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# Effect of Creditor Misbehavior on Right to Deficiency Judgment under the Uniform Commercial Code

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assessing the exact nature of the records[42] and prevent an agency from escaping the law by "padding" its records with protected information.

The use of partial disclosure should also be expressly allowed. If a few sensitive items in the record would prevent the opening of an otherwise accessible document, it would seem that the idea of public disclosure would best be served by allowing the reviewing court to strike the objectionable parts and permit the rest to be opened. Again, while this might be possible under the present statute,[43] it is not clear, and specific legislation on the point would be useful.

The problem of whether a record should be opened after action on it is completed, which took up much space in the *Wilson* decision, would be alleviated as well with the use of a balancing test. Instead of trying to set absolute rules as to when such records were to be opened, a court would merely consider them as it would other protected records and look to the interests involved to see if opening was appropriate.

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# EFFECT OF CREDITOR MISBEHAVIOR ON RIGHT TO DEFICIENCY JUDGMENT UNDER THE UNIFORM COMMERICAL CODE

*Gateway Aviation, Inc. v. Cessna Aircraft Co.*[1]

Gateway Aviation (Gateway) procured a Cessna airplane from the defendant,[2] Automatic Equipment Leasing Corporation (Automatic), through a secured sale. Gateway intended to use the plane in an air taxi service and was to pay for it in ninety-six monthly installments. Shortly after purchasing the aircraft, however, Gateway defaulted on its contract and Automatic repossessed.[3] After sending notice to Gateway, Automatic of-

42. *In camera* inspection has been adopted elsewhere judicially for similar reasons. *See, e.g.*, Lodge v. Knowlton, 118 N.H. 574, 391 A.2d 893 (1978).

43. Several federal cases have adopted such techniques to excise exempted material from a mass of unprotected material. *See, e.g.*, Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 580-81 (D.C. Cir. 1970); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704 (D.C. Cir. 1971).

1. 577 S.W.2d 860 (Mo. App., D. St. L. 1978).

2. Although Cessna Aircraft Company was the named defendant, the plaintiffs dismissed as to them, leaving Automatic as the sole party defendant. *Id.* at 861.

3. Gateway made 10 monthly installments during which time the airplane required frequent repairs. Although by their agreement Gateway was obligated

fered the plane for sale at a public auction, but refused to accept the highest bid of $130,000. Two months later, without giving further notice to Gateway, Automatic sold the airplane for $134,000 at a private sale.

Gateway subsequently sued Automatic for tortious conversion[4] and the defendant counterclaimed for a deficiency of nearly $98,000, the difference between the debt owed under the sales contract and the amount received for the collateral at the default sale. The trial court found for Automatic on both claims and the plaintiff appealed. The court of appeals upheld the lower court's finding that the repossession of the airplane had not been a tortious conversion since Automatic had the right to take possession of the collateral after Gateway repudiated its agreement.[5] However, the appellate court held that awarding a deficiency judgment to Automatic was improper because Gateway had not been given notice of the private sale. The court concluded that a secured party's failure to comply strictly with the default provisions of the Uniform Commercial Code precludes the creditor from recovering a deficiency judgment.[6]

Determining whether a secured creditor is entitled to a deficiency judgment when he has failed to comply with the default provisions of the Uniform Commercial Code[7] has been the subject of considerable controversy in recent years.[8] Section 9-504(3) of the Code controls a secured

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to make repairs, it defaulted on two payments and warned that no payments would be made unless the problems with the airplane were resolved. Automatic responded by threatening to repossess. Plaintiffs then tendered the two missed payments. Defendant refused to accept, demanding instead full payment of all installments. Such payment was not forthcoming and defendant repossessed the collateral. In violation of the agreements, Gateway had permitted the federal license for operating the plane to lapse and had not paid the insurance premiums. Also, the airplane had not been maintained in a condition to be operated for air taxi service. *Id.*

4. Also suing as plaintiffs were Paul and Ellen Silverstein, guarantors for Gateway's purchase of the airplane. One question addressed by several courts outside of Missouri is whether guarantors are "debtors" for purposes of § 9-504(3). Most courts have answered in the affirmative and have held that notice to the guarantors is necessary to comply with § 9-504(3). *See, e.g.*, Hepworth v. Orlando Bank & Trust Co., 323 So. 2d 41 (Fla. App. 1975); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (1969). *Contra,* Brinson v. Commercial Bank, 138 Ga. App. 177, 225 S.E.2d 701 (1976).

5. The court also noted that Gateway had improperly repudiated its agreements with defendant and was thus in default under the terms of the contract. 577 S.W.2d at 861.

6. *Id.* at 863. The court noted that the debtor had lost his right to redeem the airplane and to secure purchasers because he had not been given the required notice. *Id.* at 862. The court also noted that deficiency judgments were not allowed at common law and therefore should be allowed only after strict compliance with the relevant statutes. *Id.* at 863.

7. The various forms of creditor misbehavior are discussed in text accompanying notes 9-12 *infra.*

8. Henszey, *A Secured Creditor's Right to Collect a Deficiency Judgment under UCC Section 9-504: A Need to Remedy the Impasse,* 31 BUS. LAW. 2025 (1976).

party's disposal of collateral after default[9] and requires that every aspect of the disposition be commercially reasonable.[10] This subsection requires that the secured party give the debtor reasonable notice of the time and place of any public sale or of the time after which a private sale is to occur.[11] It also prohibits the secured party from purchasing the collateral at a private sale except in certain limited circumstances.[12]

Courts are often confronted with the problems created by the failure of the secured party to dispose of the collateral in accordance with the requirements of section 9-504 (3).[13] Section 9-507 (1) of the Code allows the debtor to recover any loss resulting from the secured party's noncompliance with the provisions of part 5 of Article 9 if disposition has already occurred.[14] However, this remedy alone generally has not been thought to

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9. RSMo § 400.9-504 (3) (1978) (U.C.C.) provides in material part that:
> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any 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, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

The Missouri statute is identical to U.C.C. § 9-504 (3). Hereinafter, citations will be made only to the 1962 Official Text of the Uniform Commercial Code.

10. The issue of what is commercially reasonable arises with some regularity. For a discussion of this question, see Burke, *Secured Transactions*, 32 BUS. LAW. 1133, 1161-62 (1977); Siegel, *The Commercially Reasonable Disposition of Collateral*, 80 COM. L.J. 67, 70-71, 81 (1975); Comment, *Secured Transactions: Commercial Reasonability of Secured Party's Sale of Collateral After Default Under § 9-504(3)*, 29 OKLA. L. REV. 486, 497-505 (1976).

11. U.C.C. § 9-504 (3).

12. *Id.*

13. The courts do not explicitly distinguish the various forms of creditor misbehavior in considering whether a deficiency judgment should be allowed. *See, e.g.*, Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); Jackson State Bank v. Beck, 577 P.2d 168 (Wyo. 1978). *See also* P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 8.06[2] (1975); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 1000 (1972). However, the court in *Gateway* suggests that different rules should apply for different infractions. This argument is considered more fully in text accompanying notes 23-28 *infra*.

14. U.C.C. § 9-507 (1) provides:
> If it is established that the secured party is not proceeding in accordance with the provisions of . . . Part [5] disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount

provide adequate protection for the debtor because it places the difficult burden of proving damages on the debtor.[15] Very few jurisdictions limit the debtor to this remedy.[16] Instead, the courts have tended to adopt one of two positions in an attempt to provide the debtor with an adequate remedy.

Several jurisdictions have totally barred the right to a deficiency judgment when there has been some form of creditor misbehavior.[17] These courts have held that compliance with the Code is a condition precedent to the award of a deficiency.[18] Other jurisdictions have merely

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not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

15. Norton v. National Bank of Commerce, 240 Ark. 143, 149, 398 S.W.2d 538, 542 (1966). *See also* White, *Representing the Low-Income Consumer in Repossessions, Resales, and Deficiency Judgment Cases,* 3 U.C.C. L.J. 199, 218 (1970-71); Note, *Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the UCC,* 44 COLO. L. REV. 221, 227 (1972).

16. The following cases have restricted the debtor to this remedy: Barbour v. United States, 562 F.2d 19 (10th Cir. 1977); Abbott Motors, Inc. v. Ralston, 28 Mass. App. Dec. 35 (1964); Leasco Computer, Inc. v. Sheridan Indus., Inc., 82 Misc. 2d 897, 371 N.Y.S.2d 531 (1975); Zions First Nat'l Bank v. Hurst, 570 P.2d 1031 (Utah 1977); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972).

17. *In re* Hardie, 17 U.C.C. Rep. 633 (N.D. Ohio 1975); Dynalectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659 (W.D. Okla. 1972); Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd on other grounds,* 335 F.2d 846 (3d Cir. 1964); Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); Commercial Credit Corp. v. Lloyd, 12 U.C.C. Rep. 15 (D.C. Super. Ct. 1973); Barnett v. Barnett Bank, 345 So. 2d 804 (Fla. Dist. Ct. App. 1977); Gurwitch v. Luxurest Furniture Mfg. Co., 233 Ga. 934, 214 S.E.2d 373 (1975); Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492 (Iowa 1977); Camden Nat'l Bank v. St. Clair, 309 A.2d 329 (Me. 1973); One Twenty Credit Union v. Darcy, 5 U.C.C. Rep. 792 (Mass. App. Div. 1968); Cities Serv. Oil Co. v. Ferris, 9 U.C.C. Rep. 899 (Mich. Dist. Ct. 1971); First Nat'l Bank v. Rose, 249 N.W.2d 723 (Neb. 1977); Marine Midland Bank-Central v. Watkins, 89 Misc. 2d 949, 392 N.Y.S.2d 819 (1977); Chrysler Credit Corp. v. Burns, 562 P.2d 233 (Utah 1977); Jackson State Bank v. Beck, 577 P.2d 168 (Wyo. 1978).

18. The courts have justified the denial of a deficiency on the following grounds: (1) in lack of notice cases the debtor has been deprived of his right to redeem the collateral under § 9-506, Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 1007, 104 Cal. Rptr. 315, 320 (1972); Braswell v. American Nat'l Bank, 117 Ga. App. 699, 701, 161 S.E.2d 420, 422 (1968); (2) in lack of notice cases the debtor has lost his opportunity to protect his interests by securing purchasers or by being present at the sale, Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696, 707 (W.D. Pa. 1963), *rev'd on other grounds,* 335 F.2d 846 (3d Cir. 1964); Gateway Aviation, Inc. v. Cessna Aircraft Co., 577 S.W.2d 860, 862 (Mo. App., D. St. L. 1978); (3) nothing in the language of § 9-507 suggests that it shall be the debtor's exclusive remedy, Camden Nat'l Bank v. St. Clair, 309 A.2d 329, 332 (Me. 1973); (4) under pre-Code commercial law, most courts denied a deficiency, C.I.T. Corp. v. Haynes, 161 Me. 353, 358, 212 A.2d 436, 439 (1965); Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 1090, 323 N.Y.S.2d 13, 15 (1971); (5) since the Code alters the common law regarding deficiency judgments after repossession, any right to a deficiency accrues only after strict compliance with the relevant statutes, Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534, 536 (Fla. Dist. Ct. App. 1973); Gateway Aviation, Inc. v. Cessna Aircraft Co., 577 S.W.2d 860, 863 (Mo. App., D. St. L. 1978); (6)

qualified the secured party's right to a deficiency[19] and have held that section 9-507(1) raises a rebuttable presumption[20] that the value of the collateral is at least equal to the amount of the debt.[21] Hence, for the secured party to collect a deficiency judgment he must prove that the amount that reasonably could have been obtained at a proper sale was less than the outstanding debt.[22]

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while § 9-507 provides an affirmative cause of action to recover a loss already sustained, it was not intended as a substitute for a defense to a deficiency action, Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 1007, 104 Cal. Rptr. 315, 320 (1972); Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 1089, 1092, 323 N.Y.S.2d 13, 16 (1971); and (7) barring a deficiency acts as a deterrent to creditor misbehavior, Lakin, *Default Proceedings Under Article 9: Problems, Solutions, and Lessons To Be Learned,* 8 AKRON L. REV. 1, 30 (1974); Comment, *The Right to an Article 9 Deficiency Judgment Without 9-504 Notice of Resale,* 7 VAL. U.L. REV. 465, 471 (1973).

19. United States v. Whitehouse Plastics, 501 F.2d 692 (5th Cir. 1974); Rushton v. Shea, 423 F. Supp. 468 (D. Del. 1976); *In re* U.G.M. Corp., 20 U.C.C. Rep. 827 (E.D. Pa. 1976); *In re* Thomas, 12 U.C.C. Rep. 578 (W.D. Va. 1973); Kobuk Eng'r & Contracting Servs., Inc. v. Superior Tank & Constr. Co., 568 P.2d 1007 (Alas. 1977); Universal C.I.T. Credit Co. v. Rone, 248 Ark. 665, 453 S.W.2d 37 (1970); Community Management Assoc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973); Savings Bank v. Booze, 34 Conn. Supp. 632, 382 A.2d 226 (1977); Associates Financial Servs., Co. v. DiMarco, 383 A.2d 296 (Del. Super. 1978); Commercial Discount Corp. v. Bayer, 57 Ill. App. 3d 295, 372 N.E.2d 926 (1978); Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. App. 1977); Walker v. V. M. Box Motor Co., 325 So. 2d 905 (Miss. 1976); Levers v. Rio King Land & Inv. Co., 560 P.2d 917 (Nev. 1977); Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632 (1975); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975); Security Trust Co. v. Thomas, 59 App. Div. 2d 242, 399 N.Y.S.2d 531 (1975); Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (1976); Investors Acceptance Co. v. James Talcott, Inc., 454 S.W.2d 130 (Tenn. App. 1969).

20. Some cases have held that the presumption arises only after creditor misbehavior. Barker v. Horn, 245 Ark. 315, 432 S.W.2d 21 (1968); Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632 (1975). Other cases have held that the presumption arises anytime the value of the collateral is at issue in a deficiency action. But if the sale is conducted in accordance with § 9-504(3), the sum received is evidence of the collateral's value. Universal C.I.T. Credit Co. v. Rone, 453 S.W.2d 37, 39 (Ark. 1970); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 455, 535 P.2d 1077, 1081 (1975). This seems only a semantic difference; the results of the cases are the same.

21. The justifications commonly advanced in support of this position include: (1) the secured party's disposal of the collateral makes it difficult for the debtor to prove his loss with reasonable certainty if he is limited to his remedy under § 9-507(1), Norton v. National Bank of Commerce, 240 Ark. 143, 149-50, 398 S.W.2d 538, 542 (1966); (2) the U.C.C. has already provided the debtor with a remedy in § 9-507, Hall v. Owen County State Bank, 370 N.E.2d 918, 927 (Ind. App. 1977); Wirth v. Heavey, 508 S.W.2d 263, 268 (Mo. App., D.K.C. 1974); (3) denying a deficiency contravenes the spirit of the U.C.C. which disfavors penal damages and emphasizes fluid guidelines over rigid rules of law, Hall v. Owen County State Bank, 370 N.E.2d 918, 927 (Ind. App. 1977); (4) a more just solution is obtained, Savings Bank v. Booze, 382 A.2d 226, 228 (Conn. Supp. 1977); Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 455, 535 P.2d 1077, 1081 (1975); and (5) the presumption position is more consonant with the Code's spirit of commercial reasonableness, Conti Causeway Ford v. Jarossy, 114 N.J. Super 382, 386, 276 A.2d 402, 404-05 (1971).

22. This position will hereinafter be referred to as the presumption position.

Prior to *Gateway* only one other Missouri case, *Wirth v. Heavey*,[23] had dealt with the question of whether to grant a deficiency when there had been some form of creditor misbehavior under section 9-504 (3). In *Wirth*, the Court of Appeals, Kansas City District, adopted the presumption position.[24] The St. Louis District of the Court of Appeals summarily distinguished *Gateway* from *Wirth*, however, on the ground that different forms of creditor misbehavior were involved. *Wirth* was concerned with the purchase of the collateral by a secured party at his own private sale, whereas *Gateway* involved the secured party's failure to give notice of a private sale to the debtor. The decision of the St. Louis appellate court thus suggests that a deficiency judgment should be denied when the creditor fails to give notice of a default sale to the debtor, but should be granted when the secured party buys at a private sale if he meets the requisite burden of proof with respect to the value of the collateral.[25]

Although lack of notice cases are distinguishable from cases involving other forms of creditor misconduct,[26] denying a deficiency judgment only

23. 508 S.W.2d 263 (Mo. App., D.K.C. 1974). *See also* Note, 40 Mo. L. REV. 169 (1975). In this case plaintiffs sold their interest in a root beer drive-in to their partners, the defendants, in exchange for a promissory note for $4,000 and a security agreement covering the business equipment. Defendants defaulted and plaintiffs repossessed the restaurant equipment. After advertising the sale and receiving high bids of $350 for two refrigerated root beer barrels and $500 for all the equipment, plaintiffs purchased all of the items for $650 and then resold the two refrigerated root beer barrels for $350. The trial court held that the disposition was reasonable and awarded plaintiffs a deficiency judgment. The court of appeals found that there was not a widespread market for this kind of used restaurant equipment and that there were no standard price quotations. Accordingly, plaintiffs had not complied with § 9-504 (3) when they purchased at their own private sale. However, the court of appeals adopted the presumption position and held that the trial court could have properly determined that the price obtained was the reasonable value of the collateral.

24. The court stated that denying the deficiency judgment did not suit the circumstances of the case and that adopting the presumption position appeared to be a more just remedy for creditor misbehavior. 508 S.W.2d at 268.

25. The court gave no indication what result should obtain when the creditor misbehavior involves a commercially unreasonable disposition. To the extent that a distinction is justified, a commercially unreasonable disposition probably should be grouped with a creditor buying at his own private sale in violation of § 9-504 (3) because both forms of creditor misbehavior can be distinguished from lack of notice cases. It is only in failure to give notice cases that the debtor has lost his right to redeem and the opportunity to find purchasers for the collateral.

26. It is only in lack of notice cases that the debtor loses his § 9-506 right of redemption and is deprived of the opportunity to protect his interests by finding potential buyers and by being present at a public sale. However, several commentators have argued that the right to redeem is usually not a viable alternative. *See* II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.2, at 1216 (1965); Minetz, *May a "Wrongdoer" Recover a Deficiency Judgment, or Is Section 9-507(1) a Debtor's Exclusive Remedy?*, 6 U.C.C. L.J. 344, 362 (1973-74); Note, *A Creditor's Right To a Deficiency Judgment Under Article 9 of the Uniform Commercial Code: Effect of Lack of Notice*, 42 BROOKLYN L. REV. 56, 78 (1975-76). It has also been suggested that some debtors would have little ability to protect their interests even if they had notice of the sale because they are unfamiliar with the standards of commercial reasonableness to which the secured party can be held. *See* P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 13.

when notice is not given to the debtor ignores the fact that a debtor will often suffer just as great a loss when the sale price is deflated because the secured party buys at a private sale or some aspect of the disposition is commercially unreasonable. *Gateway* appears to be the first decision to rely on this distinction in determining the secured party's right to a deficiency.[27] Since all of the acts prescribed by section 9-504 are grouped together within a single subsection, the courts have not previously differentiated between the types of creditor misbehavior either in denying or awarding a deficiency judgment, nor have most commentators made any distinction between types of creditor misbehavior and the awarding of deficiency judgments.[28]

In denying Automatic a deficiency, the *Gateway* court also placed some weight for its decision on *Anheuser v. Oswald Refractories Co.*,[29] a case involving the interpretation of section 2-706.[30] This section provides that an aggrieved seller may, when the buyer wrongfully rejects or revokes acceptance of contracted goods, recover the difference between the subsequent resale price and the original contract price.[31] *Anheuser* held that before a seller may avail himself of this remedy, he must comply with all the terms of that section.[32] By analogy, if the seller loses his remedy for misbehavior under section 2-706, the secured party could lose his remedy for misbehavior under section 9-504.

Section 2-706 (1) explicitly requires that the resale be conducted in good faith and in a commercially reasonable manner as a condition pre-

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27. One student writer has interpreted the Tennessee cases as making a similar distinction but reaching opposite results. The Tennessee courts apparently deny a deficiency when the sale is not commercially reasonable, but not when there is a lack of notice. Note, *Uniform Commercial Code—Deficiency Creditor Who Fails To Give Notice of Resale Has Increased Burden of Proof*, 22 KAN. L. REV. 297, 308 n.78 (1974).

A different distinction, barring a deficiency judgment in retail transactions when there is creditor misbehavior but not in commercial transactions, was rejected by the Georgia Supreme Court in Gurwitch v. Luxurest Furniture Mfg. Co., 233 Ga. 934, 214 S.E.2d 373 (1975).

28. *See* P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 13; J. WHITE & R. SUMMERS, *supra* note 13, at 1000; HENSZEY, *supra* note 8.

29. 541 S.W.2d 706, 711 (Mo. App., D. St. L. 1976).

30. The pertinent portions of § 2-706 are subsections (1) and (3) which state:

> (1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
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> . . . .
>
> (3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

31. U.C.C. § 2-706 (1).

32. 541 S.W.2d at 711.

cedent to the recovery of a deficiency.[33] This weakens any analogy with section 9-504 since it has no such explicit language.[34] Further, the comments to section 2-706 state that "[f]ailure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in section 2-708."[35] In other words, the misbehaving seller is not without a remedy; he is simply prevented from using the resale price to measure his damages. He may still recover damages equal to the "difference between the market price at the time and place for tender and the unpaid contract price."[36] Thus, the court's reliance on *Anheuser,* in concluding that under section 9-504 the misbehaving creditor should be totally without a remedy, seems misplaced.[37]

Several commentators and at least one court have urged an amendment to Article 9 as the best way to settle the issue of whether to grant a deficiency judgment following creditor misbehavior.[38] An amendment by the U.C.C. Editorial Board clarifying the debtor's proper remedy would make Article 9 more uniform, a stated purpose of the Code.[39] Also, the continuing split among the courts in this area suggests that possibly neither of the remedies discussed above adequately protects the debtor. Amending Article 9 would give policy makers an opportunity to develop a new and more sufficient resolution of the problem.

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33. Section 2-706 does not explicitly make notification of the sale a condition precedent. However, Portal Galleries, Inc. v. Tomar Prods., Inc., 60 Misc. 2d 523, 302 N.Y.S.2d 871 (1969), the only case cited as authority for the *Anheuser* holding that notice is a condition precedent to a recovery under § 2-706 (1), cites § 2-706 (1) for the proposition that notice is necessary to recover damages. *Id.* at 525, 302 N.Y.S.2d at 873. Thus, *Portal* suggests that notice is an aspect of a commercially reasonable sale. Even without this analysis, it would seem much easier to find notice as a condition precedent from a statute such as § 2-706 (1), which has the condition precedent of commercial reasonableness, than from § 9-504 which has no such language.

34. Hall v. Owen County State Bank, 370 N.E.2d 918, 926 (Ind. App. 1977), in adopting the presumption position, contrasted § 9-504 where there is no language barring a deficiency with § 2-706 which strongly implies that notice is a condition precedent to a recovery.

35. U.C.C. § 2-706, comment 2. *See also* Cole v. Melvin, 441 F. Supp. 193, 205 (D.S.D. 1977); Wolpert v. Foster, 254 N.W.2d 348, 351 (Minn. 1977).

36. U.C.C. § 2-708 (1).

37. It has been suggested that since Article 2 allows the second remedy under § 2-706 even when the resale involves misbehavior on the seller's part, an argument can be made in favor of not barring outright a deficiency when there is creditor misbehavior under § 9-504. Comment, *The Right to an Article 9 Deficiency Judgment Without 9-504 Notice of Resale,* 7 VAL. U.L. REV. 465, 478 (1973).

38. *See* Security Trust Co. v. Thomas, 59 App. Div. 2d 242, 245, 399 N.Y.S.2d 511, 513 (1977); Henszey, *A Secured Creditor's Right to Collect a Deficiency Judgment under UCC Section 9-504: A Need to Remedy the Impasse,* 31 BUS. LAW. 2025, 2035 (1976); Minetz, *May a "Wrongdoer" Recover a Deficiency Judgment or Is Section 9-507(1) a Debtor's Exclusive Remedy?,* 6 U.C.C. L.J. 344, 361 (1973-74).

39. U.C.C. § 1-102 (2). One commentator has suggested that the U.C.C. Editorial Board may decide uniformity is not important in the granting of deficiency judgments after creditor misbehavior. Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code,* 7 VAL. U.L. REV. 265, 302 (1973).

The debtor-creditor relationship is one in which there is often a great disparity in the ability of each party to protect his interests. Because in most cases the creditor will have greater leverage than the debtor, some deterrent is necessary to prevent overreaching by the creditor. Neither of the present positions adopted by the courts adequately meets this need. Although the presumption position purports to penalize creditors, it actually acts as a deterrent only when the creditor does not meet his burden of proof *and* when the value of the collateral is less than the outstanding debt. Two factors prevent this placing of the burden of proof on the secured party from serving as a sufficient deterrent in Missouri. First, *Wirth* requires the secured party to meet only a nominal burden of proof in order to recover a deficiency.[40] Second, a misbehaving creditor who buys at his own sale for less than a reasonable value can protect himself by documenting evidence as to the collateral's fair market value. Consequently, in cases where the collateral is worth less than the outstanding debt, he will be able to prove this and still recover a deficiency judgment. While this deficiency will not include the amount less than the reasonable value that the creditor could have collected if the debtor had not challenged his purchase, it will include the amount of the outstanding debt above the reasonable value of the collateral which is all the creditor would have collected if he had not misbehaved. In such a case the misbehaving creditor is not penalized and there is no deterrent effect. Conversely, the anti-deficiency position is unpalatable to many courts because it often exacts too high a penalty.[41] This is especially true in those situations where the deficiency is quite large, the secured party's misbehavior was unintentional, or the debtor was not really harmed by it.

What is needed is a middle ground where there is some penalty on the misbehaving creditor to act as a deterrent but where there is also some mechanism to ameliorate the harshness of the penalty. Possible ways to accomplish this include allowing the debtor to collect attorney fees from the misbehaving creditor[42] or providing for a maximum amount or

40. The only evidence plaintiffs offered as to the value of the collateral was their statement that they valued it at $650. The court of appeals stated that this evidence was sufficient for the trial court to determine that the price obtained at the sale was reasonable in light of the facts that much of the equipment was purchased for $1000 and that the $4000 note was given by the debtor in part for the sale of an ongoing business. Wirth v. Heavey, 508 S.W.2d 263, 269 (Mo. App., D.K.C. 1974). The low standard of proof required in *Wirth* has been criticized in P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 13, at 934 n.71.3.

41. *See* Associates Financial Servs. Co. v. DiMarco, 383 A.2d 296, 302 (Del. Super. 1978); Hall v. Owen County State Bank, 370 N.E.2d 918, 927 (Ind. Ct. App. 1977).

42. This remedy also would compensate the debtor more fully than the presumption position does when there has been creditor misbehavior and the secured party meets his burden of proof. In such a case the creditor is limited to a deficiency judgment for the amount of the outstanding debt that is greater than the reasonable value of the collateral as proved by the secured party. This limitation, in theory, fully compensates the debtor for the value of the collateral. In fact, the debtor is not fully compensated because he is still out his attorney's fees