North Dakota Law Review

Volume 60 | Number 3 Article 6

1984

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Kathryn Page

A SECURED PARTY'S RIGHT TO A DEFICIENCY JUDGMENT AFTER NONCOMPLIANCE WITH THE RESALE PROVISIONS OF ARTICLE 9

KATHRYN PAGE*

I. INTRODUCTION

A creditor's ability to obtain a deficiency judgment if he does not comply with the resale provisions of section 9-504 of the Uniform Commercial Code (Code) has long been an issue of debate.[1] Several jurisdictions, in response to this problem, have created a presumption that the repossessed collateral is worth the amount of the outstanding debt.[2] To recover a deficiency, the

*B.A., Bowling Green State University, Bowling Green, Ohio, 1980; J.D., University of North Dakota, 1983; member of the North Dakota Bar; currently practicing in Grand Forks, North Dakota.

1. U.C.C. § 9-504 (1978). Section 9-504 outlines the creditor's procedures for disposition of the debtor's collateral after the debtor's default. *See id.*

2. Jurisdictions creating the presumption that the repossessed collateral equals the outstanding debt when the creditor does not comply with the resale provisions of the Uniform Commercial Code are Alaska (*see* Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alaska 1969)); Arkansas (*see* Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966)); Colorado (*see* Community Mgmt. Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973)); Connecticut (*see* Savings Bank of New Britain v. Booze, 34 Conn. Supp. 532, 382 A.2d 226 (Conn. Super. Ct. 1977)); Indiana (*see* Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (1977)); Mississippi (*see* Walker v. V.M. Motor Co., 325 So.2d 905 (Miss. 1976)); Nebraska (*see* Cornett v. White Motor Corp., 190 Neb. 496, 209 N.W.2d 341 (1973)); Nevada (*see* Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 560 P.2d 917 (1977)); New Jersey (*see* Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (Ocean County Ct. 1971)); New Mexico (*see* Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975)); North Dakota (*see*

secured party must rebut this presumption by showing that the price received for the collateral was equal to the collateral's fair market value.[3] The purposes of this Article are to examine the development of this presumption and to discuss the evidence necessary to rebut it.

II. PROCEEDINGS AFTER DEFAULT

A. REPOSSESSION, DISPOSITION, AND DISTRIBUTION OF PROCEEDS

Before this Article analyzes the various approaches to remedy creditor noncompliance, a brief discussion of the parties' rights and liabilities after default may be helpful. The post-default proceedings that will be discussed in this Article include repossession, disposition, and distribution of the proceeds.

Unless the parties have agreed otherwise, the secured party may take possession of the collateral securing the debt after default.[4] After the creditor has repossessed the collateral, one of three events must occur. First, the debtor may redeem the property by paying the debt and any consequential expenses incurred by the secured party.[5] Second, if the debtor does not redeem, the secured party may keep the collateral in full satisfaction of the debt.[6] Finally, the secured party may "sell, lease or otherwise dispose of . . . the collateral"[7] at a public or private proceeding.[8]

State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980)); North Carolina (*see* Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976)); Rhode Island (*see* Associates Capital Serv. Corp. v. Riccardi,____R.I.____, 408 A.2d 930 (1979)); and Texas (*see* Ward v. First State Bank, 605 S.W.2d 404 (Tex. Civ. App. 1980)).

3. *See, e.g.*, Norton v. National Bank of Commerce, 240 Ark. 143, ____, 398 S.W.2d 538, 542 (1966) (when repossession sale not conducted according to law the creditor has the burden of proving the amount that should have been obtained through repossession sale conducted according to law); Community Mgmt. Ass'n v. Tousley, 32 Colo. App. 33, 38, 505 P.2d 1314, 1317 (1973) (when repossession sale not conducted in accordance with UCC requirements, secured party must prove that amount received is equal to market value).

4. U.C.C. § 9-503 (1978). Section 9-503 provides that the secured party may take possession through judicial action or without judicial action if it can be accomplished without a breach of the peace. *Id.* Furthermore, if the parties have agreed in the security agreement, the creditor may require the debtor to assemble the collateral and make it available to the secured party at a reasonably convenient designated location. *Id.*

5. *Id.* § 9-506. If the debtor wishes to redeem, he must do so before the secured party has disposed of the collateral, entered into a contract for its disposal, or discharged the obligation under § 9-505 (2). *Id.* The debtor may agree not to redeem, but this agreement must be in writing and can occur only after default. *Id.*

6. *Id.* § 9-505 (2). If the secured party proposes to retain the collateral in satisfaction of the obligation, the secured party must send written notice of this intent to the debtor. *Id.* The secured party must also send notice to other secured parties who have sent the creditor written notice of their claim of an interest in the collateral before the creditor announces his intent to retain the collateral. *Id.* If the secured party receives an objection in writing from a person entitled to receive notification within 21 days after notice was sent, the secured party must dispose of the collateral. *Id.* If the debtor has paid at least 60% of the cash price of a consumer good, the secured party must dispose of the collateral. *Id.* § 9-505 (1).

7. *Id.* § 9-504 (1).

8. *Id.* § 9-504 (3).

If the debtor does not redeem the collateral, the secured party may elect to sell or otherwise dispose of the collateral. Should the creditor elect to dispose of the collateral, he must comply with two obligations. First, except in specified circumstances,[9] the creditor must give the debtor reasonable notice of the disposition.[10] Second, the disposition must be commercially reasonable.[11]

The proceeds of the disposition are first applied to the expenses of repossession, preparation for disposition, and disposition of the collateral.[12] The debt secured by the collateral is then satisfied.[13] Next, if a subordinate security interest exists and the subordinate secured party makes a written demand for satisfaction, the proceeds necessary to satisfy this claim must be paid to the subordinate secured party.[14] Any money remaining after these distributions is paid to the debtor.[15] When the proceeds from the disposition of the collateral do not satisfy the secured indebtedness, the debtor must make up the difference, or "deficiency."[16]

Section 9-507 of the Code details the debtor's remedies if the secured creditor does not comply with Part 5 of Article 9. Prior to the sale or other disposition of the property, the debtor may obtain a court order to prevent the sale or disposition if it appears that the secured party is not complying with Part 5.[17] If an unlawful disposition has occurred, the debtor may recover from the secured party "any loss caused by failure to comply with the provisions of this Part."[18] Neither section 9-507 nor the Code comments indicate whether the debtor may be relieved of his obligation to pay the deficiency when the secured party does not conform with Part 5 of Article 9.[19]

9. *Id.* The secured party need not send notice of the sale to the debtor if the "collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market. . . ." *Id.*

10. *Id.* Section 9-504 (3) provides that "reasonable notification of the time and place of public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . ." *Id.*

11. *Id.* Section 9-504 (3) provides that "[s]ale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." *Id.*

The Code does not define the term "commercially reasonable," but case law indicates that this standard requires good faith on the part of the secured party and reasonable diligence to protect the interests of the debtor. *See e.g.,* Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (1977).

12. U.C.C. § 9-504 (1) (a) (1978).

13. *Id.* § 9-504 (1) (b).

14. *Id.* § 9-504 (1) (c). The secured party may require the holder of the subordinate security interest to provide proof of the interest before complying with the demand. *Id.*

15. *Id.* § 9-504 (2).

16. *Id.* The secured creditor and debtor may agree that the debtor will not be liable for any deficiency. *Id.* If the underlying transaction is a sale of accounts or chattel paper, the debtor's liability for a deficiency or entitlement to a surplus must be created by the security agreement. *Id.*

17. *Id.* § 9-507 (1).

18. *Id.*

19. One commentator has suggested that the issue of whether a debtor's liability may be

B. THREE RESULTS OF PROCEDURAL NONCOMPLIANCE

Courts that have construed this uniform law have not reached uniform conclusions. The courts have advanced three methods to solve the problem of a secured party's noncompliance with the resale provisions of section 9-504. The three methods are the "absolute bar" approach, the "set-off" approach, and the "shift" approach.

1. The Absolute Bar Approach

Under the absolute bar approach, a secured creditor's failure to comply with section 9-504 results in a complete bar to a deficiency judgment.[20] This position has been supported under various theories. First, courts deciding cases under the Uniform Conditional Sales Act (UCSA) generally have denied a deficiency when the secured party did not comply with the resale provisions of the Act.[21] Since the Code did not specifically reject this remedy, some courts have applied it to the Code.[22]

A second theory is based on the assumption that the notice provision of section 9-504 is intended to protect the debtor's right to redeem the property or bid at its sale.[23] The courts adopting this theory reason that when the debtor loses the right to redeem because of the creditor's misbehavior, the secured creditor should lose his right to a deficiency judgment.[24] Third, some commentators have noted that a denial of a deficiency judgment after noncompliance serves as a deterrent to creditor misbehavior.[25] Finally, other courts have considered principles of

"extinguished when a secured party does not comply with Article 9, Part 5 of the Code was not considered by the drafters of the Code." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4 at 1264 (1965).

20. *See* Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D.Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964) (secured party who fails to give notice cannot recover any deficiency); Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (Ct. App. 1972) (strict compliance with the resale provisions of § 9-504 is a condition precedent to recovery of deficiency); Leasco Data Processing Equip. v. Atlas Shirt Co., 66 Misc.2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971) (the right to a deficiency judgment depends on compliance with the notice and disposition requirements of § 9-504).

21. *See* Annot., 49 A.L.R.2d 82 (1956).

22. *See* Leasco Data Processing Equip. v. Atlas Shirt Co., 66 Misc.2d 1089, 1091, 323 N.Y.S.2d 13, 15 (Civ. Ct. 1971). The *Leasco* court stated, "If the authors of the UCC proposed to overthrow the firmly established and generally accepted construction of the older statute denying recovery for a deficiency where there was not precise compliance with the notice requirement, they surely would have manifested that intent in clear and unambiguous language." *Id.*

23. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 at 702. The court in *Skeels* stated that "to permit recovery by the security holder of a loss in disposing of collateral when no notice has been given permits a continuation of the evil which the Commercial Code sought to correct. The owner should have an opportunity to bid at the sale." *Id.*

24. *Id.*

25. *See* Posel, *Sales and Sales Financing*, 16 RUTGERS L. REV. 329, 345 (denial of a deficiency judgment should be classified as a penalty against a secured party rather than as a damage award to the debtor).

equity and fair play to support a denial of a deficiency.[26] As one court has stated, "The rule and requirement are simple. If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment."[27]

2. *The Set-Off Approach*

Other courts have adopted the "set-off" approach, which allows the secured creditor to obtain a deficiency judgment, but the creditor will be liable to the debtor for any harm resulting from his noncompliance with section 9-504.[28] The courts applying this approach have emphasized that the Code does not specifically deny a deficiency to a misbehaving secured party.[29] Rather, section 9-507(1) gives the debtor an affirmative action against the secured party.[30] Under this approach, any damages that the debtor can prove are subtracted or "set off" from the deficiency judgment, thereby lessening the total amount recovered by the secured party.[31]

3. *The Shift Approach*

Dissatisfaction with the results obtained under the "absolute bar" and the "set-off" approaches led to the creation of a third solution to the problem.[32] Under the "shift" approach, when a debtor shows that the secured party did not comply with section 9-504 in disposing of the collateral, a presumption arises that the collateral was worth at least the amount of the debt.[33] To obtain a

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26. *See, e.g.*, Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (Ct. App. 1972).

27. *Id.* at 1009, 104 Cal. Rptr. at 321.

28. *See* Mercantile Fin. Corp. v. Miller, 298 F. Supp. 797, 801 (E.D. Pa. 1968) (debtor must prove that collateral was worth more than the price received at disposition); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 869-70, 496 F.2d 966, 969 (1972) (debtor must show loss resulting from improper disposition).

29. Grant County Tractor Co. v. Nuss, 6 Wash. App. at 869-70, 496 P.2d at 969. The court in *Nuss* noted that because of the remedies detailed in U.C.C. § 9-507, the Code drafters could not have intended that failure to give notice would result in a forfeiture of the creditor's right to recover a deficiency. *Id.*

30. *Id.*

31. *Id.*

32. *See* Associates Capital Serv. Corp. v. Riccardi, ___ R.I. ___, ___, 408 A.2d 930, 933 (1979). The Supreme Court of Rhode Island held that after a commercially unreasonable sale of collateral a presumption is created that the fair market value of the collateral at the time of sale was equal to the debt owed the secured party. *Id.* at 934. The court arrived at this result after it rejected the rationales used by other courts in deciding the issue. *Id.* at 933.

33. *Id.* at 934. *See also* Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966) (when creditor does not comply with § 9-504, presumption arises that collateral sold was worth at least the amount of the debt); Universal C.I.T. Credit Corp. v. Rone, 248 Ark. 665, 453 S.W.2d 37 (1970) (failure to give notice cannot constitute an absolute defense to action for deficiency

deficiency judgment, the secured party must rebut this presumption.[34] To rebut this presumption the secured party must prove that the property was sold at its fair market value at the disposition.[35]

The North Dakota Supreme Court adopted the shift approach in *State Bank of Burleigh County Trust Co. v. All-American Sub, Inc.*[36] The court in *All-American Sub* reasoned that to allow a debtor to avoid liability because the creditor failed to comply with section 9-504[37] "would not be in keeping with the spirit of commercial reasonableness."[38] The remainder of this Article will discuss the rationales supporting the shift approach and the evidence necessary to rebut the arising presumption.

III. THE DEVELOPMENT AND APPLICATION OF THE SHIFT APPROACH

A. THE NO-NOTICE PROBLEM

The leading case applying the shift approach is *Norton v. National Bank of Commerce.*[39] Norton, an automobile dealer, sold a car to a customer, who executed a promissory note and a conditional sales contract for the unpaid purchase price.[40] On the same day Norton assigned, with recourse, the note and the contract to the National Bank of Commerce.[41] The buyer defaulted after making the first two monthly payments.[42] The National Bank of Commerce repossessed and resold the car without giving notice of the sale to either Norton or the buyer.[43] The bank demanded the

judgment); Carter v. Ryburn Ford Sale, 248 Ark. 236, 451 S.W.2d 199 (1970) (secured party's failure to comply with the resale provisions of § 9-504 did not entitle debtor to a directed verdict in a suit for damages from the sale of collateral); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (Super. Ct. Law Div. 1969) (when the secured party fails to give notice of disposition, the burden of proving the value of the collateral is on the secured party).

34. Associates Capital Serv. Corp. v. Riccardi, ___ R.I. at ___, 408 A.2d at 934.

35. *Id.* at 933-34.

36. 289 N.W.2d 772 (N.D. 1980).

37. Section 9-504 of the U.C.C. is codified at § 41-09-50 of the North Dakota Century Code. *See* N.D. CENT. CODE § 41-09-50 (1983).

38. State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 780 (N.D. 1980). The court in *All-American Sub* quoted from Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 386, 276 A.2d 402, 404-05 (Ocean County Ct. 1971) in adopting the shift approach. 289 N.W.2d at 780. Because the resale was commercially reasonable, the court did not find it necessary to decide whether or not the creditor gave sufficient notice. *Id.* at 778.

39. 240 Ark. 143, 398 S.W.2d 538 (1966).

40. Norton v. National Bank of Commerce, 240 Ark. 143, ___, 398 S.W.2d 538, 539 (1966).

41. *Id.* at ___, 398 S.W.2d at 539. Norton endorsed the note and assigned the contract to the National Bank of Commerce. *Id.* The assignment contained a provision that if the purchaser should default, Norton would repurchase the contract for the amount of the unpaid balance plus any additional costs and expenses. *Id.*

42. *Id.*

43. *Id.* The National Bank of Commerce notified the buyer by letter that it had repossessed the car. *Id.* Fifteen days later the National Bank of Commerce sold the car by private sale to one of its customers without giving notice of the sale to either the buyer or Norton. *Id.*

deficiency from Norton and, when he refused to pay, sued Norton alone for the deficiency.[44]

The Arkansas Supreme Court held that Norton was a debtor and was entitled to notice of the impending sale.[45] The court, however, rejected the absolute bar theory on two grounds.[46] The court first found that section 9-504(2) of the Code renders the debtor liable for any deficiency remaining after disposition.[47] Additionally, section 9-507 allows the debtor to recover any loss caused by the secured party's failure to comply with the resale provisions of the Code.[48] The court held that these provisions, taken together, prevent the conclusion that a noncomplying secured party is absolutely barred from obtaining a deficiency judgment.[49]

Confronting the issue of Norton's damages, the court concluded that "simple considerations of fair play cast the burden of proof upon the bank."[50] The bank wrongfully disposed of the collateral by selling it without notifying Norton.[51] By this action, the bank made it "difficult, if not impossible" for Norton to prove that he suffered any loss by the disposition.[52] The court reasoned that it would be unfair to allow the secured party to benefit from its own misconduct and determined that the equitable solution to this problem was to create the presumption that the collateral was worth at least the amount of the debt, thereby shifting the burden to the secured party to prove that the amount obtained at the sale was the amount that could reasonably have been obtained at a lawful disposition.[53]

Other courts followed the *Norton* lead and expanded on the rationale behind the shift approach. The underlying idea that runs throughout these cases is that it is fundamentally unfair to excuse a debtor of his obligation to pay an often sizeable deficiency simply

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44. *Id.* The National Bank of Commerce received $75.00 on the sale of the car, leaving an unpaid balance of $277.88 on the debt. *Id.*

45. *Id.* at ____, 398 S.W.2d at 540. The court determined that Norton was a debtor within the terms of Arkansas Statutes Annotated § 85-9-504 (3). *Id. See* ARK. STAT. ANN. § 85-9-504 (3) (1947 & Supp. 1983). Title 85 of the Arkansas Statutes Annotated "shall be known and may be cited as the Uniform Commercial Code." *Id.* § 85-1-101.

46. *Norton*, 240 Ark. at ____, 398 S.W.2d at 541-42. Norton contended that the bank's failure to give him notice of the sale discharged him from liability for any deficiency. *Id.*

47. *Id.* at ____, 398 S.W.2d at 542.

48. *Id.*

49. *Id.* at ____, 398 S.W.2d at 541-42.

50. *Id.* at ____, 398 S.W.2d at 542.

51. *Id.* Because the court determined Norton was a debtor under § 85-9-504(3) of the Arkansas Statutes Annotated, Norton was entitled to notice of the sale. *Id.*

52. *Id.*

53. *Id.* The court in *Norton* remanded the case for a new trial to determine the amount National Bank of Commerce would have obtained through a lawful sale. *Id.*

because the secured party failed to give notice.[54] At the same time, however, courts have tried to protect the debtor from the possibility of sham sales, which the notice provision was intended to prevent.[55]

Many courts have first looked to the specific language of the Code to resolve the no-notice problem. Sections 9-502(2) and 9-504(2) give the secured creditor the right to collect any deficiency remaining after disposition of secured collateral.[56] Both sections state that "unless otherwise agreed, the debtor is liable for any deficiency."[57] The Colorado Court of Appeals in *Community Management Association of Colorado Springs v. Tousley*[58] adopted the shift approach solely because section 9-504(2) gives the secured creditor the right to a deficiency.[59] Similarly, in *Associates Capital Services Corp. v. Riccardi,*[60] the Rhode Island Supreme Court held that since section 9-504(2) unequivocally renders the debtor liable for the deficiency, the absolute bar approach was unsupportable.[61] In *Hall v. Owen County State Bank*[62] the Indiana Court of Appeals

54. *See, e.g.*, Rushton v. Shea, 423 F. Supp. 468 (D. Del. 1976). The court noted that barring a deficiency judgment would unduly punish the secured party while granting the debtor a windfall. *Id.* at 471. Shifting the burden to the creditor to prove the value of the collateral sufficiently protects the commercial debtor. *Id.* The court in *Rushton* stated, "No sound policy requires us to inject a drastic punitive element into a commercial context." *Id.* (quoting Cornett v. White Motor Corp., 190 Neb. 496, 501, 209 N.W.2d 341, 344 (1973)).

55. *See, e.g.*, Ward v. First State Bank, 605 S.W.2d 404, 406 (Tex. Civ. App. 1980). In discussing a debtor's remedies when a creditor fails to comply with the notice provisions of the Uniform Commercial Code, the court in *Ward* stated:

> [C]ourts, obviously influenced by their own notions of fair play, have attempted to formulate a workable rule to protect the debtor from sham sales and at the same time to protect the secured creditor's right to a deficiency judgment. In order to effectuate this rule it is better to adopt a "rebuttable presumption" view and allow the courts to review each different fact situation rather than adopting a strict view that a failure, for any reason, to give [§ 9-504(c)] notice shall be a complete bar to a deficiency judgment. The strict view of "no notice, no deficiency" is undesirable because it is the debtor who initiates the misconduct, if any, by failing to pay his debt. Therefore, there is no reason to unduly penalize the secured creditor.

Id. at 406 (quoting Comment, *Texas Business & Commerce Code — Failure to Give Notice of Foreclosure Sale, as Required by Section 9.504, Is Not a Bar to Creditor's Right to an Article 9 Deficiency Judgment,* 8 TEX. TECH L. REV. 560, 567 (1976)).

56. U.C.C. §§ 9-504(2), 9-502(2) (1978). Section 9-504(2) states that "[i]f the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." *Id.* § 9-504(2). Section 9-502(2) also provides that "[i]f the security agreement secures an indebtedness . . . unless otherwise agreed, the debtor is liable for any deficiency." *Id.* § 9-502(2).

57. *Id.* §§ 9-504(2), 9-502(2).

58. 32 Colo. App. 33, 505 P.2d 1314 (1973).

59. Community Mgmt. Ass'n v. Tousley, 32 Colo. App. 33, ____, 505 P.2d 1314, 1316 (1973). The court in *Tousley* noted that the "right of a secured party to a deficiency judgment is established by [U.C.C. § 9-504(2)]." *Id.* The court reasoned that failure to give reasonable notice of the sale should not result in a forfeiture of the right to a deficiency judgment, but should shift the burden to the secured party to prove the market value of the collateral by use of evidence other than the amount received. *Id.* at ____, 505 P.2d 1314, 1316-17.

60. ____ R.I. ____, 408 A.2d 930 (1979).

61. Associates Capital Serv. Corp. v. Riccardi, ____ R.I. ____, ____, 408 A.2d 930, 933 (1979). The court noted that denying a deficiency runs counter to the pervasive spirit of fairness that is at the heart of the Code. *Id.* The court, therefore, adopted the "shift" approach. *Id.* at ____, 408 A.2d at 934.

62. 175 Ind. App. 150, 370 N.E. 2d 918 (Ct. App. 1977).

noted that the right to collect a deficiency is not taken away in any section of Article 9.[63] The court reasoned that since there is no specific language directing that a secured creditor who fails to give notice will be barred from recovering a deficiency courts should not have the authority to invoke such a sanction.[64]

In addition to the explicit directive that the debtor is liable for the deficiency, the Code contains a plain statement of the debtor's remedies for a creditor's improper resale.[65] Section 9-507 of the Code provides that if a secured party is not proceeding with the disposition in compliance with the Code, the debtor may obtain an order to restrain the secured party.[66] Section 9-507 further provides that damages are available to the debtor for any loss resulting from an improper disposition.[67] The Court of Appeals for the Fifth Circuit in *United States v. Whitehouse Plastics*,[68] noting the specificity and detail of the debtor's remedies in 9-507, concluded that the drafters of the Code could not have intended that a debtor who did not receive notice would also be entitled to the additional remedy of having the deficiency extinguished.[69]

The Code policy of commercial reasonableness has also provided guidance for courts confronted with the no-notice problem. The New Jersey Supreme Court, in *Conti Causeway Ford v. Jarossy*,[70] justified its application of the shift approach by stating that the purpose of the Code was to establish rules for commercial transactions that were commercially reasonable.[71] This policy of commercial reasonableness, the court held, directed that a secured

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63. Hall v. Owen County State Bank, 175 Ind. App. 150, ____, 370 N.E.2d 918, 926 (Ct. App. 1977).

64. *Id.* The court in *Hall* noted that from the language of § 9-504 the drafters of the Code either did not consider the question of a creditor's failure to give notice or decided to leave the question open. *Id.* at ____, 370 N.E.2d at 926.

The court, however, compared § 9-504 with § 2-706 of the Code, which allows the seller of goods to resell those goods after breach by the buyer. *Id.* The court stated that the resale of goods after a buyer's breach is similar to a repossession sale and suit for the deficiency. *Id.* The court noted that § 2-706 strongly implies that notice to the buyer in this situation is a condition precedent to the recovery of damages. *Id. See* U.C.C. § 2-706 (1978).

65. *See* U.C.C. § 9-507(1) (1978). See *infra* notes 66-67 for the relevant text of § 9-507(1).

66. U.C.C. § 9-507(1) (1978). Section 9-507(1) provides that if the debtor can establish "that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions." *Id.*

67. *Id.* Section 9-507(1) states that "[i]f the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part." *Id.*

68. 501 F.2d 692 (5th Cir. 1974).

69. United States v. Whitehouse Plastics, 501 F.2d 692, 696 (5th Cir. 1979). The court concluded that an absolute bar theory would undoubtedly serve as an incentive to compliance with the notice provisions of the Code, "but the alternative of creating a rebuttable presumption favoring the debtor would also tend to serve this function and appears more in keeping with the scheme of the Code." *Id.* at 695. The debtors were free to submit evidence that they were prejudiced by the lack of notice and the burden would then be on the secured party to rebut this evidence. *Id.* at 696.

70. 114 N.J. Super. 382, 276 A.2d 402 (1971).

71. Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, ____, 276 A.2d 402, 404 (1971).

creditor must not be arbitrarily deprived of his deficiency judgment.[72] The North Dakota Supreme Court also emphasized the importance of commercial reasonableness in the Code when it reaffirmed the application of the shift approach in *State Bank of Towner v. Hansen*.[73] In *Hansen* the debtor argued that the bank's failure to notify him of the resale barred the bank from collecting a deficiency.[74] The court rejected this argument stating, "We do not believe that the Uniform Commercial Code, which was written in the spirit of commercial reasonableness, would countenance such an onerous result without statutory language expressly mandating it. . . ."[75] The court was concerned that, in many cases, imposing an absolute bar would be a harsh and punitive remedy.[76]

The Code policy against punitive damages has concerned other courts deciding no-notice cases.[77] The Nebraska Supreme Court, in *Cornett v. White Motor Corp.*,[78] rejected the summary denial of the deficiency stating that "[n]o sound policy requires us to inject a drastic punitive element into a commercial context."[79] The *Hall* court noted that the policy of the Code expressed in section 1-106 indicates that an aggrieved party is to be fully recompensed, but that punitive damages are to be avoided.[80] The court concluded that absolutely denying a deficiency would result

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72. *Id.*

73. 302 N.W.2d 760 (N.D. 1981). The North Dakota Supreme Court first determined that the shift approach should apply in State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 779-80 (N.D. 1980).

74. State Bank of Towner v. Hansen, 302 N.W.2d 760, 767 (N.D. 1981). The bank conceded that they did not give the debtor notice prior to the sale of the collateral. *Id.* at 764.

75. *Id.* at 767.

76. *Id.* The court in *Hansen* noted that the deficiency was more than $200,000 and that a jury might find this amount still owing after crediting the debtor with the fair market value of the collateral sold. *Id.*

The court also looked to § 1-106 of the Code, which states:

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

U.C.C. § 1-106(1) (1977). The court concluded that an absolute bar to a deficiency would impose a punitive sanction upon the creditor. 302 N.W.2d at 767.

77. *See, e.g.*, Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (Ct. App. 1977) (policy of the Code is to provide full recompense to aggrieved party without assessing penal damages); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975) (complete denial of a deficiency "smacks of the punitive" and is directly contrary to Article 9's underlying theme of commercial reasonableness).

78. 190 Neb. 496, 209 N.W.2d 341 (1973). In *Cornett* the creditor repossessed and disposed of garbage trucks in a commercially unreasonable manner. Cornett v. White Motor Corp., 190 Neb. 496, 497, 209 N.W.2d 341, 342 (1973). The creditor, however, was able to show that he obtained the fair market value for the trucks and was granted a deficiency. *Id.* at 501, 209 N.W.2d at 344.

79. *Id.* The creditor was granted a deficiency judgment sufficient to cover the debtor's unpaid balance plus the expenses of repossession and repair of the collateral. *Id.* at 502, 209 N.W.2d at 345.

80. Hall v. Owen County State Bank, 175 Ind. App. 150, ____, 370 N.E.2d 918, 927 (Ct. App. 1977). *See* U.C.C. § 1-106(1) (1978). See *supra* note 76 for the text of § 1-106.

in a rejection of that policy.[81]

Section 1-106 contains another policy statement, which courts have applied in adopting the shift approach. This section states that "[t]he remedies provided by the Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed. . . ."[82] The *Hall* court, which cited favorably to this section, noted that an analysis of the merits of each case was necessary to effectuate the underlying policies of the Code.[83]

The shift approach meets the requirements of section 1-106. An inquiry into the circumstances surrounding the sale allows the court to determine whether the debtor has been harmed. If the debtor has been harmed, the court can place him in as good a position as if the secured party had complied with the notice requirement by reducing or extinguishing the deficiency judgment. If the lack of notice did not harm the debtor, the only way a court can place the secured party in as good a position as if the debtor had fully performed is for the court to grant the creditor a deficiency judgment. The absolute bar approach does not permit this inquiry.

Another important Code policy mandates that the rules governing commercial transactions should be flexible. Section 1-102(1) states that the Code "shall be liberally construed and applied to promote its underlying purposes and policies."[84] Section 1-102(2)(a) states that the purposes and policies of the Code are "to simplify, clarify and modernize the law governing commercial transactions"[85] and "to permit the continued expansion of commercial practices. . . ."[86] The drafters' desired goal, therefore, was flexibility.[87] The drafters understood that commercial legislation could not be etched in stone. The drafters intended that

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81. 175 Ind. App. at ____, 370 N.E.2d at 927.

82. U.C.C. § 1-206(1) (1978). See *supra* note 76 for the full text of § 1-106(1).

83. *Hall*, 175 Ind. App. at ____, 370 N.E.2d at 927. The court in *Hall* noted that the drafters of the Code intended to do away with rigid rules of law designed to govern all situations in favor of a case by case analysis. *Id.* This procedure would allow parties to reach the merits of each case instead of becoming entangled in procedural technicalities. *Id.*

84. U.C.C. § 1-102(1) (1978).

85. *Id.* § 1-102(2)(a).

86. *Id.* § 1-102(2)(b).

87. *Id.* § 1-102 comment 1. Comment 1 provides that:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

Id.

the Code would "make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices."[88] A summary denial of a deficiency judgment does not promote flexibility in the rules governing commercial transactions.

The court in *Hall* noted the goal of flexibility.[89] The court stated that "the drafters of the UCC intended to do away with the rigid rules of law designed to govern in all situations in favor of more fluid guidelines which allow a case by case analysis."[90] The court indicated that the goal of the Code was to permit settlement of cases on the merits, rather than by application of technical rules.[91] The *Hall* court held that a summary denial of a deficiency judgment for want of notice contravened this intent of the Code drafters.[92]

Having concluded that lack of notice did not bar recovery of the deficiency, some courts reconciled this result with case law decided under the Uniform Conditional Sales Act (UCSA).[93] Under the UCSA, compliance with the notice requirements was a condition precedent to the recovery of the deficiency.[94] In *Conti Causeway Ford v. Jarossy*[95] the New Jersey Supreme Court rejected the notion that since noncompliance with the notice provisions of the UCSA resulted in a denial of a deficiency judgment, noncompliance with the Code should have similar results.[96] The court found that the notice provision in the Code was more flexible than that contained in the UCSA.[97] The Code only requires that the notice and sale be commercially reasonable.[98] The court reasoned, therefore, that when the creditor did not give notice, the issue became whether the sale was so commercially unreasonable that recovery should have been barred.[99]

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88. *See id.*
89. *Hall*, 175 Ind. App. at ____, 370 N.E.2d at 927.
90. *Id.*
91. *Id.*
92. *Id.* at ____, 370 N.E.2d at 926-27.
93. *See* UNIF. COND. SALES ACT § 19 U.L.A. 30-31 (1922).
94. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4, at 1263 (1965). Professor Gilmore notes that even the most technical noncompliance barred a deficiency under the UCSA. *Id. See, e.g.,* Commercial Credit Corp. v. Swiderski, 195 A.2d 546 (Del. Super. Ct. 1963) (lone defect in the resale was that required notice was published in a newspaper four days before the sale rather than five days as required by UCSA).
95. 114 N.J. Super. 382, 276 A.2d 402 (1971).
96. Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, ____, 276 A.2d 402, 404 (Ocean County Ct. 1971). The court in *Jarossy* noted that under the UCSA the seller was required to give at least ten days written notice of the sale. *Id.* By contrast, the Code does not require a specific time period; the Code requires that the notice and sale be "commercially reasonable." *Id.* (quoting U.C.C. § 9-504(3) (1968) (amended 1978)).
97. *See* 114 N.J. Super. at ____, 276 A.2d at 404.
98. *See* U.C.C. § 9-504(3) (1978).
99. *Jarossy*, 114 N.J. Super. at ____, 276 A.2d at 404. The court in *Jarossy* stated that when

Furthermore, as one commentator has noted, the purpose of the Code's notice requirement is different than that contained in the UCSA.[100] The UCSA required a secured party to dispose of the collateral only at a public sale and give at least ten days notice to both the debtor and the public.[101] If the creditor did not give the required notice, the UCSA's public sales requirement would be defeated.[102] In contrast, the Code states that the secured party need only give the debtor notice of the time after which the collateral will be sold.[103] In addition, the Code encourages private resales of collateral.[104] These two factors, taken together, indicate that notice is less important under the Code than it was under the UCSA.[105]

The Delaware Federal District Court, adopting the shift approach in *Rushton v. Shea,*[106] detailed the purposes of the Code's notice requirement.[107] First, notice allows the debtor an opportunity to redeem.[108] Second, if the proposed disposition appears unfair, notice gives the debtor a chance to intervene in the disposition before it occurs.[109] Third, notice allows the debtor to procure other purchasers who may be interested in purchasing the collateral.[110] The court stated that the last two purposes "serve the ultimate goal of allowing the debtor to maximize the sale price of

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reasonable notice of the sale has not been given, "the spirit of commercial reasonableness requires that the secured party not be arbitrarily deprived of his deficiency but that the burden of proof be shifted to him to prove that the sale resulted in the fair and reasonable value of the security being credited to the debtor's account." *Id.* at ____, 276 A.2d at 404-05. When the creditor has met this burden, "the resultant deficiency ought to be collectable by the secured party. . . ." *Id.* at ____, 276 A.2d at 405.

100. *See* Note, *The Right to an Article 9 Deficiency Judgment Without 9-504 Notice of Resale,* 7 VAL. U.L. REV. 465 § (1973).

Under the UCSA two types of notice were required: notice to the buyer and notice to the public. *Id.* at 473-74. The UCSA insisted that the secured party dispose of the collateral at public sale or auction. *Id.* at 474. The purpose of the UCSA notice requirement, therefore, was to provide for public sales and auctions. *Id.*

101. *Id.* at 473-74.

102. *Id.* at 474. Whereas public sales were required under the U.C.S.A., see *supra* notes 100-01 and accompanying text, private sales of the collateral are encouraged under the Code. *See U.C.C.* § 9-504 comment 1. Comment 1 states that "public sale is recognized, [but] it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization. . . for the benefit of all parties." *Id.*

103. U.C.C § 9-504(3) (1978). Section 9-504(3) provides in part that:

> [U]nless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . .

Id.

104. *Id.* § 9-504 comment 1. See *supra* note 102 for the relevant text of comment 1.

105. Note, *supra* note 100, at 474.

106. 423 F. Supp. 468 (D. Del. 1976).

107. Rushton v. Shea, 423 F. Supp. 468, 469 (D. Del. 1976). The court in *Rushton* adopted the shift approach. *Id.* at 471.

108. *Id.* at 469.

109. *Id.*

110. *Id.*

the collateral and, thus, minimize any deficiency for which he will be liable."[111]

Given the purposes for notice described above, the courts were next required to address the manner in which a secured party must establish his right to the deficiency. Under the set-off approach, the debtor was required to come forward with evidence showing that the lack of notice caused him damage.[112] Courts adopting the shift approach found this procedure unfair.[113] When a secured creditor sells collateral without notice, he makes it nearly impossible for the debtor to prove the value of the collateral at the time of the sale.[114] Once sold, the purchaser may move the collateral far out of the debtor's reach.[115] If a debtor cannot prove the value of the collateral under the set-off approach, he cannot show his loss. The secured party is in a better position to prove the value of the collateral at the time of the sale and, therefore, should be required to do so.[116] If the court placed the burden on the debtor, a creditor who disposes of collateral without notice would gain an advantage from his own misconduct.[117] The court in *Riccardi* noted that placing the burden of proof on the debtor contravened the usual rule that a misbehaving party should bear the burden of proof.[118] Because of the inequity of requiring the wronged debtor to come forward with proof of the loss, courts adopting the shift approach held that when the secured creditor does not give notice, a presumption arises that the collateral is worth the amount of the outstanding indebtedness.[119] A secured party can rebut this

111. *Id.* at 469-70. The court in *Rushton* recognized that the debtor is not the only party that will be served by requiring notice. *Id.* Guarantors, accommodation makers, and others in similar situations have "an equal or greater interest in seeing that the collateral is sold for the best price since their resources will be called upon to meet the deficiency." *Id.* at 470.

112. *See, e.g.*, Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968) (debtor must show by a preponderance of the evidence that the collateral was worth more than the price received at the disposition).

113. *See, e.g.*, Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966) (requiring debtor to prove the extent of his loss when creditor wrongfully disposes of collateral would be manifestly unfair); Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (Ct. App. 1977) (fundamentally unfair to put the burden of showing the value of collateral on debtor when creditor has sold the collateral without notice).

114. *See Norton*, 240 Ark. at ____, 398 S.W.2d at 542.

115. *Id.* The court in *Norton* noted that a chattel such as a car may be 1000 miles away before the debtor learns of the sale. *Id.*

116. *Hall*, 175 Ind. App. at ____, 370 N.E.2d at 928.

117. *Norton*, 240 Ark. at ____, 398 S.W.2d at 542.

118. *See* Associates Capital Serv. Corp. v. Riccardi, ____ R.I. ____, ____, 408 A.2d 930, 933 (1980). In *Riccardi* the Rhode Island Supreme Court specifically rejected the set-off approach in favor of the shift approach because the set-off approach placed "the burden of proving loss upon the debtor rather than on the creditor." *Id.*

119. *See, e.g.*, Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alaska 1969) (when the debtor shows that the creditor did not comply with the notice provisions of the Code, the burden of proving that the market value of the collateral was received at the sale is upon the secured creditor); Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966) (when the creditor wrongfully disposes of collateral, a presumption arises that the collateral was worth at least the amount of the debt thereby shifting the burden to the creditor to prove the amount received was reasonable);

presumption by showing that the collateral sold for its fair market value at the disposition, despite lack of notice.[120]

The shift approach appears to be an equitable mean between the absolute bar and set-off extremes. By rebutting the arising presumption, the secured party must show that he did what the debtor could not do. He must show that he obtained the highest price possible, through diligent effort, for the collateral.[121] If the creditor can show that he obtained the best price at the disposition, the debtor would not be harmed by the lack of notice. If the secured party can meet this burden, he has approximated the commercially reasonable sale and, therefore, is entitled to a deficiency judgment.[122]

Finally, as the *Hall* court noted, the Code imposes a duty of good faith on both the debtor and the creditor.[123] The *Hall* court stated that it grounded its decision to adopt the shift approach on the belief that the Code should operate on the premise that most commercial transactions are carried out in good faith.[124] If a party has not acted in good faith, it is better to adopt a rule that affords protection to both parties on a case by case basis.[125] The shift approach neither gives the debtor a windfall of an extinguished deficiency nor the creditor a free hand to dispose of collateral at a low price and recover the deficiency from the debtor. This approach provides protection to both parties by requiring an inquiry into all of the circumstances surrounding a sale.

Community Mgmt. Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (Ct. App. 1973) (when the sale is not conducted in compliance with the Code, the secured party has the burden of proving the market value of the collateral); Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (Ct. App. 1977) (when the secured creditor disposes of collateral without proper notice, he must prove the reasonable value of the collateral); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980) (failure to give notice shifts the burden to the creditor to prove the sale resulted in a fair and reasonable value); Associates Capital Serv. Corp. v. Riccardi, ___ R.I. ___, 408 A.2d 930 (1979) (commercially unreasonable resale of collateral does not preclude creditor from obtaining a deficiency, but shifts the burden to the creditor to prove the resale price was reasonable).

120. *See, e.g.,* Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alaska 1969) (creditor met his burden of proof by showing he received the best available current price; therefore, he was allowed to recover a deficiency); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980) (creditor received a deficiency by proving that he made a good faith effort to sell the collateral at the best possible price).

121. *See* State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980) (creditor proved that he made a good faith effort to sell the collateral at the best possible price).

122. *Id.* The court in *All-American Sub* determined that the creditor had overcome the presumption by proving that the fair market value of the collateral did not exceed the amount received at the sale. *Id.* at 781. The court, therefore, determined that the creditor was entitled to the deficiency. *Id.*

123. *Hall,* 175 Ind. App. at ___, 370 N.E.2d at 928.

124. *Id.*

125. *Id.*

B. THE DEBTOR'S LOST RIGHT OF REDEMPTION

The court in *Rushton v. Shea*[126] noted that the notice requirement gives the debtor an opportunity to exercise his right of redemption.[127] When the creditor sells collateral without notifying the debtor, this right is lost.[128] This lost right in itself is harm, and the shift approach fails to compensate the debtor for this lost right. It appears that the debtor's right of redemption is less deserving of protection than the secured party's right to be made whole.[129] Perhaps this is so because of the realities of the situation: redemption really is only a "forlorn hope."[130] But even when the right of redemption is lost, the shift approach provides some protection for the debtor. When the creditor sues the debtor for the deficiency, the debtor may be able to show that he was willing and able to redeem and, thus, was harmed by the lack of notice, even if the collateral brought a fair price. This evidence may be sufficient to bar recovery of the deficiency or, at least, give rise to damages.

C. THE COMMERCIALLY UNREASONABLE SALE PROBLEM

Courts have also utilized the shift approach in cases when the debtor received notice, but alleged that the disposition was commercially unreasonable.[131] This approach is justifiable since the issue is the same in both cases: what was the collateral worth at the time of the disposition? The creditor may dispose of property improperly, yet still receive a fair price. For example, in *Wirth v.*

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126. 423 F. Supp. 468 (D. Del. 1976).

127. Rushton v. Shea, 423 F. Supp. 468, 469 (D. Del. 1976). The court in *Rushton* stated that notice allows the debtor an opportunity to redeem, to challenge the disposition before it is made, or to locate other potential purchasers. *See id.* The court did note, however, that the chance to challenge the disposition and the opportunity to locate other purchasers, rather than the right to redeem, particularly served the ultimate goal of maximizing the sale price and minimizing the deficiency. *Id.* at 469-70.

128. *See* Braswell v. American Nat'l Bank, 117 Ga. App. 699, 161 S.E. 2d 420 (Ct. App. 1968) (selling collateral without notice precludes the debtor from exercising his right of redemption).

129. *But see id.* The court in *Braswell* held that because the secured creditor did not comply with the notice provisions he deprived the debtor of his right of redemption; for that reason the court denied any deficiency. *Id.* at ____, 161 S.E.2d at 422.

130. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-9 at 1109 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS]. The authors contend that the debtor's chances of acquiring enough money to redeem the collateral after default are minimal. *Id.*

131. *See, e.g.*, Kobuk Eng'g & Contracting Serv., Inc. v. Superior Tank & Constr. Co-Alaska, Inc., 568 P.2d 1007 (Alaska 1977) (burden of proving commercial reasonableness of sale after default is on the creditor); Wirth v. Heavey, 508 S.W.2d 263 (Mo. Ct. App. 1974) (improper resale of collateral does not bar a deficiency when the creditor can show the price received was reasonable); Cornett v. White Motor Corp., 190 Neb. 496, 209 N.W.2d 341 (1973) (the effect of a commercially unreasonable sale is to alter the amount of the deficiency, not extinguish the deficiency); Associates Capital Serv. Corp. v. Riccardi, ____ R.I. ____, 408 A.2d 930 (1979) (consequence of a commercially unreasonable sale of collateral is the creation of a presumption that the fair market value of the collateral equals the debt).

Heavey[132] the Missouri Court of Appeals held that the creditor should have sold the collateral at a public rather than private sale and, therefore, the disposition was commercially unreasonable.[133] Despite this noncompliance, the court held that the collateral brought its fair market value at the disposition and the secured party was entitled to a deficiency judgment.[134]

IV. REBUTTING THE PRESUMPTION

The first problem a party must overcome in obtaining a deficiency judgment in a shift approach jurisdiction is determining how noncompliance becomes an issue at trial. In *United States v. Whitehouse Plastics*[135] the court stated that the debtor must allege and prove a violation and come forward with evidence demonstrating the loss sustained by that violation.[136] At this point, the presumption arises obligating the secured party to prove that the fair market value of the collateral was received at the disposition.[137] This leaves a substantial burden on the debtor since he must prove that he suffered harm from the alleged misbehavior of the secured party.[138] In *Clark Leasing Corp. v. White Sands Forest Products, Inc.*,[139] however, the New Mexico Supreme Court held that a secured party, when suing for a deficiency, should allege and prove that the disposition was conducted in compliance with the Code.[140] If the secured party could not prove that the disposition

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132. 508 S.W.2d 263 (Mo. Ct. App. 1979).

133. Wirth v. Heavey, 508 S.W.2d 263, 268 (Mo. Ct. App. 1974). The court in *Wirth* noted that the private sale of the collateral was improper and the debtor, therefore, was entitled to a remedy. *Id.*

134. *Id.* The court in *Wirth* determined that the proper remedy was not a denial of the deficiency, but damages for the loss caused by a creditor's failure to comply with the resale provisions. *Id.* The court concluded that the price obtained from the sale of the collateral in *Wirth* was reasonable and, therefore, the debtor suffered no compensable damage. *Id.*

135. 501 F.2d 692 (5th Cir. 1974).

136. *See* United States v. Whitehouse Plastics, 501 F.2d 692, 695 (5th Cir. 1974). The court in *Whitehouse* stated that the debtor is free to submit any evidence that he was prejudiced by the lack of notice. *Id.* at 696.

137. *Id.* at 695.

138. *See* WHITE & SUMMERS, *supra* note 130, at 1131-32. Professors White and Summers define the procedure as follows:

> The rules of the game . . . seem fairly clear. First, the secured party brings suit for a deficiency. The debtor responds by claiming that his opponent violated the provisions of Part Five of Article Nine in some way. If the court finds that the secured party committed a foul it penalizes him by indulging in the presumption that the value of the collateral is equal to the outstanding debt. However, the secured party can still recover a deficiency if he can convince the court that the reasonable value of the collateral was less than the outstanding debt.

Id.

139. 87 N.M. 451, 535 P.2d 1077 (1975).

140. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, ____, 535 P.2d 1077, 1080 (1975). The court in *Clark Leasing* stated that "[i]t is scarcely a revelation to say that a plaintiff normally has the burden of proving his case." *Id.*

was conducted in compliance with the Code, he would have to rebut the presumption to obtain a deficiency.[141] If the secured party can establish a prima facie case indicating compliance, the debtor would be required to elicit evidence to the contrary.[142] When the secured party establishes a prima facie case indicating compliance and the debtor elicits evidence to the contrary, the matter becomes an issue for the trier of fact.[143] Under the *White Sands* approach, the debtor need only show noncompliance, not loss caused by the noncompliance. However the court phrases the issue, the secured party must still produce evidence of the value of the collateral once the presumption has arisen.

A. ESTABLISHING VALUE

1. Price Obtained at the Disposition

When the disposition is conducted in accordance with the requirements of the Code, the amount received or bid at the sale is evidence of the collateral's true value in an action to recover a deficiency.[144] If the price obtained at the disposition is grossly disproportionate to the outstanding debt, however, courts will closely scrutinize the steps that the secured party took to obtain the best possible price.[145]

Comparing the price obtained at the disposition with the original contract price may not always be a reliable indicator of

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141. *Id.* at ____, 535 P.2d at 1080.

142. *Id.* The court noted that if the debtor does not show evidence of commercial unreasonableness in the sale, the secured party will obtain a directed verdict on this issue. *Id.*

143. *Id.* at ____, 535 P.2d at 1081. The court in *Clark Leasing* reasoned that parties may differ regarding what factors are relevant in determining commercial reasonableness; therefore, each case must turn on its particular facts. *Id.*

144. *See* Community Mgmt. Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (Ct. App. 1973). *See also In re* Zsa Zsa Ltd., 352 F. Supp. 665 (S.D.N.Y. 1972) (that the price received at a lawful disposition is low will not be dispositive on the issue of commercial reasonableness); U.C.C. § 9-507 (2) (1978) (fact that a different price could have been obtained from a different method of sale or at a different time is not of itself sufficient to establish that the sale was commercially unreasonable).

145. *See* Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 560 P.2d 917 (1977). In *Levers* the creditor perfected a security interest in the debtor's supplies to secure a $35,000 promissory note. *Id.* at ____, 560 P.2d at 918. After the debtor defaulted, the creditor repossessed the collateral and disposed of it at a nonjudicial sale. *Id.* At the sale the creditor purchased the collateral for $100 and subsequently resold it for $10,000. *Id.* at ____, 560 P.2d at 918-19. After reviewing the nature of the sale, the Nevada Supreme Court held that the sale was commercially unreasonable and limited the creditor's deficiency judgment to $25,000. *Id.* at ____, 560 P.2d at 920. *But see In re Zsa Zsa* Ltd., 352 F. Supp. 665 (S.D.N.Y. 1972). In *Zsa Zsa* the creditor sold the debtor's inventory at auction for $300,000. *Id.* at 668. The inventory had an estimated retail value of $3.5 million, a wholesale value of $1.5 million, and a cost of $500,000. *Id.* The court determined that even though the amount received was only 10 cents on the dollar, the price was not unreasonable. *Id.* at 671. The court based this decision on the auctioneer's testimony that this was a fair return and a price other purported bidders were willing to pay. *Id.*

value. For example, the collateral may have depreciated substantially in value through market conditions or misuse by the debtor. In this situation, the resale price obtained for the collateral will be much lower than the original contract price.

2. Stipulation

One of the simplest ways to establish value is by stipulation.[146] If the secured party obtains the stipulated value at the resale, the debtor cannot claim that the sale was commercially unreasonable.[147]

3. Appraisals

An appraisal of the collateral at the time of repossession is an excellent method of establishing the value of the collateral. In particular, if the collateral is poorer than average, an appraisal can establish the collateral's diminished value.[148] A resale price that approximates the appraisal price will substantially bolster a secured party's argument that she received the best possible price for the collateral at the disposition.

A person familiar with the collateral should make the appraisal.[149] The appraiser should examine the collateral himself, but this is not always necessary if the creditor can provide the appraiser with a sufficiently accurate description of the collateral.[150] Employees of the secured party may make the appraisals, but these appraisals are subject to attack because the appraiser is not a disinterested party.[151] The creditor may also use a reference book used in a particular trade to estimate the value of the collateral.[152]

146. *See* Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (Ocean County Ct. 1971). The parties in *Conti* stipulated that the resale price was fair and reasonable. *Id.* at 405. The court, therefore, determined that the secured party had met his burden of proving commercial reasonableness. *Id.*

147. *See id.*

148. *See* WHITE & SUMMERS, *supra* note 130, at 1119. Professors White and Summers suggest that, when the resale amount is less than the apparent value, a "creditor should arm himself with memoranda and photographs to substantiate the 'poorer than average' nature of the collateral." *Id.*

149. *See* Mayhew v. Loveless, 613 S.W.2d 118 (Ark. Ct. App. 1981). In *Mayhew* the debtor introduced evidence from an expert witness that the debtor's tractor-trailer was worth between $26,000 - $29,000, rather than the $10,500 the creditor obtained from the resale. *Id.* at 121. The expert witness had never driven the tractor and admitted he had " 'just kind of given it a sidewalk appraisal.' " *Id.* The court found that the evidence did not support the debtor's contention that the collateral was worth $26,000 and held that the $10,500 obtained from the resale was reasonable. *Id.*

150. *See* Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alaska 1969). In *Weaver* the creditor obtained appraisals from numerous sources based upon the written description of the collateral. *Id.* at 92 n.17. The creditor sold the collateral to the party that had given him the highest appraisal. *Id.* The court held that the creditor's actions were commercially reasonable. *Id.* at 92.

151. *See, e.g.*, United States v. Whitehouse Plastics, 501 F.2d 692 (5th Cir. 1974) (although employee's appraisal is subject to attack, the jury is entitled to consider it); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980) (employee's appraisals are subject to attack, but this alone does not invalidate the appraisals).

152. *See, e.g.*, Credit Bureau Metro, Inc. v. Mims, 45 Cal. App. 3d Supp. 12, 119 Cal. Rptr.

4. Market Conditions

The saleability of collateral is generally a factor in determining its value.[153] In *Wirth v. Heavey*[154] the collateral consisted of restaurant equipment specifically designed for a particular franchise.[155] The court noted that the equipment had a very limited use, which in part justified the low resale price.[156] In *Hoch v. Ellis*[157] the court stated that the local economic market at the time of the disposition is a recognized factor in determining the value of the collateral.[158]

5. Subsequent Sales

When the purchaser resells the collateral soon after disposition, the price obtained at the subsequent sale may be evidence of the value of the property.[159] Evidence that the purchaser sold the collateral for nearly the same price at a second sale indicates that the creditor sold the property at its fair value.[160] Conversely, if the purchaser sold the collateral for a much higher price at the second sale, a court may find that the price obtained at the first sale was not equal to the collateral's fair value.[161]

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622 (App. Dep't Super. Ct. 1975) (automobile sold at private sale for less than 50% of Blue Book value was unreasonable as a matter of law); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772 (N.D. 1980) (value of collateral was based on prices in reference books used in the restaurant equipment trade); Ekman v. Mountain Motors, Inc., 364 P.2d 998 (Wyo. 1961) (when damage or other factors exist that may influence the collateral's value, reference book is merely a guide). *See also* WHITE & SUMMERS, *supra* note 130, at 1117 ("Even when such handbooks are only considered a guide to valuation, they will provide the attorney with a rough standard by which to measure the sufficiency of the price received.").

153. *See* Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (Ct. App. 1977). The court in *Hall* stated that:

> [E]ven though a low sale price itself is insufficient to overturn a sale, closer scrutiny will generally be given sales in which there is a *substantial* difference between the sale price and the fair value to determine whether there were legitimate causes for the low price such as a depressed or non-existent market. . . .

Id. at ____, 370 N.E.2d at 929 (emphasis in original).

154. 508 S.W.2d 263 (Mo. Ct. App. 1974).

155. Wirth v. Heavey, 508 S.W.2d 263 (Mo. Ct. App. 1974). The restaurant franchise in *Wirth* was Mugs-Up. *Id.* at 264.

156. *Id.* at 268. Both parties in *Wirth* testified that the market for used restaurant equipment was not widespread — particularly not for the kind specially designed for use in a particular franchise. *Id.*

157. 627 P.2d 1060 (Alaska 1981).

158. Hoch v. Ellis, 627 P.2d 1060 (Alaska 1981). The court in *Hoch* noted that at the time of the disposition, Fairbanks, Alaska was in a "severe economic slump." *Id.* at 1064.

159. *Compare* Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 560 P.2d 917 (1977) (evidence that purchaser at the disposition resold the collateral at 100 times the purchase price indicated disposition sale was not commercially reasonable) *with* O'Neil v. Mack Trucks, Inc., 533 S.W.2d 832 (Tex. Civ. App. 1975) (evidence that purchaser at the disposition resold the collateral for an amount slightly in excess of the purchase price indicated the disposition sale was commercially reasonable).

160. *O'Neil*, 533 S.W.2d at 837.

161. *Levers*, 93 Nev. at ____, 560 P.2d at 920.

Moreover, a great disparity between these prices may indicate that the secured party did not proceed in good faith or in a commercially reasonable manner.[162]

6. Testimony of the Purchaser

Testimony by the purchaser of the collateral may also be helpful in determining the collateral's value. In *Hoch v. Ellis*[163] the Alaska Supreme Court noted that the superior court "placed considerable weight on the testimony of [the purchaser of the equipment]."[164] The purchaser in *Hoch* testified that he thought his purchase was a gamble and that he paid a reasonable price.[165] The purchaser also gave a detailed description of the cost and effort necessary to make the collateral operable.[166] The Alaska Supreme Court agreed with the superior court's determination that the purchaser's estimate of value before his purchase, the cost of repair, and the use of the collateral was evidence of the collateral's value.[167]

B. ESTABLISHING COMMERCIAL REASONABLENESS

Although courts place much emphasis upon the price the creditor received at the disposition, the price is not the only factor courts must consider in determining the availability of a deficiency.[168] Section 9-507(2) of the Code states that "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."[169] The *Hall* court noted that section 9-507 reflects that repossession sales seldom bring the highest value for the collateral.[170] If the courts required the creditor to obtain the highest possible price for the collateral, all

162. *But see* Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (Ct. App. 1977). The court in *Hall* noted that factors other than a secured party's failure to proceed in a commercially reasonable manner may create a substantial difference between the sale price and the fair value of the collateral. *Id.* at ____, 370 N.E.2d at 929. These factors may include a depressed or nonexistent market. *Id.*

163. 627 P.2d 1060 (Alaska 1981).

164. Hoch v. Ellis, 627 P.2d 1060, 1064 (Alaska 1981).

165. *Id.* The purchaser testified that he paid $10,000, but that he did not think he would have paid more for the collateral. *Id.* n.11.

166. *Id.* at 1064.

167. *Id.* The court in *Hoch* noted that the purchaser's testimony substantiated other evidence, which indicated the collateral was severely dilapidated. *Id.*

168. WHITE & SUMMERS, *supra* note 130, at 1119. Professors White and Summers state that "[p]rice is important, but resales may fail the test of 'commercial reasonableness' in other ways also." *Id.*

169. U.C.C. § 9-507(2) (1978).

170. *Hall*, 175 Ind. App. at ____, 370 N.E.2d at 929.

dispositions would be vulnerable to attack by showing that a higher price might have been received under different circumstances.[171] The court should consider the sale in its entirety in determining whether the sale was commercially reasonable, and thus, whether the secured party should be denied his deficiency in whole or in part.[172] When the secured party has proceeded in good faith and made certain that the "conditions of the sale, in terms of the aggregate effect of manner, method, time, place and terms employed conform to commercially accepted standards, he should be shielded from the sanctions contained in Article 9."[173]

One of the factors that courts will examine to determine whether the secured party proceeded in good faith is the solicitation of bidders.[174] If the creditor has actively solicited bidders, this indicates that he has done his best to get a good price for the collateral. In *Weaver v. O'Meara Motor Car Co.*[175] the vice president of O'Meara Motor testified that he received written appraisals from persons doing business within the state and from persons doing business in three other states.[176] An accountant acting on behalf of O'Meara Motor testified that she solicited bids within the State of Alaska without success.[177] The court found that these solicitations were factors indicating that O'Meara had made a good faith effort to get the best possible price.[178] In *State Bank of Burleigh County Trust Co. v. All-American Sub, Inc.*[179] the bank hired an outside sales company to solicit buyers.[180] The North Dakota Supreme

171. *Id.*

172. *Id.* at ____, 370 P.2d at 928-29. The Code does not specifically define a commercially reasonable sale. The Code does, however, state that the total transaction must be considered in determining commercial reasonableness. *See* U.C.C. § 9-504(3) (1978). Section 9-504(3) provides that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." *Id.*

173. *Hall,* 175 Ind. App. at ____, 370 N.E.2d at 929 (citing *In re* Zsa Zsa Ltd., 352 F. Supp. 665, 671 (S.D.N.Y. 1972)).

174. *See* WHITE & SUMMERS, *supra* note 130, at 1121. Professors White and Summers note, "Although Article 9 does not require a specific number of bidders, every single-bid sale invites scrutiny. It may well be that multiple invitations to bid are a prerequisite of a commercially reasonable sale." *Id. See also* Atlas Constr. Co. v. Dravo-Doyle Co., 3 U.C.C. Rep. Serv. (Callaghan) 124 (Pa. C.P. Allegheny County 1965). In *Atlas* the creditor's selling territory covered parts of Ohio, Pennsylvania, Maryland, and West Virginia. *Id.* at 131. The creditor, however, made no effort to contact a purchaser for the collateral other than Campbell, who bought the collateral. *Id.* The court determined that the substantially low price, together with the evidence that the creditor contacted only one purchaser, warranted the jury's conclusion that the sale was not commercially reasonable. *Id.*

175. 452 P.2d 87 (Alaska 1969).

176. Weaver v. O'Meara Motor Car Co., 452 P.2d 87, 92 n.17 (Alaska 1969). In *Weaver* the creditor obtained written appraisals from Alaska as well as California, Oregon, and Washington. *Id.* The collateral was eventually sold to a Washington firm that submitted the highest appraisal. *Id.*

177. *Id.*

178. *Id.* at 92. The *Weaver* court held that the creditor had met his burden by establishing that he received the best available current price for the collateral; therefore the sale was commercially reasonable. *Id.*

179. 289 N.W.2d 772 (N.D. 1980).

180. State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 780

Court held that this was a good faith effort to receive the best possible price.[181]

While it is desirable to have a large number of bidders at a disposition, it is not mandatory.[182] The *Hall* court indicated that a sale would not be commercially unreasonable as a matter of law when the creditor received only one or two bids, but "such sales must receive the closest scrutiny and should be declared invalid where there is evidence of collusion, self-dealing, or bad faith."[183]

When the creditor disposes of the collateral at a public sale, the courts may look to the sufficiency of the advertisement of the sale.[184] In *United States v. Whitehouse Plastics*[185] the court noted that the auction company that the secured party employed publicized the sale and kept records of the advertisements placed by the auction company concerning the sale.[186] In a footnote, however, the court stated that a secured party could not "bootstrap its way to a verdict based on the price received at the foreclosure sale where that is the only evidence of the value of the goods or where the sale is less well publicized or conducted than this one."[187]

V. CONCLUSION

The Uniform Commercial Code does not authorize summary denial of a deficiency judgment. Such a denial, because it precludes a decision on the merits of each case, is a harsh, punitive, and unwarranted measure. The Code prohibits the award of punitive damages. For this reason the absolute bar approach to noncompliance problems is improper.

The set-off approach is also an inequitable solution because it requires the debtor to submit evidence proving a loss. The noncomplying secured party is in a better position to prove the value of the collateral at the time of the sale. By requiring the debtor to prove the loss, courts are in effect allowing secured parties to profit from their own wrong-doing.

(N.D. 1980). The bank in *All-American Sub* was unable to obtain bids for the sale of the collateral and, therefore, hired Jet Sales to solicit buyers. *Id.*

181. *Id.* at 781. The court affirmed the district court's finding that the sale of the collateral was commercially reasonable. *Id.*

182. *See* WHITE & SUMMERS, *supra* note 130, at 1121. (Article 9 does not require a specific number of bidders).

183. *Hall*, 175 Ind. App. at ____, 370 N.E.2d at 930.

184. WHITE & SUMMERS, *supra* note 130, at 1121. Professors White and Summers state that "[o]ne factor of great importance is the manner in which the sale is publicized. . . . " *Id.*

185. 501 F.2d 692 (5th Cir. 1974).

186. United States v. Whitehouse Plastics, 501 F.2d 692, 697 (5th Cir. 1974). The court determined that because of the advertisements and evidence that 140 to 145 registered bidders were present, the "jury could find, as it did, that the sale was 'commercially reasonable.' " *Id.*

187. *Id.* n. 9.

The shift approach is more equitable than the extremes of the absolute bar approach and set-off approach. It neither provides a technical defense to debtors nor burdens them with proving harm. Protecting the debtor from loss by secured party noncompliance is one of the goals of the resale provisions of section 9-504 of the Code. When a secured party can rebut the presumption that the collateral was worth at least the amount of the outstanding debt, he shows that the debtor has not suffered a loss. Providing flexibility in dispositions is another goal: the Code only requires that notice and resale be commercially reasonable. Because the shift approach allows for inquiry into the reasonableness of notice and disposition, it protects the interests of both debtors and creditors. This being the goal of section 9-504 of the Code, the shift approach is the best solution to noncompliance problems.