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

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INTRODUCTION

The default provisions of Article 9 of the Uniform Commercial Code (U.C.C. or Code) strive to provide "flexible, effective, and efficient realization procedures."[1] The provisions fall short of achieving this noble goal, and blame rests squarely on the provisions themselves. The default statutes are not drafted with a great degree of rigidity and detail, but instead are loosely organized and informal.[2] Consequently, they fail to provide guidance on several fundamental issues.[3] These statutory gaps have prompted judicial intervention that has been "wasteful, expensive, inefficient, unfair and detrimental to secured financing."[4]

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1. William E. Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 253 (1962).

2. *See* 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.1, at 1183 (1965) (noting that the default provisions reject the approach of "detailed statutory regulation," and instead "opt[] for a loosely organized informal, anything-goes type of foreclosure pattern"); *see also* Hogan, *supra* note 1, at 207 (observing the "remarkable absence of stringent requirements for mandatory public sales, detailed public notices, or other specific prohibitions").

Professor Gilmore was the primary drafter of the original Article 9. *See* BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 1.01[2][c], at 1-8 (rev. ed. 1993 & Supp. 1998).

3. Examples include the following: Is a guarantor a "debtor"? When will a secured party's repossession of collateral trigger a breach of the peace? Must a disposition notice be in writing? When is a disposition not commercially reasonable? Can a secured party's retention of collateral for an unreasonable period of time result in an involuntary waiver of any deficiency claim? Will a secured party's misconduct adversely affect its ability to pursue a deficiency claim?

4. Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, __ CHI.-KENT L.J. (forthcoming 1999) (manuscript at 2-3, on file with *The Business Lawyer*, University of Maryland School of Law); *see also infra* notes 58 and 286 and accompanying

The two sponsors of the U.C.C.—the National Conference of Commissioners on Uniform State Laws (NCCUSL)[5] and the American Law Institute (ALI)[6]—have issued a revised version of Article 9.[7] The most extensive changes have been made to the default provisions (which, for stylistic and substantive reasons, have expanded from seven to twenty-eight—an increase of 300%). With one exception,[8] Parts I and II of this Article examine each of these twenty-eight provisions.[9] It provides the inevitable (but hopefully useful) comparative analysis of current and revised law, offers drafting advice where appropriate, discusses perceived statutory weaknesses, and raises issues that may survive enactment. The Article concludes that while the revised default provisions may be imperfect, they do significantly improve the flexibility, efficiency, and effectiveness of realization procedures for all interested parties and, therefore, are a notable improvement in the law.[10]

text (addressing whether a guarantor is a "debtor"); *infra* notes 184-96 and accompanying text (summarizing conduct that may breach the peace); *infra* notes 305-06 and accompanying text (discussing whether disposition notices must be written or whether they may be oral); *infra* notes 227-33 and accompanying text (analyzing commercial reasonableness).

5. NCCUSL, an organization over a century old, is composed of representatives (Commissioners) from each state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Most Commissioners are appointed by the governor of the state; some derive appointment from their state's legislature or from another state body. All Commissioners are lawyers and serve without compensation. *See* Discussion, *Uniform State Laws: A Discussion Focused On Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257, 259 n.1 (1997).

6. The ALI, founded in 1923, has fostered improvement in the law through its Restatements of important areas of the common law. Its members currently exceed 2500, are primarily elected, and include "practitioners, judges, law professors, and others who have distinguished legal accomplishments." *Id.* at 260 n.2.

7. The Permanent Editorial Board for the Uniform Commercial Code (PEB) established a committee (PEB Study Group) in 1990 to study Article 9 and recommend any revisions it thought desirable. The PEB Study Group issued a report on Dec. 1, 1992. *See* PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9 (1992) [hereinafter PEB STUDY GROUP REPORT]. The PEB Study Group issued 30 default-related recommendations. *See id.* at 37-42 (recommendations only), 199-247 (recommendations and comments). On the PEB Study Group's recommendation, the PEB created a drafting committee (Drafting Committee) in 1993, charging it with the task of rewriting Article 9. William M. Burke chaired the Drafting Committee, and Professors Steven L. Harris (Chicago-Kent College of Law) and Charles W. Mooney, Jr. (University of Pennsylvania School of Law), served as co-reporters. The Drafting Committee met numerous times and issued several drafts of proposed revised Article 9. Many of the drafts are available on the Internet. *See* NCCUSL, *Drafts of Uniform and Model Acts* (visited Mar. 26, 1999) <http://www.law.upenn.edu/library/ulc/ulc.htm>. Several of these drafts are cited in this Article.

8. *See infra* note 109 (explaining omission).

9. The current version of Article 9, U.C.C. § 9-__ (1995), is distinguished by the use of "current Article 9" or "current section __" where appropriate. The revised version of Article 9, U.C.C. § 9-__ (1998), is distinguished by the use of "revised Article 9" or "revised section __" where appropriate.

Part II of this Article, covering revised §§ 9-615 to 9-628, will appear in the August 1999 issue of *The Business Lawyer*.

10. This Article makes no (direct) attempt to fuel the scholarly debates concerning (i) the

REVISED SECTION 9-601: RIGHTS AFTER DEFAULT; JUDICIAL ENFORCEMENT, CONSIGNOR OR BUYER OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES, OR PROMISSORY NOTES

A secured party's post-default rights under current Article 9 are found in part 5.[11] The post-default rights enjoyed by a secured party under revised Article 9 are codified in part 6.[12] Most, but not all, of those rights are created by other provisions of part 6.[13] If the collateral consists of one

utility of secured credit, (ii) the treatment afforded secured creditors in bankruptcy, and (iii) the degree to which a *commercial* code should apply to *consumer* transactions (and, if so, whether rules governing commercial and consumer transactions should be identical or different). A number of articles discuss the utility of secured credit. *See* David Gray Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179 (1994); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997); Randal C. Picker, *Security Interests, Misbehavior, and Common Pools*, 59 U. CHI. L. REV. 645 (1992); Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984); Robert E. Scott, *The Truth About Secured Financing*, 82 CORNELL L. REV. 1436 (1997); Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901 (1986); Paul M. Shupack, *Solving the Puzzle of Secured Transactions*, 41 RUTGERS L. REV. 1067 (1989); James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984). Numerous other articles debate the proper treatment to be afforded secured creditors in bankruptcy. *See* Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279 (1997); Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349 (1997); Lynn M. LoPucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 CORNELL L. REV. 1483 (1997); Steve H. Nickles, *Consider Process Before Substance, Commercial Law Consequences of the Bankruptcy System: Urging the Merger of the Article 9 Drafting Committee and the Bankruptcy Commission*, 69 AM. BANKR. L.J. 589 (1995); David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, 50 LAW & CONTEMP. PROBS. 53 (1987); Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234 (1997); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997); Steven L. Schwarcz, *Protecting Rights, Preventing Windfalls: A Model for Harmonizing State and Federal Laws on Floating Liens*, 75 N.C. L. REV. 403 (1997); James J. White, *No: It's a Populist Craving for a Petit Bourgeois Valhalla*, in *The Slippery Slope to Bankruptcy: Should Some Claimants Get a 'Carve-Out' from Secured Credit?*, BUS. LAW TODAY, Jan.-Feb. 1998, at 33; William J. Woodward Jr., *Yes: Reserve a Cushion of Free Assets for Unsecured Creditors*, in *The Slippery Slope to Bankruptcy: Should Some Claimants Get a 'Carve-Out' from Secured Credit?*, BUS. LAW TODAY, Jan.-Feb. 1998, at 32. Recent articles also discuss the propriety of including consumer transactions within the scope of Article 9 and whether consumer and commercial transactions should be governed by similar rules. *See* Michael M. Greenfield, *Article 9 and Consumer Transactions: The Need for Revision*, 48 CONSUMER FIN. L.Q. REP. 483 (1994); Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187 (1997); Kathleen Patchel & Amelia H. Boss, *Consumer Transactions and the Code: Some Considerations*, 51 BUS. LAW. 1343 (1996).

11. *See* U.C.C. § 9-501(1) (1995) (opening sentence).

12. *See id.* § 9-601(a) (1998).

13. *See, e.g., id.* § 9-607 (permitting a creditor to pursue collection efforts against parties owing money to a debtor); *id.* § 9-609(b)(2) (permitting a creditor to take possession of col-

or more bills of lading, warehouse receipts, or other documents of title, however, revised section 9-601 expressly permits the creditor to proceed either against the documents themselves or the goods described in the documents.[14] For example, a secured party that possesses a negotiable document of title for inventory stored by the debtor at a warehouse may, on the debtor's default, sell the document or, alternatively, surrender the document to the warehouse operator, obtain possession of the goods, and then sell the goods.[15]

Revised section 9-601 also permits a creditor to exercise non-Article 9 rights. For example, a creditor may reduce its claim to judgment and then have the collateral sold under a writ of execution.[16] A creditor that proceeds to liquidate the collateral under a writ of execution need not worry about complying with the procedural requirements of non-judicial collateral dispositions under part 6,[17] but this advantage may be meaningless if the value of the collateral is likely to decline during the time necessary to obtain the post-judgment writ and the debtor has no other marketable assets.[18]

Under current law, any judgment lien against the collateral relates back to the date of perfection, even if the secured party filed its financing statement on an earlier date.[19] Under revised section 9-601, the judicial lien relates back to the perfection date or the filing date, whichever is earlier.[20] This change mirrors the "first to file or perfect" priority rule[21] and, by providing a possibly earlier relation-back date, better protects a creditor whose security interest is perfected after, rather than at the moment when, the financing statement is filed (which may occur if the financing statement is filed before the security agreement is executed, the creditor extends any

lateral without judicial process); *id.* § 9-610 (permitting a creditor to dispose of collateral); *id.* § 9-620 (permitting a creditor to retain collateral in satisfaction of debt).

14. *See id.* § 9-601(a)(2). The secured party enjoys the same right under current Article 9. *See id.* § 9-501(1) (1995).

15. *See* 9 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-501:5, at 632 (1997).

16. *See* U.C.C. § 9-601(a)(1) (1998). The secured party enjoys the same right under current Article 9. *See id.* § 9-501(1) (1995); *see also* Stewart v. Henning, 481 N.W.2d 230, 232 (N.D. 1992); Charles E. Brauer Co. v. NationsBank of Virginia, N.A., 466 S.E.2d 382, 386 (Va. 1996).

17. *See* U.C.C. § 9-601(f) (1998).

18. If the collateral is worth less than the secured debt, however, and the debtor has other marketable, non-exempt assets, then the creditor may conclude that its most prudent course of action is to ignore the collateral and instead pursue a judgment against the debtor and have the non-exempt assets sold under a writ of execution.

19. *See id.* § 9-501(5) (1995). One author suggests that the failure to relate the judgment lien back to the earlier of the two dates "was probably a drafting oversight." Eldon H. Reiley, *The Article 9 Revision Process and Interpretation of Original Article 9*, 31 UCC L.J. 261, 306 (1999).

20. *See id.* § 9-601(e) (1998). Subsection (e) also provides rules governing agricultural liens, which are not discussed in this Article. *See infra* note 109.

21. *See* U.C.C. § 9-322(a)(1) (1998); *id.* § 9-312(5)(a) (1995).

value, or the debtor acquires rights in the collateral).[22] This relation-back doctrine benefits the secured creditor in two ways. First, it negates any suggestion that the creditor somehow loses its original interest in the collateral and acquires a new interest that may be subject to a less favorable priority position in a dispute with a lien creditor or another secured creditor.[23] And second, if the debtor seeks bankruptcy protection shortly after the execution sale, the creditor's interest is less likely to be avoided as a voidable preference[24] because the sale itself does not trigger a transfer for antecedent debt[25] and the transfer date (a date earlier than the sale date) may fall outside the preference period.[26]

Revised section 9-601 states that the rights of part 6, whether statutory, contractual, or judicial, are cumulative and may be exercised simultaneously.[27] For example, a creditor may conduct an Article 9 disposition of repossessed collateral without forfeiting its right to bring a simultaneous or subsequent *in personam* action against the debtor.[28] Or, a creditor may pursue a judgment against the debtor without impairing its ability to concurrently or thereafter enforce its Article 9 rights in the collateral.[29]

Under current Article 9, a secured party that possesses collateral, whether before or after a default, has the rights and duties provided by section 9-207,[30] such as the limited right to operate the collateral[31] and

22. *See id.* § 9-308(a) (1998) (providing a general rule that a security interest cannot be perfected before it has attached); *id.* § 9-203(a), (b) (indicating that a security interest attaches if the debtor has authenticated a security agreement that describes the collateral, the debtor has rights (or the power to transfer rights) in the collateral, and the creditor has given value); *cf. id.* § 9-303(1) (1995) (stating a security interest must attach before it can be perfected); *id.* § 9-203(1) (indicating the steps of attachment).

23. *See id.* § 9-501 cmt. 6 (1995); *id.* § 9-601 cmt. 6 (1998).

24. *See generally* 11 U.S.C. § 547 (1994).

25. *See id.* § 547(b)(2); U.C.C. § 9-501 cmt. 6 (1995).

26. *See* 11 U.S.C. § 547(b)(4).

27. *See* U.C.C. § 9-601(c) (1998); *cf. id.* § 9-501(1) (1995) (indicating that rights and remedies are cumulative but not indicating whether they may be exercised simultaneously). The creditor's ability to exercise its remedies cumulatively or concurrently may be subject to statutory or equitable limitations. *See, e.g.,* CAL. CIV. CODE §§ 1812.2, 1812.5 (West 1998) (forcing creditors under retail installment sales contracts to either repossess and sell collateral and forego any possible deficiency action, or waive its rights in the collateral and seek an *in personam* judgment); Shedoudy v. Beverly Surgical Supply Co., 161 Cal. Rptr. 164, 166 (Ct. App. 1980) (invoking the doctrine of equitable marshalling); Coones v. FDIC, 848 P.2d 783, 797-98 (Wyo. 1993) (viewing creditor's pursuit of simultaneous remedies as harassment); U.C.C. § 9-601 cmt. 5 (1998) (requiring a secured party to act in good faith when simultaneously exercising remedies).

28. *See, e.g.,* Chase Manhattan Bank v. Natarelli, 401 N.Y.S.2d 404, 406-07 (Sup. Ct. 1977); U.C.C. § 9-615(d)(2) (1998) (imposing liability on obligors for any deficiency remaining after an Article 9 foreclosure sale).

29. *See, e.g.,* Fleming v. Carroll Publ'g Co., 621 A.2d 829, 835 (D.C. 1993).

30. *See* U.C.C. § 9-501(1) (1995) (fourth sentence).

31. *See id.* § 9-207(4); *see also* Jorgensen v. Pressnall, 545 P.2d 1382, 1385-86 (Or. 1976) (permitting secured party to occupy mobile home in order to avoid water damage); McGinnis

the duty to exercise reasonable care.[32] Under revised Article 9, section 9-207 creates rights in favor of, and imposes duties on, a secured party when collateral is in its possession (such as inventory, equipment, or consumer goods) *or control* (for example, a deposit account, electronic chattel paper, investment property, or a letter-of-credit right).[33] A conforming change is reflected in revised section 9-601.[34]

As the first two words of revised section 9-601 indicate, the secured creditor cannot exercise its rights under part 6 until "[a]fter default."[35] The first-time visitor to Article 9 may be surprised to discover that, like its predecessor, part 6 does not define "default." Nor does any other provision of Article 9 or section 1-201 (the "General Definitions" section of the U.C.C.) define this all-important term. Instead, the definition, which may be "as long as the creditor's arm and as broad as the counsel's imagination,"[36] is left to the agreement of the parties.[37] Why the Drafting

v. Wentworth Chevrolet Co., 645 P.2d 543, 546 (Or. Ct. App. 1982), *rev'd on other grounds*, 668 P.2d 365 (Or. 1983) (permitting creditor to remove vehicle from storage and drive it approximately 3000 miles during 26-month period); 2 GILMORE, *supra* note 2, § 42.11, at 1164 ("If a secured party takes possession of collateral which will deteriorate unless kept in use, he undoubtedly has a right to protect his own interest by using it and thus preserving its value.").

32. *See* U.C.C. § 9-207(1) (1995); *see also* Peoples State Bank & Trust Co. v. Krug (*In re* Krug), 189 B.R. 948, 959-61 (Bankr. D. Kan. 1995) (mem.) (concluding that a creditor which indiscriminately pastured bulls and females together breached duty to exercise reasonable care for purebred, registered, and registration-eligible cattle); Credit Alliance Corp. v. Timmco Equip., Inc., 507 So. 2d 657, 658-59 (Fla. Dist. Ct. App. 1987) (concluding creditor failed to exercise reasonable care when fire damaged loader); Royal West Airways, Inc. v. Valley Bank, 747 P.2d 895, 896-97 (Nev. 1987) (per curiam) (remanding to district court for determination of whether the creditor violated its custodial duties where the value of an airplane declined significantly after the creditor left it unattended and exposed to the elements, causing corrosion, rust, and tears to control surfaces, metal elements, and engines). Both versions of Article 9 permit a secured party and a debtor to contractually agree on the contours of "reasonable care" by adopting standards that are not manifestly unreasonable. *See* U.C.C. § 9-603(a) (1998); *id.* § 9-501(3) (1995). The term "reasonable" is not defined in the Code, but its excessive use prompted one author to write: "The word *reasonable*, effective in small doses, has been administered by the bucket, leaving the corpus of the Code reeling in dizzy confusion." David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86 (1967).

33. *See* U.C.C. § 9-207 (1998). The steps necessary to "control" a deposit account, electronic chattel paper, investment property, and a letter-of-credit right are codified at *id.* §§ 9-104, 9-105, 9-106, and 9-107, respectively. *See also id.* § 9-102(a)(29) (defining "deposit account"); *id.* § 9-102(a)(31) (defining "electronic chattel paper"); *id.* § 9-102(a)(49) (defining "investment property"); *id.* § 9-102(a)(51) (defining "letter-of-credit right").

34. *See id.* § 9-601(b).

35. *Id.* § 9-601(a); *cf. id.* § 9-501(1) (1995) (explaining its application "[w]hen a debtor is in default").

36. *See* 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 34-2, at 386 (4th ed. 1995).

37. *See* U.C.C. § 9-601 cmt. 3 (1998). The loan papers in many collateralized transactions define "default" in a manner that includes one or more of the following events: (i) the debtor fails to pay any of the debt when due; (ii) the debtor fails to comply with any covenant in any loan paper; (iii) the debtor becomes a party to (except as a claimant or creditor) or is

Committee elected to reflect this deference to contract law through a statement in a comment rather than in one of the statutory provisions, or through an open-ended definition, is anyone's guess. Also worth noting in light of the perceived disparity in bargaining strength between secured creditors and consumer debtors is the failure of consumer advocates to persuade the Drafting Committee to limit "default" in consumer transactions to nonpayment of the debt and material impairment of collateral.[38] Nevertheless, secured creditors must be aware of state or federal law that may define "default" in such a narrow manner.[39]

Revised Article 9 does not attempt to address whether a creditor's post-default conduct can effectively waive a default if the loan papers include a "no waiver" clause.[40] This issue, frequently litigated,[41] will continue to be resolved by law outside Article 9. Courts occasionally conclude that

made the subject of any proceeding under the Bankruptcy Code; (iv) the debtor fails to pay when due any other debt in excess (individually or collectively) of a specific amount; (v) any default exists under any other agreement to which the debtor is a party, the effect of which causes, or permits any other party thereto to cause, an amount in excess of a specific amount to become due and payable by the debtor before its stated maturity; and (vi) any representation or warranty made by the debtor contained in any loan paper was materially incorrect when made.

Absent any definition in the loan papers, a creditor may find that a "default" exists only if the debtor fails to pay any part of the secured debt. *See, e.g.,* Cofield v. Randolph County Comm'n, 90 F.3d 468, 471 (11th Cir. 1996); Jefferds v. Ellis, 486 N.Y.S.2d 649, 655 (Sup. Ct. 1985), *rev'd on other grounds,* 505 N.Y.S.2d 15 (App. Div. 1986).

38. The proposal "was generally rejected as being likely to breed frivolous litigation." Alvin C. Harrell, *UCC Article 9 Revisions Confront Issues Affecting Consumer Collateral,* 49 CONSUMER FIN. L.Q. REP. 256, 259 (1995).

39. *See, e.g.,* UNIF. CONSUMER CREDIT CODE § 5.109, 7A U.L.A. 152 (1999) (stating a default exists in a consumer credit transaction only if "the consumer fails to make a payment as required by agreement," or "the prospect of payment, performance, or realization of collateral is significantly impaired"). The Uniform Consumer Credit Code has been enacted in only five states: Colorado, Idaho, Iowa, Kansas, and Maine. *See id.* at 1. At least two other states have enacted a provision similar to Uniform Consumer Credit Code § 5.109. *See* MO. ANN. STAT. § 408.552 (West 1990); NEB. REV. STAT. § 45-1,105(5) (1993).

40. *See* U.C.C. § 9-601 cmt. 3 (1998). A typical "no waiver" (or "anti-waiver") clause, a boilerplate provision in most loan papers, follows:

> The acceptance by Lender at any time and from time to time of partial payment on the secured obligation shall not be deemed to be a waiver of any Default then existing. No waiver by Lender of any Default shall be deemed to be a waiver of any other then-existing or subsequent Default. No delay or omission by Lender in exercising any right or remedy shall impair that right or remedy or be construed as a waiver thereof, nor shall any single or partial exercise of any right or remedy preclude other or further exercise of that, or any other, right or remedy.

41. *See, e.g.,* Lewis v. National City Bank, 814 F. Supp. 696, 702 (N.D. Ill. 1993), *aff'd,* 23 F.3d 410 (7th Cir. 1994); B.P.G. Autoland Jeep-Eagle, Inc. v. Chrysler Credit Corp., 799 F. Supp. 1250, 1255-56 (D. Mass. 1992); Riley State Bank v. Spillman, 750 P.2d 1024, 1028 (Kan. 1988); Kessel v. Western Sav. Credit Union, 463 N.W.2d 629, 631 (N.D. 1990).

actions speak louder than words,[42] so prudence dictates that a secured party think twice before tolerating the debtor's failure to strictly comply with the terms of the loan papers.

A person that is either a consignor or a buyer of accounts, chattel paper, payment intangibles, or promissory notes falls within the definition of "secured party."[43] Nevertheless, with one exception, the rights and duties imposed by part 6 on a secured party do not apply to a buyer of such collateral or a consignor.[44] These parties are excluded from all but one of the provisions of part 6 because (i) buyers usually acquire the entire interest in the property and, therefore, should be permitted to enforce their rights in the property without regard to provisions enacted to protect a debtor's equitable interest, and (ii) other law governs the enforcement rights of a consignor.[45]

REVISED SECTION 9-602: WAIVER AND VARIANCE OF RIGHTS AND DUTIES

One of the basic tenets of the U.C.C. is freedom of contract. This principle is codified in current section 1-102, which permits parties to vary U.C.C. provisions by agreement.[46] This freedom is subject to a general limitation on the ability to disclaim Code-imposed duties of good faith, diligence, reasonableness, and care.[47] The principle is further subject to express limitations stated in other provisions of the U.C.C.[48] One provision is section 9-501, which prohibits waivers or variances of specific rights given to the debtor, and selected duties imposed on the creditor, after default.[49] The drafters viewed section 9-501(3) as a codification of the "long-standing and deeply rooted attitude" that "agreements designed to cut down the debtor's rights and free the secured party of his duties" after default—when overreaching may reach its apex—should be viewed "with

42. *See, e.g.,* Westinghouse Credit Corp. v. Shelton, 645 F.2d 869, 873-74 (10th Cir. 1981) (remanding for determination whether creditor's acceptance of payments habitually late by one to three months established course of performance that modified payment terms and "anti-waiver" clause of contract); Mercedes-Benz Credit Corp. v. Morgan, 850 S.W.2d 297, 299-300 (Ark. 1993) (concluding secured creditor's routine acceptance of delinquent payments effectively amended contractual payment and enforcement provisions); Moe v. John Deere Co., 516 N.W.2d 332, 338 (S.D. 1994) (holding creditor's repeated acceptance of late payments obligated creditor to notify debtor, before repossessing collateral, that debtor was expected to strictly comply with contract terms). *See also* 2 GILMORE, *supra* note 2, § 44.1, at 1214 ("[C]ourts pay little attention to clauses which appear to say that meaningful acts are meaningless and that the secured party can blow hot or cold as he chooses.").

43. *See* U.C.C. § 9-102(a)(72)(C), (D) (1998).

44. *See id.* § 9-601(g).

45. *See id.* § 9-601 cmt. 9.

46. *See id.* § 1-102(3) (1995).

47. *See id.*

48. *See id.*

49. *See id.* § 9-501(3).

suspicion."[50] The concern with potential overreaching under revised Article 9 remains, as evidenced by revised section 9-602, which, like its predecessor, expressly prohibits waivers and variances of specific rights and duties[51] (which are discussed elsewhere in this Article as part of the analysis of the provision that creates the right or imposes the duty).

There are three notable differences between current section 9-501(3) and revised section 9-602. First, the revised list of statutes that create non-waivable rights and duties is much longer than the current list.[52] One reason is that some of the rights and duties existing under both versions of Article 9 are not expressly non-waivable under current Article 9 but are expressly non-waivable under revised Article 9.[53] Also, part 6 creates additional non-waivable rights in favor of the debtor[54] and imposes more non-waivable duties on the secured party.[55]

Second, section 9-501(3) prohibits waivers or variances of rights given to a "debtor,"[56] a person who owes payment or other performance of the secured obligation, whether or not the person owns or has rights in the collateral.[57] Whether a guarantor is a "debtor" (and, therefore, a party either with non-waivable rights or to whom the secured party owes a non-waivable duty) is an issue frequently litigated under current Article 9.[58]

50. *See id.* § 9-501 cmt. 4; *see also* Walker v. Grant County Sav. & Loan Ass'n, 803 S.W.2d 913, 916 (Ark. 1991) ("One clear policy reason underlying Article 9 default provisions is the protection of post default debtors from the potential of overbearing tactics and intimidation by secured parties. After default the secured party is unquestionably in a position of control and even dominance.").

51. *See* U.C.C. § 9-602 & cmt. 2 (1998). This section is expressly subject to § 9-624, which provides three limited waivers. *See id.* (beginning "Except as otherwise provided in Section 9-624").

52. *Compare id.* § 9-501(3) (1995) (referencing seven provisions), *with id.* § 9-602 (1998) (referencing 20 provisions).

53. For example, current § 9-503 permits a creditor, after default, to seize collateral without judicial process if the creditor can do so without breaching the peace. *Id.* § 9-503 (1995). This duty, to act without breaching the peace, is not included among the non-waivable duties listed in § 9-501(3). Revised Article 9 continues to permit a creditor to seize collateral, after default, without judicial process so long as it does not breach the peace. *See id.* § 9-609(b)(2) (1998). Under revised Article 9, this duty cannot be waived or varied. *Id.* § 9-602(6).

54. *See, e.g., id.* § 9-616(e) (1998) (creating, in favor of debtors and consumer obligors, the right to request and receive from the secured party an explanation of the calculated surplus or deficiency). This right is non-waivable under § 9-602(9).

55. *See, e.g., id.* § 9-615(f) (forcing the secured party to adopt a special method of calculating a deficiency or surplus if one of three listed parties is the transferee). This duty is non-waivable under § 9-602(8).

56. *Id.* § 9-501(3) (1995).

57. *See id.* § 9-105(1)(d).

58. *See, e.g.,* FDIC v. Payne, 973 F.2d 403, 409 (5th Cir. 1992); SNCB Corp. Fin. Ltd. v. Schuster, 877 F. Supp. 820, 827 (S.D.N.Y. 1994), *aff'd*, 71 F.3d 406 (2d Cir. 1995); Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F. Supp. 813, 833 (E.D. Pa. 1993); Hollander v. California Mfg. Enters., Inc., 51 Cal. Rptr. 2d 694, 696 (Ct. App. 1996); May v. Women's Bank, N.A., 807 P.2d 1145, 1147-51 (Colo. 1991); United States v. Jensen, 418 N.W.2d 65, 65-67 (Iowa 1988); Ford Motor Credit Co. v. Thompson Mach., Inc., 649 A.2d 19, 21-22 (Me. 1994);

That issue disappears under revised Article 9, which not only redefines "debtor"[59] but also adds a new term, "obligor," that is defined in a manner that includes any guarantor.[60] Revised section 9-602 acknowledges the two terms by referring to rights given "to a debtor or obligor."[61]

Third, section 9-501(3) strongly implies, but does not expressly state, that a debtor cannot waive or vary the enumerated rights and duties.[62] Revised section 9-602 expressly states that "the debtor or obligor may not waive or vary the rules stated" in the referenced sections.[63] Revised section 9-602 does not, however, prohibit parties from agreeing to settle claims for prior conduct that may have violated or breached the specific rights or duties, even if the settlement agreement includes language that could be construed as a waiver.[64]

REVISED SECTION 9-603: AGREEMENT ON STANDARDS CONCERNING RIGHTS AND DUTIES

Although section 9-501 prohibits parties from waiving or varying specific rights and duties, the section permits parties to determine, by agreement, the standards by which the fulfillment of those rights and duties will be measured.[65] For example, section 9-504 requires a secured creditor to send "reasonable notification" of most post-default collateral dispositions to a debtor.[66] In an attempt to define the contours of the quoted term,[67] creditors often include some variation of the following provision in their collateral documents: "Notice sent at least _____ calendar days prior to any action to which the notice relates is deemed reasonable notification." This agreed-upon standard is enforceable so long as it is not "manifestly unreasonable."[68]

McKesson Corp. v. Colman's Grant Village, Inc., 938 S.W.2d 631, 633 (Mo. Ct. App. 1997); Caterpillar Fin. Servs. Corp. v. Wells, 651 A.2d 507, 518-19 (N.J. Super. Ct. Law Div. 1994); *see also* Beth C. Housman, Note, *Guarantors as Debtors Under Uniform Commercial Code § 9-501(3)*, 56 FORDHAM L. REV. 745, 749 n.34 (1988) (citing cases).

59. *See* U.C.C. § 9-102(a)(28) (1998).

60. *See id.* § 9-102(a)(59) (including within the definition of "obligor" any person that "owes payment or other performance of the obligation" or "is otherwise accountable in whole or in part for payment or other performance of the obligation").

61. *Id.* § 9-602.

62. *See id.* § 9-501(3) (1995) ("[T]he rules stated in the subsections referred to below may not be waived or varied . . . .").

63. *Id.* § 9-602 (1998).

64. *See id.* § 9-602 cmt. 3.

65. *See id.* § 9-501(3) (1995).

66. *See id.* § 9-504(3).

67. Other than requiring (i) a notice of public disposition to state the time and place of disposition, and (ii) a notice of private disposition to include the time after which the disposition will occur, § 9-504(3) offers no guidance on the meaning of "reasonable notification."

68. *See id.* § 9-501(3); *see also* Mullins v. Horne, 587 P.2d 773, 776-77 (Ariz. Ct. App. 1978) (concluding provision in promissory note stating that notice mailed at least five days prior to

This contractual freedom to define standards of performance in a manner not manifestly unreasonable continues under revised section 9-603.[69] There are two differences, however, between revised section 9-603 and its predecessor. First, current section 9-501 refers to rights given to a "debtor."[70] The language of revised section 9-603 acknowledges that part 6 gives rights to a "debtor" and an "obligor."[71]

And second, unlike current section 9-501, revised section 9-603 expressly prohibits parties from attempting to agree on what actions by a creditor, engaged in self-help repossession, will not breach the peace.[72] This express prohibition codifies the result reached in many cases where creditors unsuccessfully argued that they did not breach the peace during repossession because their actions were permitted by provisions in the loan documents.[73] The prohibition makes sense, as the goal of protecting life

collateral disposition "*shall be deemed reasonably and properly given*" was not manifestly unreasonable); First Bank and Trust Co. v. Mitchell, 473 N.Y.S.2d 697, 701 n.1 (Sup. Ct. 1984) ("Notice sent five days in advance of sale is the standard agreed to by the parties and is not manifestly unreasonable."). Creditors also have successfully drafted contractual standards for "commercially reasonable" dispositions under § 9-504(3). *See, e.g.,* Ford Motor Credit Co. v. Solway, 825 F.2d 1213, 1216-17 (7th Cir. 1987) (upholding contractual provision stating that any sale of collateral to the highest of at least three bidders would be deemed a commercially reasonable disposition).

69. *See* U.C.C. § 9-603(a) (1998); *see also id.* § 1-102(3) (1995) (permitting parties to agree on the standards by which the performance of the U.C.C.-imposed, non-waivable, obligations of good faith, diligence, reasonableness, and care are to be measured if the agreed-upon standards are not manifestly unreasonable). The "agreement" that establishes the standards need not be written. *See id.* § 1-201(3) (defining "agreement" as "the bargain of the parties in fact as found in their language *or by implication from other circumstances,*" such as course of dealing, course of performance, or usage of trade) (emphasis added).

70. *See id.* § 9-501(3) (1995).

71. *See id.* § 9-603(a) (1998).

72. *See id.* § 9-603(b); *see also id.* § 9-609(b)(2) (imposing the duty to avoid breaching the peace); *id.* § 9-602(6) (prohibiting a waiver or variance of the duty); *cf. id.* § 9-503 (1995) (imposing the same duty); *id.* § 9-501(3) (omitting the duty from the list of duties that cannot be waived or varied); 9 HAWKLAND ET AL., *supra* note 15, § 9-503:3, at 680 ("Although the Code does not explicitly state that the debtor can waive his or her right to protest self-help repossession, any such waiver clause in a security agreement would probably not be enforceable.").

73. *See, e.g.,* Renaire Corp. v. Vaughn, 142 A.2d 148, 150 (D.C. 1958) ("While the contract gave the vendor the right to enter upon the premises it did not expressly give the right to break in in order to enter and we refuse to hold that it impliedly gave that right."); Girard v. Anderson, 257 N.W. 400, 402-03 (Iowa 1934) ("An agreement permitting a family's home to be broken open and entered [into] for the purpose of forcibly taking possession of property therein is contrary to good public policy and void to that extent."); Hileman v. Harter Bank & Trust Co., 186 N.E.2d 853, 854 (Ohio 1962) (holding that a clause permitting a chattel mortgagor to "make use of such force as may be necessary to enter upon, with or without breaking into any premises where the chattel(s) may be found and take possession thereof" did not authorize conduct that constituted a breaking and entering); *see also* Kimble v. Universal TV Rental, Inc., 417 N.E.2d 597, 601 n.4 (Ohio—Franklin County Mun. Ct. 1980) ("[I]t is probable that a contract . . . which authorized a repossession that constituted a breach of the peace, would violate public policy and would be unconscionable and unenforceable.").

and property significantly outweighs any interest in preserving contractual expectations.

The definition of "manifestly unreasonable" is not found in revised section 9-603 or elsewhere in the U.C.C.[74] The term probably resides on the spectrum of reasonableness somewhere between "unreasonable" and "unconscionable." But knowing where to place the term between those two points remains uncertain. What is certain is that courts will be asked to engage in some line-drawing, not all courts will draw the line in the same place, and the line may move closer to "unreasonable" if the debtor is a consumer. Perhaps the flexible, or fact-sensitive, scope of the term will provide benefits otherwise destroyed by fixed and rigid contours, but those benefits come at the expense of uniformity and clarity—two of the stated purposes and policies of the U.C.C.[75]

REVISED SECTION 9-604: PROCEDURE IF SECURITY AGREEMENT COVERS REAL PROPERTY OR FIXTURES

In many loan transactions, the collateral includes both real and personal property. Usually the creditor's interest in personal property is created through the security agreement, and the interest in real estate is evidenced by a mortgage or deed of trust. Upon default, the creditor will pursue its rights against the personal property under Article 9 provisions and its rights against the real estate under applicable real property law. Occasionally, the interest in both types of collateral is created through a single document. Under section 9-501, a creditor whose security agreement covers both types of collateral can proceed against the personal property under either

74. Creditors may be pleased that the revision did not create, and make applicable to selected consumer transactions, a more stringent standard of "not unreasonable"—a proposal that was debated and rejected during the drafting process. *See* U.C.C. § 9-501(e) (Draft July 28-Aug. 4, 1995) (proposing a "not unreasonable" test in consumer secured transactions and a "not manifestly unreasonable" test in all other transactions). Not until two years later was the proposal abandoned in favor of a uniform "not manifestly unreasonable" test. *See id.* § 9-603 (Draft Aug. 7, 1997). Consumer representatives advocated a "not unreasonable" standard, contending "that the 'manifestly unreasonable' standard gives too much discretion to creditors to impose onerous standards on consumers." Alvin C. Harrell, *UCC Article 9 Drafting Committee March 1996 Meeting Considers Consumer-Related Collateral*, 50 CONSUMER FIN. L.Q. REP. 95, 96 (1996). Although the Drafting Committee adopted a uniform "not manifestly unreasonable" standard, consumer representatives may take solace in the likelihood that a court may interpret the standard more strictly in consumer transactions than in commercial transactions. *See id.*

75. *See* U.C.C. § 1-102(2) (1995); *see also* William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511, 1522 (1997) ("[W]ithout 'uniformity,' the UCC loses its great appeal as a commercial statute."); *cf.* Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 718 n.28 (1998) (summarizing the detriments of nonuniformity).

the provisions of part 5 of current Article 9 or applicable real estate law, in which case the part 5 provisions are inapplicable.[76]

The secured party continues to enjoy the same option under revised section 9-604. The creditor can pursue its rights against the personal property under the provisions of part 6 of revised Article 9 or in accordance with local property law.[77] Revised section 9-604 also expressly states what current section 9-501(4) implied: the creditor does not prejudice its rights against the real estate if it elects to exercise its U.C.C. rights against the personal property.[78] Which option should a creditor pursue? A prudent creditor will make its election only after becoming familiar with the relevant provisions of both the U.C.C. and the local property code and evaluating a host of factors, including: (i) the amount of the unpaid secured debt; (ii) the potential fair market value of the various types of collateral, both individually and collectively; (iii) any limits imposed by local non-U.C.C. law on the creditor's ability to pursue concurrent or subsequent actions; (iv) the rights afforded by the U.C.C. and real estate law; (v) the convenience and expediency of complying with the procedural and substantive requirements imposed on a creditor that wishes to exercise those rights; and (vi) the penalties that may be assessed against the creditor who fails to comply with those requirements.

Revised section 9-604 also offers guidance when the collateral is goods that are, or may become, fixtures.[79] The creditor may exercise any of its U.C.C. rights and remedies against the fixtures[80] or it can opt out of part

76. *See* U.C.C. § 9-501(4); *see also* FDIC v. Hulsey, 22 F.3d 1472, 1485 (10th Cir. 1994) (acknowledging that § 9-501(4) provides the creditor with "alternative ways to proceed if both real and personal property are involved"); United States v. Dawson, 929 F.2d 1336, 1340 (8th Cir. 1991) (observing that § 9-501(4) permits a creditor with an interest in both real and personal property to bring a single action against all of the collateral under real property law or separate actions against the real estate under real property law and the personal property under the U.C.C.); Lenape State Bank v. Winslow Corp., 523 A.2d 223, 228 (N.J. Super. Ct. App. Div. 1987) (holding that local real estate law governed, and U.C.C. was inapplicable to, disposition of real and personal property in single foreclosure action).

77. *See* U.C.C. § 9-604(a) (1998).

78. *See id.* § 9-604(a)(1); *see also Hulsey*, 22 F.3d at 1485 ("[B]y choosing to proceed under article 9 for the personal property, the FDIC was not thereafter precluded from foreclosing on the leasehold.").

79. The definition of "fixtures" remains substantially unchanged. *Compare* U.C.C. § 9-313(1)(a) (1995) (defining "fixtures" as goods that "become so related to particular real estate that an interest in them arises under real estate law"), *with id.* § 9-102(a)(41) (1998) (defining "fixtures" as "goods that have become so related to particular real property that an interest in them arises under real property law").

80. By expressly permitting the fixture financier to exercise any of its U.C.C. rights, revised § 9-604(b) effectively overrules cases holding that the only post-default U.C.C. remedy available to the fixture financier is removal. *See, e.g.*, Maplewood Bank & Trust v. Sears, Roebuck & Co., 625 A.2d 537, 540 (N.J. Super. Ct. App. Div. 1993) ("We are also persuaded that Sears is not entitled to any remedy, other than removal of the fixtures, based on equitable principles."), *aff'd*, 638 A.2d 140 (N.J. 1994).

6 of revised Article 9 and be governed by applicable real estate law.[81] The U.C.C. permits the creditor to remove the fixture from the real property after default,[82] subject to two significant statutory limitations. First, the creditor cannot remove the fixture without judicial process if doing so will breach the peace.[83] Second, as under current law, the creditor's interest must enjoy priority over the competing interest of any owner or encumbrancer of the real property.[84]

Just because a creditor can overcome these two statutory roadblocks to removal does not necessarily mean that the creditor should, or will, exercise that remedy. The creditor may voluntarily forego this right if removal is impracticable or cost-prohibitive, such as when the fixture is specially designed for the real estate and will have negligible value after removal.[85] Additionally, concepts of good faith and commercial reasonableness, equitable principles, or judicial interference may thwart removal of certain fixtures—such as a heating system from a Minneapolis elementary school in January or an air conditioning unit from a Phoenix nursing home in July—if health or safety would be adversely affected.[86]

The creditor that exercises its statutory right of removal is obligated to promptly reimburse any person, other than the debtor, with an interest in the real estate for the cost of repairing any physical injury to the real estate, but not for any diminution in value of the real estate caused by the absence of the fixture or the need to replace it.[87] For example, by removing a kitchen sink from a dwelling, the creditor may cause damage of $150 to the countertops and diminish the market value of the residence by $750; the creditor is obligated to pay only $150. The party entitled to reim-

81. *See* U.C.C. § 9-604(b) (1998).

82. *See id.* § 9-604(c).

83. *See id.* (permitting a creditor to remove a fixture "[s]ubject to the other provisions of this part"); *id.* § 9-609(b)(2) (permitting self-help repossession that does not breach the peace).

84. *See id.* § 9-604(c); *cf. id.* § 9-313(8) (1995). The priority scheme for fixtures has been relocated from current § 9-313 to revised § 9-334. Revised Article 9 does not define "encumbrancer." Presumably the term refers to a person with an "encumbrance," a term defined comparably under revised Article 9 and current Article 9. *See id.* § 9-102(a)(32) (1998); *id.* § 9-105(1)(g) (1995).

85. *See* Morris G. Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788, 805 (1964) (using an elevator as an example).

86. *See id.* at 804-05.

87. U.C.C. § 9-604(c) (1998). The creditor has the same obligation under current Article 9. *See id.* § 9-313(8) (1995); *see also* Coffee County Bank v. Hughes, 423 So. 2d 831, 834 (Ala. 1982) (holding that a mortgagee could recover damages for alleged physical injury to mortgaged property caused by removal of mobile home but not damages for decrease in market value of mortgaged property caused by absence of mobile home). The statute does not indicate which person is entitled to reimbursement if more than one person claims an interest in the real estate. In such a case, the fixture financier should consider depositing the appropriate amount with the court and bringing an interpleader action against all real estate claimants.

bursement enjoys the statutory right to block removal until the creditor provides "adequate assurance" that it will honor its reimbursement obligation.[88] The quoted term is not defined, but presumably may take any mutually agreeable form, such as a cash deposit, letter of credit, or indemnification agreement. Once the creditor has provided adequate assurance, a party entitled to reimbursement should not unreasonably interfere with removal. Otherwise, the interfering party may be liable for conversion.[89]

A creditor that does not, or cannot, remove the fixture may conclude that its best course of action is to proceed judicially against the debtor, reduce its claim to judgment, and then enforce the judgment against the debtor's nonexempt assets.[90] Alternatively, a creditor that cannot remove a fixture because its interest is junior to one or more real estate claimants may be able to claim a share of any proceeds of any foreclosure sale of the real estate.[91] Even if the creditor is able to prove what percentage of the proceeds represents the value of the fixture, however, the creditor's claim may have "little value" after the holders of the prior real estate interests are paid and the costs of foreclosure are satisfied.[92] Although the creditor may argue that its interest in the fixture survives any foreclosure and remains effective against the real estate purchaser,[93] the argument may ring hollow if local real estate foreclosure law terminates all junior interests.

Two other options are available to the fixture financier that foregoes removal. First, the creditor may render the fixture unusable if it is equipment.[94] This may be an attractive option if removing and storing the equipment pending disposition is expensive, impractical, or both.[95] The statute does not expressly require the creditor to avoid breaching the peace,[96] but prudence suggests that the creditor not act in a manner that

88. U.C.C. § 9-604(c) (1998); *cf. id.* § 9-313(8) (1995) (requiring "adequate security").

89. *See* Leban Store Fixture Co. v. August Properties, 499 N.Y.S.2d 109, 110-11 (App. Div. 1986) (affirming judgment of $16,536 for conversion against landlord that unreasonably interfered with secured party's right to remove items sold to tenant).

90. *See* U.C.C. § 9-601(a)(1) (1998) (permitting secured party to proceed judicially against debtor); *see also* Stewart v. Henning, 481 N.W.2d 230, 232 (N.D. 1992) (holding creditor need not foreclose on its real and personal property liens before pursuing money judgment against debtor).

91. *See* 9 HAWKLAND ET AL., *supra* note 15, § 9-313:7, at 344.

92. *Id.*

93. *See* U.C.C. § 9-315(a)(1) (1998) (continuing the effectiveness of a security interest following disposition of collateral unless the creditor authorized the disposition free of the security interest).

94. *See id.* § 9-609(a)(2). The creditor enjoys the same right under current Article 9. *See id.* § 9-503 (1995). Because revised § 9-609 references "equipment," the creditor does not enjoy a statutory right to render unusable fixtures that may be consumer goods (e.g., refrigerators, water heaters, etc.).

95. *Id.* § 9-503 (1995).

96. *But see* 9 HAWKLAND ET AL., *supra* note 15, § 9-313:7, at 344 ("[W]hen the fixture is equipment, [the creditor should be able] to render it unusable if it can be done without a

triggers tort liability.[97] And second, as under current law, the creditor may dispose of the fixture (whether or not rendered unusable) while it remains on the debtor's premises, in accordance with other applicable default provisions.[98]

REVISED SECTION 9-605: UNKNOWN DEBTOR OR SECONDARY OBLIGOR

Revised Article 9 imposes many duties on a secured party, some of which are owed to a debtor,[99] a secondary obligor,[100] or a party that has filed a financing statement against the debtor.[101] It is conceivable that the secured creditor may fail to perform a duty owed to a party because it is not aware of that party's existence. For example, without the secured party's knowledge, the original debtor may have sold the collateral to a new owner that has become a "new debtor" under revised section 9-203(e) and as defined at revised section 9-102(a)(56). A secured party of record may have also acquired its status by purchasing a loan funded by the original secured party that failed to disclose to the new secured party the existence of a guarantor or other secondary obligor. Finally, a public official may provide the secured party with a search report against the debtor that erroneously omits one or more filings submitted by another secured party.

In these and other similar situations, it seems unfair to ask the secured party to perform a duty in favor of an unknown party. Revised section 9-605 comes to the secured party's rescue. This new section relieves a secured party of its duty to a person that is a debtor or obligor unless the secured party "knows" (i) that a person is either a debtor or an obligor, (ii) the

breach of the peace."); *cf.* U.C.C. § 2A-525 (permitting a lessor to take possession of goods or render them unusable without judicial process if action is taken without breaching the peace).

97. *See also* U.C.C. § 9-503 cmt. ("The authorization to render equipment unusable . . . would not justify unreasonable action by the secured party, since, under Section 9-504(3), all his actions in connection with disposition must be taken in a 'commercially reasonable manner.' ").

98. *See id.* § 9-609(a)(2) (1998); *id.* § 9-503 (1995).

99. *See, e.g., id.* § 9-611(c)(1) (1998) (requiring a secured party to send a disposition notice to a debtor); *id.* § 9-616(b) (obligating a secured party to send an explanation of the calculated surplus or deficiency to a debtor in a consumer-goods transaction); *see also id.* § 9-102(a)(28) (defining "debtor").

100. *See, e.g., id.* § 9-611(c)(2) (requiring a secured party to send a disposition notice to any secondary obligor); *id.* § 9-621(b) (compelling a secured party to send a proposal of partial strict foreclosure to any secondary obligor); *see also id.* § 9-102(a)(71) (defining "secondary obligor").

101. *See, e.g., id.* § 9-611(c)(3)(B) (obligating a secured party to send a disposition notice to certain parties that have filed financing statements against the debtor); *id.* § 9-621(a)(2) (forcing a secured party to send a proposal of strict foreclosure to certain parties that have filed financing statements against the debtor).

person's identity, and (iii) how to communicate with that person.[102] The section also relieves a secured party of its duty to any other secured party or a lienholder that has filed a financing statement against a person unless the secured party knows (i) that the person is a debtor, and (ii) the person's identity.[103]

An issue that may arise with some frequency is whether the secured party must take steps to acquire the requisite knowledge before it can claim the protection afforded by revised section 9-605. For example, a secured party may know that an individual is a debtor, know the debtor's identity (e.g., Timothy R. Zinnecker), and yet not know how to communicate with the debtor because the loan documents list either no address or a known stale address. Must the secured party review telephone books and on-line address listings before it is relieved of any duties owed to the debtor? Or may the secured party confine its knowledge to information provided solely by the loan papers? Presumably the non-waivable obligation to act in good faith[104] prevents the secured party from burying its head in the sand. But whether, and to what extent, the secured party must take affirmative steps to acquire the requisite knowledge remains unclear.[105]

102. *See id.* § 9-605(1); *see also id.* § 1-201(25) (1995) ("A person 'knows' . . . of a fact when he has actual knowledge of it."). Revised § 9-628(a)(1) is a companion exculpatory provision. For much of the drafting process, the two companion provisions were significantly inconsistent: revised § 9-605 referenced "secondary obligor," and revised § 9-628 referenced "obligor." *See, e.g., id.* § 9-605 (Draft approved at NCCUSL Annual Meeting, July 30, 1998) (referencing "secondary obligor"); *id.* § 9-628(a) (referencing "obligor"). The author mentioned this inconsistency in a memorandum dated Sept. 2, 1998, and e-mailed to the co-reporters of the Drafting Committee on or about the same date, hoping that the text would be corrected or the inconsistency explained in the official comments which were not yet drafted. *See* Memorandum from Timothy R. Zinnecker, Associate Professor, South Texas College of Law, to Steven L. Harris and Charles W. Mooney, Jr. (Sept. 2, 1998) (on file with *The Business Lawyer*, University of Maryland School of Law) [hereinafter Zinnecker Memorandum]. The inconsistency was corrected in the next draft. *See* U.C.C. § 9-605 (Draft Nov. 16, 1998) (referencing "obligor").

103. *See id.* § 9-605(2) (1998). Revised § 9-628(a)(1) is a companion exculpatory provision. *See id.* § 9-628(a)(1).

104. *See id.* § 1-203 (1995) (obligating a party to perform and enforce every contract or duty created by the U.C.C. in good faith); *id.* § 1-102(3) (prohibiting a party from disclaiming its duty to act in good faith); *id.* § 9-102(c) (1998) (incorporating Article 1 principles into revised Article 9).

Current Article 9 does not define "good faith" but instead incorporates the Article 1 definition. Revised Article 9 adopts a new and broader definition. *Compare id.* § 1-201(19) (1995) (defining "good faith" as "honesty in fact in the conduct or transaction concerned"), *with id.* § 9-102(a)(43) (1998) (defining "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing"). This new definition follows the definition of "good faith" as applied to merchants under Article 2, as incorporated into Article 2A, and as used in revised Article 3, revised Article 4, Article 4A, and revised Article 8. *See id.* § 2-103(1)(b) (1995); *id.* § 2A-103(3); *id.* § 3-103(a)(4); *id.* § 4-101(c); *id.* § 4A-105(a)(6); *id.* § 8-102(a)(10). Revised Article 5 retains the narrower definition. *See id.* § 5-102(a)(7) & cmt. 3.

105. The author mentioned this concern to the Drafting Committee. *See* Zinnecker Memorandum, *supra* note 102, at 1.

In addition to creating duties in favor of another secured party or lienholder that has filed a financing statement against the debtor,[106] revised Article 9 also creates duties in favor of a party that holds a security interest perfected by compliance with a statute, regulation, or treaty.[107] If a secured party's knowledge of the existence of such a creditor hinges on the accuracy of any information provided by the applicable official, then it seems reasonable to relieve the secured party of its duty toward that person if the information provided by the official fails to provide the secured party with the requisite knowledge. The Drafting Committee curiously did not draft revised section 9-605 accordingly.[108]

REVISED SECTION 9-607:[109] *COLLECTION AND ENFORCEMENT BY SECURED PARTY*

The collateral in many secured transactions includes accounts, chattel paper, general intangibles, and instruments. The loan documents may specifically address whether the obligors should continue to remit payments on that collateral to the debtor or, instead, the secured party. Whether or not the secured party and debtor contractually agree on collection procedures, current Article 9 expressly provides the secured party with collection rights after default. Under section 9-502, a secured party is permitted to notify an account debtor, or any obligor on an instrument serving as collateral, to make payment to the secured party, whether or not the security arrangement permitted the debtor to receive payment before de-

106. *See supra* note 101.

107. *See, e.g.,* U.C.C. § 9-611(c)(3)(C) (1998) (obligating a secured party to send a disposition notice to certain creditors that have perfected a security interest by complying with selected statutes, regulations, or treaties); *id.* § 9-621(a)(3) (requiring a secured party to send a proposal of strict foreclosure to certain creditors that have perfected a security interest by complying with selected statutes, regulations, or treaties).

108. The author raised this issue with the Drafting Committee. *See* Zinnecker Memorandum, *supra* note 102, at 1-2. Revised § 9-605 could have been drafted as follows (new language italicized):

> A secured party does not owe a duty based on its status as secured party . . . to a secured party or lienholder that has filed a financing statement against a person, *or to a secured party that has perfected a security interest against the person by complying with a statute, regulation, or treaty described in Section 9-311(a),* unless the secured party knows: (A) that the person is a debtor; and (B) the identity of the person.

See id. § 9-605; *cf. id.* § 9-611(e) (providing a safe harbor for a secured party that relies on information provided in a report that omits a filed financing statement).

109. Noticeably absent from this Article is any discussion of revised § 9-606 ("Time of Default for Agricultural Lien"). *See id.* § 9-606. The scope of revised Article 9 includes agricultural liens. *See id.* § 9-109(a)(2); *see also id.* § 9-102(a)(5) (defining "agricultural lien"). Because the author has no practical or academic experience with statutory, agricultural-related security interests, the author has elected not to discuss revised § 9-606 or any other provision of part 6 dealing solely with agricultural liens.

fault.[110] Additionally, the creditor may take control of any identifiable proceeds of the collateral,[111] such as cash or checks.[112]

A secured party continues to enjoy these rights under revised section 9-607.[113] The section also provides the creditor with additional rights. For example, a creditor may notify any party that owes a performance obligation (as contrasted with a payment obligation) to the debtor on any of the collateral and request that party to render performance to, or for the benefit of, the creditor.[114] Furthermore, the creditor is not limited to *notifying* a party that owes a payment or performance obligation to the debtor. The section expressly permits the creditor to *enforce* those obligations by exercising any rights that the debtor may have against the obligated party.[115] To illustrate:

- Bank has a security interest in Retailer's accounts. Retailer sells a unit of inventory to Buyer on credit, creating an account. Retailer defaults on its obligations to Bank. Bank may notify Buyer to make payment directly to Bank. Bank also may exercise any of Retailer's contractual and other rights against Buyer if Buyer fails to honor its payment obligation.
- Bank has a security interest in Retailer's equipment, including a photocopier purchased from Seller that fails to operate properly.

110. *See* United States v. Delco Wire and Cable Co., 772 F. Supp. 1511, 1521 (E.D. Pa. 1991); U.C.C. § 9-502(1) (1995); *see also* U.C.C. § 9-105(1)(a) (defining "account debtor" as a person "obligated on an account, chattel paper or general intangible").

111. *See* U.C.C. § 9-502(1); *id.* § 9-306(2) (preserving the creditor's interest "in any identifiable proceeds").

112. Debtors may commingle cash proceeds with other cash not representing proceeds. Most courts have held that commingling does not automatically destroy identifiability and have invoked equitable tracing methods to determine which commingled proceeds remain identifiable. *See* 9 HAWKLAND ET AL., *supra* note 15, § 9-306:3, at 37-38. Revised Article 9 affirms these decisions. *See* U.C.C. § 9-315(b)(2) (1998). For a discussion of the most common equitable tracing method—the lowest intermediate balance rule—see Robert H. Skilton, *The Secured Party's Rights in a Debtor's Bank Account Under Article 9 of the Uniform Commercial Code*, 1977 S. ILL. U. L.J. 120, 140-43. *See also* U.C.C. § 9-315 cmt. 3 (1998) (referencing the "lowest intermediate balance rule" as a permissible equitable principle).

113. *See* U.C.C. § 9-607(a)(1)-(2) (1998); *see also id.* § 9-102(a)(3) (defining "account debtor" as "a person obligated on an account, chattel paper, or general intangible" but excluding "persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper").

114. *See id.* § 9-607(a)(1). Under the common law, the ability of the assignee to enforce an obligor's performance may be limited if (i) enforcement in favor of the assignor will materially change the obligor's duty, materially increase the burden or risk imposed on the obligor by the underlying contract, materially impair the obligor's chance of obtaining return performance, or materially reduce the value of the return performance; or (ii) the assignment is prohibited by statute, public policy, or contract terms. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981); E. ALLAN FARNSWORTH, CONTRACTS § 11.4 (2d ed. 1990); *cf.* U.C.C. § 2-210(2) (1995).

115. *See* U.C.C. § 9-607(a)(3) (1998).

Retailer defaults on its obligations to Bank. Bank may enforce Retailer's breach of warranty action against Seller.[116]

- Bank has a security interest in Retailer's intellectual property. Competitor is conducting its business in a manner that infringes on one of Retailer's patents. Retailer defaults on its obligations to Bank. Bank may seek an injunction against Competitor.[117]

The notification and enforcement rights awarded by revised section 9-607 do not adversely impact rights that a third party may have (either under the U.C.C. or otherwise) against the debtor or the secured party.[118] For example, Buyer may discharge its payment obligation on an account by remitting a check directly to Retailer, instead of Bank, if Bank has not honored Buyer's request for "reasonable proof" of Bank's security interest in the account.[119] Also, Bank may have a security interest in a negotiable promissory note in Retailer's possession executed by Buyer and payable to the order of Retailer. Although Buyer is obligated to pay Retailer, Buyer may avoid paying Bank if Bank's lack of possession prevents it from qualifying as a "person entitled to enforce" the note.[120] Or Bank may have a security interest in a letter of credit issued for the benefit of Retailer. But just because Retailer has the right to submit a draw request to, and receive payment from, the issuer of the letter of credit does not necessarily mean that Bank enjoys the same right.[121]

A secured party that attempts to enforce a payment or performance obligation must proceed in a "commercially reasonable manner" if the secured party has chargeback or recourse rights.[122] This duty cannot be

116. *See id.* § 9-607 cmt. 3.

117. *See id.*

118. *See id.* § 9-607(e) & cmt. 6; *see also* Rapson, *supra* note 4 (discussing enforcement rights under leases and licenses) (manuscript at 43-54).

119. *See* U.C.C. § 9-406(c).

120. *See id.* § 3-301 (1995) (defining "person entitled to enforce" an instrument in a manner that requires possession in most instances).

121. *See id.* § 5-112(a) (generally prohibiting anyone other than the beneficiary from drawing, or otherwise demanding performance, under a letter of credit that does not provide otherwise); *see also id.* § 9-409 (1998) (rendering ineffective, under subsection (a), any contractual term or rule of law, custom, or practice, that restricts assignment of letter-of-credit rights, but preserving, under subsection (b), letter-of-credit law and practice that limits the right of a beneficiary to transfer its right to draw or otherwise demand performance under the letter of credit); *id.* § 9-102(a)(51) (excluding from the definition of "letter-of-credit right" a beneficiary's right to demand payment or performance under the letter of credit).

122. *Id.* § 9-607(c) (1998); *see also id.* § 9-502(2) & cmts. 2-3 (1995); 9 HAWKLAND ET AL., *supra* note 15, § 9-502:03, at 737-38 (explaining why the U.C.C. imposes a duty of commercial reasonableness on a secured party that has chargeback or recourse rights but not a secured party without those rights); CC Fin., Inc. v. Ross, 301 S.E.2d 262, 264 (Ga. 1983) ("The apparent reason for the requirement of commercial reasonableness is to assure, where the secured assignee of receivables undertakes to collect on accounts, that the assignee act with the same degree of prudence which the original account creditor would exercise.").

waived or varied.[123] Revised Article 9 does not define "commercially reasonable manner," but does provide some guidance in limited situations. For example, the mere fact that a secured party could have obtained a greater amount by collecting or enforcing the obligations at a different time or in a different method does not prevent the secured party from proving that it acted in a commercially reasonable manner.[124] Additionally, a secured party's collection or enforcement efforts are commercially reasonable if those efforts are pre-approved in a judicial proceeding or by a bona fide creditors committee, a representative of creditors, or an assignee for the benefit of creditors.[125] Usually, however, the task of crafting the contours of permissible conduct will fall on the courts.[126] As under current

123. *See* U.C.C. § 9-602(3) (1998); *cf. id.* § 9-501(3) (1995) (prohibiting the waiver of rights and duties under § 9-502 only if those rights and duties require accounting for any surplus proceeds of collateral). One author believes that the failure to include the duty to act in a commercially reasonable manner among the nonwaivable duties listed in current § 9-501(3) is "a drafting error." *See* CLARK, *supra* note 2, ¶ 4.04[1], at 4-68 to 4-69; *see also* PEB STUDY GROUP REPORT, *supra* note 7, at 208 (recommending that the duty to collect in a commercially reasonable manner be non-waivable).

124. *See* U.C.C. § 9-627(a) (1998).

125. *See id.* § 9-627(c).

126. *See, e.g., In re* Braten Apparel Corp., 68 B.R. 955, 965 (Bankr. S.D.N.Y. 1987) (noting that the mere possibility of better collection results through alternative methods does not establish commercial unreasonableness, stating that "conformity with reasonable commercial practices among others collecting receivables would establish that a collection effort was done in a commercially reasonable manner," and holding that the creditor liquidated receivables in a commercially reasonable manner where evidence revealed full-time collection personnel prepared collection folders for each account, corresponded in writing and by telephone with account debtors as necessary, instituted litigation where appropriate, reviewed results of efforts and planned follow-up activities on a daily basis, kept substantial accounting records, and prepared regular progress reports); *In re* Emergency Beacon Corp., 48 B.R. 341, 349 (S.D.N.Y. 1985) (noting that "[t]he wide discrepancy between the $650 actually received from collections and the $16,000 top estimated value of the receivables signals a need for close scrutiny," but stating that "a seemingly low return is usually not dispositive of the issue of commercial reasonableness"); Fedders Corp. v. Taylor, 473 F. Supp. 961, 977 (D. Minn. 1979) ("If the requirement of commercial reasonableness as applied to liquidation of accounts receivable means anything it must mean at a minimum that Fedders was obligated to account to defendants as to the final disposition of the receivables."); Western Decor & Furnishings Indus. v. Bank of Am., 154 Cal. Rptr. 287, 290 (Ct. App. 1979) (determining that the creditor liquidated the debtor's receivables with face value of approximately $183,000 in a commercially reasonable manner even though creditor notified only 335 of the 356 account debtors and collected only $12,347); Kearney State Bank & Trust Co. v. Scheer-Williams, 428 N.W.2d 888, 895 (Neb. 1988) (concluding that the evidence supported jury's determination that liquidation of accounts receivable was commercially reasonable); DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 243 N.W.2d 745, 751 (Neb. 1976) (holding that the bank failed to prove it acted in commercially reasonable manner where record indicated bank did not attempt to collect all accounts but instead sent two letters on some accounts and thereafter took no further action on any accounts); Interchange State Bank v. Rinaldi, 696 A.2d 744, 750-51 (N.J. Super. Ct. App. Div. 1997) (rejecting as "legally untenable . . . or unsupported by the evidence" the debtor's assertion that the creditor's failure to give notice of receivables liquidation was commercially unreasonable); Man-

law, parties to the transaction can attempt to mitigate the degree of judicial involvement by agreeing on parameters of permissible conduct through the use of standards that are not manifestly unreasonable.[127] For example, the parties might contractually agree that the secured party acts in a commercially reasonable manner if it (i) expends resources, subject to a dollar or percentage cap, in an effort to collect from financially troubled account debtors and (ii) compromises or settles claims against selected categories of account debtors who assert defenses or counterclaims, whether meritorious or not.[128] A creditor that fails to act in a commercially reasonable manner in exercising its collection or enforcement rights is subject to several potential penalties, including court-ordered modification or termination of the collection and enforcement rights,[129] liability to the aggrieved party for actual damages,[130] and a reduction or elimination of any deficiency claim.[131]

A creditor that attempts to enforce its collection and enforcement rights against third-party obligors may incur a variety of fees and expenses. This section permits a creditor to deduct from any collections all reasonable expenses incurred in the collection and enforcement process, "including reasonable attorney's fees and legal expenses."[132]

Occasionally the collateral includes a real estate note.[133] If the debtor-holder has defaulted on its obligations to the secured party, the secured party may desire to exercise the debtor's rights in the real estate, including the right to proceed with a nonjudicial foreclosure.[134] Unless it has a recordable interest in the property, the creditor may not be able to exercise that right. Revised section 9-607 addresses this concern.[135] The creditor

ufacturers & Traders Trust Co. v. Pro-Mation, Inc., 497 N.Y.S.2d 541, 542 (App. Div. 1985) (holding that creditor acted in commercially reasonable manner by notifying parties obligated on debtor's accounts receivable and instructing them to remit payments to creditor).

127. *See* U.C.C. § 9-603(a) (1998); *see id.* § 9-501(3) (1995).

128. *See* WILLIAM H. LAWRENCE ET AL., UNDERSTANDING SECURED TRANSACTIONS § 18.03, at 368 (1997).

129. *See* U.C.C. § 9-625(a) (1998).

130. *See id.* § 9-625(b).

131. *See id.* § 9-626(a)(3), (4).

132. *See id.* § 9-607(d); *cf. id.* § 9-502(2) (1995) (permitting a creditor to "deduct his reasonable expenses of realization from the collections"). As used in revised § 9-607(d), "reasonable attorney's fees and legal expenses" include "fees and expenses incurred in proceeding against account debtors or other third parties . . . [and] other attorney's fees and legal expenses in proceeding against the debtor or obligor." *Id.* § 9-607 cmt. 10 (1998).

133. The current and revised versions of Article 9 both exclude interests in real estate from their coverage. *See id.* § 9-104(j) (1995); *id.* § 9-109(d)(11) (1998). But both versions govern security interests in payment obligations secured by real estate interests. *See id.* § 9-102(3) & cmt. 4 (1995); *id.* § 9-109(b) (1998).

134. As the secured party's rights derive from those of the debtor, the secured party can exercise rights against the real property only if the debtor could then do so. *See id.* § 9-607 cmt. 8 (1998).

135. The concern also might disappear if the creditor can obtain a recordable assignment

may record a copy of the security agreement that creates or provides for the security interest in the obligation secured by the real estate, accompanied by the creditor's sworn affidavit stating that a default has occurred and that the creditor is entitled to conduct a nonjudicial foreclosure against the real property, in the appropriate real estate office.[136] Even if the creditor satisfies the requirements of revised section 9-607, the creditor should review the local real estate law and comply with any additional requirements that it may impose. Additionally, the creditor may wish to include in its loan papers a provision in which the debtor acknowledges that the creditor, after default, may exercise nonjudicial rights of foreclosure against the real estate.[137]

Unlike its predecessor, revised Article 9 governs security interests in selected deposit accounts.[138] Revised section 9-607 provides a creditor with self-help remedies against deposit accounts in which the creditor's security interest is perfected by "control."[139] If the deposit account is maintained with the secured party, the secured party has "control"[140] and, upon default, may apply the balance of the account against the secured obligation.[141] If the account is maintained with another depositary institution,

from the debtor. Prudence dictates that the creditor request the assignment *before* default. Thereafter, the debtor—already in default under at least one provision of the loan documents—may be unwilling to cooperate, even if the loan documents include a traditional "cooperation clause," such as "Debtor shall promptly authorize, execute, acknowledge, deliver, file, and record any additional writing as Secured Party may deem reasonably necessary or appropriate to preserve, protect, or enforce its interest in the Collateral or any other contractual, equitable, or statutory right or remedy."

136. *See* U.C.C. § 9-607(b).

137. An example follows: "Debtor acknowledges that upon Default, Secured Party may exercise any and all rights then or thereafter available to Debtor against any real estate interest created by any mortgage or deed of trust executed in favor of Debtor that secures repayment of any Collateral, including, without limitation, the right to conduct a nonjudicial foreclosure of any such real estate interest." Several drafts of revised Article 9 contemplated that the secured party's ability to exercise nonjudicial rights of foreclosure had to be evidenced in the recorded security agreement, not the recorded sworn affidavit. *See, e.g., id.* § 9-607(b) (Draft Oct. 1997) (requiring creditor to file or record "a copy of the security agreement that entitles the secured party to exercise those rights" of nonjudicial foreclosure).

138. *Compare id.* § 9-109 cmt. 16 (1998) ("Except in consumer transactions, deposit accounts may be taken as original collateral under this Article."), *with id.* § 9-104*(l)* (1995) ("This Article does not apply . . . to a transfer of an interest in any deposit account . . . .").

Revised Article 9 defines "deposit account" as "a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument." *Id.* § 9-102(a)(29). A "bank" is defined as "an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies." *Id.* § 9-102(a)(8); *cf. id.* § 9-105(1)(e) (1995) (defining "deposit account" as "a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit").

139. *See id.* § 9-607(a)(4)-(5) (1998).

140. *See id.* § 9-104(a)(1).

141. *See id.* § 9-607(a)(4).

the creditor may obtain "control" in one of two ways. First, the debtor, creditor, and depositary institution may agree that, without the debtor's consent, the depositary institution will honor the creditor's instructions directing disposition of funds in the account.[142] Second, the account can be restyled, presumably with the debtor's consent, in a manner that reflects the creditor as the institution's "customer" on the account.[143] If the creditor has achieved control in either manner, the creditor may instruct the depositary institution to pay the balance in the account to, or for the benefit of, the creditor.[144] Because the provision is silent on how quickly the institution must honor the request, the creditor may wish to reach agreement with the institution on this matter when control is first established.

REVISED SECTION 9-608: APPLICATION OF PROCEEDS OF COLLECTION OR ENFORCEMENT; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS

Although current section 9-502 provides the secured party with collection rights, the section offers little guidance on how any proceeds collected are to be applied.[145] The statute permits the creditor to deduct "reasonable expenses of realization from the collections,"[146] and requires the creditor to "account to the debtor for any surplus,"[147] but does not address such issues as whether junior or senior creditors are entitled to any of the collected proceeds, how the secured party should handle any noncash pro-

142. *See id.* § 9-104(a)(2). The three-party agreement must be an authenticated record. *Id.*; *see id.* § 9-102(a)(7), (69) (defining "authenticate" and "record," respectively). The agreement to honor the creditor's instructions may be subject to any agreed-upon condition (e.g., "Creditor's instruction must be accompanied by a statement that Debtor is in default under the loan documents.") other than the debtor's consent. *Id.* § 9-104 cmt. 3. Because the debtor's ability to direct disposition of funds from the account is not automatically terminated when a creditor has control over the account, *see id.* § 9-104(b), a creditor should include a provision in the three-party agreement that addresses the debtor's ability to withdraw funds from the account. Otherwise, the creditor's post-default demand for funds may be an exercise in futility. Additionally, the creditor should consider requesting a provision that limits the institution's ability to exercise any right of set-off or recoupment. With one exception, these rights are not adversely affected by the creation or perfection of a security interest in the deposit account, the institution's knowledge of the security interest, or the institution's receipt of instructions from the creditor. *See id.* §§ 9-340, 9-341.

143. *See id.* § 9-104(a)(3); *see also id.* § 4-104(a)(5) (1995) (defining "customer" as "a person having an account with a bank or for whom a bank has agreed to collect items"); *id.* § 9-102(b) (1998) (incorporating the Article 4 definition of "customer" into revised Article 9).

144. *See id.* § 9-607(a)(5) (1998).

145. One of the principal architects of Article 9 believed that the payment scheme of § 9-504(1) governs application of proceeds collected under § 9-502. *See* 2 GILMORE, *supra* note 2, § 44.8, at 1251.

146. U.C.C. § 9-502(2) (1995).

147. *Id.* Absent a contrary agreement, the secured party is entitled to keep surplus proceeds if the underlying transaction was a sale of accounts or chattel paper.

ceeds that it receives, and when the secured party may deduct its legal fees and expenses. These issues, as well as others, are addressed by revised section 9-608.

Under revised section 9-608, a secured party must apply cash proceeds received from exercising its collection or enforcement rights under revised section 9-607 as follows. First, the creditor may satisfy its reasonable expenses of collection and enforcement.[148] The creditor also may recoup its reasonable attorneys' fees and legal expenses *if the loan documents so provide* and recoupment is not prohibited by law.[149] Whether expenses of any nature are "reasonable" will vary from case to case, but common sense suggests that the expenses incurred should not be disproportionate to either the amount attempted to be collected or enforced or the amount of the unpaid secured debt. Second, the creditor may apply the proceeds against any debt that was secured by the collateral that generated the proceeds.[150] Third, the creditor must remit any remaining proceeds to any party with a *subordinate* security interest in, or lien on, the collateral that generated the proceeds if the creditor has received from that party an authenticated demand before the proceeds are completely distributed.[151] However, the creditor that requests, but does not timely receive, reasonable proof of the subordinate security interest or lien need not honor that party's demand.[152] Fourth, the creditor must return any remaining cash proceeds to the debtor[153] unless the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes.[154]

148. *See id.* § 9-608(a)(1)(A) (1998).

149. *See id.* The emphasized language should prompt creditors to revise their standard loan documents accordingly. Even then, creditors may run afoul of state statutes that limit, or prohibit, recoupment of attorneys' fees. *See, e.g.,* Northwestern Nat'l Bank v. American Beef Packers, Inc. (*In re* American Beef Packers, Inc.), 548 F.2d 246, 247-48 (8th Cir. 1977); Harper v. Wheatley Implement Co., 643 S.W.2d 537, 540-41 (Ark. 1983); White v. Associates Commercial Corp., 725 S.W.2d 7, 9 (Ark. Ct. App. 1987); First Nat'l Bank v. Schroeder, 355 N.W.2d 780, 782-83 (Neb. 1984).

150. *See* U.C.C. § 9-608(a)(1)(B) (1998). Implicit is the understanding that the creditor may not apply proceeds to unsecured debt or collateralized debt not secured by the proceeds. For example, Bank may make a $1000 unsecured loan to Debtor, a $2000 purchase-money loan to Debtor secured only by equipment purchased with the loan proceeds, and a $5000 loan secured by the Debtor's accounts. Debtor defaults on all three payment obligations. If Bank is fortunate enough to collect payments from account debtors in excess of the unpaid $5000 loan, Bank cannot apply the excess against the unpaid amounts of either the $1000 unsecured loan or the $2000 purchase-money loan. Instead, any excess must be remitted to subordinate creditors under revised § 9-608(a)(1)(C) or the debtor, as surplus, under revised § 9-608(a)(4).

151. *See id.* 9-608(a)(1)(C); *see also id.* § 9-102(a)(7) (defining "authenticate"). A creditor that receives authenticated records from multiple creditors should bring an interpleader action against those creditors and deposit the relevant amount with the court.

152. *See id.* § 9-608(a)(2).

153. *Id.* § 9-608(a)(4); *cf. id.* § 9-502(2) (1995) (stating that "the secured party must account to the debtor for any surplus"). The obligation to remit surplus proceeds to the debtor cannot be waived or varied under either version of Article 9. *See id.* § 9-501(3)(a); *id.* § 9-602(5) (1998).

154. *See id.* § 9-608(b) (1998). Under § 9-502(2), if the underlying transaction is a sale of

This payment scheme noticeably excludes from the list of potential recipients any creditor whose security interest in, or lien on, the collateral that generated the proceeds enjoys priority over the security interest of the collecting creditor. Senior creditors may be distraught over the text of section 9-608,[155] but the official comments should allay their concerns.[156] Notwithstanding any contrary results suggested by the language of revised section 9-608 (e.g., "A secured party *shall* apply . . . cash proceeds . . . in the following order . . . ."[157]), the application scheme "does not affect the priority of a security interest in collateral which is senior to the interest of the secured party who is collecting or enforcing collateral under Section 9-607."[158] Whether a junior secured party enjoys priority in collected proceeds is dictated by several non-default provisions of revised Article 9.

accounts or chattel paper the debtor is entitled to proceeds "only if the security agreement so provides." *Id.* § 9-502(2) (1995). No similar language appears in revised § 9-608(b). The omission of such language may suggest that subsection (b) cannot be contractually modified. That is not the intended construction. For a while, revised § 9-608(b) included the phrase "only if its agreement so provides." *See, e.g., id.* § 9-608(b) (Draft Oct. 1996). The language was subsequently deleted "as unnecessary" because revised § 9-602, which limits freedom of contract, does not include revised § 9-608(b) among its list of statutes that create non-waivable rights and duties. *See id.* § 9-608(b) & cmt. ("Changes from Prior Draft") (Draft Mar. 1998); *see also id.* § 9-602(4)-(5) (1998) (referencing subsection (a), but not subsection (b), of revised § 9-608).

155. A creditor whose security interest or lien enjoys a rank *equal* to the interest of the collecting creditor also is excluded from the distribution scheme of revised § 9-608. The date and time of filing a financing statement or recording a lien will often dictate priority of the interests, so interests of equal rank should occur infrequently. Parties may contractually agree that their competing interests enjoy equal priority, notwithstanding the priority dictated by their respective filings. However, most creditors that go to the trouble of contractually altering their priority also contractually agree on how proceeds are to be applied. Therefore, concerns raised by competing interests of equal rank may be more academic than realistic.

156. One can make a plausible argument for excluding senior claimants from the payment scheme of revised § 9-608. A creditor with a senior security interest in or lien on accounts, chattel paper, instruments, and similar collateral should be cognizant of the risk that the debtor will neither remit payments to the creditor nor buy additional collateral (e.g., inventory) with the payments. A creditor that fails to control collections implicitly assumes that risk and is not placed in a worse position if a junior creditor obtains an interest in the collateral and then collects payments directly from the account debtors and other parties. A senior creditor that assumes these risks should not be surprised at being excluded from the payment scheme of revised § 9-608, especially when the creditor can so easily mitigate the risk by (i) demanding that account debtors and other obligors remit payments directly to the creditor (or a lockbox that the creditor controls), and (ii) monitoring the activities of the debtor, account debtors, and other obligors to ensure compliance.

157. *Id.* § 9-608(a)(1) (1998) (emphasis added).

158. *Id.* § 9-608 cmt. 5; *cf.* PEB STUDY GROUP REPORT, *supra* note 7, at 222 (recommending that a junior creditor is entitled to retain collected proceeds free of the senior creditor's interest only if the junior creditor acts in good faith and without knowledge that the collections violate the rights of the senior creditor). *See generally* Rapson, *supra* note 4 (discussing collections by subordinate secured creditors) (manuscript at 11-14).

Fortunately, these provisions are referenced in comment 5 to revised section 9-607, which, in turn, is cross-referenced in comment 5 to revised section 9-608.

A creditor that receives noncash proceeds[159] instead of cash proceeds is subject to the duties imposed by revised section 9-207,[160] such as exercising reasonable care in handling and preserving the collateral[161] and keeping the collateral identifiable.[162] A creditor may elect not to apply the noncash proceeds against the unpaid debt unless failure to do so is commercially unreasonable.[163] A creditor that does apply the noncash proceeds against the unpaid debt must do so in a commercially reasonable manner.[164] For example, a creditor that receives a promissory note from an account debtor may, if not commercially unreasonable, simply hold the note and reduce the debtor's unpaid balance only as the maker remits payments. Alternatively, the creditor may, in a commercially reasonable manner, apply the principal portion of the note against the amount owed by the debtor to the creditor.[165] The duty to act in this manner cannot be waived or varied,[166] but the parties may, through adoption of standards that are not manifestly unreasonable, attempt to contractually define what conduct is deemed commercially reasonable.[167] For example, the parties may agree that upon receipt of a promissory note from an account debtor the secured party will immediately apply an agreed-upon percentage of the principal against the debtor's unpaid obligation.

Absent any contrary agreement, a creditor retains the ability to pursue a deficiency action against the debtor and any other obligor if proceeds collected and applied do not extinguish the debtor's entire unpaid obligation.[168] No obligor is liable for any deficiency in a transaction involving the sale of accounts, chattel paper, payment intangibles, or promissory notes, however, unless the loan documents so provide.[169]

159. *See* U.C.C. § 9-102(a)(58) (defining "noncash proceeds").

160. *See id.* § 9-601(b); *cf. id.* § 9-501(1) (1995) (stating that a secured party has the rights, remedies, and duties provided in § 9-207).

161. *See id.* § 9-207(a) (1998); *cf. id.* § 9-207(1) (1995) (obligating a secured party to exercise reasonable care with respect to collateral in its possession).

162. *See id.* § 9-207(b)(3) (1998); *cf. id.* § 9-207(2)(d) (1995) (stating that a "secured party must keep the collateral identifiable").

163. *See id.* § 9-608(a)(3) (1998).

164. *Id.*

165. *Id.* § 9-608 cmt. 3.

166. *See id.* § 9-602(4).

167. *See id.* §§ 9-603(a), 9-608 cmt. 4.

168. *See id.* § 9-608(a)(4); *cf. id.* § 9-502(2) (1995) (imposing liability on a debtor for any deficiency).

169. *See id.* § 9-608(b) (1998); *see also supra* note 154; *cf. id.* § 9-502(2) (1995) (relieving a debtor from liability for any deficiency if the underlying transaction is a sale of accounts or chattel paper, unless the agreement provides otherwise).

REVISED SECTION 9-609: SECURED PARTY'S RIGHT TO TAKE POSSESSION AFTER DEFAULT

The right to engage in self-help repossession "is a remedy of ancient and honorable lineage."[170] Two policies underlie this valuable right: (i) creditors are able to seize collateral without resorting to judicial process, which can be expensive and time-consuming; and (ii) debtors have access to credit at lower costs.[171] The drafters of current Article 9 included self-help among the creditor's post-default rights.[172] A creditor continues to enjoy the right to seize collateral without judicial process under revised Article 9, subject to three limitations. This right and its limitations are found in revised section 9-609.[173]

First, as under current Article 9, a creditor cannot seize the collateral unless a default exists.[174] Therefore, before exercising its self-help remedy a creditor should review the loan documents to determine that the debtor is indeed in default.[175] Otherwise, the creditor may be liable for conversion or wrongful repossession.[176]

170. Soia Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767, 767 (1973). For an excellent article that traces the development of the self-help remedy from its origin in Greek and Roman law, see James R. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973).

171. *See* Williams v. Ford Motor Credit Co., 674 F.2d 717, 719 n.4 (8th Cir. 1982); Riley State Bank v. Spillman, 750 P.2d 1024, 1029 (Kan. 1988). *See generally* James J. White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503; Robert W. Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973); Mentschikoff, *supra* note 170, at 769-70 (suggesting numerous economic and other consequences that would result if automobile financiers were forced to repossess collateral by judicial process).

172. *See* U.C.C. § 9-503 (1995).

173. Additional non-U.C.C. limitations may exist. *See, e.g.*, N.Y. PERS. PROP. LAW § 413(12)(c) (McKinney Supp. 1999) (permitting self-help repossession against selected consumer debtors only if the debtor consents to the repossession in a "substantially contemporaneous writing"). Furthermore, a party may successfully repossess collateral only to have its possession challenged by a senior claimant. *See* U.C.C. § 9-609 cmt. 5 (1998).

174. *See id.* §§ 9-609(a)(1), 9-609(b)(2) (1998); *id.* § 9-503 (1995); *see also* United States v. Fullpail Cattle Sales, Inc., 617 F. Supp. 73, 75 (E.D. Wis. 1985) (noting that the creditor's right to possess collateral turned on whether debtors were in default); Fulton v. Anchor Sav. Bank, 452 S.E.2d 208, 213-17 (Ga. Ct. App. 1994) (reversing trial court's grant of summary judgment in favor of repossessing creditor where evidence raised genuine issues of material fact concerning existence of default).

175. *See* Ash v. Peoples Bank, 500 So. 2d 5, 7 (Ala. 1986) (concluding that debtors' failure to maintain insurance on van triggered default that made creditor's subsequent repossession lawful); First Nat'l Bank v. Beug, 400 N.W.2d 893, 896 (S.D. 1987) (noting that debtor's failure to make payments on note constituted a default that permitted creditor to repossess equipment).

176. *See, e.g.*, Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1376 (11th Cir. 1982) (affirming a verdict that creditor's vehicle repossession amounted to conversion where evidence indicated debtor had not yet defaulted); Bank of Cabot v. Bledsoe, 653 S.W.2d 144, 146 (Ark. Ct. App. 1983) (affirming the trial court's conclusion that creditor wrongfully

Second, even if a default exists, the contract terms may limit the creditor's ability to take possession of the collateral. This contractual limitation is recognized by 9-503 through its opening language: "Unless otherwise agreed . . . ."[177] This phrase has been deleted from revised section 9-609(a),[178] presumably because the Drafting Committee viewed the language as unnecessary because the U.C.C. permits the secured party and the debtor to contractually modify their behavior,[179] subject to express prohibitions not applicable here.[180] Therefore, prior to repossessing any collateral, the creditor should determine that the loan documents neither prohibit self-help nor require satisfaction of any conditions precedent. Otherwise, the creditor may be charged with conversion or wrongful repossession.[181]

The third, and most frequently litigated, limitation on the creditor's self-help remedy is the requirement that the creditor not breach the peace.[182] Noted jurist Sir William Blackstone offered the following justification for this restraint:

> If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such

repossessed vehicle in absence of default). *But see* Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law,* 75 WASH. U. L.Q. 549, 591-92 (1997) (contending that conversion is a "conceptually wrong" remedy for a breach of the peace).

177. *See* U.C.C. § 9-503 (1995).

178. The language was not deleted until late in the drafting process. *Compare id.* § 9-609 (Draft Oct. 1997) (including the language), *with id.* § 9-609(a) (Draft Jan. 1998) (deleting the language).

179. *See id.* § 1-102(3) & cmt. 2 (1995).

180. *See id.*; *id.* § 9-602 (1998).

181. *See, e.g.,* Klingbiel v. Commercial Credit Corp., 439 F.2d 1303, 1307 (10th Cir. 1971) (concluding that the creditor's failure to give contractually required notice prior to repossessing vehicle triggered wrongful repossession and conversion); Zimprich v. North Dakota Harvestore Sys., Inc., 461 N.W.2d 425, 427-29 (N.D. 1990) (concluding that the creditor's post-default repossession of feed-storage system constituted conversion when creditor had agreed to defer exercising its right to repossess); Frierson v. United Farm Agency, Inc., 672 F. Supp. 1272, 1276-77 (W.D. Mo. 1987) (holding that the creditor who failed to comply with notice requirement in loan documents could neither seize funds in bank account nor ignore garnishment summons), *rev'd in part on other grounds*, 868 F.2d 302 (8th Cir. 1989).

182. *See* U.C.C. § 9-609(b)(2) (1998). The same limitation exists under current Article 9. *See id.* § 9-503 (1995). The duty to avoid breaching the peace cannot be waived or varied under revised Article 9. *See id.* § 9-602(6) (1998); *cf. id.* § 9-501(3) (1995) (failing to list § 9-503 as a statute that creates a duty that cannot be waived or varied); PEB STUDY GROUP REPORT, *supra* note 7, at 208-09 (recommending that "Section 9-501(3) be revised to make it clear that the 'no breach of peace' right and duty cannot be waived").

> exertion must occasion strife and bodily contention, or endanger the peace of society.[183]

The drafters of current Article 9 intentionally declined to define "breach of peace,"[184] and the term remains undefined in revised Article 9.[185] The task of fashioning the contours of the term has fallen to the courts.[186] Although the inquiry is fact-sensitive, and no two cases present identical facts,[187] the following guidelines can be gleaned from the case law.

- A creditor will not breach the peace if the debtor is present and voluntarily consents to the repossession.[188]
- A creditor will breach the peace if the debtor is present and objects to the repossession.[189]

183. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 4-5 (Legal Classics Library 1983) (1768); *see also* Sam A. Simmerman & John Variola, Case Comment, Ford Motor Credit Company v. Byrd: *Is Repossession Accomplished by the Use of Stealth, Trickery, or Fraud a Breach of the Peace Under Uniform Commercial Code Section 9-503?*, 40 OHIO ST. L.J. 501, 504 (1979) ("Another policy implicit in the breach of the peace restriction is that a democratic government favors resolution of disputes through institutions and not by individual, extrajudicial activity.").

184. As one author has stated:

> In establishing the section 9-503 procedure the Code draftsmen intended to build upon the prior history of the self-help remedy and not to create any new rights or obligations. Thus, the choice of the term "breach of peace" was not inadvertent. Nor was it an oversight in draftsmanship that the proponents of Article 9 failed to define breach of peace.

Eugene Mikolajczyk, Comment, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 DICK. L. REV. 351, 354-55 (1978).

185. Some states, however, have a statutory definition. *See, e.g.*, WYO. STAT. ANN. § 6-6-102(a) (Michie 1997) ("A person commits breach of the peace if he disturbs the peace of a community or its inhabitants by unreasonably loud noise . . . .").

186. Revised Article 9 prohibits the parties from attempting to define the parameters of permissible conduct, even through standards that are not manifestly unreasonable. *See* U.C.C. § 9-603(b) & cmt. 2 (1998).

187. A glimpse at the case law reveals that a breach of the peace arises most often when a vehicle is repossessed—an event that occurs approximately 500,000 times each year. *See* Harrell, *supra* note 38, at 256.

188. *See, e.g.*, Brown v. Indiana Nat'l Bank, 476 N.E.2d 888, 893 (Ind. Ct. App. 1985); 4 WHITE & SUMMERS, *supra* note 36, § 34-7, at 418 ("If the debtor voluntarily and contemporaneously consents to a repossession it cannot be a breach of the peace."). Whether the consent of a third person is effective may depend on such factors as the apparent authority and age of that person, as well as the relationship between that person and the debtor. *See id.* at 419.

189. *See, e.g.*, Fulton v. Anchor Sav. Bank, 452 S.E.2d 208, 213 (Ga. Ct. App. 1994); Dixon v. Ford Motor Credit Co., 391 N.E.2d 493, 497 (Ill. App. Ct. 1979); Census Fed. Credit Union v. Wann, 403 N.E.2d 348, 351-52 (Ind. Ct. App. 1980); First & Farmers Bank v. Henderson, 763 S.W.2d 137, 140-41 (Ky. Ct. App. 1988); Hester v. Bandy, 627 So. 2d 833, 840-41 (Miss. 1993); Morris v. First Nat'l Bank & Trust Co., 254 N.E.2d 683, 686-87 (Ohio 1970); Hollibush v. Ford Motor Credit Co., 508 N.W.2d 449, 453 (Wis. Ct. App. 1993); 9 HAWKLAND ET AL., *supra* note 15, § 9-503:3, at 678 ("[I]f the debtor protests the secured

- A creditor will not breach the peace by removing collateral from a parking lot, street, driveway, or open garage.[190]
- A creditor will breach the peace by removing collateral from a restricted area.[191]

party's repossession . . . a breach of peace will be imminent, and self-help repossession should no longer be an alternative for the secured party."); 4 WHITE & SUMMERS, *supra* note 36, § 34-7, at 421-22 ("When the creditor repossesses in disregard of the debtor's unequivocal oral protest, most courts find the creditor guilty of a breach of the peace. . . . A rule that an oral protest is sufficient to foreclose non-judicial repossession is wise because it does not beckon the repossessing creditor to the brink of violence."); Braucher, *supra* note 176, at 574 ("The law imposes the obligation to withdraw on the party in a better position to react coolly—the one who has not been surprised and who is just doing a job."). *But see* Williams v. Ford Motor Credit Co., 674 F.2d 717, 720 (8th Cir. 1982) (concluding that a vehicle can be repossessed if the debtor is present but fails to object); Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1174 (Ill. App. Ct. 1996) (rejecting "[the defendant's] invitation to define 'an unequivocal oral protest' " as a breach of the peace in the absence of any evidence that the debtor "implied violence at the time of or immediately prior to the repossession by holding a weapon, clenching a fist, or even vehemently arguing toe-to-toe with the repossessor so that a reasonable repossessor would understand that violence was likely to ensue if he continued with the vehicle repossession").

190. *See, e.g.,* Butler v. Ford Motor Credit Co., 829 F.2d 568, 568 (5th Cir. 1987) (removing truck from driveway); *In re* Hamby, 19 B.R. 776, 779-80 (Bankr. N.D. Ala. 1982) (removing car from parking lot); Ash v. Peoples Bank, 500 So. 2d 5, 6 (Ala. 1986) (removing van from public street); Reno v. General Motors Acceptance Corp., 378 So. 2d 1103, 1105 (Ala. 1979) (removing car from supermarket parking lot); Oaklawn Bank v. Baldwin, 709 S.W.2d 91, 92 (Ark. 1986) (removing truck from driveway); Raffa v. Dania Bank, 321 So. 2d 83, 84 (Fla. Dist. Ct. App. 1975) (removing car from driveway); Pierce v. Leasing Int'l, Inc., 235 S.E.2d 752, 755 (Ga. Ct. App. 1977) (removing car from open garage attached to residence); Jordan v. Citizens & Southern Nat'l Bank, 298 S.E.2d 213, 214 (S.C. 1982) (removing truck from driveway); Ragde v. Peoples Bank, 767 P.2d 949, 950 (Wash. Ct. App. 1989) (removing cars from driveway).

191. *See, e.g.,* Laurel Coal Co. v. Walter E. Heller & Co., 539 F. Supp. 1006, 1007 (W.D. Pa. 1982) (removing bulldozer after cutting chain used to lock fence); Henderson v. Security Nat'l Bank, 140 Cal. Rptr. 388, 391 (Ct. App. 1977) (removing car after breaking lock on garage door); Girard v. Anderson, 257 N.W. 400, 400 (Iowa 1934) (removing piano from house in absence of debtors but in accordance with contract terms); Riley State Bank v. Spillman, 750 P.2d 1024, 1030 (Kan. 1988) (removing collateral from business premises after locksmith unlocked door and removed and replaced locks); Bloomquist v. First Nat'l Bank, 378 N.W.2d 81, 86 (Minn. Ct. App. 1985) (removing collateral from business premises after climbing through cracked, but taped shut, window pane and opening garage door secured by deadbolt lock); Martin v. Dorn Equip. Co., 821 P.2d 1025, 1026 (Mont. 1991) (removing collateral from ranch by using bolt cutters to cut padlock on chained gate); Kimble v. Universal TV Rental, Inc., 417 N.E.2d 597, 601-03 (Ohio—Franklin County Mun. Ct. 1980) (removing television after forcibly entering locked apartment); Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 30 (Tenn. Ct. App. 1991) (removing vehicle from enclosed garage where vehicle had been chained to a post with a logging chain and two padlocks); General Elec. Credit Corp. v. Timbrook, 291 S.E.2d 383, 384 (W. Va. 1982) (removing mobile home after breaking lock on door). *But see* Polivy v. Air One, Inc., 700 A.2d 71, 73 (Conn. App. Ct. 1997) (cutting chains to gain access to airplane did not trigger breach of peace because chains had been installed by mechanic that had disclaimed any right to possession);

- A creditor will breach the peace if a peace officer is present during the repossession and a confrontation between the creditor and debtor occurs.[192] This is true even if the peace officer is present at the creditor's request to prevent any potential violence, because the peace officer's presence chills the debtor's right to object to the repossession.[193]
- A creditor that repossesses a motor vehicle containing the owner's personal effects may be liable for conversion unless the contract permits the creditor to seize personal effects; even if the contract permits seizure of personal effects, the creditor must make them available to the owner once possession of the vehicle is secured, and the creditor cannot make their return contingent on payment of the unpaid debt.[194]

Global Casting Indus., Inc. v. Daley-Hodkin Corp., 432 N.Y.S.2d 453, 454, 456 (Sup. Ct. 1980) (holding that creditor's use of locksmith to gain access to collateral located on business premises was not a breach of the peace because debtor had executed security agreement that "authorize[d] and empower[ed] Bank, with the aid and assistance of any person, to enter upon the premises").

192. *See, e.g.,* Harris v. City of Roseburg, 664 F.2d 1121, 1125-27 (9th Cir. 1981) (holding that police officer's verbal confrontation with debtor during vehicle repossession precluded summary judgment on issue of state action); MacLeod v. C & G Inv. Group (*In re* MacLeod), 118 B.R. 1, 2 (Bankr. D.N.H. 1990) (concluding that repossession was unlawful where policeman awakened debtor and told him to remain in his house and not "do something stupid" during an imminent repossession); Walker v. Walthall, 588 P.2d 863, 866 (Ariz. Ct. App. 1978) ("[T]he introduction of law enforcement officers into the area of self-help repossession, regardless of their degree of participation or non-participation in the actual events, would constitute state action, thereby invalidating a repossession without a proper notice and hearing."); *First & Farmers Bank*, 763 S.W.2d at 140 (concluding that the presence of the deputy sheriff, armed and in full uniform, during creditor's confrontation with debtor prevented lawful repossession); Waisner v. Jones, 755 P.2d 598, 602 (N.M. 1988) (holding that the presence of military security police during creditor's confrontation with debtor during repossession on military base prevented lawful seizure); Stone Mach. Co. v. Kessler, 463 P.2d 651, 652-53, 655 (Wash. Ct. App. 1970) (finding breach of the peace where sheriff, in uniform and wearing his badge and sidearm, told debtor, "[w]e come [sic] to pick up the tractor"). *But see* United States v. Coleman, 628 F.2d 961, 964 (6th Cir. 1980) (ruling that the mere presence of police in patrol car parked around corner from site where creditor repossessed vehicle without confronting debtor did not constitute state action); *First & Farmers Bank*, 763 S.W.2d at 137, 143 (McDonald, J., concurring) ("It is one thing to hold that an officer of the law may not *participate* in a self-help repossession. It is quite another to say that he may never be present as a neutral observer."); *Walker*, 588 P.2d at 866-67 (Eubank, J., dissenting) (arguing that mere presence of peace officer who took no part in repossession negotiations between creditor and debtor did not trigger breach of peace).

193. *See MacLeod*, 118 B.R. at 3; *Stone Mach. Co.*, 463 P.2d at 651, 654-55; *see also* Braucher, *supra* note 176, at 581 (observing that "a repossession using a law officer is not self-help, and thus it is not authorized by UCC section 9-503, making it unlawful," absent judicial approval).

194. *See, e.g.,* Thompson v. Ford Motor Credit Co., 550 F.2d 256, 258-59 (5th Cir. 1977) (holding that an exculpatory provision in a contract saved creditor from liability for allegedly converting personal items in repossessed vehicle); Larranaga v. Mile High Collection & Recovery Bureau, Inc., 807 F. Supp. 111, 114-15 (D.N.M. 1992) (finding a creditor liable for conversion of personal property in repossessed vehicle in absence of any contractual lan-

- The creditor's duty to avoid breaching the peace is non-delegable; the creditor remains liable for the conduct of any independent contractor hired to perform the repossession.[195]
- A creditor that breaches the peace may be liable for punitive damages.[196]

guage); Oaklawn Bank v. Baldwin, 709 S.W.2d 91, 92 (Ark. 1986) (ruling that owners of personal property in repossessed vehicle were entitled to trial on conversion theory); Ford Motor Credit Co. v. Herring, 589 S.W.2d 584, 586 (Ark. 1979) (holding that contract terms did not shield creditor from liability for intentionally withholding personal items in repossessed vehicle from debtor who demanded return after creditor had secured possession of vehicle); Southern Indus. Sav. Bank v. Greene, 224 So. 2d 416, 418-19 (Fla. Dist. Ct. App. 1969) (concluding that the creditor was liable for losing cash and jewelry hidden in trunk of repossessed car); Newman v. Basin Motor Co., 644 P.2d 553, 556 (N.M. Ct. App. 1982) (concluding that contractual provision permitting creditor to seize items in repossessed motor vehicle did not protect creditor from liability for wrongfully repossessing and selling trailer attached to vehicle); Jones v. General Motors Acceptance Corp., 565 P.2d 9, 12 (Okla. 1977) (stating that a contractual provision authorizing seizure of personal items in repossessed vehicle did not save creditor from liability for wrongful retention).

195. *See* Clark v. Associates Commercial Corp., 877 F. Supp. 1439, 1444-45 (D. Kan. 1994); General Fin. Corp. v. Smith, 505 So. 2d 1045, 1047-48 (Ala. 1987); Sammons v. Broward Bank, 599 So. 2d 1018, 1019-21 (Fla. Dist. Ct. App. 1992); Fulton v. Anchor Savs. Bank, 452 S.E.2d 208, 213-14 (Ga. Ct. App. 1994); Nichols v. Metropolitan Bank, 435 N.W.2d 637, 640-41 (Minn. Ct. App. 1989); Robinson v. Citicorp Nat'l Servs., Inc., 921 S.W.2d 52, 54-55 (Mo. Ct. App. 1996); DeMary v. Rieker, 695 A.2d 294, 301-02 (N.J. Super. Ct. App. Div. 1997); Mauro v. General Motors Acceptance Corp., 626 N.Y.S.2d 374, 376-77 (N.Y. 1995); Williamson v. Fowler Toyota, Inc., 956 P.2d 858, 861 (Okla. 1998); McCall v. Owens, 820 S.W.2d 748, 751-52 (Tenn. Ct. App. 1991); MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151, 152-53 (Tex. 1992). *But see* Kouba v. East Joliet Bank, 481 N.E.2d 325, 328 (Ill. App. Ct. 1985) (stating that employer usually is not liable for acts of independent contractors but could be liable for failing to exercise reasonable care in selecting a competent contractor or ordering or directing the injurious act); Hester v. Bandy, 627 So. 2d 833, 843 (Miss. 1993) (holding that creditor can be liable for acts of independent contractor "when one employs another to perform a task in which a serious danger to person or property, a crime, or some tort can reasonably be anticipated in its performance"); *MBank El Paso*, 836 S.W.2d at 158-60 (Hecht, J., dissenting) (arguing that Article 9's self-help remedy provision does not create a nondelegable duty). As noted by Professor Braucher, "lenders have responded to this legal development by increasingly insisting that their independent contractors obtain liability insurance coverage for most breaches of the peace." Braucher, *supra* note 176, at 560.

196. *See, e.g.,* Klingbiel v. Commercial Credit Corp., 439 F.2d 1303, 1309-10 & n.15 (10th Cir. 1971) ($7500); Chrysler Credit Corp. v. Turner, 553 So. 2d 64, 67 (Ala. 1989) ($15,000); Big Three Motors, Inc. v. Rutherford, 432 So. 2d 483, 487 (Ala. 1983) ($15,000); Vogel v. Carolina Int'l, Inc., 711 P.2d 708, 711 (Colo. Ct. App. 1985) ($73,000); Deavers v. Standridge, 242 S.E.2d 331, 334 (Ga. Ct. App. 1978) ($1000); *First & Farmers Bank,* 763 S.W.2d at 139 ($75,000); *Bloomquist,* 378 N.W.2d at 86-87 (remanding for determination of damages, which may include punitives); Zimprich v. North Dakota Harvestore Sys., Inc., 461 N.W.2d 425, 427 (N.D. 1990) ($20,000); *Kimble,* 417 N.E.2d at 601-03 ($4000); *Williamson,* 956 P.2d at 863 ($15,000); Mitchell v. Ford Motor Credit Co., 688 P.2d 42, 44 (Okla. 1984) ($60,000); 2 GILMORE, *supra* note 2, § 44.1, at 1213 (noting that "[j]uries love to award punitive damages" for certain breaches of the peace). *But see General Fin. Corp.*, 505 So. 2d at 1049 (Torbert, C.J., concurring specially) ("Without proof that a creditor knew that an independent contractor

With all of the foregoing case law at its disposal, it is somewhat surprising that the Drafting Committee declined to eliminate, if not reduce, the vagueness of the "breach of the peace" standard through codification of the less controversial holdings.[197] As recently noted by one author, statutory elaboration and clarification would encourage better compliance and provide more certainty.[198]

A creditor that cannot seize collateral without breaching the peace, or who wishes to obtain the collateral with no risk of liability for violating

was going to breach the peace in repossessing the collateral or ratification of the independent contractor's conduct, punitive damages should not be recoverable."); *Henderson*, 140 Cal. Rptr. at 392-93 (refusing to assess punitive damages against creditor that did not authorize, ratify, or participate in, wrongful acts of repossessor); *MBank El Paso*, 836 S.W.2d at 155-58 (Cook, J., dissenting) (arguing that creditors should not be held strictly liable for wrongful acts of independent contractors); CLARK, *supra* note 2, ¶ 4.05[2][c][ii], at S4-50 to S4-51 (arguing that the dual purposes of awarding punitive damages—punishment and deterrence—are not advanced when a creditor is held liable for an independent contractor's actions that the creditor did not authorize). *See generally* Jonathan M. Purver, Annotation, *Punitive Damages For Wrongful Seizure Of Chattel By One Claiming Security Interest*, 35 A.L.R.3D 1016 (1971 & Supp. 1995).

197. Two helpful statements are found in revised § 9-609 cmt. 3 (1998). First, "courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral." *Id.* Second, "[t]his section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer." *Id.*

198. *See* Braucher, *supra* note 176, at 615-16. Professor Braucher proposed that § 9-503 be amended by including some variation of the following two clauses:

> (b) In taking possession of collateral by self-help, it is a breach of the peace for the secured party, without the contemporaneous permission of the debtor, to:
>
> (1) enter a locked or unlocked residence, garage or commercial building;
>
> (2) break, open or move any lock, gate or other barrier to enter enclosed real property;
>
> (3) enter upon residential real property, including a driveway, before 8 o'clock antemeridian or after 9 o'clock postmeridian;
>
> (4) proceed with a repossession if the debtor, a member of the debtor's household or an employee of the debtor is present and objects by words or actions or requests that the repossession not take place;
>
> (5) attempt a repossession by a trick that will or is likely to involve a confrontation with the debtor, a member of the debtor's household or an employee of the debtor; or
>
> (6) otherwise create an unreasonable risk of violence.
>
> (c) If a secured party or its independent contractor in the course of taking possession of collateral by self-help breaches the peace or uses law officers without the benefit of judicial process, the secured party shall be liable to the debtor for the fair market value of any property taken, and the debt shall be canceled.

Id. According to Steven O. Weise, an American Bar Association advisor to the Drafting Committee, "the Drafting Committee specifically considered the proposals in [Professor Braucher's] article and concluded that it would not be productive to have specific rules." Memorandum from Steven O. Weise to Timothy R. Zinnecker (Mar. 22, 1999) (on file with *The Business Lawyer*, University of Maryland School of Law) [hereinafter Weise Memorandum].

that duty, enjoys the statutory right to take possession of collateral with judicial assistance.[199] For example, a creditor may bring an action against the debtor, receive a favorable judgment, obtain a writ of execution, and, with the assistance of the sheriff or other proper official, seize the collateral over the objections of the debtor.[200] Also, a creditor may attempt to repossess collateral by complying with local replevin or sequestration procedures.[201] Although the time and expense necessary to accomplish judicial seizure may make this option appear less attractive than self-help, prudence suggests that repossession by judicial process may be the preferred course of action if any possibility exists that self-help repossession cannot be accomplished without breaching the peace.[202]

Under current Article 9, the secured party can require the debtor to move the collateral to a mutually convenient location "[i]f the security agreement so provides."[203] The secured party enjoys the same right under revised Article 9 "[i]f so agreed, and in any event after default."[204] Although revised Article 9 no longer requires a written agreement, the secured party should consider addressing the matter contractually before the debtor defaults and becomes uncooperative. Any provision should dictate not only one or more acceptable locations[205] but also the promptness with which the debtor must respond to the creditor's request. A creditor may find this right attractive if the collateral is likely to decline in value (from market forces, debtor misconduct, or otherwise) if it remains at its present location. Additionally, a creditor might request movement if the collateral is located at several places, especially if it believes that relocation to a central place will attract more potential buyers and possibly higher bids at any foreclosure sale. A secured party must realize, however, that any relocation request may be an exercise in futility. A debtor already in default may not be troubled if its refusal triggers another default, especially when retaining physical control of the collateral may represent the debtor's most

199. *See* U.C.C. § 9-609(a)(1), (b)(1) (1998); *cf. id.* § 9-503 (1995) (permitting the creditor to "proceed by action"); *id.* § 1-201(1) (defining " '[a]ction' in the sense of a judicial proceeding to include[ ] recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined").

200. *See, e.g.,* Dakota Bank & Trust Co. v. Reed, 402 N.W.2d 887, 888 (N.D. 1987).

201. *See, e.g.,* Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc., 603 F. Supp. 1071, 1075-76 (W.D. Wis. 1985), *aff'd,* 795 F.2d 1344 (7th Cir. 1986); Sedalia Mercantile Bank & Trust Co. v. Loges Farms, Inc., 740 S.W.2d 188, 192 (Mo. Ct. App. 1987).

202. Absent a debtor's consent, repossession by judicial process will, by necessity, be the only option available to some creditors (e.g., those with a security interest in inventory and equipment kept by a debtor in a store, warehouse, or other closed facility).

203. U.C.C. § 9-503 (1995).

204. *Id.* § 9-609(c) (1998)

205. Just because a new location is "reasonably convenient" under revised § 9-609(c) does not necessarily make the new location commercially reasonable. As the new location must be "reasonably convenient" to both parties, the debtor should be estopped from challenging its commercial reasonableness. But such challenges may be brought by others, such as another secured party.

powerful post-default weapon in its relationship with the creditor. If the debtor refuses to cooperate, the creditor should attempt to enforce this right with the aid of injunctive relief.[206]

Like its predecessor, revised Article 9 requires a creditor that possesses collateral to exercise "reasonable care" in its custody and preservation[207] and to preserve the identifiability of non-fungible collateral.[208] The secured party may use or operate the collateral for the purpose of preserving it or its value,[209] and all reasonable expenses (including any insurance or taxes) incurred by the creditor in possessing, preserving, using, or operating the collateral become part of the secured obligation.[210]

A creditor that elects not to repossess equipment may render it unusable,[211] which may be attractive when repossessing and storing equipment is expensive, impractical, or both,[212] and the creditor is concerned that the debtor may conceal, misuse, or dispose of the equipment.[213] Current Article 9 does not expressly prohibit the creditor from breaching the peace when rendering equipment unusable.[214] Revised Article 9 expressly re-

206. *See, e.g.,* Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 57 (5th Cir. 1970) (affirming trial court's issuance of injunctive order requiring debtor to move equipment located in five states to a central location). *See also* Bookout v. Atlas Fin. Corp., 395 F. Supp. 1338, 1340 (N.D. Ga. 1974) (relying on *Clark* to invoke equitable principles and appoint receiver to conserve collateral), *aff'd sub nom.* Bookout v. First Nat'l Mortgage & Discount Co., 514 F.2d 757 (5th Cir. 1975); *cf.* Stern v. South Chester Tube Co., 390 U.S. 606, 609-10 (1968) (concluding that the shareholder could seek mandatory equitable relief against corporation that repeatedly denied statutory access to books and records).

207. *See* U.C.C. § 9-207(a) (1998); *id.* § 9-207(1) (1995); *see also supra* note 32.

208. *See* U.C.C. § 9-207(b)(3) (1998); *id* § 9-207(2)(d) (1995); *see also* Aspen Enters., Inc. v. Bodge, 44 Cal. Rptr. 2d 763, 769 (Ct. App. 1995) (concluding that a secured party could commingle repossessed tires with its general inventory as secured party kept repossessed tires identifiable and the tires were fungible).

209. *See* U.C.C. § 9-207(b)(4)(A) (1998); *id.* § 9-207(4) (1995); *see also supra* note 31.

210. *See* U.C.C. § 9-207(b)(1) (1998); *id.* § 9-207(2)(a) (1995); *see also* J. T. Jenkins Co. v. Kennedy, 119 Cal. Rptr. 578, 583 (Ct. App. 1975) (concluding that § 9-207(2) permitted secured party to recover $6200 paid to extinguish fuel tax lien on repossessed truck); First City Div. of Chase Lincoln First Bank v. Vitale, 510 N.Y.S.2d 766, 770 (App. Div. 1987) (remanding for determination of reasonableness of repossession and relocation expenses of $30,447); Davis v. Small Bus. Inv. Co., 535 S.W.2d 740, 744-45 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (denying recovery of expenses of $23,060 absent proof that charges were reasonable); 2 GILMORE, *supra* note 2, § 42.6, at 1139 (distinguishing a secured party's payments made to protect its own interest from those made to protect the debtor's interest).

211. *See* U.C.C. § 9-609(a)(2) (1998). The creditor enjoys the same right under current Article 9. *See id.* § 9-503 (1995).

212. *See id.* § 9-609 cmt. 6 (1998); *id.* § 9-503 cmt. (1995); *see also* First Republic Corp. of Am. v. BayBank, 677 N.E.2d 1146, 1148 (Mass. 1997) ("The estimate given for the cost of removing and storing the equipment was over one-half of the actual value of the equipment itself, making a move impractical for any of the parties involved.").

213. *See* 9 HAWKLAND ET AL., *supra* note 15, § 9-503:6, at 684-85.

214. *But see id.* § 9-313:7, at 344 ("[W]hen the fixture is equipment, [the creditor should be able] to render it unusable if it can be done without a breach of the peace."); U.C.C. § 9-503 cmt. (1995) ("The authorization to render equipment unusable . . . would not justify

quires the creditor to avoid breaching the peace.[215] Finally, as under current law, the creditor may dispose of collateral in accordance with other applicable default provisions whether or not the creditor has taken possession of the collateral or rendered it unusable.[216]

REVISED SECTION 9-610: DISPOSITION OF COLLATERAL AFTER DEFAULT

Under section 9-504, a creditor enjoys the post-default right to "sell, lease or otherwise dispose of any or all of the collateral."[217] The creditor continues to enjoy this right under revised section 9-610, which also expressly states that licensing is a permitted form of disposition.[218]

Current law permits the secured party to dispose of the collateral "in its then condition *or* following any commercially reasonable preparation or processing."[219] Despite the disjunctive nature of the language, some courts have held that creditors are required to take commercially reasonable steps to prepare or process collateral before disposal, and that failure

unreasonable action by the secured party, since, under Section 9-504(3), all his actions in connection with disposition must be taken in a 'commercially reasonable manner.' "); *cf. id.* § 2A-525(2), (3) (permitting a lessor to take possession of goods or render them unusable without judicial process if action is taken without breaching the peace). For a case in which a secured party was convicted of criminal trespass and aggravated theft after rendering heavy equipment unusable by entering the debtor's premises and removing vital parts, see *State v. Pranger*, 822 P.2d 714 (Or. Ct. App. 1991).

215. *See* U.C.C. § 9-609(a)(2), (b)(2) (1998). This clarification occurred very late in the drafting process. *Compare id.* § 9-609 (Draft approved at NCCUSL Annual Meeting, July 30, 1998) (prohibiting a secured party from breaching the peace during self-help repossession under subsection (b)(2) but not while rendering equipment unusable under subsection (d)(1)), *with id.* § 9-609(b)(2) (Draft Nov. 16, 1998) (requiring the secured party to avoid breaching the peace when rendering equipment unusable under subsection (a)(2)). *See also* Zinnecker Memorandum, *supra* note 102, at 2 ("Can the secured party breach the peace while rendering equipment unusable under 9-609(d)(1)?").

216. *See* U.C.C. § 9-503 (1995); *cf. id.* § 9-609(a)(2) (1998).

217. *See id.* § 9-504(1) (1995).

218. *See id.* § 9-610(a) (1998). Licensing may be an attractive option for disposing of particular types of collateral, including: patents, copyrights, trademarks, and similar intellectual property; film and music collections; and computer software. In simple terms, licensing is the grant of a limited right of use, with the licensor retaining ownership and control.

> Licenses can be exclusive or non-exclusive; limited in duration, territory, products, services, and otherwise; may be royalty-bearing or royalty-free, for a finite sum, a mix of royalty and lump sum, or other types of consideration; and, in general, may be as expansive or limited as the parties to a license agree.

Steven M. Weinberg, *Overview of the Law and Business of Licensing Copyrights, Trademarks and Publicity Rights*, *in* ADVANCED SEMINAR ON LICENSING AGREEMENTS 1998, at 9, 15 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4033, 1998).

219. U.C.C. § 9-504(1) (1995) (emphasis added).

to do so may impair the creditor's ability to recover a deficiency.[220] The retention of the language in its then-present form was a source of debate during the early stages of the drafting process,[221] but the Drafting Committee soon reached a consensus: the language would remain intact in the same statutory location.[222] Other than replacing "then condition" with

220. *See, e.g.*, Chavers v. Frazier (*In re* Frazier), 93 B.R. 366, 371 (Bankr. M.D. Tenn. 1988) (holding that the creditor's failure to inspect and overhaul jet engines prior to sale of Lear jet constituted commercially unreasonable behavior), *aff'd*, 110 B.R. 827 (M.D. Tenn. 1989); Farmers & Merchants Bank v. Barnes, 705 S.W.2d 450, 452-53 (Ark. 1986) (concluding that the creditor failed to sell excavator in commercially reasonable manner when it failed to spend $1000 to paint it, fix leaks, and replace broken windows, worn-out pins, and worn-off teeth); Franklin State Bank v. Parker, 346 A.2d 632, 635 (N.J. Dist. Ct. 1975) (holding that the creditor acted improperly in selling vehicle without making such minor repairs as replacing missing spark plugs, points, condenser, and carburetor air filter); Weiss v. Northwest Acceptance Corp., 546 P.2d 1065, 1071-73 (Or. 1976) (noting relevance of evidence indicating that cleaning and washing logging equipment prior to sale could have resulted in higher sales price); First Bank v. VonEye, 425 N.W.2d 630, 637 (S.D. 1988) (citing Westgate State Bank v. Clark, 642 P.2d 961, 970 (Kan. 1982), for authority that "when the cost of preparing the collateral for sale is small, in comparison to the additional price it is likely to generate, the creditor should spend the extra money"). *But see* C.I.T. Corp. v. Duncan Grading & Constr., Inc., 739 F.2d 359, 361 (8th Cir. 1984) (citing statutory language for the proposition that a creditor "may, but is not required to, repair, improve, or otherwise spruce up the collateral before it is sold"); 4 WHITE & SUMMERS, *supra* note 36, § 34-14, at 451-52 ("We believe the cases are an incorrect reading of the statute. After all, the person complaining of the secured creditor's failure to paint, repair or the like, is usually the debtor—the very person who allowed the collateral to deteriorate in the first place.").

221. *See* U.C.C. § 9-504 cmt. 3 (Draft July 28-Aug. 4, 1995). The draft stated that

> [t]he Drafting Committee has not reach[ed] a consensus on whether a secured party is entitled to sell collateral without preparation or processing in all cases or whether preparation or processing is required if it would not be commercially reasonable to forego it. Accordingly, the draft places brackets around the language that appears to give a secured party the freedom to forego preparation or processing even if the omission would not [be] commercially reasonable. If the bracketed language ["in its then condition or following any commercially reasonable preparation or processing"] is deleted from subsection (a), new language ["If commercially reasonable, a secured party may dispose of collateral . . . in its then condition or following preparation or processing . . . ."] . . . should be added to make clear that preparation and processing are required if necessary to the commercial reasonableness of a disposition. Alternatively, the issue could be clarified in an Official Comment along the following lines:
>
> > A secured party is not entitled to dispose of collateral "in its then condition" when, taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in its then condition.

Id.

222. *See id.* § 9-504 cmt. 3 (Draft July 12-19, 1996).

> The Drafting Committee was concerned that if the quoted language were added to the list in subsection (f) ["If commercially reasonable, a secured party may dispose of collateral . . . in its then condition or following preparation or processing . . . ."], courts might be unnecessarily quick to impose a duty of preparation or processing on the

"present condition," the final version of the renumbered statute reflects that decision.[223] Therefore, creditors are advised not to interpret the statutory language literally, but instead to evaluate the probable benefits likely to result from preparing or processing the collateral. If the creditor believes that the benefits may outweigh the costs, then the creditor should consider preparing or processing the collateral to avoid allegations that its disposition was not commercially reasonable.[224] For example, a creditor should spend $75 to tune a repossessed piano if the creditor believes that, as a result of the tuning, the sales price may increase by $500. But a creditor should forego replacing the keyboard at a price of $1000 if the creditor believes that taking such action will increase the sales price by only $600.

The success of any prediction of potential return may turn more on luck than on a fair assessment of existing commercial realities. And knowing at what point between costs and benefits a court will draw the line of commercial reasonableness remains uncertain.[225] Nevertheless, because the amount of any deficiency may be adversely affected by behavior that is commercially unreasonable,[226] a creditor should seriously consider spending the money necessary to prepare or process the collateral for disposition if the probable benefits outweigh the costs. Furthermore, in anticipation of likely challenges from the debtor, the creditor should document how and why it concluded whether to prepare or process the collateral prior to disposition.

Like its predecessor, revised Article 9 allows the creditor to dispose of the collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place, but every aspect of the sale must be "commercially reasonable."[227] The term is not defined by the U.C.C., but proof that the secured party could have achieved a better price by disposing of the collateral at a different time or by a different method does not, by itself, prevent the secured party from proving that its conduct was commercially reasonable.[228] In the absence of very limited situations,[229] the contours of "commercial reasonableness" are dictated

> secured party. Accordingly, the Drafting Committee chose to retain the language in subsection (a).

Id.

223. *See id.* § 9-610(a) (1998).

224. Under both the current and revised versions of Article 9, all aspects of disposition must be "commercially reasonable." *See id.* § 9-504(3) (1995); *id.* § 9-610(b) (1998); *infra* notes 227-31 and accompanying text (discussing this requirement).

225. But "courts should not be quick to impose a duty of preparation or processing on the secured party." *Id.* § 9-610 cmt. 4 (1998).

226. *See id.* § 9-626.

227. *See id.* § 9-610(b); *id.* § 9-504(3) (1995).

228. *See id.* § 9-627(a) (1998); *id.* § 9-507(2) (1995).

229. *See id.* § 9-627 (1998) (stating that dispositions are deemed "commercially reasonable" in limited situations); *cf. id.* § 9-507(2) (1995) (same).

by the facts of each case.[230] And one need only look as far as the nearest treatise to conclude that the term has been the subject of an overwhelming amount of litigation.[231] No doubt the issue of commercial reasonableness will remain a frequent visitor to the courthouse under revised Article 9. Whether the Drafting Committee should be praised or pilloried for promoting litigation through its continued use of an undefined term[232] depends on whether one prefers the certainty provided by rules or the flexibility afforded by standards.[233]

Under both current and revised Article 9, the duty to dispose of collateral in a commercially reasonable manner cannot be waived or varied.[234] The parties may adopt contractual standards that define commercially reasonable conduct, however, if those standards are not manifestly unreasonable.[235] No doubt some debtor advocates will argue that this provision improperly erases the line between "commercially reasonable" and "commercially unreasonable" behavior and redraws it between "commercially reasonable" and "manifestly unreasonable" conduct.[236] And

230. One case offers 17 factors (including "[o]ther factors") that should be given "equal weight" in determining whether a disposition was commercially reasonable. *See* Crosby v. Reed (*In re* Crosby), 176 B.R. 189, 195-96 (B.A.P. 9th Cir. 1994), *aff'd*, 85 F.3d 634 (9th Cir. 1996); *see also* William Mark Rudow, *Determining the Commercial Reasonableness of the Sale of Repossessed Collateral*, 19 UCC L.J. 139, 140-58 (1986) (analyzing 12 factors).

231. *See, e.g.*, CLARK, *supra* note 2, ¶¶ 4.08[1]-[8], at 4-113 to 4-172; 9 HAWKLAND ET AL., *supra* note 15, §§ 9-504:4 to 9-504:10, at 709-60; 4 WHITE & SUMMERS, *supra* note 36, §§ 34-10 to 34-16, at 429-58. *See also* Richard C. Tinney, Annotation, *What is "Commercially Reasonable" Disposition of Collateral Required by UCC § 9-504(3)*, 7 A.L.R.4TH 308, 313 (1981); *cf.* Donald J. Rapson, *Who Is Looking Out For The Public Interest? Thoughts About The UCC Revision Process In The Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 258-59 (1994) (criticizing the nebulous concept of "commercial reasonableness").

232. Litigation on one contentious, price-related issue should be reduced somewhat by revised § 9-615(f), a provision that addresses the commercial reasonableness of using a disposition price to calculate a deficiency or surplus if that price results from a disposition by the foreclosing secured party to itself, a related party, or a secondary obligor. *See* U.C.C. § 9-615(f).

233. For an interesting discussion of the "rules versus standards" debate in the context of a rather famous (or infamous, depending on your team loyalty) professional sports incident, see Robert A. Hillman, *What the Knicks Debacle of '97 Can Teach Students About the Nature of Rules*, 47 J. LEGAL EDUC. 393 (1997); *see also* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992) (suggesting that rules should govern frequent behavior and standards should regulate infrequent behavior). *But see* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 430 (1985) (concluding that the debate is a worthless undertaking).

234. *See* U.C.C. § 9-602(7) (1998); *id.* § 9-501(3) (1995).

235. *See id.* § 9-603(a) (1998); *id.* § 9-501(3)(b) (1995).

236. *See* Greenfield, *supra* note 10, at 485; *see also* Mark Snyderman, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335, 1342 (1988) (noting a distinction between "a proscription against 'not manifestly unreasonable' behavior and a requirement that contract performance behavior meet 'reasonable commercial standards' "); *cf.* U.C.C. § 1-203 (1995) (obligating a secured party to act in "good faith"); *id.* § 9-102(a)(43) (1998) (defining "good faith" as "honesty in fact *and the observance of reasonable commercial standards of fair dealing*") (emphasis added).

consumer advocates will contend that the provision cloaks creditors with the authority to *unilaterally* dictate the standards by which their conduct will be governed because consumers are bereft of any bargaining power.[237] Nevertheless, creditors that prefer to control their own destiny, rather than placing themselves at the complete mercy of the courts, should take advantage of this statutory invitation to contractually define commercially reasonable conduct.[238] Possible matters that might be addressed include minimum and maximum preparation and processing costs, acceptable times and places of sale, the content and mode of any publicity, and the speed with which the creditor must sell the collateral.

Like current section 9-504, revised section 9-610 permits a secured party to purchase collateral at a public disposition and, in limited situations, at a private disposition.[239] Why restrict the creditor's right to purchase at its own sale unless the sale is public? As Professor Gilmore explained, "At a 'public sale,' it may be hoped, there will be that lively concourse of bidders which will protect the secured party from his own weakness and drive the price up to those Himalayan peaks of fair value and true worth."[240] Current Article 9 does not define "public sale" or "private sale,"[241] so that

237. *See* Greenfield, *supra* note 10, at 485-86; *cf.* 2 GILMORE, *supra* note 2, § 44.3, at 1221 ("No one will deny that the consumer security agreement is a contract of adhesion or that the consumer needs protection."). If the consumer is truly without any bargaining power, then perhaps the standards remain unenforceable, not because they are manifestly unreasonable but because they were not reached "by agreement" as required by revised § 9-603. Professor Greenfield acknowledges this argument, but believes that "it is too subtle and too easily missed by lawyers and judges who are not steeped in the UCC." Greenfield, *supra* note 10, at 485-86.

238. *See, e.g.,* Ford Motor Credit Co. v. Solway, 825 F.2d 1213, 1216-17 (7th Cir. 1987) (holding that the contract provision, which provided that creditor's sale to highest cash bidder would be a commercially reasonable means of disposal if creditor solicited bids from three or more dealers in the type of repossessed collateral, was not manifestly unreasonable); Ford Motor Credit Co. v. DeValk Lincoln-Mercury, Inc., 600 F. Supp. 1547, 1551-52 (N.D. Ill. 1985) (same); Liberty Bank v. Honolulu Providoring Inc., 650 P.2d 576, 579-80 (Haw. 1982) (observing that creditor failed to comply with provision, not manifestly unreasonable, requiring creditor to provide debtor with notice at least five days prior to sale); Wippert v. Blackfeet Tribe, 695 P.2d 461, 464 (Mont. 1985) (concluding that creditor complied with contract provision, not manifestly unreasonable, requiring creditor to give written notice to debtor at least five days prior to any sale); *cf.* Walker v. Grant County Sav. & Loan Ass'n, 803 S.W.2d 913, 916 (Ark. 1991) (holding that "[the] agreement . . . must be in writing"). The ability to "agree" on the timeliness of notice has been constrained. *See infra* notes 316-36 and accompanying text (discussing U.C.C. § 9-612 (1998)).

239. *See* U.C.C. § 9-610(c) (1998); *id.* § 9-504(3) (1995).

240. 2 GILMORE, *supra* note 2, § 44.6, at 1242; *see also* 1A PETER F. COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 8.06[2][c], at 8-110 to 8-111 (1991) ("It is inappropriate for the secured creditor to establish the value of the collateral by negotiating with himself, so the Code sensibly prohibits the secured party's buying at a private sale unless there is some external guide . . . to fix the price.").

241. *See* U.C.C. § 2-706 cmt. 4 (1995) (indicating that a public sale is "a sale by auction" and a private sale "may be effected by solicitation and negotiation conducted either directly or through a broker").

task has fallen to the courts. Most cases have held that restricting access to the sale creates a private sale, even if the invited attendees engage in competitive bidding.[242] Additionally, courts have held that a "public invitation" is an essential element of a public sale.[243] Furthermore, selling collateral to the general public by "sealed bids" has created a private sale,[244] whereas conducting an auction "with reserve" has not.[245]

To some extent, revised Article 9 codifies existing case law. "Public disposition" (like its predecessor "public sale") is not defined in the text, but the official comments reveal that the term is intended to refer to a dis-

242. Most of the "restricted access" cases have involved sales of vehicles at "dealers only" auctions. *See, e.g., Solway*, 825 F.2d at 1217-18; Chrysler Credit Corp. v. Curley, 753 F. Supp. 611, 617 n.12 (E.D. Va. 1990); Beard v. Ford Motor Credit Co., 850 S.W.2d 23, 27-29 (Ark. Ct. App. 1993); John Deery Motors, Inc. v. Steinbronn, 383 N.W.2d 553, 555-56 (Iowa 1986); Garden Nat'l Bank v. Cada, 738 P.2d 429, 431-32 (Kan. 1987); Coy v. Ford Motor Credit Co., 618 A.2d 1024, 1028-29 (Pa. Super. Ct. 1993). *See also* Morrell Employees Credit Union v. Uselton, 28 U.C.C. Rep. Serv. (Callaghan) 269, 272-74 (Tenn. Ct. App. 1979) (concluding that restricting access to corporate employees and members of credit union created private sale); *cf.* RESTATEMENT OF SECURITY § 48 cmt. c (1941) ("A public sale is one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold."); Hogan, *supra* note 1, at 226 ("There is some indication that 'public' is a literal requirement and that everyone must be allowed to be present and to make an offer."). *But see* 1A COOGAN ET AL., *supra* note 240, § 8.06[2][c], at 8-111 (arguing that a dealer's auction, regularly scheduled and conducted, and where competitive bidding is present, should be a public sale because market forces operate unimpeded); LAWRENCE ET AL., *supra* note 128, § 18.02[A][3], at 351 ("The hallmark of a public sale should be the competitive nature of the sale, not whether the public is invited.").

243. *See, e.g.*, Stewart v. Taylor Chevrolet, Inc. (*In re* Webb), 17 U.C.C. Rep. Serv. (Callaghan) 627, 631 (S.D. Ohio 1975) (holding that a sale was private in absence of evidence that "the public was invited by newspaper advertisement, poster, bulletin, or broadside, or by radio or television announcement"); Lavender v. AmSouth Bank, N.A., 539 So. 2d 193, 195 (Ala. 1988) (noting the presence of several factors that created public sale, including public invitation through newspaper advertisement); Bolen v. Mid-Continent Refrigerator Co., 411 N.E.2d 1255, 1259 (Ind. Ct. App. 1980) (holding that the placement of notice in two local newspapers satisfied the requirement of public invitation); Lloyd's Plan, Inc. v. Brown, 268 N.W.2d 192, 196 (Iowa 1978); Bank of Houston v. Milam, 839 S.W.2d 705, 708 (Mo. Ct. App. 1992) (finding a public sale after noting three notices of sheriff's sale were posted in public places); Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28, 30 (Utah 1982) ("The requirement of a public invitation is essential for a public sale . . . . It is fundamental that a public sale presupposes posting public notices or advertising."); *see also* 2 GILMORE, *supra* note 2, § 44.6, at 1242 ("If the sale has not been appropriately publicized, it would not be a public sale no matter where it was held or how it was conducted."); J. E. Keefe, Jr., Annotation, *What Constitutes A "Public Sale,"* 4 A.L.R.2D 575, 575 (1949); Boyd J. Peterson, Annotation, *Secured Transactions: What is "Public" or "Private" Sale Under UCC § 9-504(3)*, 60 A.L.R.4TH 1012, 1018 (1988).

244. *See* Cheshire v. Walt Bennett Ford, Inc., 788 S.W.2d 490, 494 (Ark. Ct. App. 1990); Boatmen's Nat'l Bank v. Eidson, 796 S.W.2d 920, 923 (Mo. Ct. App. 1990); *see also* Hogan, *supra* note 1, at 227 ("Furthermore, the term 'public sale,' may carry with it the notion of an auction where the price is successively raised through a series of offers; thus, sealed bids may not suffice."). *But see* Bank of Am. v. Lallana, 960 P.2d 1133 (Cal. 1998) (holding that disposition of debtor's automobile by sealed bid at public auction was public sale).

245. *See* Liberty Nat'l Bank v. Greiner, 405 N.E.2d 317, 321 (Ohio Ct. App. 1978).

position "at which the price is determined after the public has had a meaningful opportunity for competitive bidding."[246] The term "meaningful opportunity" is "meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition)."[247] Neither revised section 9-610 nor its accompanying comments discuss the intended meaning of "private disposition," which leads to the inference that the term encompasses any disposition that is not a "public disposition."

As before, the creditor can purchase collateral at a private disposition if the collateral "is customarily sold on a recognized market."[248] Most courts have narrowly construed the term "recognized market," finding that it exists only where sales involve many fungible items with nonexistent or immaterial differences, haggling and competitive bidding are absent because price is controlled by neutral forces, and current price quotations of comparable items are readily available.[249] Revised Article 9 adopts a similar narrow construction, defining "recognized market" as a market "in which items sold are fungible and prices are not subject to individual negotiation."[250] No one should object to a creditor purchasing collateral at a private sale if the collateral is customarily sold on a recognized market because the commercial reasonableness of the creditor's purchase price is so easily measured against an objective benchmark.[251]

Whether a "recognized market" exists for specific collateral has been frequently litigated. Courts have consistently held that stocks, bonds, and other publicly traded investments are customarily sold on a "recognized market."[252] Revised Article 9 affirms these decisions through its use of the New York Stock Exchange as an example of a "recognized market."[253] Courts have reached inconsistent results in the numerous cases involving

246. U.C.C. § 9-610 cmt. 7 (1998).

247. *Id.* For much of the drafting process, "meaningful opportunity" implied access to "the public (or the commercially relevant segment of the public)." The parenthetical was deleted very late in the drafting process. *Compare id.* § 9-610 cmt. 7 (Draft Nov. 16, 1998) (including the parenthetical), *with id.* (1998) (omitting the parenthetical).

248. *Id.* § 9-610(c)(2) (1998); *id.* § 9-504(3) (1995).

249. *See* Aspen Enters., Inc. v. Bodge, 44 Cal. Rptr. 2d 763, 772 (Ct. App. 1995); Cooper Invs. v. Conger, 775 P.2d 76, 80 (Colo. Ct. App. 1989); Havins v. First Nat'l Bank, 919 S.W.2d 177, 183 (Tex. App. Ct.—Amarillo 1996, no writ).

250. U.C.C. § 9-610 cmt. 9 (1998).

251. A creditor's sale, whether to itself or another party, of collateral normally sold on a recognized market may be statutorily commercially reasonable. *See id.* § 9-627(b).

252. *See, e.g.*, FDIC v. Blanton, 918 F.2d 524, 528 (5th Cir. 1990); Finch v. Auburn Nat'l Bank, 646 So. 2d 64, 65-66 (Ala. Civ. App. 1994); Hersch v. Citizens Sav. & Loan Ass'n, 194 Cal. Rptr. 628, 630 (Ct. App. 1983); Northern Trust Co. v. Burlew, 525 N.E.2d 1123, 1126 (Ill. App. Ct. 1988); Washburn v. Union Nat'l Bank & Trust Co., 502 N.E.2d 739, 742 (Ill. App. Ct. 1986); Marine Midland Bank-Rochester v. Vaeth, 388 N.Y.S.2d 548, 550 (Sup. Ct. 1976).

253. *See* U.C.C. § 9-610 cmt. 9.

motor vehicles[254] and livestock.[255] Revised Article 9 will bring some consistency in future cases, as it states: "A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions."[256] Under this statement, a "recognized market"—at least as that term is used in revised Article 9—does not exist for automobiles or livestock, for no two cars and no two animals are identical. With few exceptions, courts have hesitated to find a recognized market for most other collateral.[257] This trend should continue if courts are mindful of the purpose underlying this narrow exception to the general rule prohibiting a creditor from buying collateral at a private disposition.

Another limited exception under the current and revised versions of Article 9 permits the creditor to purchase collateral at a private disposition if the collateral is "the subject of widely distributed standard price quotations."[258] Neither version offers any insight into the intended meaning

254. *See, e.g.,* Chrysler Credit Corp. v. H & H Chrysler-Plymouth-Dodge, Inc., 927 F.2d 270, 273 (6th Cir. 1991) (no); Norton v. National Bank of Commerce, 398 S.W.2d 538, 540 (Ark. 1966) (no); Community Management Ass'n v. Tousley, 505 P.2d 1314, 1315-16 (Colo. Ct. App. 1973) (no); Beneficial Fin. Co. v. Reed, 212 N.W.2d 454, 459 (Iowa 1973) (no); Nelson v. Monarch Inv. Plan, 452 S.W.2d 375, 376-77 (Ky. Ct. App. 1970) (no); Ford Motor Credit Co. v. Russell, 519 N.W.2d 460, 465 (Minn. Ct. App. 1994) (yes); L.C. Arthur Trucking, Inc. v. Evans, 13 U.C.C. Rep. Serv. 2d (Callaghan) 623, 625 (Va. Cir. Ct. 1990) (yes); Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 570 P.2d 702, 712 (Wash. Ct. App. 1977) (yes).

255. *See, e.g.,* Wippert v. Blackfeet Tribe, 695 P.2d 461, 464 (Mont. 1985) (no); State Bank v. Hansen, 302 N.W.2d 760, 765 (N.D. 1981) (no); First Nat'l Bank v. Kehn Ranch, Inc., 394 N.W.2d 709, 714-15 (S.D. 1986) (yes); Havins v. First Nat'l Bank, 919 S.W.2d 177, 183-84 (Tex. App.—Amarillo 1996, no writ) (yes, but not in this case); Cottam v. Heppner, 777 P.2d 468, 473 (Utah 1989) (yes).

256. U.C.C. § 9-610 cmt. 9.

257. *See, e.g.,* Smith v. Mark Twain Nat'l Bank, 805 F.2d 278, 289 (8th Cir. 1986) (certificates of deposit and repurchase agreements); *In re* Bro Cliff, Inc., 8 U.C.C. Rep. Serv. (Callaghan) 1144, 1149 (Bankr. W.D. Mich. 1971) (inventory of air conditioners, televisions, and stereos); Canadian Community Bank v. Ascher Findley Co., 280 Cal. Rptr. 521, 533-34 (Ct. App. 1991) (oil rig); Cooper Invs. v. Conger, 775 P.2d 76, 80-81 (Colo. Ct. App. 1989) (restaurant equipment and furniture); 1st Charter Lease Co. v. McAl, Inc., 679 P.2d 114, 115 (Colo. Ct. App. 1984) (computer hardware); Hertz Commercial Leasing Corp. v. Dynatron, Inc., 427 A.2d 872, 876 (Conn. Super. Ct. 1980) (photocopier); Roberts v. First-Citizens Bank & Trust Co., 478 S.E.2d 809, 813 (N.C. Ct. App. 1996) (certificate of deposit); M.P. Crum Co. v. First Southwest Sav. & Loan Ass'n, 704 S.W.2d 925, 927 (Tex. App.—Tyler 1986, no writ) (residential mortgages). *But see* Clark v. EZN, Inc., 67 Cal. Rptr. 2d 403, 405 (Ct. App. 1997) (concluding that distributorship was a "recognized market" for foldable steel ramps that attach to back of truck tailgates); Aspen Enters., Inc. v. Bodge, 44 Cal. Rptr. 2d 763, 771-73 (Ct. App. 1995) (holding that the jury could conclude from evidence that "recognized market" existed for new tires); American Parts Sys., Inc. v. T & T Automotive, Inc., 358 N.W.2d 674, 677 (Minn. Ct. App. 1984) (finding a "recognized market" for auto parts).

258. U.C.C. § 9-610(c)(2).

of the phrase. Nor does either version suggest answers to two questions asked by Professor Gilmore: (i) To what degree must price quotations be disseminated before they are "widely distributed"?; and (ii) When do price quotations become "standard"?[259] One author has suggested that collateral falls within the exception if prices realized in actual sales of comparable property are currently available by quotation.[260] That interpretation is plausible and would be in line with the policy underlying any limited exception to the general prohibition against creditor purchases at private sales. Yet, it is difficult to imagine collateral that would fall within this exception (at least under the suggested interpretation), such as securities and commodities, that also would not be sold on a recognized market.[261]

The Drafting Committee presumably contemplated that some items of collateral not sold on a recognized market might be subject to widely distributed standard price quotations; otherwise, the latter exception is redundant. One possibility is an automobile for which a vehicle valuation (the so-called "blue book" value) is published by the National Automobile Dealers Association (NADA).[262] But because no two vehicles are identical in every respect, the stated price may be better viewed as a mere starting point for price negotiation,[263] a factor that reduces the likelihood that the

259. *See* 2 GILMORE, *supra* note 2, § 44.6, at 1244.

260. *See* Richard C. Tinney, Annotation, *Nature of Collateral Which Secured Party May Sell or Otherwise Dispose of Without Giving Notice to Defaulting Debtor Under UCC § 9-504(3)*, 11 A.L.R.4TH 1060, 1064 (1982).

261. For evidence that significant overlap between the two exceptions may exist, see U.C.C. § 9-627 cmt. 4 (describing a "recognized market" as a market "in which there are standardized price quotations"). Notice the omission of "widely distributed." *Cf. id.* § 9-610(c)(2) (referring to "widely distributed standard price quotations").

262. *See generally* N.A.D.A., OFFICIAL USED CAR GUIDE (1998).

263. *See In re* Ruiz, 227 B.R. 264, 267 (Bankr. W.D. Tex. 1998) (observing that a "blue book" quote "is only a guide" and "is in no way definitive with regard to . . . the particular replacement value"); *In re* Younger, 216 B.R. 649, 655 (Bankr. W.D. Okla. 1998) (noting that NADA price quotes "do not purport to constitute definitive appraisals of particular vehicles"); Carter v. Ryburn Ford Sales, Inc., 451 S.W.2d 199, 202-03 (Ark. 1970) (stating that price quotes in NADA books are "merely a guide"); Jon Ann Giblin & Stephen P. Strohschein, *Current Issues and Recent Developments in Consumer Bankruptcy*, 52 CONSUMER FIN. L.Q. REP. 78, 79 (1998) (observing that NADA price quotes "may be inaccurate as regards particular vehicles"); Alvin C. Harrell, *Consumer Credit 1997*, 52 CONSUMER FIN. L.Q. REP. 104, 105 (1998) (contending that NADA price quotes "are notoriously inaccurate in the context of an individual transaction"); *see also In re* Brown, 221 B.R. 46, 48 (Bankr. S.D. Ga. 1998) (observing, in a case involving a foreclosure sale of two mobile homes, that "NADA values have no relevance unless some evidentiary connection is established with the actual mobile homes in question"); Northern Commercial Co. v. Cobb, 778 P.2d 205, 210-11 (Alaska 1989) (holding that market publications listing wholesale and retail prices did not mean Caterpillar tractor was subject to widely distributed standard price quotations); Hayes v. Ring Power Corp., 431 So. 2d 226, 228-29 (Fla. Dist. Ct. App. 1983) (ruling that auction value publications listing successful bids at public auctions did not create widely distributed standard price quotations for Caterpillar tractor). *But see* Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 570 P.2d 702, 712 (Wash. Ct. App. 1977) (concluding, with no analysis, that new and used cars, trucks, and campers are not only sold on a recognized market but also subject

published valuations are "widely distributed standard price quotations."[264] Other than motor vehicles, one is left to ponder whether any other collateral, not already sold on a recognized market, falls within the exception. For whatever reason (perhaps, in light of extensive revisions elsewhere, a desire to leave untouched language that has generated little controversy), the Drafting Committee declined to clarify the intended meaning of "widely distributed standard price quotations," and failed to offer any examples.[265] In the absence of any official pronouncement, creditors are well-advised to place little, if any, reliance on this exception as an excuse to purchase collateral at a private disposition.

Revised Article 9 expressly offers purchasers a benefit not provided by current Article 9—warranties. Under revised section 9-610, a creditor that disposes of collateral provides the purchaser with warranties relating to title, possession, quiet enjoyment, and the like if those warranties, as a matter of law, accompany a voluntary disposition of such collateral.[266] For example, if the creditor is selling collateral consisting of goods, then the creditor provides the purchaser with the title warranty of section 2-312(1),[267] the warranty of merchantability under section 2-314(1) (if the creditor is a merchant in this type of collateral), and, in applicable situa-

to widely distributed standard price quotations). Courts have had little trouble concluding that other types of collateral are not subject to the exception. *See, e.g.,* Cooper Invs. v. Conger, 775 P.2d 76, 81 (Colo. Ct. App. 1989) (restaurant equipment and furniture); Hertz Commercial Leasing Corp. v. Dynatron, Inc., 427 A.2d 872, 876 (Conn. Super. Ct. 1980) (photocopier); M.P. Crum Co. v. First Southwest Sav. & Loan Ass'n, 704 S.W.2d 925, 927 (Tex. App.—Tyler 1986, no writ) (residential mortgages).

264. *M.P. Crum Co.*, 704 S.W.2d at 927.

265. The author requested clarification by the Drafting Committee. *See* Zinnecker Memorandum, *supra* note 102, at 2.

266. *See* U.C.C. § 9-610(d) (1998); *see also* PEB STUDY GROUP REPORT, *supra* note 7, at 218-19 (recommending that a foreclosing creditor provide warranties that can be disclaimed or modified).

267. Under § 2-312, the foreclosing creditor does not warrant good title because foreclosure sales are "out of the ordinary commercial course." *See* U.C.C. § 2-312(2) & cmt. 5 (1995). The Drafting Committee has expressly rejected this assumption, setting up a conflict between Article 2 and revised Article 9. *See id.* § 9-610 cmt. 10 (1998). To resolve the conflict, comment 5 to § 2-312 will be revised to read as follows:

> 5. Subsection (2) recognizes that sales by sheriffs, executors, *certain* foreclosing lienors and persons similarly situated ~~are~~ may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.
>
> *Foreclosure sales under Article 9 are another matter. Section 9-610 provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (2) or under the special provisions for exclusion in Section 9-610, a disposition of collateral consisting*

tions, the warranty of fitness for a particular purpose in section 2-315. And if the creditor opts to lease, rather than sell, any goods, then the creditor may trigger the warranty provisions of Article 2A concerning interference and infringement, merchantability, and fitness for a particular purpose.[268]

Most creditors will not be pleased that revised Article 9 exposes them to potential liability for a warranty breach, especially when potential damages may exceed the disposition proceeds. That displeasure should be short-lived, as revised section 9-610 permits the creditor to disclaim the warranties by communicating to the purchaser: "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" (or words of similar import).[269] What remains to be resolved is whether the creditor may disclaim the warranties in all situations, or only in those situations where to do so is commercially reasonable. The statute does not expressly place any limits on the ability to disclaim the warranties, suggesting the creditor has unfettered discretion. If the warranty disclaimer is one of the "other terms" under revised section 9-610(b) that must be commercially reasonable, however, then a cautious creditor may hesitate to disclaim any warranties; to do so may invite the debtor to argue that the disclaimer depressed the sales price and, therefore, was commercially unreasonable.[270] Guidance on this issue from the Drafting Committee would have been most welcome.[271]

of goods under Section 9-610 includes the warranties imposed by subsection (1) and, if applicable, subsection (3).

Id. § 2-312(2) cmt. 5 (1998).

For an article critical of this about-face, see Robyn L. Meadows, *Warranties of Title, Foreclosure Sales, and the Proposed Revision of U.C.C. § 9-504: Has the Pendulum Swung Too Far?*, 65 FORDHAM L. REV. 2419, 2433-41 (1997) (suggesting that a title warranty will increase the risks, complexity, and costs associated with secured lending).

268. *See* U.C.C. §§ 2A-211, 2A-212, 2A-213 (1995) (respectively). Some of these warranties are made only if the creditor-lessor is a merchant. *See id.* §§ 2A-211(2), 2A-212; *cf.* Mercedes-Benz Credit Corp. v. Lotito, 703 A.2d 288, 292 (N.J. Super. Ct. App. Div. 1997) (permitting consumer lessee to assert breach of warranty against financing lessor having close relationship with seller and manufacturer).

269. *See* U.C.C. § 9-610(f) (1998). The communication may be in any form provided by applicable law or in the form of a "record" as defined in § 9-102(a)(69). *See id.* § 9-610(e)-(f) & cmt. 11.

270. *See* Meadows, *supra* note 267, at 2444-49; *see also* Rapson, *supra* note 4 ("[I]f the secured party is conducting a public foreclosure sale of new automobiles, would it be commercially reasonable for the automobiles to be sold without the customary manufacturer's warranties that usually accompany the sale of new cars?") (manuscript at 30). *But see* Weise Memorandum, *supra* note 198 ("I would think that it would be unlikely that it would not be commercially reasonable to do something (disclaim a warranty) that the statute expressly authorizes.").

271. The author requested guidance from the Drafting Committee. *See* Zinnecker Memorandum, *supra* note 102, at 2.

Three other foreseeable questions arise. First, is "as is," "with all faults," or other language "of similar import"?[272] If the law that creates the warranties makes such a disclaimer effective, then such a disclaimer is effective under revised section 9-610.[273] Second, may a creditor that adopts the recommended disclaimer but fails to expressly reference the warranties against merchantability (if a sale) or interference and infringement (if a lease) rely on the phrase "or the like" as an effective disclaimer of those warranties?[274] Probably not. Those warranties, if applicable, do not arise under revised section 9-610 and, therefore, must be disclaimed in the manner required by other governing law.[275] And third, must any disclaimer be conspicuous?[276] If warranties of title, possession, quiet enjoyment, and the like are disclaimed, the disclaimer need not be conspicuous. Whether disclaimers of other warranties must be conspicuous is governed by law other than revised Article 9.[277] Prudence dictates that a creditor take steps to avoid these potential landmines.

REVISED SECTION 9-611: NOTIFICATION BEFORE DISPOSITION OF COLLATERAL

Under current Article 9, a secured party that intends to dispose of collateral is almost always required to send notice of the intended disposition to the debtor.[278] Several reasons justify the notice requirement: (i) it informs the debtor how long it has to redeem the collateral; (ii) it permits the debtor to attend, and actively participate in, any public sale; (iii) it allows the debtor to contact other potential buyers; and (iv) it gives the debtor an opportunity to monitor the commercial reasonableness of the disposition.[279] Under current law, the creditor is excused from sending any notice in limited situations but is required to send notices to ad-

272. *See* U.C.C. § 2-316(3)(a) (1995) (permitting waiver of implied warranties through the use of "as is," "with all faults," or similar language); *id.* § 2A-214(3)(a) (same).

273. *Id.* § 9-610(e)(1) & cmt. 11 (1998).

274. *See id.* § 2-316(2) (1995) (indicating that a waiver must mention merchantability); *id.* § 2A-214(4) (requiring "specific" language in order to waive warranties against interference and infringement).

275. *Id.* § 9-610 cmt. 11 (1998).

276. *Id.* §§ 2-316(2), 2A-214(2), 2A-214(4) (1995) (requiring "conspicuous" language); *see also id.* § 1-201(10) (defining "conspicuous").

277. *Id.* § 9-610 cmt. 11 (1998).

278. *See id.* § 9-504(3) (1995).

279. *See, e.g.*, Central W. Rental Co. v. Horizon Leasing, 967 F.2d 832, 839 (3d Cir. 1992); *In re* Excello Press, Inc., 890 F.2d 896, 902 (7th Cir. 1989); Travis v. Boulevard Bank N.A., 880 F. Supp. 1226, 1232 (N.D. Ill. 1995); Peoples Heritage Sav. Bank v. Theriault, 670 A.2d 1391, 1393 (Me. 1996); Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste*, 40 UCLA L. REV. 695, 715-20 (1993). Professor Lloyd offers an additional and "perhaps the most important reason" why business debtors want notice: it tells them how fast to file a bankruptcy petition that will halt the proposed sale. *Id.* at 716.

ditional parties at other times.[280] This duty to send notice, together with some of the procedural aspects of that duty and the composition of the distribution list, are found in revised section 9-611.

A creditor that disposes of collateral under revised section 9-610 must send "a reasonable authenticated notification of disposition."[281] As under current law, notice is excused if the collateral (i) is perishable, (ii) threatens to decline speedily in value, or (iii) is of a type customarily sold on a recognized market.[282] The reason for the first two exceptions is rather obvious: any benefit afforded by giving notice is more than offset by the harm resulting from a decrease in potential proceeds (and a corresponding increase in the size of the deficiency) if disposition is postponed until after notice is given and the debtor is given a commercially reasonable period of time to protect its interests.[283] Notice is excused when the collateral is sold on a recognized market for the same reason that permits a creditor to buy such collateral at a private sale; independent market forces dictate a uniform price against which the reasonableness of the price received by the creditor is easily measured. That same reason permits a creditor to buy at a private sale if the collateral is subject to widely distributed standard price quotations, so it remains a mystery why the statute does not similarly excuse notice when the creditor disposes of such collateral.[284] In

280. *See* U.C.C. § 9-504(3).

281. *See id.* § 9-611(b) (1998). The contents of the notification are the subject of § 9-613 (transactions other than consumer-goods transactions), and § 9-614 (consumer-goods transactions). *See infra* notes 337-80 and accompanying text.

282. U.C.C. § 9-611(d) (1998); *id.* § 9-504(3) (1995).

283. Courts have refused to find these two exceptions applicable in most cases. *See, e.g.,* United States v. Mid-States Sales Co., 336 F. Supp. 1099, 1103 (D. Neb. 1971) (cattle); Hollander v. California Mfg. Enters., Inc., 51 Cal. Rptr. 2d 694, 698-99 (Ct. App. 1996) (business machines and equipment); Backes v. Village Corner, Inc., 242 Cal. Rptr. 716, 717-19 (Ct. App. 1987) (restaurant equipment); Rock Rapids State Bank v. Gray, 366 N.W.2d 570, 574 (Iowa 1985) (restaurant equipment); McKesson Corp. v. Colman's Grant Village, Inc., 938 S.W.2d 631, 632 (Mo. Ct. App. 1997) (pharmaceuticals, pharmacy records, and customer lists); Boatmen's Bank v. Dahmer, 716 S.W.2d 876, 879 (Mo. Ct. App. 1986) (cattle); Roberts v. First-Citizens Bank & Trust Co., 478 S.E.2d 809, 813 (N.C. Ct. App. 1996) (certificate of deposit); Chittenden Trust Co. v. Andre Noel Sports, 621 A.2d 215, 218 (Vt. 1992) (outdated, high-fashion ski and sports apparel). *But see* Diamond Bank v. Carter (*In re* Carter), 203 B.R. 697, 702 (Bankr. W.D. Mo. 1996) (stating that the exception applicable to collateral threatening to decline speedily in value "may well be applicable" to cattle); *In re* Umbles Drew-Hale Pharmacy, Inc., 80 B.R. 421, 425 (Bankr. N.D. Ohio 1987) (concluding that approaching expiration dates of pharmaceuticals made exceptions applicable); Moutray v. Perry State Bank, 748 S.W.2d 749, 752 (Mo. Ct. App. 1988) (holding that evidence of significant price declines and impending harvests of competing wheat and corn crops established collateral of milo threatened to decline speedily in value); American City Bank v. Western Auto Supply Co., 631 S.W.2d 410, 420-21 (Tenn. Ct. App. 1981) (holding that exceptions applied to the November sale of Christmas toys and other seasonal items); *cf.* City Bank & Trust Co. v. Van Andel, 368 N.W.2d 789, 794 (Neb. 1985) (noting that whether cattle were perishable was a question of fact).

284. No such exception exists under current Article 9 either. *See* U.C.C. § 9-504(3) (1995).

any event, a creditor that fails to send notice should not place too much hope in the forgiveness offered by the narrow exceptions.

As before, the notice must be sent to the debtor.[285] A frequently litigated issue has been whether a guarantor is a "debtor" and thus entitled to notice.[286] That issue disappears under the revisions, which obligate the creditor to send notice to any "secondary obligor,"[287] a term that includes guarantors.[288]

Yet, while the revised statute expands the circle of recipients in some transactions, it contracts the circle elsewhere. For example, Bank makes a $10,000 loan to Borrower, who offers no collateral. At Borrower's encouragement (and Bank's insistence), however, Parent offers collateral to secure repayment of the loan. When Borrower defaults, Bank seizes and prepares to sell the collateral. Under current Article 9, Bank is required to send notice of the sale to Borrower and Parent, both of whom are "debtors."[289] Under the revisions, however, Bank is obligated to send notice only to Parent (the "debtor").[290] Borrower is not entitled to notice; it is not a "debtor" under revised section 9-102(a)(28), and its liability as the maker of the note is primary, so it is not a "secondary obligor" under revised section 9-102(a)(71). That this is the intended result is evidenced by the official comments.[291] And excluding Borrower from the notice pro-

But see id. § 9-504 cmt. 18 (Draft Nov. 15, 1995) ("[T]he presence of a recognized market provides an independent check on the price received upon disposition, thereby eliminating the need to notify the debtor of an intended disposition. Under this view, notification probably also should be excused if the collateral is 'of a type which is the subject of widely distributed standard price quotations.' "). The author requested an explanation by the Drafting Committee. *See* Zinnecker Memorandum, *supra* note 102, at 2.

285. *See id.* § 9-611(c)(1) (1998); *id.* § 9-504(3) (1995).

286. *See* Annotation, *Construction of Term "Debtor" As Used In UCC § 9-504(3), Requiring Secured Party to Give Notice to Debtor of Sale of Collateral Securing Obligation*, 5 A.L.R.4TH 1291 (1981) (listing cases); *see also* Harry C. Sigman, *Guarantors' Pre-Default Waivers of Article 9 Debtors' Rights to Notice and Commercially Reasonable Disposition Should Be Effective*, 29 IDAHO L. REV. 627, 636-37 (1992-1993) (suggesting that the drafters never intended for guarantors to fall within the definition of "debtor").

287. *See* U.C.C. § 9-611(c)(2) (1998).

288. *See id.* § 9-102(a)(59) (defining "obligor" in a manner that includes any party that "(i) owes 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"); *id.* § 9-102(a)(71) (including within the definition of "secondary obligor" an obligor whose obligation is "secondary"); *id.* § 9-102 cmt. 2(a) (directing the reader to "consult the law of suretyship to determine whether an obligation is secondary"); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 15(a) (1996) ("[I]f the parties to a contract identify one party as a 'guarantor' or the contract as a 'guaranty,' the party so identified is a secondary obligor . . . ."); *see also* Willoughby v. Board of Trustees, 466 S.E.2d 285, 289 (N.C. Ct. App. 1996) (observing that "a guarantor . . . is only secondarily or derivatively liable"); Garner v. Corpus Christi Nat'l Bank, 944 S.W.2d 469, 475 (Tex. Ct. App.—Corpus Christi 1997, writ denied) (noting that "[a] guaranty creates a secondary obligation"), *cert. denied*, 119 S. Ct. 410 (1998).

289. *See* U.C.C. § 9-105(1)(d) (1995).

290. *See id.* § 9-611(c)(1) (1998).

291. *See id.* § 9-611 cmt. 3; *id.* § 9-102 cmt. 2a (example 3).

visions seems fair, as Borrower's ultimate economic liability either to Bank (on the promissory note) or to Parent (on Borrower's reimbursement obligation) remains the same, whether or not Borrower receives notice of the disposition.

If the collateral consists of consumer goods, then the creditor need not send notice to anyone other than the debtor and any secondary obligor.[292] This rule makes sense in most transactions because the value of the collateral makes it attractive as security only to the foreclosing creditor, usually holding a purchase-money security interest. It is conceivable, however, that a high-dollar consumer good that retains its value over a period of time (such as a grand piano) might simultaneously serve as collateral on multiple loans. Nevertheless, the statute does not require the foreclosing creditor to give notice to any other secured creditor.

Under current Article 9, a creditor disposing of collateral other than consumer goods is obligated to send notice to other secured parties from whom the creditor has timely received written notice of a competing interest in the collateral.[293] Under revised Article 9, the secured party must send its notice to three additional parties. First, any other person claiming an interest (whether statutory, judicial, or consensual) in the collateral is entitled to notice if the creditor has received, before the "notification date,"[294] an authenticated notification of the competing interest.[295] Second, any other secured party or lienholder is entitled to notice if, ten days prior to the "notification date," that party's interest was perfected by a filed financing statement that identified the collateral, was indexed under the debtor's then-existing name, and was filed in the then-proper place.[296] And third, any other secured party (regardless of priority) is entitled to notice if, ten days prior to the "notification date," that party held a security interest perfected by compliance with any statute, regulation, or treaty referenced in revised section 9-311(a).[297]

292. *Id.* § 9-611(c); *cf. id.* § 9-504(3) (1995) (requiring a secured party to send notice of a disposition of consumer goods only to a "debtor," a term often interpreted to include any guarantor). Both of these versions of Article 9 define "consumer goods" in the same manner. *See id.* § 9-102(a)(23) (1998); *id.* § 9-109(1) (1995).

293. *See id.* § 9-504(3) (1995).

294. As used in revised § 9-611, the "notification date" refers to the date when the creditor sends its disposition notice to the debtor and any secondary obligor, unless all of those parties have previously waived their right to notice in accordance with revised § 9-624(a), in which case the "notification date" is the date of the last waiver. *See id.* § 9-611(a) (1998).

295. *See id.* § 9-611(c)(3)(A).

296. *See id.* § 9-611(c)(3)(B) & cmt. 4. For much of the drafting process, the statute required notice to other secured parties *but not to lienholders*. This created an unexplained inconsistency with statutory language requiring a secured party to send notice of a strict foreclosure to other secured parties *and lienholders*. *See id.* §§ 9-611(c)(3)(B), 9-621(a)(2) (Draft approved at NCCUSL Annual Meeting, July 30, 1998). The author questioned this inconsistency, and it was remedied in a subsequent draft. *See* Zinnecker Memorandum, *supra* note 102, at 4; *see also* U.C.C. § 9-611(c)(3)(B) (Draft Nov. 16, 1998) (inserting "or lienholder").

297. *See id.* § 9-611(c)(3)(C) (1998). For some unexplained reason, the provision does not

As revised, Article 9 no longer allows the creditor to remain passive, sending notice only to those parties that have contacted it. Instead, in order to ensure that notice is sent to all required parties, the foreclosing creditor not only must order a U.C.C. search report listing financing statements filed against the debtor[298] but also must be familiar with other means of perfection, and order search reports from appropriate recording officers. This should not pose a problem for most parties that hold a perfected security interest, for it is not likely that any other competing interest is perfected in a manner or place different from the manner and place of its own perfection.[299] No doubt some delay will arise between ordering and receiving information from public recording officers. The statute acknowledges this delay and affords the creditor a safe harbor against challenges from non-notified parties if the creditor complies with two requirements. First, the creditor must request (in a commercially reasonable manner) the search report no later than twenty days, and no earlier than thirty days,

protect lienholders, who also are excluded from the companion notice provision in the strict foreclosure statute. Perhaps the referenced statutes, regulations, and treaties do not allow for the recordation of judicial, statutory, and other nonconsensual liens, whereas applicable law may permit lienholders to evidence their property interest by filing a financing statement in the U.C.C. records.

298. Prior to the 1972 amendments to Article 9, § 9-504(3) obligated a creditor to send notice to any other person with a security interest in the collateral who had duly filed a financing statement indexed in the name of the debtor. *See id.* § 9-504(3), 3B U.L.A. 128 (1992) ("Text Prior to 1972 Amendment"). The 1972 amendments deleted this requirement because the drafters believed that the "burdens of searching the record . . . were greater than the circumstances called for because as a practical matter there would seldom be a junior secured party who really had an interest needing protection in the case of a foreclosure sale." *Id.* at 129 ("Official Reasons for 1972 Change"). Nevertheless, a few states that adopted the 1972 amendments retained this requirement. *See, e.g.,* ARIZ. REV. STAT. ANN. § 47-9504(C) (West 1997); FLA. STAT. ANN. § 679.504(3) (West Supp. 1998); TEX. BUS. & COM. CODE ANN. § 9.504(c) (West 1992); WASH. REV. CODE ANN. § 62A.9-504(3) (West 1995); WIS. STAT. ANN. § 409.504(3) (West 1995); *see also* CLARK, *supra* note 2, ¶ 4.06[3], at 4-99 (suggesting that the pre-1972 statutory requirement of sending notice to all secured parties of record was "better public policy"); *cf.* PEB STUDY GROUP REPORT, *supra* note 7, at 214-15 (encouraging the Drafting Committee to consider requiring a disposing creditor to notify other secured parties of record but revealing a preference by a "substantial majority" of the PEB Study Group to retain existing notice requirements).

299. This will be true in most, but certainly not all, situations. For example, Bank may perfect a security interest in Dealer's inventory of motor vehicles by filing a financing statement. Dealer's inventory may include a trade-in that is subject to a security interest perfected by the former owner's creditor under a certificate of title statute. The vehicle would be encumbered by two security interests perfected in different ways. Also, Lender may perfect a security interest in Dealer's inventory of musical instruments by filing a financing statement with the central filing office (e.g., the U.C.C. filing office of the Texas Secretary of State). Dealer's inventory may include a used piano acquired from a musician who used it as a consumer good. The used piano is subject to a security interest perfected by the musician's creditor under a financing statement recorded with the local filing office (e.g., the U.C.C. filing office of Harris County, Texas). The piano would be encumbered by two security interests perfected by filing, but the filings would be recorded in different locations.

before the notification date.[300] Second, if the creditor receives a response before the notification date, the creditor must send its notice before the notification date to each named secured party and lienholder whose financing statement covers the collateral.[301] Because the safe harbor requires the secured party to send notice only to parties "named in that response,"[302] the secured party need not worry that it has breached its duty by failing to notify a party erroneously omitted from the report. Placing the risk of non-notification on the non-notified parties rather than on the foreclosing creditor seems fair for two reasons. First, the non-notified parties are somewhat protected through the foreclosing creditor's obligation to conduct a commercially reasonable disposition.[303] And second, any person with a compelling property interest can obligate the foreclosing creditor to send a disposition notice to it merely by timely notifying the foreclosing creditor of its interests.[304]

An issue occasionally litigated under present law is whether oral notice is acceptable. Current Article 9 does not expressly require written notice,[305] and a few courts have concluded that the notice may be oral.[306]

300. *See* U.C.C. § 9-611(e)(1) (1998). Conduct that may prevent the search from being commercially reasonable includes: submitting the request to the wrong public official; submitting the request in a manner not prescribed by the public official; failing to include the required fee with the request; and submitting a request against a trade name, misspelled name, or otherwise incorrect name of the debtor.

301. *See id.* § 9-611(e)(2). Subsection (e)(2) did not reference "lienholder" until very late in the drafting process. *Compare id.* § 9-611(e)(2)(B) (Draft Nov. 15, 1998) ("each secured party named in that response"), *with id.* (1998) ("each secured party or other lienholder named in that response").

302. *Id.* § 9-611(e)(2)(B) (1998).

303. *See id.* § 9-610(b).

304. *See id.* § 9-611(c)(3)(A). A holder of a subordinate property interest that does not receive notice of a disposition because the U.C.C. search report either is not timely received by the foreclosing creditor or provides incorrect or incomplete information does not have any remedy against the foreclosing creditor (notwithstanding the termination of the holder's subordinate property interest under revised § 9-617(a)(3)). *See id.* § 9-611 cmt. 4. A non-notified holder may have a remedy, however, if it timely notified the foreclosing creditor of its competing property interest under revised § 9-611(c)(3)(A). Therefore, the holder should take steps to inform the foreclosing creditor of its property interest and not rely solely on the notice provided by its financing statement that may not appear on a search report that may not be timely received by the foreclosing creditor.

305. *Cf. id.* § 9-504(3) (1995) (referencing the creditor's receipt of "written notice" from competing claimants); *id.* § 9-505(2) (requiring the creditor to send "[w]ritten notice" of its proposal to retain collateral in satisfaction of the unpaid obligation); *see also id.* § 1-201(38) (defining "send" in a manner strongly suggesting a written product).

306. *See, e.g., In re* Excello Press, Inc., 890 F.2d 896, 902-03 (7th Cir. 1989); BancFlorida v. De Pasquale (*In re* De Pasquale), 166 B.R. 663, 674 (Bankr. N.D. Ill. 1994) (applying Florida law); Hall v. Owen County State Bank, 370 N.E.2d 918, 925 (Ind. Ct. App. 1977); Crest Inv. Trust, Inc. v. Alatzas, 287 A.2d 261, 264 (Md. 1972); Schulke v. Gemar, 870 P.2d 1378, 1380 (Mont. 1994); Beltran v. Groos Bank, N.A., 755 S.W.2d 944, 945-46 (Tex. App.—San Antonio 1988, no writ). *But see* Executive Fin. Servs., Inc. v. Garrison, 722 F.2d 417, 418-19 (8th Cir. 1983) (concluding that Missouri law requires written notice); Jones v. First Nat'l

By requiring the creditor to send "authenticated notification,"[307] the revised statute stops short of requiring written notice, but it does effectively preclude oral notice.[308] Although oral notice can just as easily accomplish the underlying purposes of the notice requirement as a written notice, oral notice does expose the sender to proof problems not associated with written notice, such as whether notice was sent (and, if so, its contents). These proof problems are reduced, if not eliminated, by the statutory requirement that notification be authenticated.

As under the current statute, notice must be sent but need not be received.[309] Assuming that the creditor sends notice to the last known address with proper postage but discovers that a party has not received the notice, must the creditor resend the notice or attempt to contact the party by other means? Current Article 9 does not expressly address the issue,[310] so any guidance offered by the revisions would have been most welcome. Revised Article 9 acknowledges the issue but delegates it "to judicial resolution, based upon the facts of each case."[311] As the case law has been mixed,[312] prudence dictates that a creditor utilize all information readily

Bank, 505 So. 2d 352, 355-56 (Ala. 1987) (holding that oral notice is not permitted by Tennessee law); Walker v. Grant County Sav. & Loan Ass'n, 803 S.W.2d 913, 916-17 (Ark. 1991) (ruling that notice must be written); Stoppi v. Wilmington Trust Co., 518 A.2d 82, 86 (Del. 1986) (requiring written notice); Van Ness v. First State Bank, 430 N.W.2d 109, 110-11 (Iowa 1988) (holding that oral notice is insufficient); McKee v. Mississippi Bank & Trust Co., 366 So. 2d 234, 238 (Miss. 1979) (requiring written notice); Lendal Leasing, Ltd. v. Farmer's Wayside Stores, Inc., 720 S.W.2d 376, 379 (Mo. Ct. App. 1986) (concluding that notice must be written); DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 243 N.W.2d 745, 749 (Neb. 1976) (holding that secured creditor must send written notice).

307. U.C.C. § 9-611(b) (1998).

308. *See id.* § 9-611 cmt. 5; *id.* § 9-102(a)(7) (defining "authenticate"); *id.* § 9-102 cmt. 9.

309. *See id.* § 9-611(b) (obligating the creditor to "send" notice to various parties); *id.* § 9-504(3) (1995) (stating that reasonable notification shall be "sent"); *see also id.* § 1-201(38) (defining "send"); *id.* § 1-201 cmt. 26 (contrasting "send" and "receive"); Commerce Bank v. Dooling, 875 S.W.2d 943, 946 (Mo. Ct. App. 1994) ("Bank correctly notes that the code requires only that a secured party send notice of a sale and not that the debtor actually receive it."); First Nat'l Bank v. Mork, 850 P.2d 954, 956 (Mont. 1993) ("However, [§ 9-504(3)] must be read in conjunction with [§ 1-201(26)], which does not require that the debtor receive actual notice of the sale; it only requires that the creditor take reasonable steps to assure that the debtor is notified.").

310. *But see* CAL. COM. CODE § 9504(3) (West Supp. 1998) (requiring notice to the debtor to be "delivered personally or be deposited in the United States mail" using the address from the financing statement, the security agreement, or "such other address as may have been furnished to the secured party in writing for this purpose," or, in the absence of any of the foregoing, to the "last known address"); MONT. CODE ANN. § 30-9-504(3)(b) (1997) (stating that notice is reasonable when sent by certified mail to the debtor's most recent address in the loan documents or in any other writing from the debtor and received by the creditor).

311. U.C.C. § 9-611 cmt. 6 (1998).

312. *See, e.g.,* Ford Motor Credit Co. v. Solway, 825 F.2d 1213, 1219 (7th Cir. 1987) (holding that creditor's notice sent to address in contract was commercially reasonable as creditor had no knowledge that debtor had moved); *In re* Marshall, 219 B.R. 687, 690-91 (Bankr. M.D.N.C. 1997) (concluding that notices sent via first class mail or certified mail, return

available to it in an effort to notify the intended party. Otherwise, a court may conclude that the creditor has failed to take all steps necessary to

receipt requested, to debtors' last known address were reasonable even though secured party knew debtors no longer resided at that address); Stone v. Cloverleaf Lincoln-Mercury, Inc., 546 So. 2d 388, 390 (Ala. 1989) (concluding that creditor who sold collateral one day before receiving "unclaimed" certified notice acted in commercially reasonable manner); Underwood v. First Alabama Bank, 453 So. 2d 742, 745 (Ala. Civ. App. 1983) (holding that notice sent to contract address was reasonable, even though notice was returned because contract address did not provide apartment number); Day v. Schenectady Discount Corp., 611 P.2d 568, 573 (Ariz. Ct. App. 1980) (concluding that a question of fact existed on reasonableness of notice sent to debtor's last known address that creditor knew was not current); Friendly Fin. Corp. v. Bovee, 702 A.2d 1225, 1228 (Del. 1997) (determining that notice sent to an address with an incorrect zip code was not reasonable notice); Henson v. Foremost Ins. Co., 280 S.E.2d 848, 849-50 (Ga. Ct. App. 1981) (holding that a creditor who made unsuccessful efforts to discover debtor's forwarding address could rely on certified notice sent to debtor's last known address); La Grange Bank & Trust Co. v. Rodriguez, 485 N.E.2d 394, 398 (Ill. App. Ct. 1985) (concluding that creditor's decision to send notice to debtor at his wife's address rather than to debtor's last known address raised an issue of fact on the reasonableness of notice); Fidelity Fin. Servs., Inc. v. Stewart, 608 So. 2d 1111, 1112-14 (Miss. 1992) (imposing duty on creditor to make additional good faith effort to notify debtor after creditor received notice receipt signed by debtor's neighbor-relative); *Commerce Bank*, 875 S.W.2d at 947 (holding that the creditor failed to take reasonable steps to notify debtor where creditor, with knowledge that debtor had not received mailed notice, failed to utilize telephone numbers and work address on loan application); *First Nat'l Bank & Trust Co.*, 850 P.2d at 956 (holding that the return of creditor's notice sent to last known address did not make notice unreasonable as creditor had no knowledge of debtor's new address and had contacted debtor's former wife who also had no knowledge of debtor's new address); First Nat'l Bank & Trust Co. v. Hermann, 286 N.W.2d 750, 751-53 (Neb. 1980) (concluding that the creditor could rely on certified notice, sent to correct address but returned unclaimed, even though creditor knew debtor's telephone number at place of employment and had previously contacted debtor at that number on other matters); Altman Tractor & Equip. Co. v. Weaver, 343 S.E.2d 444, 445 (S.C. 1986) (holding that the creditor was not required to take further action after sending registered mail to proper address and receiving acknowledgment signed by third person); NationsBank v. Clegg, 29 U.C.C. Rep. Serv. 2d (CBC) 1366, 1373 (Tenn. Ct. App. 1996) ("While absolute proof of receipt of notice may not be required in every instance, a creditor, who only makes one attempt to contact the debtor, and is left uncertain of receipt of the notice, has not fulfilled its obligation to the debtor when it proceeds with a disposition less than two weeks from mailing its first [certified] notice."); ITT Indus. Credit Co. v. Rector, 34 U.C.C. Rep. Serv. (Callaghan) 379, 380-81 (Tenn. Ct. App. 1982) (ruling that the creditor was required to attempt to contact debtor by known telephone number after properly-addressed notice was returned unclaimed); Commercial Credit Corp. v. Cutshall, 28 U.C.C. Rep. Serv. (Callaghan) 277, 279-82 (Tenn. Ct. App. 1979) (finding reasonable notification by creditor that unsuccessfully attempted to contact debtor through relatives and employer after registered notice sent to most recently known address of debtor was returned unclaimed); Mallicoat v. Volunteer Fin. & Loan Corp., 415 S.W.2d 347, 351 (Tenn. Ct. App. 1966) (ruling that the creditor's reliance on registered notice returned unclaimed was not commercially reasonable because creditor had knowledge of debtor's place of employment and parents' residence); First Virginia Bank-Mountain Empire v. Ruff, 17 U.C.C. Rep. Serv. 2d (CBC) 663, 664 (Va. Cir. Ct. 1992) (concluding that bank could not rely on notice sent to contract address because bank knew debtor had not received notice and bank knew of other possible addresses which it could use but did not).

provide "reasonable" notification,[313] a conclusion that could result in damages[314] and affect the amount of any deficiency.[315]

REVISED SECTION 9-612: TIMELINESS OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL

Current Article 9 does not expressly state how much "advance warning" a disposition notice must provide, but it does require "reasonable notification."[316] Current default provisions do not define "reasonable notification," but the comments indicate that "at a minimum [notice] must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests" in the collateral.[317] Not surprisingly, the timeliness of the creditor's notice is occasionally litigated.[318] Many creditors confront the issue by including in the loan documents a variation of the following: "Notice sent not less than _____ calendar days prior to any disposition of collateral shall be commercially reasonable." So long as the number of days is not manifestly unreasonable,[319] most courts uphold the provision.[320]

313. *See* U.C.C. § 9-611(b) (1998) (obligating the secured party to send "*reasonable* authenticated notification") (emphasis added).

314. *See id.* § 9-625(b) (stating that "a person is liable for damages in the amount of any loss caused by a failure to comply with this article"). *But see id.* § 9-628(a) (excusing liability if a secured party does not know how to communicate with a debtor or obligor).

315. *See id.* § 9-626(a)(3)-(4).

316. *See id.* § 9-504(3) (1995).

317. *See id.* § 9-504 cmt. 5.

318. *See, e.g.,* City Nat'l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1312-13 (8th Cir. 1991) (holding that two weeks' notice of date after which collateral could be sold at private sale was reasonable); Bagel Break Bakery, Inc. v. Bagelman's, Inc., 431 So. 2d 676, 676-77 (Fla. Dist. Ct. App. 1983) (holding that two days' notice was unreasonable); Wells v. Central Bank of Alabama, N.A., 347 So. 2d 114, 119 (Ala. Civ. App. 1977) (ruling that notice received by debtor on same day as sale was "clearly deficient"); Credithrift of Am., Inc. v. Smith, 308 S.E.2d 53, 53 (Ga. Ct. App. 1983) (concluding that notice sent 10 days prior to public sale was reasonable, but finding that other parts of notice were unreasonable); Ennis v. Atlas Fin. Co., 172 S.E.2d 482, 484 (Ga. Ct. App. 1969) (concluding that the reasonableness of a two-day notice of private sale was a jury issue); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 436 (Minn. 1983) (holding that notice postmarked on date of sale was inadequate); Chadron Energy Corp. v. First Nat'l Bank, 459 N.W.2d 718, 729 (Neb. 1990) (observing that compliance with state's minimum requirement of three business days may not be commercially reasonable in all cases); Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 919 (Nev. 1977) (holding that a creditor who sold collateral on June 2, after sending letter on May 25, did not give timely notice); Franklin State Bank v. Parker, 346 A.2d 632, 635 (N.J. Dist. Ct. 1975) (holding that three days' notice of private sale was not timely).

319. *See* U.C.C. § 9-501(3) (permitting parties to agree on standards by which statutory rights and duties are to be fulfilled if standards are not manifestly unreasonable).

320. *See, e.g.,* Aetna Fin. Co. v. Culpepper, 320 S.E.2d 228, 232-33 (Ga. Ct. App. 1984) (upholding a 10-day notice provision); Mullins v. Horne, 587 P.2d 773, 776-77 (Ariz. Ct. App. 1978) (upholding a five-day notice provision); Liberty Bank v. Honolulu Providoring

Revised Article 9 speaks directly to the timeliness of notice through revised section 9-612, which states that the issue usually raises a question of fact, not law.[321] The question becomes one of law, however, and is resolved in the secured party's favor, if the secured party sends notice at least ten days prior to the earliest time of disposition stated in the notice.[322] To avail itself of this safe harbor, the creditor must satisfy three conditions.

First, the secured party must send notice after default;[323] it cannot send notice prior to default (but at least ten days before any scheduled disposition) and fall within the ambit of the statute.[324]

Second, the *manner* in which the notice is sent must be commercially reasonable.[325] As the definition of "send" permits a "deposit in the mail,"[326] notice deposited with the U.S. Postal Service should suffice, at least if the secured party and the recipient are both located in the same state or, perhaps excluding Alaska and Hawaii, different states. In other situations, notice sent by "regular mail" may not be commercially reasonable if the time necessary to accomplish delivery leaves the recipient with little or no time in which to take steps to protect its interest in the collateral.[327] Prudence suggests that the few extra dollars spent to send notice by an expedited delivery service is money well spent if the creditor is concerned that the timeliness of notice sent by other means may be challenged.[328] Alternatively, the creditor may attempt to avoid those challenges by selecting a disposition date that is more than ten days after notice is sent.

And third, the transaction cannot be a consumer transaction.[329] During much of the drafting process, the Drafting Committee contemplated a

Inc., 650 P.2d 576, 579-80 (Haw. 1982) (upholding a five-day notice provision, but observing that the creditor failed to comply with it); Wippert v. Blackfeet Tribe, 695 P.2d 461, 464 (Mont. 1985) (upholding a five-day notice requirement); Byrd v. General Motors Acceptance Corp., 581 S.W.2d 198, 201 (Tex. Civ. App.—Waco 1979, no writ) (upholding a 10-day notice requirement).

321. *See* U.C.C. § 9-612(a) (1998); *cf.* BancFlorida v. De Pasquale (*In re* De Pasquale), 166 B.R. 663, 674 (Bankr. N.D. Ill. 1994) (holding that the *adequacy* of notice raised question of law, but that the issue did not concern the *timeliness* of notice); West Chicago State Bank v. Rogers, 515 N.E.2d 1261, 1268 (Ill. App. Ct. 1987) (same); First Nat'l Bank v. DiDomenico, 487 A.2d 646, 649 (Md. 1985) (same).

322. *See* U.C.C. § 9-612(a), (b); *see also* PEB STUDY GROUP REPORT, *supra* note 7, at 231 (recommending a 10-day safe harbor).

323. *See* U.C.C. § 9-612(b).

324. *See id.* § 9-612 cmt. 3.

325. *See id.*

326. *Id.* § 1-201(38) (1995).

327. *See id.* § 9-612 cmt. 3 (1998) (suggesting that a creditor may not invoke the statutory safe harbor by using surface mail to contact an overseas debtor).

328. The secured party may wish to include some variation of the following provision in the security agreement: "Notice sent by either party via [list of mutually acceptable delivery services] shall be deemed a commercially reasonable means of delivery."

329. *See* U.C.C. § 9-612(b); *see also id.* § 9-102(a)(26) (defining "consumer transaction").

twenty-one-day safe harbor in consumer secured transactions and a ten-day safe harbor in other transactions,[330] but this distinction disappeared by the summer of 1997.[331] What, then, is the rule in consumer transactions? During part of the drafting process, revised section 9-612 included a subsection (c), which stated:

> The limitation of the rule in subsection (b) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rule in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.[332]

Subsection (c) was deleted late in the drafting process,[333] but the substance of the subsection was retained in an accompanying comment.[334] This comment, however, did not survive the final editing process. It seems curious that the Drafting Committee chose not to offer any guidance, especially when some direction may have reduced the foreseeable problem of nonuniform results.

The statute does not obligate the creditor to give at least ten days notice; the creditor can give notice less timely. A creditor that does so, however, invites challenges on the timeliness of the notice. Such a challenge raises a fact question,[335] which will frustrate the creditor's ability to win a deficiency judgment on a motion for summary judgment. A creditor that desires more flexibility than that afforded by the ten-day safe harbor may wish to negotiate a shorter period into the security agreement. A creditor's compliance with the negotiated provision should survive scrutiny, absent a finding that the shorter period is manifestly unreasonable.[336]

REVISED SECTION 9-613: CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL: GENERAL

Current Article 9 requires the creditor to send "reasonable notification" but provides little guidance on its contents. A notice of public disposition

330. *See, e.g., id.* § 9-612 (Draft Oct. 1996); *id.* § 9-504(j) (Draft July 28-Aug. 4, 1995).

331. *See, e.g., id.* § 9-612 (Draft July 25-Aug. 1, 1997) (providing a 10-day safe harbor in transactions other than consumer-goods secured transactions, but not providing any safe harbor for consumer goods secured transactions). This draft offered no explanation for the change from the preceding February 1997 draft.

332. *Id.* § 9-612(c) (Draft July 24-31, 1998).

333. *Id.* § 9-612 (Draft approved at NCCUSL Annual Meeting, July 30, 1998).

334. *Id.* § 9-612 cmt. 4 (Draft Nov. 16, 1998).

335. *See id.* § 9-612(a), (b) (1998).

336. *See id.* § 9-603(a); *see also* Mullins v. Horne, 587 P.2d 773, 776-77 (Ariz. Ct. App. 1978) (upholding a five-day notice provision); Liberty Bank v. Honolulu Providoring Inc., 650 P.2d 576, 579-80 (Haw. 1982) (same); Wippert v. Blackfeet Tribe, 695 P.2d 461, 464 (Mont. 1985) (same). The same contractual option should be available in a consumer transaction, where any timeliness issue raises a question of fact. *See* U.C.C. § 9-612(a).

must give the time and place of disposition,[337] and a notice of private disposition must provide the time after which the disposition will occur.[338] Creditors that send notices with this minimum information, and then dispose of collateral accordingly, withstand content-based challenges on the reasonableness of the notice. But creditors who send a notice that does not provide the minimum information, or who dispose of collateral contrary to the notice, often find themselves litigating their compliance with section 9-504(3)—usually unsuccessfully.[339]

The contents of reasonable notice are now prescribed with much more particularity by revised section 9-613, a section that does not apply to consumer-goods transactions.[340] Under revised Article 9, a notice of dis-

337. *See* U.C.C. § 9-504(3) (1995).

338. *See id.*

339. *See, e.g.,* Lavender v. AmSouth Bank, N.A., 539 So. 2d 193, 194-95 (Ala. 1988) (holding that notice stating collateral "will be sold at public auction or private sale" failed to notify debtor of subsequent public sale); Simmons Mach. Co. v. M & M Brokerage, Inc., 409 So. 2d 743, 749-50 (Ala. 1981) (concluding that a letter stating equipment would be "eligible" for resale after a specific date was defective); Connecticut Bank & Trust Co., N.A. v. Incendy, 540 A.2d 32, 34-37 (Conn. 1988) (ruling that the creditor's failure to give notice of subsequent private sale of unauctioned collateral violated § 9-504(3), even though the notice of earlier public sale was proper); Hertz Commercial Leasing Corp. v. Dynatron, Inc., 427 A.2d 872, 874-76 (Conn. Super. Ct. 1980) (concluding that proper notice of public sale in August 1977 did not give debtor reasonable notice of private sale held in May 1978); Staley Employee Credit Union v. Christie, 443 N.E.2d 731, 732-33 (Ill. App. Ct. 1982) (holding that notice of public sale to be held on June 17 at a particular time and place did not give notice of subsequent sales on June 29 and June 30); Peoples Heritage Sav. Bank v. Theriault, 670 A.2d 1391, 1392-94 (Me. 1996) (ruling that the creditor failed to comply with notice requirements by sending letter stating: "The purpose of this notice is to provide you with notice of the Bank's intent to dispose of the Collateral by private sale. Therefore, please be advised that the Collateral will be sold at public auction on August 20, 1993."); Society Bank, N.A. v. Cazeault, 613 N.E.2d 1103, 1105-06 (Ohio Ct. App. 1993) (holding that the creditor's failure to include state—which was different from debtor's residence, location of creditor's office, and place where collateral was seized—and full name of city in notice was fatal); Finova Capital Corp. v. Nicolette, 689 A.2d 924, 927-28 (Pa. Super. Ct. 1997) (concluding that a letter stating that the creditor "will proceed with reclaiming the equipment on or shortly after May 10, 1993," and will subsequently "proceed with the sale of the equipment" failed to comply with statutory requirements), *cert. denied sub nom.* Finova Capital Corp. v. Lifecare X-Ray, Inc., 118 S. Ct. 1185 (1998); General Motors Acceptance Corp. v. Carter, 349 S.E.2d 342, 343-44 (S.C. Ct. App. 1986) (ruling that a letter indicating vehicle "*may* be sold at any time" after a specific time was defective), *vacated,* 361 S.E.2d 620 (S.C. Ct. App. 1987); Knights of Columbus Credit Union v. Stock, 814 S.W.2d 427, 430-31 (Tex. App.—Dallas 1991, writ denied) (holding that a letter referring to "possible sale," without more information, was inadequate); Wright v. Interfirst Bank Tyler, N.A., 746 S.W.2d 874, 875-77 (Tex. App.—Tyler 1988, no writ) (concluding that a letter advising debtor of "public sale on April 13, 1984 at 12:00 Noon at the location of Interfirst Bank, Tyler, Texas" was inadequate to give notice of private sale on May 24, 1984); Scharf v. BMG Corp., 700 P.2d 1068, 1071 (Utah 1985) (holding that a letter stating equipment "will be sold *on September 30, 1980*" did not reasonably inform the debtor of private sales on October 1 and 9, 1980).

340. *See* U.C.C. § 9-613 (1998); *see also id.* § 9-102(a)(24) (defining "consumer-goods transaction"). The content and form of disposition notices in consumer-goods transactions are

position is sufficient if it: (i) describes the debtor and the secured party; (ii) describes the collateral to be disposed; (iii) states the method of disposition (e.g., sale, lease, license, etc.); (iv) states that the debtor is entitled to an accounting of the unpaid debt for a stated fee; and (v) states the time and place of any public sale of the collateral or the time after which the collateral will be disposed by another manner.[341]

The statute offers the following model form:

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: [*Name of debtor, obligor, or other person to which the notification is sent*]
From: [*Name, address, and telephone number of secured party*]
Name of Debtor(s): [*Include only if debtor(s) are not an addressee*]

[*For a public disposition:*]

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

Day and Date:
Time:
Place:

[*For a private disposition:*]

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

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, *as applicable*] [for a charge of $____]. You may request an accounting by calling us at [*telephone number*].[342]

The proposed form requires a collateral description but does not dictate how detailed the description must be. A description that is lifted from the security agreement or financing statement and otherwise "reasonably identifies what is described"[343] should be acceptable, but the failure of the statute to expressly require a description used in either document suggests that other descriptions may be sufficient.[344] Incorporating the description from either document by reference (i.e., "the 'Collateral' as defined in the Security Agreement executed by Debtor and Secured Party and dated

governed by revised § 9-614. *See infra* notes 361-80 and accompanying text. Although revised § 9-613 does not apply to consumer-goods transactions, the notice contents listed in revised § 9-613(1) are required to be included in a disposition notice in a consumer-goods transaction through revised § 9-614(1)(A). The rights and duties created by revised § 9-613 cannot be waived or varied. *See* U.C.C. § 9-602(7).

341. *See* U.C.C. § 9-613(1).

342. *Id.* § 9-613(5).

343. *See id.* § 9-108(a); *cf. id.* § 9-110 (1995) (stating that a description is sufficient "if it reasonably identifies what is described").

344. *Cf.* N.C. GEN. STAT. § 25-9-602(c) (1995) (suggesting that a notice of public sale should describe the collateral "as it is described in the security agreement . . . and may add such further description as will acquaint bidders with the nature of the property").

March 1, 1998," or "the 'Collateral' as described in financing statement no. 98-12345 filed with the Texas Secretary of State on March 1, 1998") may be permissible but is not a practice to be encouraged. The time and expense necessary to either accurately retype, or attach a photocopy of, the description pales in comparison to the time and expense that may be incurred in litigating the propriety of referencing a description in an ancillary document, a copy of which the recipient may not possess or readily obtain.

The model notice leaves to the creditor's discretion whether to charge a fee for the accounting and, if so, how much. A decision to charge a fee no greater than the amount in revised section 9-210(f)[345] should be safe from challenge. The reasonableness of a larger fee—which could appear to be intended to suppress the request, rather than to compensate the creditor for its reasonable expenses—may be scrutinized.

The creditor need not adopt the proposed form verbatim;[346] a notice that substantially complies with the five requirements of revised section 9-613(1) is sufficient.[347] By adopting a "substantial compliance" standard, the statute acknowledges that the slightest error may not necessarily destroy the reasonableness of the notification. Failure to rigidly adhere to the statutory requirements will not be fatal if the errors are "minor errors that are not seriously misleading."[348] Rephrased, non-fatal errors are both minor and not seriously misleading; all other errors destroy the effectiveness of the notice. By adopting a literal reading, however, a court is permitted to conclude that a major error cannot be excused even if the error is not seriously misleading. Yet, if evidence reveals that the fatally flawed notice accomplished its intended purpose of providing the recipient with an opportunity to protect its interest in the collateral, then perhaps a court should overlook the defect, notwithstanding the statutory language. A court might reach that result by concluding that an error not seriously misleading must be minor.

Although used in a different context, the phrase "minor errors that are not seriously misleading" has a home and a history under current Article 9,[349] spawning a legion of cases.[350] This suggests that whether a notice contains an error that is minor or seriously misleading is likely to be the subject of frequent debate with inconsistent results. Some courts may conclude that the complete omission of any of the five prescribed elements

345. U.C.C. § 9-210(f) (1998) (providing the debtor with one free request for an accounting every six months, but permitting the creditor to charge $25 for each additional request); *cf. id.* § 9-208(3) (1995) (same, with a $10 maximum charge).

346. *See id.* § 9-613(4) (1998).

347. *See id.* § 9-613(1)-(3).

348. *Id.* § 9-613(3)(B).

349. *See id.* § 9-402(8) (1995) (preserving the effectiveness of financing statements with minor errors that are not seriously misleading).

350. *See, e.g.*, 9 HAWKLAND ET AL., *supra* note 15, § 9-402:14; CLARK, *supra* note 2, ¶ 2.10.

from the notice is a major error,[351] while others may hold that the failure to include any of the required information is not fatal if the notice accomplishes its intended purpose.[352] Examples of errors that may be minor but not seriously misleading include some typographical mistakes and digit transpositions, such as referring to the debtor as "XYZ Corp." instead of "XYZ, Inc."[353] or switching the last two numbers of the zip code of the debtor's address if the switch does not frustrate timely delivery.[354] Examples of errors that may not be minor include providing the required day and date of public sale but using inconsistent information (e.g., indicating that the sale will be held on Tuesday, July 20, when July 20 is a Monday) or selling collateral that is described in the security agreement and financing statement but not described in the notice.[355]

Creditors may supplement the model form with additional information—such as a reference to one or more of the loan documents, a description of the event of default, or a statement of acceptable payment methods—without necessarily removing the notice from the safe harbor.[356] If the additional information is erroneous and concerns any rights provided to the recipient by revised Article 9, however, the notice may be defective.[357] For example, the notice might assert that the creditor is en-

351. *See, e.g.,* Guardian State Bank v. Lambert, 834 P.2d 605, 606-08 (Utah Ct. App. 1992) (holding that the creditor's failure to comply with statutory signature requirements rendered financing statement ineffective and could not be saved by the "minor errors" exception of § 9-402(8)).

352. *See, e.g.,* Riley v. Miller, 549 S.W.2d 314, 315-16 (Ky. Ct. App. 1977) (holding that the absence of statutorily mandated addresses of debtor and secured party from financing statement was not fatal error where lien creditor lived in same town as debtor and secured party, and lien creditor knew their respective addresses).

353. *See, e.g., In re* Reeco Elec. Co., 415 F. Supp. 238, 240-42 (D. Me. 1976) (concluding that financing statements identifying Reeco Electric Co., Inc., as "Reeco Electric" and Petersbuilt Incorporated as "Petersbuilt, Inc." were effective, and misidentifications were minor errors not seriously misleading).

354. *Cf.* Adams v. Nuffer, 550 P.2d 181, 182 (Utah 1976) (holding that the discrepancy between boat's serial number on financing statement—D.M.F.A. 0082 M-75L—and actual serial number—D.M.F.A. 0082 M-74L—was insufficient to invalidate effectiveness of financing statement).

355. *See, e.g.,* Rotta v. Early Indus. Corp., 733 P.2d 576, 577-78 (Wash. Ct. App. 1987) (holding that the creditor who used financing statement description of collateral in disposition notice failed to give reasonable notice of sale of collateral described in security agreement but not described in financing statement).

356. *See* U.C.C. § 9-613(3)(A) (1998).

357. Late in the drafting process, revised § 9-613 permitted erroneous information not otherwise required by the statute "unless the erroneous information is misleading with respect to rights and remedies arising under this article." *See id.* § 9-613(4)(B) (Draft Mar. 1998). The quoted language was deleted in the next draft. *See id.* § 9-613(3) (Draft Apr. 6, 1998). Most, if not all, erroneous information concerning a recipient's statutory rights would be seriously misleading, a major error, or both. The language may have been deleted as unnecessary or redundant in light of nearby language that overlooks an error only if the error is minor and not seriously misleading.

titled to retain any surplus proceeds or advise the debtor that its right of redemption terminates on a specific date. Both declarations are incorrect statements of rights afforded to a debtor by revised Article 9[358] and may destroy the effectiveness of an otherwise proper notice.

A creditor that departs from, negligently completes, or supplements the model form invites challenges to the propriety of its notice.[359] In some cases, the creditor may find a lifeline in the words of the statute. In other cases, however, the lifeline will be nothing more than a rope of sand. As failure to provide reasonable notice can have adverse consequences for the creditor,[360] prudence suggests that a creditor adhere to, and carefully complete, the model form. A creditor that does so will have no difficulty proving that its notice complies with revised section 9-613.

REVISED SECTION 9-614: CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL; CONSUMER-GOODS TRANSACTION

This section prescribes the contents and form of notice for dispositions of collateral in transactions excluded from revised section 9-613—consumer-goods transactions.[361]

Unlike revised section 9-613, which states that a notice is "sufficient" if certain information is provided,[362] revised section 9-614 indicates that the notice in a consumer-goods transaction "must" include all of the following:[363] (i) a description of the debtor, the secured party, and the collateral that is being disposed; the method of disposition; a statement that the debtor is entitled to an accounting of the unpaid debt and the charge, if any, for the accounting; and "the time and place of a public sale or the time after which any other disposition is to be made";[364] (ii) a description

358. *See id.* § 9-615(d)(1) (1998) (requiring the secured party to remit surplus proceeds to the debtor); *id.* § 9-623(c)(2) (permitting a debtor to redeem collateral at any time before a secured party has disposed of the collateral or entered into a disposition contract). For a case in which the creditor's misstatement of the debtor's redemption rights destroyed the effectiveness of its notice under § 9-504(3), see *DiDomenico v. First Nat'l Bank*, 468 A.2d 1046, 1048 (Md. Ct. Spec. App. 1984), *aff'd*, 487 A.2d 646 (Md. 1985).

359. Does such a challenge raise a question of fact, or a question of law? If the challenge concerns the absence of required information, the challenge raises a question of fact. *See* U.C.C. § 9-613(2). However, the statute does not address whether any other type of error creates a legal or factual issue. The omission of statutory clarification may lead courts to apply inconsistent labels. The author requested clarification from the Drafting Committee. *See* Zinnecker Memorandum, *supra* note 102, at 3.

360. *See, e.g.*, U.C.C. § 9-625(b), (c); *id.* § 9-626(a)(3), (4).

361. *See id.* § 9-614 ("In a consumer-goods transaction, the following rules apply . . . ."); *id.* § 9-613 ("Except in a consumer-goods transaction, the following rules apply . . . ."); *see also id.* § 9-102(a)(24) (defining "consumer-goods transaction"). The rights and duties created by § 9-614 cannot be waived or varied. *See id.* § 9-602(7).

362. *Id.* § 9-613(1).

363. *Id.* § 9-614(1).

364. *See id.* § 9-614(1)(A) (incorporating the information described in § 9-613(1)).

of the recipient's liability for any deficiency;[365] (iii) a telephone number from which the recipient can obtain the redemption price of the collateral;[366] and (iv) a telephone number or mailing address from which the recipient can obtain additional information concerning the disposition and the obligation.[367]

The section suggests that the sender adopt the following model notice:

[Name and address of secured party]
[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]
Subject: *[Identification of Transaction]*
We have your *[describe collateral]* because you broke promises in our agreement.

[For a public disposition:]

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

Date:
Time:
Place:

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

[For a private disposition:]

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

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

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

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

365. *See id.* § 9-614(1)(B); *cf.* NEB. REV. STAT. § 9-504(6) (1992) (requiring a disposition notice to include "a statement to the effect that the debtor may be liable for any deficiency existing after sale or disposition of collateral").

366. *See* U.C.C. § 9-614(1)(C).

367. *See id.* § 9-614(1)(D).

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

We are sending this notice to the following other people who have an interest in /describe collateral/ or who owe money under your agreement: *[Names of all other debtors and obligors, if any]*[368]

The opening paragraph of the notice suggests that the creditor must possess the collateral that is being disposed. As a practical matter this is true. The disposition price will be adversely affected if the debtor possesses the collateral, a complication that most likely would prompt an interested party to challenge the commercial reasonableness of the disposition. Nevertheless, as a matter of law the creditor is permitted to dispose of collateral that remains on the debtor's premises.[369]

The third paragraph (which begins "The money that we get from the sale") informs the obligated party that it may remain liable for any deficiency and should dispel (albeit belatedly) the popular notion held by many consumers that surrendering the collateral, voluntarily or otherwise, effectively discharges the consumer's liability for any unpaid debt.[370] This warning will hopefully prompt the recipient to take steps to protect its interest in the collateral, rather than remain passive, believing that the debt has been forgiven.

The following paragraph (which begins "You can get the property back") prompts two comments. First, the notice informs the recipient that it can redeem the collateral "at any time before we sell it." The notice would be more precise if it informed the recipient that it may redeem the collateral "at any time before we sell it or enter into a contract for its disposition."[371] Second, the recipient may be surprised that the "full amount" of the redemption price may include future payments, not just past-due amounts. Mere surprise alone does not make the notice misleading, but the creditor is reminded that, when calculating the "full amount," it should not include future payments if either the loan documents do not include an acceleration clause or the creditor has failed to properly exercise the clause.

The subsequent paragraph (beginning "If you want") provides the creditor with discretion to charge a fee for providing the recipient with a written explanation of the amount owed to the creditor. A creditor probably should not charge more than $25.[372]

368. *Id.* § 9-614(3).

369. *See id.* § 9-609(a)(2); *see also id.* § 9-610(a) (indicating that the only predicate to disposition is a default).

370. *See* Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 207 (1994) ("Consumers who surrender vehicles on request from creditors often think that the surrender unwinds the transaction and that there will be no deficiency.").

371. *See* U.C.C. § 9-623(c)(2).

372. *See id.* § 9-210(f).

As under revised section 9-613, the creditor need not adopt the particular phrasing of the proposed form.[373] A creditor is cautioned that the degree to which erroneous information is tolerated by revised section 9-614 greatly differs from revised section 9-613. Under revised section 9-614, the absence of required information makes the notice insufficient as a matter of law.[374] Also, an error in supplemental information is acceptable "unless the error is misleading with respect to rights arising under this article."[375] And the effect of voluntary information provided in a non-model form is determined by law other than Article 9.[376] This deference to other law may result in inconsistent results, as courts grapple with what test to apply and whether the test raises questions of law or fact. Unpredictability should encourage a secured party to adhere to, and carefully complete, the model form. A legitimate threat of a class action for significant statutory damages also should motivate a secured party to be diligent and precise.[377]

Undoubtedly, creditors that transact business with both consumers and non-consumers will be unhappy that revised Article 9 does not provide one generic, all-purpose notice and a single set of rules governing permitted errors. Those creditors may be concerned that revised Article 9 forces them to correctly determine whether a transaction is a consumer-goods transaction before they can send notice. In many transactions the concern will be short-lived because the classification will be obvious.[378] Ad-

373. *See id.* § 9-614(2); *id.* § 9-613(4).

374. *See id.* § 9-614(1) & cmt. 2 (stating that notice "must" provide certain information); *cf. id.* § 9-613(2) (permitting a trier of fact to conclude that the absence of specific information does not destroy the sufficiency of the notice).

375. *Id.* § 9-614(5); *cf. id.* § 9-613(3)(B) (allowing minor errors that are not *seriously* misleading).

376. *See id.* § 9-614(6); *cf. id.* § 9-613(3)(A) (permitting the inclusion of supplemental information). The numerous changes over the last several months of the drafting process to provisions ultimately codified at revised § 9-614 suggest that treatment of errors and supplemental information was the subject of much debate. *See, e.g., id.* § 9-613(b)(3) (Draft Jan. 1998) (allowing substantial compliance and permitting "minor errors that are not seriously misleading"); *id.* § 9-613A(3) (Draft Mar. 1998) (bracketing language permitting substantial compliance and prohibiting "erroneous information [that] is misleading with respect to rights and remedies arising under this article"); *id.* § 9-613A(a)(4) (Draft Apr. 6, 1998) (allowing the standard form to contain errors in supplemental information "unless the error is misleading with respect to rights arising under this article," and permitting a court "to apply established approaches" to determine "the proper rule for notifications in another form and for errors in information not required"); *id.* § 9-614(6) (Draft approved at NCCUSL Annual Meeting, July 30, 1998) ("If a notification under this section is not in the form of paragraph (3), law other than this article determines the effect of including information not required by paragraph (1).").

377. *See* Rapson, *supra* note 4 (manuscript at 26-27).

378. The mere presence of an individual debtor does not make the election obvious. For example, a music store may intend to sell a repossessed piano originally sold on credit to an individual. If the individual used the piano for personal enjoyment and relaxation, the instrument is a consumer good under revised § 9-102(a)(23), the transaction is a consumer-

ditionally, revised Article 9 provides a safe harbor for the creditor that acts in reasonable reliance on the debtor's representations concerning the purpose for which the collateral has been used, acquired, or held.[379] Therefore, in order to protect itself against a challenge that the wrong form of notice was sent, a creditor should revise its loan documents—particularly those used in transactions with consumers—to include such a warranty.

By proposing a notice unique to consumer-goods transactions, adoption of which is strongly encouraged through adherence standards that are less predictable than those applied to notices sent under section 9-613, the Drafting Committee has acknowledged the proposition that consumers, in general, are less sophisticated in commercial matters than their business counterparts, and, as a result, must rely on the law to protect their interests which they themselves cannot adequately protect. If that proposition reflects reality, then the desired purpose could have been better achieved if the circle of protection had been drawn in a manner that included all consumer debtors, not just those who incur a debt for a particular purpose or offer specific types of collateral.[380]

CONCLUSION

As evidenced by the foregoing analysis, the default provisions of revised Article 9 are much more detailed than their counterparts under current Article 9. With additional detail comes increased statutory complexity. But the additional guidance should improve the efficiency of secured financing through greater certainty and less judicial intervention. The foregoing is true not only with respect to the default provisions examined in Part I of this Article but also those that are examined in Part II, including provisions that address application of foreclosure proceeds, rights of transferees of collateral, strict foreclosure, collateral redemption, and noncompliance.

goods transaction under revised § 9-102(a)(24), and the form and content of the disposition notice is subject to revised § 9-614. If the individual is a professional musician who used the piano primarily in a studio, however, the instrument is equipment under revised § 9-102(a)(33), the transaction is not a consumer-goods transaction, and the form and content of the disposition notice is governed by revised § 9-613.

379. *See id.* § 9-628(c)(1) (1998).

380. *See id.* § 9-102(a)(24) (defining "consumer-goods transaction" in a manner that requires an obligation incurred "primarily for personal, family, or household purposes" collateralized by "consumer goods").