supra* note 24, at 352.

¹⁰¹ Before the revision, section 2-102 listed “filing” requirements as one of the aspects of a purchase money security transaction not altered by Article 2. U.C.C. § 2-102 (Draft Spring 1950) *in* 10 KELLY, *supra* note 24, at 80.

repossession right.¹⁰² Without some indication from the drafters of a change in policy, it seems very unlikely the drafters' deletion of section 2-102(b) expresses their intent to have Article 2 govern all facets of an installment sale contract.

Additional evidence that the drafters did not intend the September 1950 Revisions to effect a change of policy comes from the comparison symbols the drafters used in the Spring 1951 Draft to highlight the changes from the Spring 1950 Draft. The drafters created symbols to indicate the types of changes they made: "AAA—Major change of substance. AA—Minor change of substance. A—Change of form only."¹⁰³ The symbol used for the section 2-102 change is "AA," indicating a "[m]inor change of substance."¹⁰⁴ If the drafters had intended to change the policy of Article 2 from not governing the remedies peculiar to a purchase-money transaction to governing such remedies they likely would have labeled the change "AAA—Major change of substance." The Spring 1951 Draft is a text only draft so there is no comment to clarify the drafters' intent. Consequently, the symbols support the inference that the drafters did not intend to change their policy that Article 2 does not alter remedies peculiar to security aspects of a sale/purchase-money security transaction.

The next draft with comments was the 1952 Official Draft. In accordance with the September 1950 Revisions, the text of section 2-102 no longer expressed the rule that Article 2 did not alter "rights and remedies . . . peculiar to any purchase money security transactions."

This Article does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating such sales to consumers, farmers or other specified classes of buyers.¹⁰⁵

The effect of the Revisions was that section 2-102 was silent regarding the issue of whether Article 2 governed the remedies of a purchase-money seller. The only declaration in section 2-102 was that a transaction in form a sale but in substance a security was not governed by Article 2.

The changes to the comment in the 1952 draft are intriguing. In reference to the comment, the September 1950 Revisions stated: "Comment to be changed to conform to text."¹⁰⁶ That statement implies the drafters would change the comment to reflect the deletion of section 2-102(b) that had stated Article 2 did not alter the security remedies of a seller in a purchase-money security

¹⁰² Article 2 provides limited reclamation rights in two instances. An unpaid seller can reclaim the goods upon discovering the buyer's insolvency. U.C.C. § 2-702 (2001). A seller who delivered goods conditioned on the buyer's payment at delivery can reclaim the goods when the buyer fails to pay upon delivery. U.C.C. § 2-507(2) (2001).

¹⁰³ Foreword (Proposed Final Draft No. 2 Spring 1951) in 12 KELLY, *supra* note 24, at 5.

¹⁰⁴ U.C.C. § 2-102 (Proposed Final Draft No. 2 Spring 1951), 12 KELLY, *supra* note 24, at 42.

¹⁰⁵ U.C.C. § 2-102 (Official Draft 1952), in 16 KELLY, *supra* note 24, at 75-76.

¹⁰⁶ September 1950 Revisions, in 11 KELLY, *supra* note 24, at 352.

transaction. However, the actual changes had no such effect. Instead, they indicate the drafters' intent to retain the policy of the deleted subsection. The drafters changed the comment by deleting the paragraph that discussed the subsection retained while retaining the paragraph that discussed the subsection deleted. Exactly the opposite of what one would expect. The deleted paragraph of the comment expressed the policy of section 2-102(a) that Article 2 does not apply to transactions the parties intend to operate only as security: "The reason of this Article does not, in general, extend to transactions of a purely 'security' nature."¹⁰⁷ The retained paragraph declared the policy of the now deleted section 2-102(b): Article 2 would not affect the rights and remedies peculiar to purchase money security transactions. Before the 1952 Draft changed the comment it had provided:

The Article leaves substantially unaffected the peculiar aspects of the law relating to purchase money security such as conditional sale or chattel mortgage, though it of course regulates the general sales aspects of such transactions. The provisions of the chattel security intended to be saved by paragraph (b) of this section include matters relative not only to the security of the seller's remedies in regard thereto, but also to any legislation requiring a minimum down payment, the explicit statement of the financing charges, or the like.¹⁰⁸

In the 1952 Official Draft the comment provided:

The Article leaves substantially unaffected the peculiar aspects of the law relating to purchase money security such as conditional sale or chattel mortgage, though it regulates the general sales aspects of such transactions. "Security transaction" is used in the same sense as in the Article on Secured Transactions (Article 9).¹⁰⁹

The drafters' retention of their statement in the comment that Article 2 left the law of purchase money security substantially unaffected reiterates their policy that Article 2 does not govern the security components of the sale/security interest transaction. The 1952 draft did remove the sentence in the comment that exemplified subjects peculiarly part of the security transaction and thus not affected or governed by Article 2. As an advocate of the interpretation that Article 2 does not regulate the security component of an installment sale contract, I would have preferred they kept that sentence because it does support my assertion. But I think the omission was simply removing a sentence whose only purpose was to provide examples. The drafters condensed a longer comment into a shorter comment. The new comment definitely supports, as did

¹⁰⁷ U.C.C. § 2-102, cmt. 1 (Draft Spring 1950), *in* 10 KELLY, *supra* note 24, at 80.

¹⁰⁸ U.C.C. § 2-102, cmt. 2 (Draft Spring 1950), *in* 10 KELLY, *supra* note 24, at 80. *See supra* note 95 for a discussion of the drafters neglect to discover a scrivener's error in the Spring 1950 Comment.

¹⁰⁹ U.C.C. § 2-102, cmt. (Official Draft 1952), *in* 16 KELLY, *supra* note 24, at 76.

all previous comments, the policies that Articles 2 and 9 govern an installment sale agreement: Article 2 governs only the “general sales aspects” and Article 9 governs the security aspects.

The drafters made only minor changes to section 2-102 after the 1952 Official Draft. They changed the caption of section 2-102 by adding the word “Scope.”¹¹⁰ The only change to the text of the section was to add the sentence: “Unless the context otherwise requires, this Article applies to transactions in goods.”¹¹¹ The “Reason” for that change was to “eliminate any ambiguity as to the application of Article 2 to contracts not for the sale of goods.”¹¹² The drafters made no changes to the Comment to section 2-102 after the 1952 Official Draft. It reads now as it read then.

My analysis of the prior uniform laws and of the drafts of Article 2 leads to the conclusion that the drafters would not apply Article 2 to regulate the limitation period for a deficiency action in an installment sale contract. All sources other than the current text of section 2-102 are consistent with the policy that Article 2 does not affect laws relating to the remedies in a purchase-money security transaction, nor govern the remedies of a secured party, although it governs the sales part of the transaction. Those sources also show that none of the forerunners of Article 2 included a remedy similar to the Article 9 remedy of repossessing and selling the collateral and recovering any deficiency from the buyer. That remedy was created by the UCSA, and, according to the RUSA and the early drafts, it was to be governed by laws that apply to security transactions, not by Article 2. A deficiency suit is part of a secured party’s remedy. Limitation of action for a deficiency action is an aspect of the remedy. Law other than Article 2 should determine the limitation period for a deficiency suit. Unfortunately, the text of section 2-102, the best source for resolving UCC questions, is simply not relevant to the issue. That omission leaves the other signals in control of the question. Those signals align with using laws other than Article 2 to regulate the action.

V. Courts Link a Deficiency Action to a Sale of Goods

Most courts determining which statute of limitations regulates a deficiency action arising from default of an installment sale contract focus on a single question: is the deficiency action more closely related to the sales aspects or security aspects of the transaction? The source of that question could be the statement in the section 2-102 comment that Article 2 “regulates the general sales aspects of such [purchase-money security] transactions.” The cases neglect, however, to acknowledge the declaration in the comment that Article 2 does not affect the law of purchase-money security transactions, and thus ignore

¹¹⁰ Supplement No. 1 to the 1952 Official Draft, January 1955, in 17 KELLY, *supra* note 24, at 323.

¹¹¹ *Id.*

¹¹² *Id.*

the likely intent of the drafters that Article 2's application to such transactions is restricted to sales parts of the transaction. None of the opinions examine the prior uniform laws or early drafts of Article 2 and consequently they are unaware that the remedies of a secured party originate in the security transaction, not the sale transaction. I will examine closely the first case to discuss the issue because it set the precedent for most subsequent cases. My review of the opinions of other courts is limited to those that differ in result or rationale.

The first case to determine the applicable statute of limitations for a deficiency action was *Associates Discount Corporation v. Palmer*.¹¹³ In April 1957, Palmer purchased an automobile from a dealer, structuring the purchase as a "Bailment Lease Security Agreement," which the court concluded was "a combination, all inclusive instrument, constituting both a contract for sale and a security transaction."¹¹⁴ The dealer assigned the agreement to the plaintiff, Associates Discount Corporation [Associates], the day after the sale. After making one payment, Palmer allowed Associates to repossess the automobile and it sold the automobile in August 1957 for \$393.70 less than the outstanding balance. Associates took no further steps to recover the indebtedness until July 1964, when it instituted an action to recover the deficiency plus accrued interest and attorney's fees.¹¹⁵ The New Jersey Supreme Court applied Pennsylvania law pursuant to the agreement of the parties.¹¹⁶

The majority opinion, holding that Article 2 governed the action, was largely a response to the concurring justice who asserted that Article 9 controlled a deficiency suit.¹¹⁷ The court presented three reasons for its holding.¹¹⁸ First, the court characterized a deficiency suit as an action for the unpaid purchase price.

Such a suit is nothing but a simple *in personam* action for that part of the sales price which remains unpaid after the seller has exhausted his rights under Article 9 by selling the collateral; it is an action to enforce the obligation of the buyer to pay the full sale price to the seller, an obligation which is

¹¹³ 219 A.2d 858 (1966).

¹¹⁴ 219 A.2d at 859-860.

¹¹⁵ 219 A.2d at 860. The total sought was \$642.91.

¹¹⁶ 219 A.2d at 859. Pennsylvania, the first state to adopt the U.C.C., adopted the 1952 Edition of the U.C.C. in 1953.

¹¹⁷ Aware that Article 9 includes no statute of limitation, the concurring justice would have applied New Jersey's general statute of limitations, six years, to the action and the action would be barred nevertheless. 219 A.2d at 864-65. The plaintiff contended that the Pennsylvania Motor Vehicle Sales Financing Act governed the transaction rather than the U.C.C. and alternatively that the statute of limitations for a sealed instrument should govern. The court disagreed with both arguments. 219 A.2d at 860.

¹¹⁸ Because Article 2 governed the transaction, § 2-725, Article 2's four-year statute of limitations, barred the action. 219 A.2d at 860.

an essential element of all sales and which exists whether or not the sale is accompanied by a security arrangement.¹¹⁹

Second, they found nothing in the UCC that rebutted their conclusion that a deficiency action was an action for the unpaid purchase price. “Thus, because of the absence of a contrary indication anywhere in the Code, a deficiency action must be considered more closely related to the sales aspect of a combination sales-security agreement rather than to its security aspect”¹²⁰ The majority is accurate in their failure to find any section in the UCC that addresses whether a deficiency action is more closely related to the security aspect of an installment sale agreement. Likewise, there is no section in the UCC that indicates a deficiency action connects to the “sales” aspect of an installment sale agreement. However, section 9-615(d)(2), is the only section in Articles 2 and 9 that expressly pertains to an obligor’s liability for a deficiency.¹²¹

Finally, the court examined Pennsylvania’s section 2-102 and concluded that nothing in that section “changes this result,” because section 2-102 excludes transactions designed to operate only as security transactions.¹²² The majority’s conclusion was justified by their previous characterization of the transaction as a sale and security agreement. As such, the transaction was not intended only as a security transaction.

The majority cited the Pennsylvania Bar Association’s comment to section 2-102 as support for its holding. That comment provides: “Since transactions intended to operate ‘only’ as security transactions are excluded, actual sales are subject to this Article of the Code (Article 2—Sales), although a security interest is retained by the seller.”¹²³ The majority opinion seems to interpret that comment as directing that Article 2 applies to a sale/security transaction because such a transaction is not intended to operate “only” as a security transaction: “As we noted above, the instrument sued upon in the present case is not *only* a security agreement but is a sales contract as well.”¹²⁴ The court’s discussion of the comment could indicate an all or nothing result—Article 2 is the sole governing law unless the transaction is “only” a security transaction. The Pennsylvania comment accurately restates the policy of the Official Comment to section 2-102, however, only if it is interpreted as directing that Articles 2 and 9

¹¹⁹ 219 A.2d at 861. A seller’s action for the price of the goods, § 2-709(1), is an Article 2 remedy. Accordingly, an action under § 2-709 is governed by the four-year statute of limitations of § 2-725. Thus, if one agrees that a deficiency action is an action for the price, then one must agree with the majority decision.

¹²⁰ *Id.*

¹²¹ The only Article 2 remedy similar to a deficiency is the right of a seller in possession of the goods after the buyer’s default to resell them and recover the difference between the contract price and the retail price. U.C.C. § 2-706(1) (2001). The seller possesses the goods typically because the buyer wrongfully rejected or revoked acceptance of the goods. See U.C.C. § 2-703.

¹²² 219 A.2d at 861. The Pennsylvania § 2-102 was the same as the uniform § 2-102.

¹²³ *Id.* (quoting Pa. Stat. Ann. tit. 12A, s 2-102, Pennsylvania Bar Association Notes.)

¹²⁴ 219 A.2d at 861.

both regulate their respective parts of a sale/security transaction. Perhaps that is what the Pennsylvania Bar Association meant. In any event, the court's reliance on the Pennsylvania comment is problematic because the comment might not reflect the policy of the Official Comment to section 2-102 that Articles 2 and 9 govern an installment sale contract.¹²⁵

Justice Hall, the concurring justice in the case, focused on the relationship between the scope of Article 2 and an action to recover a deficiency under a purchase-money security interest.¹²⁶ He quoted the Official Comment to section 2-102, emphasizing the words, "it [Article 2] regulates the general sales aspects of such transactions"¹²⁷ That indicates his awareness of the policy that different parts of a dual purpose transaction should be governed by different laws. Justice Hall stated that the right to recover a deficiency under a security interest, whether created in connection with a sale or otherwise, is "defined and controlled by Article 9 and the special saved statutes . . . since such matters are not 'general sales aspects' of the transaction."¹²⁸ His opinion aligns with the prior uniform laws and early Article 2 drafts, although he apparently did not need those sources to reach his opinion.

If one is asserting that the applicable statute of limitations for a deficiency action is not governed by Article 2, *Associates Discount Corporation v. Palmer* must be questioned because nearly all subsequent cases involving the issue favorably cite *Palmer* as the correct approach to determining the statute of limitations issue. The primary assertion of the majority in *Palmer* is that a deficiency suit is an action to enforce the obligation of the buyer to pay the full sale price to the seller—an essential element of all sales regardless whether the transaction includes a security interest. There is no question that the buyer is obligated to pay the full indebtedness. But there is a question whether the remedy utilized by the secured party to recover payment of the debt is more closely connected to the sale of the goods or enforcement of the security interest in the goods. I believe my examination of the prior uniform laws and early drafts of Article 2 proves that the recovery of a deficiency after repossession and resale of the collateral is a remedy connected to the security component of a dual

¹²⁵ Persons interpreting the U.C.C. must be mindful that the body enacting the law, a state legislature, did not draft the law. This has the result that the intent of the U.C.C. drafters is subordinate to the intent of the legislature. However, it is difficult to get a sense of the legislature's intent in many instances of statutory interpretation. Nevertheless, to the extent that the intent is ascertainable a state legislature's interpretation should prevail over that of the U.C.C. drafters

¹²⁶ 219 A.2d at 862-65. His opinion was a concurrence because the action was not commenced within the applicable statute of limitations as determined by Justice Hall. 219 A.2d at 864-65. He also believed that U.C.C. § 2-725, the Article 2 statute of limitations applied by the majority, was intended to apply only to actions "particularly related to the sale itself" 219 A.2d at 863-64.

¹²⁷ *Id.* at 863.

¹²⁸ *Id.* "Special saved statutes" refers to an earlier reference in his concurring opinion where Justice Hall notes that security transactions are governed by Article 9 and "other special state statutes saved from repeal (such as the Pennsylvania Motor Vehicle Sales Finance Act)." *Id.*

purpose transaction.¹²⁹ Additionally, the majority opinion does not examine the attributes of a deficiency action to support its conclusion that it is simply an “in personam action” for the unpaid sales price. Consequently, there are reasons to disagree with *Palmer*. In Part VI I analyze a deficiency action to show it is connected to a security transaction.

The North Carolina Court of Appeals entered the discussion in *North Carolina National Bank v. Holshouser*.¹³⁰ Holshouser purchased a motor vehicle from the seller “executing a purchase money security agreement” giving the seller a purchase-money security interest in the vehicle, with the seller retaining title until Holshouser paid the purchase price.¹³¹ Holshouser made no payments and the seller’s assignee repossessed and sold the vehicle, and subsequently sued Holshouser for the deficiency.

Holshouser is the first of only two courts holding the Article 2 statute of limitations inapplicable in an action to recover a deficiency under an installment sale contract.¹³² The decision is noteworthy in two respects. First, the court recognized that an installment sale contract has a dual function and that different laws could govern different parts of such a transaction. Second, the court held that a deficiency action is connected to the security component of an installment sale. After reviewing section 2-102 and its comment and other applicable sections of Article 2, the court acknowledged that Articles 2 and 9 would apply to the transaction because it combined a sale with a security interest.¹³³ In determining which statute of limitations applied, the court was influenced by the “deference to Article 9 where a security interest is involved” shown by section 2-401(1) in a transaction where the seller reserves title to the goods.¹³⁴ Finding that a purchase-money security agreement “is a creature of Article 9 . . . and is outside the provisions of Article 2” the court held that the Article 2 statute of limitations would not apply.¹³⁵ While finding Article 9 “paramount” regarding security aspects of the transaction, the court noted that Article 9 includes no

¹²⁹ See *supra* pages 9-24.

¹³⁰ 247 S.E.2d 645 (N.C. Ct. App. 1978). Before *North Carolina National Bank v. Holshouser*, the California Court of Appeals addressed the issue in *Massey-Ferguson Credit Corp. v. Casaulong*, 62 Cal. App. 3d 1024, 133 Cal. Rptr. 497 (Cal. Ct. App. 1976). The court relied substantially on *Palmer* in its holding that a deficiency action was a sales aspect of an installment sale contract.

¹³¹ *Holshouser*, 247 S.E.2d at 645. Under U.C.C. 2-401(1) and in accordance with the definition of a security interest (U.C.C. 1-201(35)), retention of title is limited in effect to reservation of a security interest.

¹³² In 1972, the Oregon Supreme Court held § 2-725 inapplicable to a debtor’s suit to recover a surplus generated by the sale of collateral after repossession. See *Chaney v. Fields Chevrolet Co.*, 503 P.2d 1239, 1241 (Or. 1972) discussed *infra* at 33.

¹³³ *Holshouser*, 247 S.E.2d at 647. The court quoted sections 2-106 (definition of sale), 2-203 (the law of seals inoperative), 2-401(1) (effect of reservation of title), and 2-725 (the Article 2 statute of limitations).

¹³⁴ *Id.* The court is referring to the passage in section 2-401(1) that deems reservation of title to goods a security interest and provides that “[s]ubject to . . . the provisions of the article on secured transactions (article 9)” title passes on the conditions agreed to by the parties.

¹³⁵ *Id.* at 647. The court noted that the Article 2 statute of limitations applies to actions for breach of contract for sale of goods.

statute of limitations and consequently it applied the North Carolina statute of limitations for sealed instruments. As additional support for its holding the court found that North Carolina courts had been applying that statute of limitations to purchase-money security agreements.¹³⁶

The *Holshouser* court discussed briefly *Associates Discount Corp. v. Palmer*. It found the logic of the concurring opinion “more compelling.”¹³⁷ It also believed that the *Palmer* court based its decision on the intent of the Pennsylvania Bar Association’s comment to section 2-201 which, the court thought, was contrary to the North Carolina comment.¹³⁸ I discuss the North Carolina comment in the next paragraph.

Several courts disagree with *Holshouser* because they believe it was based chiefly on the North Carolina Comment to section 2-102 that they perceive expresses the legislative intent that a transaction intended as security, regardless of whether intended *only* as security, is not governed by Article 2.¹³⁹ I question whether those courts are correct in either assumption. The *Holshouser* court cited the section 2-102 Official Comment as authority for its decision that the Article 2 statute of limitations did not apply to a deficiency action arising from a purchase money security agreement. It did not discuss the North Carolina Comment in its analysis of that issue, although the opinion reproduced the North Carolina Comment together with other pertinent statutes. It discussed the North Carolina comment only to respond to *Holshouser*’s argument that *Palmer* represents the overwhelming authority on the issue. The court thought that the *Palmer* court “reached its decision largely on the basis of what the Pennsylvania Legislature expressed as its intent in enacting the statute in question.”¹⁴⁰ Admittedly, the court finds the intent of the North Carolina Legislature, as indicated by its commentary, “precisely contrary” to the Pennsylvania Legislature.¹⁴¹ And the intent of the legislature is relevant to a court’s interpretation of the state’s UCC. However, I think the North Carolina Comment agrees with the policy of the Official Comment to section 2-102. The North Carolina Comment states: “This section [2-102] sets out the scope of the Code, limiting it to transactions in goods . . . and indicates that *the article on sales does not apply to transactions intended as security even though in the form of an*

¹³⁶ *Id.* N.C. GEN. STAT. ANN. § 1-47(2) adopts a ten-year statute of limitations for actions on a sealed instrument.

¹³⁷ *Id.* at 648.

¹³⁸ *Id.*

¹³⁹ See *First Nat’l Bank in Albuquerque v. Chase*, 887 P.2d 1250, 1252-53 (N.M. 1994); *First of America Bank v. Thompson*, 552 N.W.2d 516, 520 at n. 4 (Mich. Ct. App. 1996); *Scott v. Ford Motor Credit Co.*, 691 A.2d 1320, 1323 (Md. 1997).

¹⁴⁰ 247 S.E.2d at 648. The Pennsylvania Bar Association’s comment to section 2-102 is: “Since transactions intended to operate ‘only’ as security transactions are excluded, actual sales are subject to this Article of the Code, although a security interest is retained by the seller.” 13 PA. CONS. STAT. ANN. § 2102, Pennsylvania Bar Association’s Notes, discussed *supra* at 26.

¹⁴¹ 247 S.E.2d at 648. In my discussion of *Palmer*, *supra* at 26, I question whether the Pennsylvania comment aligns with the U.C.C. § 2-102 comment.

*unconditional contract of sale or to sell.*¹⁴² The North Carolina Comment differs from section 2-102 in that it omits the qualifier “only” from the phrase “transaction . . . intended to operate only as a security transaction.” That omission does not express the intent that Article 2 does not apply to a transaction that combines a sale with a security interest. North Carolina’s section 2-102 is verbatim with UCC 2-102.¹⁴³ The court does not interpret section 2-102 or the comment to preclude Article 2 from applying to a purchase-money transaction. It states affirmatively that Article 2 applies to the sales aspects of the transaction.¹⁴⁴ The court’s opinion shows it understands that both articles can regulate a dual-purpose transaction and believes that a deficiency action is connected to the security interest component of a dual-purpose transaction. Examining the *Holshouser* court’s use of the North Carolina Comment leads me to conclude that the comment was not a significant basis for the court’s decision, and even if it were, it aligns with section 2-102 and its comment. Consequently, I disagree with the courts that distinguish the *Holshouser* opinion based on the North Carolina Comment.

Since *Holshouser* was decided sixteen courts have rendered an opinion on whether the Article 2 statute of limitations regulates an action to recover a deficiency judgment.¹⁴⁵ Ten of those cases rely primarily on *Associates Discount Corporation v. Palmer* in holding that Article 2 governs the issue.¹⁴⁶ Judges dissented in two of those cases on the ground that an action for a deficiency is a remedy arising under Article 9, and consequently Article 2 should not apply.¹⁴⁷ In three other cases, the courts applied the Article 2 statute of limitations without, apparently, recognizing the issue of whether an action for a deficiency derives

¹⁴² N.C. GEN. STAT. ANN. § 25-2-102, North Carolina Commentary (emphasis added).

¹⁴³ Compare N.C. GEN. STAT. ANN. § 25-2-103 with U.C.C. 2-102 (2001).

¹⁴⁴ 247 S.E.2d at 647.

¹⁴⁵ One court addressed the issue in an action that arose after the debtor’s default, but not apparently in the context of a deficiency after sale. In *Citizen’s National Bank of Decatur v. Farmer*, 395 N.E.2d 1121 (Ill. Ct. App. 1979), the court, relying on *Palmer*, rejected plaintiff’s argument that Article 2 did not govern the action. Plaintiff argued that because the transaction, a retail installment sales contract, contained provisions for the sale of goods and an obligation to pay, its action originated in the debtor-creditor relationship, rather than the buyer-seller relationship. The court found the obligation to pay to be a “fundamental part of the contract for sale,” and consequently governed by Article 2. *Id.* at 1123.

¹⁴⁶ *D.A.N. Joint Venture, III v. Clark*, 218 S.W.3d 455 (Mo. Ct. App. 2006); *DaimlerChrysler Services North America, LLC v. Ouimette*, 830 A.2d 38 (Vt. 2003); *Barnes v. Community Trust Bank*, 121 S.W.3d 520 (Ky. Ct. App. 2003) (citing *Citizen’s Nat’l Bank of Decatur v. Farmer*, 395 N.E.2d 1121 (Ill. Ct. App. 1979) which relies on *Palmer*); *Ford Motor Credit Co. v. Arce*, 791 A.2d 1041 (N.J. Super. Ct. App. Div. 2002); *Action Mgmt. Inc. v. Fratello*, No. 743 S 1999, 2000 WL 1865005 (Pa. Ct. Com. Pl. 2000); *Scott v. Ford Motor Credit Co.*, 691 A.2d 1320 (Md. 1997); *First of America Bank v. Thompson*, 552 N.W.2d 516 (Mich. Ct. App. 1996); *First Nat’l Bank in Albuquerque v. Chase*, 887 P.2d 1250 (N.M. 1994); *Worrel v. Farmers Bank of the State of Delaware*, 430 A.2d 469 (Del. 1981) (wherein the parties, in the appeal to the Delaware Supreme Court, agreed the Article 2 statute of limitations governed the action for a deficiency after the Delaware Superior Court held, relying on *Palmer*, that Article 2 controlled); *Indus. Valley Bank & Trust Co. v. Sharpe*, 30 U.C.C. Rep. Serv. 1295 (Pa. Ct. Com. Pl. 1980).

¹⁴⁷ *Scott v. Ford Motor Credit Co.*, 691 A.2d 1320 (Md. Ct. App. 1997); *First Nat’l Bank in Albuquerque v. Chase*, 887 P.2d 1250 (N.M. 1994).

from the sale or security aspect of a combination sale/security interest transaction.¹⁴⁸ Two courts noted in dictum the application of section 2-725.¹⁴⁹

One court, *U.S. Trust Co. v. Melchiono*,¹⁵⁰ held that Article 2 did not apply to the deficiency action. In a brief opinion, the Massachusetts Appellate Division of the District Court rejected the defendant's argument that the Article 2 statute of limitations governed an action to recover a deficiency under a retail installment sale contract that established a sale and a security interest. The significant factors to the court were: 1) the agreement created a security interest and Article 9 governs security interests, and 2) section 2-102 excludes transactions in the form of a sale but intended to operate as a secured transaction.¹⁵¹ The court did not acknowledge that section 2-102 yields its jurisdiction when the parties intend that the transaction operate "only" as a security interest. The court stated that when a transaction establishes a security interest, the creditor can proceed under either the secured transaction or the underlying contract.¹⁵² Applying Massachusetts statutory law, the court held that claims arising under Article 9 are subject to a six-year statute of limitations.¹⁵³

Although the tally of cases deciding the issue is greatly in favor of applying Article 2, there are three reasons why one can disagree with the majority. First, many courts rely completely on *Palmer* without communicating any other reason, and as I discussed previously, there are significant grounds for disagreeing with *Palmer*.¹⁵⁴ Second, most courts neglect to consider the drafters' policy expressed in the section 2-102 comment that Article 2 leaves security transactions law unaffected although it applies to the general sales aspects of sale/security interest transactions. Third, most courts have not analyzed the

¹⁴⁸ Jack Heskett Lincoln-Mercury Inc. v. Metcalf, 204 Cal. Rptr. 355 (Cal. Ct. App. 1984) (relying on Massey-Ferguson Credit Corp. v. Casaulong, 133 Cal. Rptr. 497 (Cal. Ct. App. 1976) discussed *supra* at p. ; Wheel Estate Corp. v. Webb, 679 P.2d 529 (Ariz. Ct. App. 1984) (applying § 2-725 (ARIZ. REV. STAT. § 44-2404) without discussion); Mobile Disc. Corp. v. Price, 656 P.2d 851 (Nev. 1983) (applying § 2-725 (NEV. REV. STAT. 104.2725) without discussion).

¹⁴⁹ *Cabrera v. Courtesy Auto Inc.*, 192 F. Supp. 2d 1012, 1016 n.6 (D. Neb. 2002) (noting the majority of courts have applied § 2-725 to deficiency actions involving breach of a sales contract); *First Hawaiian Bank v. Powers*, 998 P.2d 55, 66 (Haw. Ct. App. 2000) (creditor did not dispute and court agreed that § 2-725 applied to an action to recover a deficiency arising from a credit sale contract with retention of a security interest).

¹⁵⁰ 32 U.C.C. Rep. Serv. 2d 1013 (Mass. App. Div. 1997).

¹⁵¹ *Id.* at 1014. In two instances, for no apparent reason, the court uses the labels "mortgage interest" and "chattel mortgage" when discussing the transaction. *Id.* In all other references the court uses "security interest."

¹⁵² *Id.*

¹⁵³ *Id.* (citing MASS. GEN. LAWS § 260:2)

¹⁵⁴ Is it possible that *Palmer* and its progeny are simply applying a variant of the predominant purpose test to reach a decision? Courts apply the predominant purpose test to determine whether Article 2 governs a transaction that is part sale of goods and part service. See, e.g., *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974). I think it is unlikely those courts are using that test because there are several obstacles to utilizing it that are difficult to overcome: the sale and the security interest are equal parts of the transaction consequently there is no "predominant purpose," and Article 2 contains virtually no rules pertaining to security interests.

characteristics of a deficiency action to ascertain whether the remedy is connected to a sale rather than a security interest. Having previously discussed the first two reasons for my disagreement with the *Palmer* majority, I discuss the attributes of a deficiency action in Part VI.

Courts, in several analogous instances, have recognized the reasonableness in having different bodies of law govern a transaction. My review of those situations starts with a transaction combining a sale of goods with a promissory note. A common credit-sale transaction is the installment contract sale of goods where the buyer signs a promissory note obligating the buyer to pay monthly installments to the seller.¹⁵⁵ If the buyer defaults the seller sues the buyer to enforce the note. Is the applicable statute of limitations that for an instrument, or that for a sale of goods? Several courts have decided the Article 2 statute of limitations did not govern the action regardless that the transaction is a sale of goods.¹⁵⁶ In future cases it seems likely that courts will apply the Article 3 statute of limitations, section 3-118, added in the 1990 Article 3 revisions.¹⁵⁷

A second situation involved a “lease-purchase” contract. In *Chemical Bank v. Rinden Professional Association*, the court applied Articles 9 and 2 to a “lease-purchase” contract which the court held was also a secured transaction.¹⁵⁸ The court rejected the purchaser’s argument that section 2-209(1) was not applicable to a modification of the contract because the transaction was governed by Article 9.¹⁵⁹ Although the court partly based its holding on UCC section 9-206, it held that section 2-102 did not preclude using section 2-209(1) to validate the modification.¹⁶⁰ The court found no impediment to applying

¹⁵⁵ It is likely that the buyer in such a transaction would also grant a security interest in the goods to the seller.

¹⁵⁶ See, e.g., *O’Neill v. Steppat*, 270 N.W.2d 375 (S.D. 1978) (The court based its opinion in part of U.C.C. § 2-701: “Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of chapters this Article.”); *Cabrera v. Courtesy Auto, Inc.*, 192 F.Supp. 2d 1012 (D. Neb. 2002) (“Where the secured transaction is a promissory note, the applicable statute of limitations instead may be U.C.C. Revised § 3-118(a.)”); *Oaklawn Bank v. Alford*, 845 S.W.2d 22 (Ark. Ct. App. 1993) (court applies five-year statute of limitations for written obligations applicable to deficiency action for promissory note secured by security interest in vehicle to finance debtor’s purchase of the vehicle); *Bancohio Nat’l Bank v. Freeland*, 468 N.E.2d 941, 944 (Ohio Ct. App. 1984) (deficiency action based on a promissory note secured by security interest in vehicle is not a transaction in goods regardless that debtor purchased vehicle with the money he borrowed). *Contra* *Fallimento C.Op.M.A. v. Fischer Crane Co.*, 995 F.2d 789 (7th Cir. 1993) (distinguishing *O’Neill v. Steppat*, 270 N.W.2d 375 (S.D. 1978) on the ground that the Illinois statute of limitations expressly yields to U.C.C. § 2-725, the Article 2 statute of limitations). In a case involving an action on a guaranty included with a contract for the sale of goods, the court held that the U.C.C. did not apply to the guaranty part of the contract. *M.S. Distributing Co. v. Web Records, Inc.*, 51 U.C.C. Rep. Serv. 2d 716 (N.D. Ill. 2003).

¹⁵⁷ U.C.C. § 3-118 provides several limitation periods for actions to enforce instruments.

¹⁵⁸ 498 A.2d 706, 711 (N.H. 1985).

¹⁵⁹ U.C.C. § 2-209(1) validates modifications made without consideration if made in good faith.

¹⁶⁰ 498 A.2d at 712-13. U.C.C. § 9-206 (1995) enforced a buyer or lessee’s waiver of defenses against an assignee of the contract. Although the plaintiff in *Chemical Bank* was the assignee of the original contract, the court did not indicate the result would have been different if the original seller/lessor had commenced the action. In fact, if the court was willing to apply both Articles 2

Articles 2 and 9 to a transaction in goods that involved a sales contract and a security agreement.¹⁶¹

An interesting case of a court rejecting the argument that the Article 2 statute of limitations applies to an installment sale contract is *Chaney v. Fields Chevrolet*.¹⁶² In *Chaney* the buyer brought an action to recover the surplus produced by the sale of repossessed collateral. The secured party/seller argued that Article 2 applied because the action was for the breach of a contract of sale, and consequently section 2-725 barred the action. In dicta the court agreed with *Associates Discount Corporation v. Palmer* that the seller's action for a deficiency would be governed by Article 2.¹⁶³ However, it held the buyer's action to recover a surplus is created by UCC section 9-504(2) and thus is more closely related to the security aspects of the contract than to the sales aspects.¹⁶⁴ Because deficiency and surplus result from a secured party exercising its remedy of repossession and sale of the collateral, arguably both originate in the same remedy and are governed by the same statute of limitations. Although the *Chaney* court would disagree with that result, it would not disagree with applying Articles 2 and 9 to the same transaction.

Lastly is a Sixth Circuit case applying Kentucky law, *Son v. Coal Equity, Inc.*¹⁶⁵ In issue was whether the Article 2 statute of limitations regulated an action to recover the balance stated in an invoice arising from a brokerage agreement for the sale of coal. The district court applied Article 2 and its statute of limitations.¹⁶⁶ Although the Sixth Circuit did not disagree with the district court's holding that Article 2 applied, it reversed the holding that the Article 2 statute of limitations applied. Instead it followed the statutory interpretation maxim that the more specific statute prevails over the more general statute and applied the Kentucky statute of limitations that regulates actions upon a merchant's account for goods sold and delivered because it found the merchant's account statute was more specific than section 2-725.¹⁶⁷ The court had no qualms about applying law other than Article 2 to an issue arising under a contract for sale even though there is no doubt that the court would apply Article 2 to other issues arising under the contract

and 9 to the assignee who was not a party to the initial transaction, it is likely the court would have applied both Articles to the original party.

¹⁶¹ *Id.* at 713.

¹⁶² 503 P.2d 1239 (Or. 1972).

¹⁶³ *Id.* at 1240-41.

¹⁶⁴ *Id.* at 1241. In Revised Article 9, section 9-615(d) (2001) grants a debtor the right to a surplus. The court stated that the six-year statute of limitation applicable to contract and statutory liability would apply in accordance with O.R.S. § 12.080. *Id.*

¹⁶⁵ 122 Fed. Appx. 797 (6th Cir. 2004).

¹⁶⁶ *Son v. Coal Equity, Inc.*, 293 B.R. 392, 395-96 (W.D. Ky. 2003), *aff'd in part, rev'd in part*, 122 Fed. Appx. 797 (6th Cir. 2004).

¹⁶⁷ 122 Fed. Appx. at 799-800. Interestingly, the Sixth Circuit reached its decision after the Kentucky Court of Appeals previously had applied the Article 2 statute of limitations to an action seeking a deficiency under an installment sale contract. See *Barnes v. Community Trust Bank*, 121 S.W.3d 520, 523 (Ky. Ct. App. 2003).

The foregoing cases indicate courts have not hesitated to apply law other than Article 2 to contracts involving sales of goods. That is exactly how courts should operate; let the nature of the action dictate the applicable law. There is no reason in the Uniform Commercial Code that courts cannot apply Articles 2 and 9, or other applicable law to the same contract.

VI. Anatomy of a Deficiency Action Arising from the Breach of an Installment Sale Contract

The central theme of the cases holding that Article 2, and hence its statute of limitations, governs a secured party's action to recover a deficiency is that such action is more closely related to the sales aspects than the security aspects of the sale/security transaction. I think that an examination of the structure of the transaction that culminates in an action to recover a deficiency proves it is more closely related to the security aspects of a sale/security transaction. The secured party's rights and obligations arising after the debtor defaults all stem from Article 9.

The transaction reviewed in this article commences with the parties agreeing that the buyer will purchase the goods by making installment payments and granting the seller a security interest in the goods being purchased.¹⁶⁸ This transaction creates a purchase-money security interest.¹⁶⁹ The seller is a secured party.¹⁷⁰ Because the transaction is a security interest, the secured party is able to use the Article 9 remedies should the buyer default in any

¹⁶⁸ See JOHN F. DOLAN, *COMMERCIAL LAW—ESSENTIAL TERMS AND TRANSACTIONS* 124-25 (Aspen 1997). Some installment sale contracts still use "reservation of title" terms. See, e.g., *North Carolina National Bank v. Holshouser*, 247 S.E.2d 645 (N.C. Ct. App. 1978). "The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a 'security interest'." U.C.C. § 1-201(35) (2001). To the same effect is U.C.C. § 2-401(1).

¹⁶⁹ See U.C.C. § 9-103(a), (b)(1) (2001) for Article 9's definition of a purchase-money security interest. This type of contract also creates chattel paper because it evidences a monetary obligation, i.e., the buyer's obligation to pay, and a security interest in the goods purchased. U.C.C. § 9-102(a)(11) (2001). Chattel paper is created in situations where the monetary obligation is coupled with a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of a specific goods and license of software used in the goods. U.C.C. § 9-102(a)(11) (2001). Labeling the transaction as chattel paper does not affect the statute of limitations issue.

¹⁷⁰ See U.C.C. § 9-102(a)(72) (2001) for Article 9's definition of secured party.

obligation secured.¹⁷¹ One Article 9 remedy authorizes the secured party to repossess the goods.¹⁷²

Repossession of the collateral by the secured party starts the sequence of events that may culminate in an action to recover a deficiency.¹⁷³ Once the secured party has possession of the collateral, Article 9 authorizes the secured party to sell it.¹⁷⁴ If the proceeds of the sale are not sufficient to pay the total obligation, Article 9 makes the obligor¹⁷⁵ liable to the secured party for the amount of the deficiency.¹⁷⁶ However, the obligor's liability for a deficiency is not absolute. In the secured party's action to recover a deficiency, the answer of the defendant can place in issue the secured party's compliance with Article 9's requirements for disposition of the collateral.¹⁷⁷ When compliance is in issue, the secured party has the burden of proving it complied with Article 9's requirements.¹⁷⁸ If the secured party fails to carry its burden, Revised Article 9's "rebuttable presumption" rule limits the amount of the deficiency.¹⁷⁹ The rebuttable presumption rule credits the debtor with the greater of the actual proceeds of the disposition or the proceeds the secured party would have received had it complied with the requirements of Article 9.¹⁸⁰ The rule presumes

¹⁷¹ Article 9 authorizes a secured party to recover a judgment against the debtor, foreclose the security interest, collect the obligation directly from the obligor of the collateral, repossess the collateral, sell the collateral, accept the collateral in satisfaction of the debt, or exercise any other remedy pursuant to the parties' agreement. See U.C.C. §§ 9-601, 9-607, 9-609, 9-610, and 9-620 (2001).

¹⁷² U.C.C. § 9-609 (2001). The secured party could forego repossession and use its Article 2 remedy to sue the buyer for the price of the goods. U.C.C. § 2-709 (2001).

¹⁷³ Repossession is not necessary if the debtor voluntarily relinquishes the collateral to the secured party.

¹⁷⁴ U.C.C. § 9-610 (2001). Alternatively, a secured party in possession of collateral can accept the collateral in total or partial satisfaction of the obligation. See U.C.C. § 9-620 (2001).

¹⁷⁵ A buyer in an installment sale contract is initially the debtor and the obligor. In accordance with Article 9's definitions, the obligor is the person that is obligated on the secured debt, while the debtor is the person having an interest in the collateral, regardless of whether such person is also the obligor. See U.C.C. § 9-102(a)(28), (59) (2001). The definitions account for the situation where a debtor sells the collateral. The buyer of the collateral from the debtor becomes the debtor and, if the buyer agrees to be liable for the obligation owed to the secured party, an obligor.

¹⁷⁶ U.C.C. § 9-615(d)(2) (2001). Before any proceeds of sale are apportioned to the secured debt, they are applied first to the secured party's expenses for retaking, holding, preparing and selling the collateral. U.C.C. § 9-615(a)(1) (2001).

¹⁷⁷ U.C.C. § 9-626(a)(2) (2001).

¹⁷⁸ The collateral must be sold in a commercially reasonable manner after the secured party sends notification to the debtor. U.C.C. §§ 9-610(b), 9-611 (2001).

¹⁷⁹ The rebuttable presumption rule operates in favor of a debtors and secondary obligors. U.C.C. § 9-626(a)(3) (2001). Typically the debtor is also the obligor. An obligor who is not also the debtor is a secondary obligor due to its right of recourse against the collateral in accordance with the definition of secondary obligor in U.C.C. § 9-102(a)(71) (2001). See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 2, illus. 3, 4 (1996).

¹⁸⁰ U.C.C. § 9-626(a)(3) (2001). Former Article 9 had no similar rule, but many courts imposed it as a consequence of a secured party's failure to comply with Article 9. See *Norton v. Nat'l. Bank Of Commerce of Pine Bluff*, 398 S.W. 2d 538 (Ark. 1966); *Conti Causeway Ford v. Jarossy*, 276

that the amount of proceeds the secured party would have received from a compliant sale equals the secured obligation, plus expenses and fees.¹⁸¹ The secured party can rebut the presumption with proof of the amount of proceeds a compliant sale would have produced.¹⁸² However, unless rebutted, there is no deficiency because the sale proceeds equal the debt.

The rebuttable presumption rule expressly does not apply to a consumer transaction security interest.¹⁸³ Article 9 allows courts to decide whether to apply the rule when a secured party fails to comply with the Article 9 requirements in a consumer transaction security interest.¹⁸⁴ In cases occurring under former Article 9, some courts denied a deficiency entirely when the secured party failed to comply with Article 9 provisions on notice and disposition, while others applied the judicial version of the rebuttable presumption rule.¹⁸⁵ In a case arising under Revised Article 9, a bankruptcy court, following the precedent of pre-Revised Article 9 state law, denied the secured party a deficiency in a consumer transaction security interest under Revised Article 9 when the secured party failed to comply with the Article 9's notice provisions.¹⁸⁶

A brief example will help illustrate the rebuttable presumption. Debtor purchases a 2002 Toyota Camry pursuant to an installment sale contract in which Debtor agrees to make installment payments on the obligation and grants seller a security interest in the goods purchased. After a year, Debtor defaults, owing seller \$16,000. Seller repossesses the car, and sells it for \$10,000, and sues Debtor for \$6,000. Debtor claims, and the court agrees, that the sale was not commercially reasonable. The rebuttable presumption rule presumes that the proceeds of the sale are \$16,000. Consequently there is no deficiency—the

A.2d 402 (Ocean County Ct. N.J. 1971); *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917 (Nev. 1977).

¹⁸¹ U.C.C. § 9-626(a)(4) (2001).

¹⁸² *Id.*

¹⁸³ U.C.C. § 9-626(a) (2001). A consumer transaction security interest is a transaction where an individual incurs a personal, family or household obligation, and secures it with a security interest in collateral used for personal, family or household purposes. U.C.C. § 9-102(a)(26) (2001). Many installment sale contracts will be consumer transactions because individuals frequently purchase high cost consumer goods on credit and grant a security interest in the goods purchased.

¹⁸⁴ “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.” U.C.C. § 9-626(b) (2001).

¹⁸⁵ For cases denying a deficiency, see *Camden Nat'l. Bank v. St. Clair*, 309 A.2d 329 (Me. 1973); *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999 (Cal. Dist. Ct. App. 1972); *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W. 2d 492 (Iowa 1977). For case applying a rebuttable presumption rule, see *Norton v. Nat'l. Bank Of Commerce of Pine Bluff*, 398 S.W. 2d 538 (Ark. 1966); *Conti Causeway Ford v. Jarossy*, 276 A.2d 402 (Ocean County Ct. N.J. 1971); *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917 (Nev. 1977). The Kentucky Supreme Court prohibited a deficiency when the secured party failed to comply with Article 9's notice requirements, but applied the rebuttable presumption rule when the secured party failed to dispose of the collateral in a commercially reasonable manner. *Holt v. Peoples Bank of Mt. Washington*, 814 S.W.2d 568 (Ky. 1991).

¹⁸⁶ *In re Downing*, 286 B.R. 900 (Bankr. W.D. Mo. 2002).

proceeds equal the debt. Seller can rebut the presumption by proving the amount of proceeds a commercially reasonable sale would have produced, and recover the deficiency between that amount and the secured debt. Accordingly, while Article 9 establishes the obligor's liability for a deficiency, recovery of the deficiency can require more than simply proving the amount of debt remaining after applying the proceeds of the disposition. To disrupt the recovery a debtor need only allege that the secured party did not proceed in accordance with Article 9's requirements pertaining to notice and disposition.

The composition of the deficiency is also noteworthy in determining whether recovery of a deficiency is a remedy connected to the security or sale aspect of an installment sale contract. A secured party who repossesses and resells the goods will apply the proceeds of resale in accordance with section 9-615. Cash proceeds are applied first to the expenses the secured party incurs in retaking, holding, and disposing of the goods, and attorney's fees provided for by agreement.¹⁸⁷ Then the proceeds are applied to the secured obligation.¹⁸⁸ The deficiency is the balance remaining unpaid. Consequently, a secured party suing to recover a deficiency is seeking to recover not just the unpaid purchase price, but the unpaid purchase price augmented by expenses and attorney's fees.¹⁸⁹

Although Article 2, in section 2-706, includes a remedy authorizing an unpaid seller to resell the goods, credit the sale proceeds to the obligation, and sue the buyer for the difference, the repossession and resale by a secured party/seller is not the use of that remedy.¹⁹⁰ Section 2-706 is available to a seller in the situation where the buyer has rejected the seller's tender of the goods, or the buyer has revoked acceptance of the goods, the buyer's action being wrongful in either situation.¹⁹¹ That is not the situation of a deficiency action. In a deficiency action, the buyer accepts and retains the goods until it defaults in its obligation. Then the secured party/seller repossesses the goods, sells them, and brings an action to recover a deficiency.

¹⁸⁷ U.C.C. § 9-615(a)(1) (2001).

¹⁸⁸ U.C.C. § 9-615(a)(2) (2001). The secured obligation could include expenses, taxes, insurance, freight charges, storage charges and other similar charges. U.C.C. § 9-103, cmt. 3 (2001).

¹⁸⁹ A seller who resells goods after buyer defaults pursuant to its Article 2 remedies can prove and recover, in a suit against the buyer, incidental damages which include expenses of holding and selling the goods. U.C.C. §§ 2-708, 2-710 (2001). However, pursuant to section 9-615(a)(1) (2001), the cash proceeds of the disposition are simply applied first to expenses, the secured party need not prove them as incidental damages. Additionally, a seller using its Article 2 remedies has no right to repossess goods delivered to a buyer other than the limited right to reclaim goods upon discovery of the buyer's insolvency, § 2-702 (2001), or the right to reclaim goods delivered on the condition of buyer's payment on delivery when the buyer fails to pay, § 2-507(2) (2001).

¹⁹⁰ U.C.C. § 2-706 (2001).

¹⁹¹ U.C.C. § 2-703 (2001). A seller could also use this remedy when it reclaimed goods delivered on the condition of buyer's payment on delivery and the buyer fails to pay. See U.C.C. §§ 2-507(2), 2-703 (2001). The remedy of reclaiming the goods upon discovering the buyer's insolvency excludes all other remedies. U.C.C. § 2-702(3) (2001).

This analysis of the deficiency remedy confirms that a secured party's action to recover a deficiency is connected to the security interest component of an installment sale contract. From the start—taking possession of the collateral, to the finish—bringing an action to recover the deficiency, Article 9 guides and governs the actions of the secured creditor. Employing the Article 9 remedies of repossession and disposition of the collateral and recovery of the deficiency are alternatives to seeking recovery of the purchase price of the goods under Article 2. Article 2 plays no role whatsoever in the secured party's route to recovery of a deficiency. Article 9 should govern the action and the statute of limitations should be that prescribed by the limitation of actions statutes of the jurisdiction.

VII. Solutions

Although I believe a court faced with the issue of determining the applicable statute of limitations for a deficiency action should decide that the Article 2 statute of limitations does not regulate the action, convincing a court to so hold is not the only means to achieve the result of regulating the action with a more appropriate statute of limitations. Other possible means are: a state could enact a statute of limitations applicable to installment sales contracts that expressly supplants the Article 2 statute of limitations; the drafters could amend Article 9 to include a statute of limitations; or, the drafters could declare in the section 2-102 comment, as they did in the early drafts of section 2-102, that Article 2 does not govern the rights and remedies of a secured party.

All states have statutes of limitations regulating the time for bringing an action. Many states have installment sales acts, and some have motor vehicle installment sales acts.¹⁹² Thus, enacting a statute of limitations provision would fit neatly into many states' existing statutory scheme. However, only Kentucky, Mississippi, and Georgia have a statute of limitation expressly applicable to actions under an installment sale contract.¹⁹³ Persuading a state legislature to

¹⁹² See, e.g., ARIZ .REV. STAT. §§ 44-6001 to -6006 (Arizona retail installment sales act); CONN. GEN. STAT. ANN. §§ 36a-770 to 788 (Connecticut retail installment sales financing act); GA. CODE ANN. §§ 10-1-30 to -42 (Georgia motor vehicle sales financing act); 815 ILL. COMP. STAT. §§ 375/1 to /26 (Illinois motor vehicle retail installment sales act); 815 ILL. COMP. STAT. §§ 405/1 to /32 (Illinois retail installment sales act); MICH. COMP. LAWS ANN. §§ 492.101 to .141 (Michigan motor vehicle installment sales act); MICH. COMP. LAWS ANN. §§ 445.851 to .873 (Michigan retail installment sales act); N.D. CENT. CODE §§ 51-13-01 to -08 (North Dakota retail installment sales act); 9 VT. STAT. ANN. §§ 2351 to 2362 (Vermont motor vehicle retail installment sales financing act); 9 VT. STAT. ANN. § 2401 to 2410 (Vermont retail installment sales act); WASH. REV. CODE § 63.14.010 to .926 (Washington installment sales of goods and services act).

¹⁹³ KY. REV. STAT. § 190.124 (enacted in 2006, Kentucky allows four years from the earlier of the maturity date, the sale after default, or the accelerated maturity date for retail installment sales of motor vehicles); MISS. CODE ANN. § 15-1-23 (Mississippi allows one year for commencement of an action on an installment note after foreclosure or sale of the collateral; other deficiency actions are subject to Mississippi's three-year statute of limitation, MISS. CODE ANN. § 15-1-49); GA. CODE

enact a statute of limitations for installment sales contracts requires a person, persons, or group that desires such a statute and is willing to lobby on its behalf. It is not difficult to imagine that creditor institutions would favor such a statute because a creditor undoubtedly thinks the four-year statute of limitations in Article 2 is too short. Whether an interested group would be willing to commit the resources for an effort to persuade the legislature to enact a specific statute of limitations is more difficult to imagine. An obvious limitation of this solution is that any such group must work within the legislative process without any guarantee the legislature would be convinced. Moreover, this solution is piecemeal because not all states would enact such a provision. Consequently, a creditor would not know the applicable statute of limitations without researching the law of the jurisdiction. Although enacting a specific statute of limitation is an effective resolution of the issue, the effort and success necessary for it to produce large scale change make it an unlikely solution.

Perhaps the best solution is for the drafters to adopt a statute of limitations for Article 9. Article 9 has never included a statute of limitations provision. It is interesting that the drafters have not done so.¹⁹⁴ I have found no statement by the drafters expressing the rationale for not including an Article 9 statute of limitations. Similarly, Article 3 did not include a statute of limitations for negotiable instruments until the approval of the 1990 revisions, so possibly the drafters may act yet.¹⁹⁵ However, because Article 9 underwent a major revision with the adoption of Revised Article 9 in 1999, it seems less likely the drafters would adopt now a statute of limitations for Article 9.

A feasible solution is for the drafters to clarify the scope of Article 2 with a statement in the comment to section 2-102. The Official Comment to section 2-102 now invites a court to apply different bodies of law to different parts of the same transaction and thus it is the most logical place for the drafters to insert a clarification. As I noted in my discussion of the applicable cases, courts considering the issue typically ignore the drafters' policy that different laws apply and that Article 2 does not regulate Article 9 remedies, instead they ask whether the deficiency action is more closely connected to the sales aspects or the security aspects of the transaction. The drafters could clarify their policy by adding the following sentence to the Official Comment to section 2-102. "Consequently, when a transaction has incidents of both sale and purchase-money security interest, this Article shall not affect the rights and remedies of either the seller or the buyer that Article 9 creates." If the comment so read, a court considering the applicable statute of limitations for a deficiency action would find it difficult to ignore the directive that Article 2 not apply because

ANN. § 10-1-14 (Georgia allows four years for retail installment sales of consumer goods, excluding motor vehicles).

¹⁹⁴ One cannot help but wonder whether courts turn to the Article 2 statute of limitations by default because Article 9 has no statute of limitations. However, no court has stated that it is applying the Article 2 statute of limitations because Article 9 has none.

¹⁹⁵ Revised Article 3 was approved in 1990.

repossession, disposition, and an action for a deficiency are Article 9 remedies. An inquiry of the court as to whether the issue is connected to the sale aspects of the transaction would not be necessary. If, however, a court did inquire, the inquiry would be made with the understanding that Article 2 does not apply to the remedies created by Article 9. However, without an Article 9 statute of limitations, the applicable statute of limitations could be that for an action on a contract or a debt agreement. For actions on a contract, that can be as long as twenty years or as short as three.¹⁹⁶ Twenty states have enacted a six-year limitation period.¹⁹⁷

That lack of uniformity exposes a deficiency of using the official Comment to solve the problem. Because there would not be a uniform statute of limitations, a creditor must research the law of the jurisdiction to ascertain the applicable statute of limitations. Uniformity of law is one of the principles of the Uniform Commercial Code, and applying the Article 2 statute of limitations has the virtue of uniformity.¹⁹⁸ However, interpreting each section of the UCC in accordance with the applicable policy of the section is also a principle of the UCC:

The Uniform Commercial Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Uniform Commercial Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.¹⁹⁹

Conclusion

Most courts faced with the issue of fixing the statute of limitations for a deficiency action have chosen to apply the Article 2 statute of limitations after

¹⁹⁶ Maine has a twenty-year statute of limitations for actions on a written contract. 14 ME. REV. STAT. ANN. § 751. Eight states have three-year statutes of limitation: Alaska, ALASKA STAT. § 09.10.053; Arkansas, ARK. CODE ANN. § 16-56-105; Colorado, COLO. REV. STAT. § 13-80-101; Delaware, DEL. CODE ANN. 10 § 8106; Maryland, MD. CODE CTS. & JUD. PROC. § 5-1-1; New Hampshire, N.H. REV. STAT. § 508:4; North Carolina, N.C. GEN. STAT. ANN. § 1-52; and South Carolina, S.C. CODE ANN. § 15-3-530.

¹⁹⁷ Alabama, ALA. CODE § 6-2-34; Arizona, ARIZ. REV. STAT. § 12-548; Connecticut, CONN. GEN. STAT. ANN. § 52-576; Georgia, GA. CODE ANN. § 9-3-24; Hawaii, HAW. REV. STAT. § 657-1; Massachusetts, MASS. GEN. LAWS ANN. 260, § 2; Michigan, MICH. COMP. LAWS ANN. § 600-5807; Minnesota, MINN. STAT. ANN. § 514.05; Nevada, NEV. REV. STAT. § 11.190; New Jersey, N.J. STAT. ANN. § 2A:14-1; New Mexico, N.M. STAT. ANN. § 37-1-3; New York, N.Y. C.P.L.R. § 213; North Dakota, N.D. CENT. CODE § 28-01-16; Oregon, Or. Rev. Stat. § 12.080; South Dakota, S.D. CODIFIED LAWS § 25-2-13; Tennessee, TENN. CODE ANN. § 28-3-109; Utah, UTAH CODE ANN. § 78-12-23; Vermont, VT. STAT. ANN. tit. 12, § 511; Washington, WASH. REV. CODE § 4-16-040; and Wisconsin, WIS. STAT. ANN. § 893.43.

¹⁹⁸ U.C.C. § 1-103(a)(3) (2001).

¹⁹⁹ U.C.C. § 1-103, cmt.1 (2001).

making a cursory examination of the issue. My analysis of the issue indicates that courts could make a more reasoned choice, although because the UCC does not provide a definitive answer courts choosing the Article 2 statute of limitations are not clearly erroneous. I think courts should consider two matters. First, they should review the history of a deficiency action beginning with prior uniform laws and continuing through the early drafts of Article 2. Second, they should examine the process of how a deficiency action arises. A court that conducts this investigation will find it is more consistent with the history and structure of the deficiency remedy to connect it to the security aspects of an installment sale contract.

Apart from judicial action, there are several ways to reach a result that is consistent with the policy of Article 2: state legislatures could enact a special statute of limitations for installment sales, the drafters of the UCC could approve a statute of limitations for Article 9, or the drafters could clarify their policy by adding a sentence to the section 2-102 Official Comment that indicates Article 2 does not regulate Article 9 remedies. In the absence of such actions, courts should undertake a vigorous examination of the issue. When they do so, I believe they will decide the Article 2 statute of limitations does not apply to a secured party's action to recover a deficiency.