Creditor's Deficiency Judgment Under Article 9 of the Uniform Commercial Code: Effect of Lack of Notice and a Commercially Reasonable Sale - Atlas Thrift Co. v. Horan

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CREDITOR’S DEFICIENCY JUDGMENT UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE:
Effect of Lack of Notice and a Commercially Reasonable Sale

*Atlas Thrift Co. v. Horan*

Upon default by a debtor in a security agreement, a secured creditor may, pursuant to Part 5 of Article 9 of the Uniform Commercial Code, repossess and dispose of the collateral in order to minimize the existing indebtedness. A problem, however, exists because, while the Code requires the secured creditor to notify the debtor of the disposition and to conduct the disposition in a commercially reasonable manner, it fails to chart explicitly the consequences that befall the secured creditor should he not do so. Courts faced with the issue have not uniformly chastised the misbehaving creditor. Rather, interpretation of the Code has resulted in divergent remedies for the debtor and various penalties for the creditor. One interpretation allows the debtor to treat the contract as discharged, with the secured creditor’s misbehavior denying him the deficiency normally allowed when the disposition price does not meet the indebtedness. Another interpretation, however, accords the creditor his deficiency judgment; the

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1. 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972).
2. *Uniform Commercial Code* § 9-504(1) states that “[A] secured party after default may sell, lease or otherwise dispose of any or all of the collateral. . . .” Thus the term “disposition” connotes any method the creditor utilizes to rid himself of the collateral. Throughout the paper the terms “disposition” and resale will be used interchangeably.

Technically speaking, there is no such thing under our law as a “deficiency judgment” in the sense that a formal judgment of that description is rendered by the court, or entered by the clerk for the amount not made by the sale of the mortgaged [secured] property. There is only the original judgment for the full amount of the indebtedness, upon which a deficiency may exist after the issuance and return of the special execution, or even perhaps of one or more general executions in addition. It has nevertheless been customary in ordinary parlance to refer to the amount still due after the return of the special execution as a “deficiency judgment.” *Id.*, citing *Bank of Douglas v. Neel*, 30 Ariz. 375, 247 P. 132, 134 (1926).
debtor's remedy then is to sue for affirmative relief under section 9-507(1).⁶

The problem is nicely explicated in *Atlas Thrift Co. v. Horan*,⁷ a recent California Court of Appeals case. Plaintiff, Atlas Thrift Company, being in the industrial loan business, entered into a security agreement with the defendant's son-in-law, who wished to purchase equipment for a delicatessen business. The defendant, who had successfully done business with the plaintiff in the past, orally assured plaintiff that he was backing his son-in-law as a "silent partner".⁸ Thereafter, the son-in-law went bankrupt. Plaintiff obtained a release of the secured collateral from the trustee in bankruptcy and sold the fixtures and equipment to itself for $2,000 at a "public sale" in its own office. While there was notice of the sale by publication, neither the defendant nor his son-in-law received personal notice or notice by mail.

Plaintiff then sued for a deficiency judgment, i.e., the difference between the resale proceeds and the amount of the loan still outstanding. Defendant maintained that his lack of notice of the resale should preclude plaintiff from recovering the deficiency.⁹

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6. **Uniform Commercial Code** § 9-507(1). In general this section allows the debtor to "recover from the secured party any loss caused by a failure [of a secured creditor] to comply with the provisions..." of Part 5.


8. As defendant's lease to his own delicatessen location prohibited him from engaging in a similar business within twenty-five miles, the defendant did not actually sign the security papers for his son-in-law's loan. At trial the defendant denied that he was a silent partner and, therefore, a debtor. The trial court, however, as a finding of fact, which was not challenged on appeal, determined that the defendant orally represented to plaintiff that he was a partner and that in reliance the plaintiff lent the money. Thus, even though he did not sign the security agreement, the defendant was found by the trial court to be a debtor within the meaning of **Uniform Commercial Code** § 9-105(d) which states:

   "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the division dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.


Plaintiff loaned defendant's son-in-law $10,000. The balance owed on the security agreement at the date of the sale of the delicatessen equipment was $15,000. These amounts, as findings of facts by the trial court, were not challenged on appeal.

9. For a discussion of what constitutes proper notice of sale, see 1 P. Coogan, Secured Transactions Under the **Uniform Commercial Code** § 804(2) (1963 and 1971 Cum. Supp.); II G. Gilmore, Security Interests in Personal Property § 44.6 [hereinafter cited as Gilmore]; White, Representing the Low Income Consumer in Repossessions, Resales and Deficiency Judgment Cases, 64 Nw. U.L. Rev. 808, 818 (1969-70) [hereinafter cited as White]; Annot., 30 A.L.R. 3d 9, 80 (1970). In Maryland the Court of Appeals has ruled that formal written notice of a public foreclosure sale is not necessary under section
Defendant further asserted that—because the sale was conducted in plaintiff’s office, plaintiff purchased the equipment and the price paid was substantially less than the value of the equipment—the sale was conducted in a commercially unreasonable manner; for that reason no deficiency should be allowed. The plaintiff answered that defendant’s recourse for the alleged misconduct was not a denial of the deficiency but rather a suit or counterclaim for affirmative damage relief. Thus, the issue before the court was whether, in the absence of conclusive language in the Code, the plaintiff creditor could recover a deficiency when the creditor admits that he has not complied with the Code provisions.

Following the line of cases which deny a deficiency judgment, the defendant debtor based his argument on section 9504 of the California Commercial Code. That section implies that, unless otherwise agreed, the debtor in a secured transaction is liable for any deficiency which might exist after repossession and disposition of the collateral. However, the Code also provides that “[a] sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner.” Further,

9-504(3) as long as the person entitled to notice has received actual notice of the sale. Crest Inv. Trust, Inc. v. Alatzas, 264 Md. 571, 287 A.2d 261 (1972). See Uniform Commercial Code § 1-201(26) for the definition of “notice”.

10. For a discussion of what constitutes a commercially reasonable sale, see 1 P. Coogan, supra note 9, at § 8.04(2)(a); H Gilmore, supra note 9, at §§ 44.5-44.6; White, supra note 9, at 821; Annot., 30 A.L.R.3d 9, 77 (1970); Annot., 49 A.L.R.2d 15 (1956) (discussing the rights and duties of parties to a conditional sales contract in regard to resale of repossessed property, which discussion is basically applicable to the Uniform Commercial Code provisions on resale). Adequacy of notice and of the sale is a jury question. See, e.g., Leasing Associates, Inc. v. Slaughter & Son, Inc., 450 F.2d 174 (8th Cir. 1971); Farmers’ Equip. Co. v. Miller, 252 Ark. 1092, 482 S.W.2d 805 (1972); Goodin v. Farmers Tractor & Equip. Co., 249 Ark. 30, 458 S.W.2d 419 (1970); Baber v. Williams Ford Co., 239 Ark. 1054, 396 S.W.2d 302 (1965); First Nat’l Bank v. Rose, 188 Neb. 362, 146 N.W.2d 507 (1964).

11. That “plaintiff did not send written notice to the defendants . . . nor . . . conduct a sale of collateral in a commercially reasonable manner” was a trial court conclusion not disputed on appeal. 27 Cal. App. 3d at 1002, 104 Cal. Rptr. at 316.

12. Section 9-504(1) and section 9-504(2) must be read together to reach this conclusion. Compare Cal. Comm. Code § 9504(2) (West 1964) with Cal. Comm. Code 9504(1) (West 1964). Note that the California Code has removed the dash from the section numbers of the Uniform Commercial Code so that, for example, section 9-504(2) of the Uniform Commercial Code becomes section 9504(2) of the California Code.

13. Cal. Comm. Code § 9504(3) (West 1964) (emphasis added). This language is slightly different from Uniform Commercial Code § 9-504(3) which states that “every aspect of the disposition including the method, manner, time, place and terms must be
[u]nless collateral is perishable or threatens to decline speedily in value, or is of a type customarily sold on a recognized market, the secured party must give to the debtor . . . notice in writing of the time and place of any public sale. . . . Such notice must be delivered personally or be deposited in the United States mail postage prepaid addressed to the debtor . . . at least five days before the date fixed for any public sale. . . .

While the Code does not take the next step and specifically say that lack of good faith, of a commercially reasonable sale and of notice as required by section 9504(3) should preclude the deficiency allowed in section 9504(2), the defendant contended that the Code implies such a forfeiture of the deficiency.

Relying on the other interpretation which grants a deficiency to a misbehaving creditor, plaintiff argued that section 9507(1) of the California Commercial Code adequately covers his failure to perform in a reasonable manner by entitling the debtor to recover from the secured party "any loss caused by a failure to comply with the provisions [of the section on default (to include section 9504)]. . . ." The debtor's remedy could be in the form of an independent suit or counterclaim, with any judgment acting to offset and to minimize any deficiency judgment. Thus, since the language of the section makes it the debtor's exclusive remedy, and since absolving the liability of the debtor for a deficiency is commercially reasonable". As a practical matter there is no difference between the two, as UNIFORM COMMERCIAL CODE § 1-203 states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement".

14. [A] "recognized market" might well be a stock market or a commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where the prices paid in actual sales of comparable property are currently available by quotation.


15. CAL. COMM. CODE § 9504(3) (West 1964) (emphasis added). This section is substantially different from UNIFORM COMMERCIAL CODE § 9-504(3) which merely provides that "reasonable notice of the time and place of any public sale . . . shall be sent by the secured party to the debtor . . ." This substitution in California of a definite notice standard for the Code's reasonable notice standard was explicitly made to avoid controversy in each case in determining what is reasonable. SIXTH PROGRESS REPORT TO THE LEGISLATURE BY SENATE FACT FINDING COMMITTEE BY THE SENATE FACT FINDING COMMITTEE ON JUDICIARY, PART I, THE UNIFORM COMMERCIAL CODE 587 (1959-61).

Note also that both the California and the Uniform Commercial Code in section 9-504(3) allow the secured party to buy at a public sale. The creditor may also purchase the collateral at a private sale if the collateral is customarily sold in a recognized market or is subject to widely distributed price quotations.

not among the penalties set forth in section 9507(1), the debtor is precluded from raising a creditor's failure to comply with section 9504 as a defense to a deficiency action.

Defendant answered that section 1103 allows common law principles to supplement the Code except in those instances in which these principles are specifically displaced by provisions of the Code. Therefore, because section 9507 does not state that it is an exclusive remedy, the section is cumulative, and the law existing in California regarding deficiency judgments should also apply. California courts had previously held that failure to notify the debtor extinguished the mortgage lien and barred a deficiency judgment.17

The trial court concluded that the defendant, as a debtor, was entitled to notice, that notice was not given and that the sale was not conducted in a commercially reasonable manner. Despite these findings, the court awarded the plaintiff his deficiency judgment.18 In reversing this decision, the Court of Appeals relied basically on defendant's argument that the "most natural and reasonable construction of the statutory language"19 requires that to obtain the deficiency allowed by section 9504(2) the secured party must comply with the literal conditions set forth in section 9504(3). Thus, failure to give notice and to conduct a reasonable sale was a bar to the secured creditor's deficiency judgment.20

17. Methany v. Davis, 107 Cal. App. 137, 290 P. 91 (1930). The mortgagee failed to demand payment from the mortgagor prior to the sale, to give him notice and to conduct a lawful sale. Consequently, the mortgagee could not collect his deficiency.

18. The trial court, however, could not accept plaintiff's contention that the collateral was worth only the $2000 paid for it at the sale. Failure to give notice may require the secured party to prove the amount that should have been obtained at the sale of the collateral. Further, if this burden of proof is not met, it will usually be presumed that the collateral is worth the amount of the debt. See note 59 infra and accompanying text. In Atlas the trial court found that plaintiff met the burden of proof and thereby avoided the presumption by introducing into evidence the Security Agreement which stated the price of the collateral to be $12,500. Therefore, taking plaintiff's admission of value of $12,500 and adding to that $500 in payments made and subtracting that sum from the $15,000 due, the deficiency judgment totaled $2000. While affirmative action by the debtor was not mentioned in the trial court's opinion, presumably defendant could thereafter sue for affirmative relief under section 9507(1). 27 Cal. App. 3d at 1005-6, 104 Cal. Rptr. 315, 319.

19. Id. at 1009, 104 Cal. Rptr. at 321.

20. For the court's specific reasons for so holding, see the text accompanying notes 36 and 52 infra. Defendant in Atlas Thrift secondarily contended that granting of the deficiency judgment would be an unlawful imposition of a forfeiture or penalty because the $2000 judgment partially reflected a full five years interest on eight months use of the $10,000 loaned (interest at seventy-five percent per annum for eight months). The court in dicta agreed. Noting the split of authority, the court rejected the line of cases which hold that acceleration clauses are to be construed to accord the lender on default the right to demand payment of the debt with interest for the full loan period since such payment
The decisions of both the trial and appeals courts point out the two divergent views taken by the courts when they are confronted by a creditor who has not complied with the Code but who is asking for a deficiency. Whether the creditor can recover can not be determined conclusively from the literal language of section 9-504 of the statute. The courts rather must look to the general purpose of the Code, to other sections of the Code, such as the section providing for redemption, and to principles of law existing prior to the promulgation of the Code in order to reach a conclusion.

**JURISDICTIONS DENYING THE DEFICIENCY**

While jurisdictions denying the entire deficiency are not in agreement as to the basis and reason for their conclusion, many have come to their conclusion by analyzing the common law and the uniform acts culminating in the Uniform Commercial Code. At common law, in the absence of contractual provisions to the contrary, repossession of the collateral by the secured creditor or conditional vendor constituted a rescission of the contract.¹ Contracts were then developed to authorize the seller to sell the goods for the debtor, to credit the debtor's account and to hold the debtor to any deficiency. Because this arrangement worked to the disadvantage of the debtor,² statutes were passed in many jurisdictions to govern the problems of repossession and resale. The most important of these statutes was the Uniform Conditional Sales Act³ of which sections 19, 20, 21 and 22 were devoted to the

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¹ is a contractual penalty which the debtor could avoid by paying the due installments. Instead, the court invoked the rule that collection or retention of interest charged on the principal after default is excessively penal; the court compared the situation to the cases of "collection under duress" and foreclosure in which the courts will not enforce "grossly unfair and unconscionable demands or penalties or forfeitures." *Id.* at 1010, 104 Cal. Rptr. at 322. It is thus feasible that a rule might develop which would deny deficiencies when the bulk of the deficiency is made up of credit service charges.


³ *Id.*

¹ The Uniform Conditional Sales Act, adopted by thirteen jurisdictions, has today been superseded by the Uniform Commercial Code. Also applicable to the problems of repossession and disposition was section 6 of the Uniform Trust Receipts Act, passed by forty jurisdictions. The Uniform Trust Receipts Act has too been repealed by the Code. Cases interpreting the repossession and disposition sections of the Uniform Conditional Sales Act with regard to the creditor's right to a deficiency will be discussed throughout the text; there do not appear to be any cases, however, interpreting section 6 of the Uniform Trust Receipts Act in this regard. Maryland never enacted the Uniform Conditional Sales Act but did enact the Uniform Trust Receipts Act which until repealed by ch. 538 [1963] Md. Laws 786 was found in Md. Ann. Code art. 95 1/2, §§ 1-20 (1957). Still existing in Maryland is the Retail Installments Sales Act, Md. Ann. Code art. 83, §§ 128-
problems of repossession and disposition.

The Uniform Conditional Sales Act was quite specific in its resale and notice requirements. The sale had to be by public auction; the seller had to give the buyer at least ten days notice before the sale; the sale had to occur within thirty days after retaking; and if $500 or more had been paid on the purchase price, there had to be notice of sale by publication in a newspaper at least five days before the sale.24 The Act recognized deficiencies25 and the right of a buyer to recover from the seller any actual damages incurred if the seller did not comply with the disposition, redemption, proceeds and retention sections.26

The courts in adjudging deficiency actions required the seller to comply strictly with those requirements before a deficiency could be obtained,27 despite the language of the Act (like the language of the Code) which did not specifically link the right to secure a deficiency judgment with the obligation to give notice and to conduct a reasonable sale and despite the specific provisions allowing the debtor to recover actual damages if the conditional vendor violated the sections requiring notice and resale. A deficiency judgment was very hard to obtain under the Uniform Conditional Sales Act; in addition, mere technical noncompliance with the statute might subject the seller to the penalty provisions of section 25.28 Thus, under the Act it was possible that failure to comply with notice and resale provisions not only would discharge the buyer from the contract but would accord him the

153 (1969) of which sections 140 through 145 deal with repossession and disposition of goods by the seller in an installment sales contract with a consumer. See note 66 infra.


26. Uniform Conditional Sales Act § 25, which also provided that in no event would the buyer recover “less than one-fourth of the sum of all payments which have been made under the contract, with interest”.

27. See, e.g., Frantz Equip. Co. v. Anderson, 37 N.J. 420, 181 A.2d 499 (1962) (failure to comply with provisions of the conditional sales law not only deprived the vendor of this right to a deficiency judgment but also exposed him to imposition of damages); Berger Auto Co. v. Mattarochio, 58 N.J. Super. 161, 155 A.2d 787 (1959); Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 1091, 323 N.Y.S.2d 13, 15 (1971). A few cases interpreting the Uniform Conditional Sales Act, however, did hold that substantial compliance was sufficient to support a deficiency. See, e.g., Bulldog Concrete Forms Sales Corp. v. Taylor, 195 F.2d 417 (7th Cir. 1952) (substantial compliance is sufficient, absent a showing of prejudice to the buyer or debtor); Schabler v. Indianapolis Morris Plan Corp., 142 Ind. App. 319, 234 N.E.2d 655 (1968).

right to sue for affirmative relief.

While it is true that the Code is more flexible in its resale and notice requirements since it permits private as well as public sales, allows reasonable notice and requires that the sale need be only commercially reasonable, the basic outline is the same. This similarity of provisions led the New York court in *Leasco Data Processing Equipment Corp. v. Atlas Shirt Co.*\(^{29}\) to interpret the Code's silence concerning the question of the right to a deficiency, where the creditor has not precisely complied with the Code, as manifesting the intent that the Uniform Conditional Sales Act case law should also apply to the Code. In other words, if the authors of the Code had wanted to overrule the great majority of the Uniform Conditional Sales Act case law denying deficiencies when the Act has been contravened, they would have done so in clear and unambiguous language.\(^{30}\)

It is important to note that *Atlas Thrift* is a California case and that with respect to notice provisions the California Code is similar to the Uniform Conditional Sales Act, *i.e.*, notice must be given five days before the sale, and there must be notice by publication five days before the sale if the value of the collateral is over $500. Thus, it would seem even more logical for California courts to follow the Act's case law. *Atlas Thrift*, however, does not specifically follow this reasoning, probably because California never enacted the Uniform Conditional Sales Act, and the court did not, therefore, deem it necessary to compare and to contrast the two enactments.\(^{31}\)

This approach is not entirely satisfying, however, because the Uniform Conditional Sales Act's case decisions requiring literal compliance with the Act's resale provisions prior to allowing a deficiency rarely bothered to argue or discuss the point, it being "too obvious to require either a reasoned analysis or citation to precedent."\(^{32}\) Nevertheless, what was clear under the Act may be

\(^{29}\) 66 Misc. 2d 1089, 1091, 323 N.Y.S.2d 13, 15-16 (1971).

\(^{30}\) In fact, the 1972 revision of the Code, which concentrated on changing Article 9, continued this silence. Perhaps an equally plausible reason is that the drafters view this as an area where uniformity among jurisdictions is not necessary. However, such a view violates one of the basic purposes of the Code which is to "make uniform the law among the various jurisdictions". UNIFORM COMMERCIAL CODE § 1-102(1)(c).

\(^{31}\) Note, however, that the *Atlas Thrift* decision relies very heavily on *Leasco* and that *Leasco* relied very heavily on the fact that the New York case law interpreting the Conditional Sales Act denied all deficiency actions where there was not precise compliance with the Conditional Sales Act. *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 1091, 323 N.Y.S.2d 13, 15 (1971).

\(^{32}\) J. GILMORE, supra note 9 at 1263. See, *e.g.*, Frantz Equip. Co. v. Anderson, 317 N.J. 420, 155 A.2d 787 (1959). Many of the Code cases too are devoid of real analysis. See,
equally clear under the language of the Code; moreover, denial of deficiencies may even be a more reasonable holding under Article 9 inasmuch as the enormously complicated procedures of the Act have been replaced by rather minimal standards which are not too difficult, oppressive or unfair to satisfy before the creditor can sue for a deficiency.

While it may be said that it is unfair to interpret the Uniform Conditional Sales Act and the Code to deny a deficiency for non-compliance with the statute even where there is no proof proffered to show that compliance would have aided the debtor, statutes exist and have existed which, upon any noncompliance by the creditor, allow a debtor to recover finance charges already paid, permit treble damages and apply criminal penalties and accord recovery of the total amount paid plus a license to keep the collateral bought or secured without offset for its use. Compared to these statutory penalties, the Code's denial of a deficiency to a misbehaving creditor is moderate.

Both Atlas Thrift and Leasco, in holding that notice and a commercially reasonable sale are conditions precedent for a recovery of a deficiency, primarily base their conclusion on textual analysis of the applicable Code sections. As Leasco explains:

It surely has meaning that the very section (9-504) that affirms the right to a deficiency judgment after sale of a repossessed article also describes in simple and practical terms the rules governing dispositions as well as the pertinent notice requirements. If a secured creditor's right to a deficiency judgment were intended to be independent of compliance with those rules, one would surely expect that unusual con-

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33. I GILMORE, supra note 9 at 1263-64. Gilmore concludes that "the secured party's compliance with the default provisions of Part 5—both the formal requirements of notice and the like and the substantial requirement of a 'commercially reasonable' sale—is a condition precedent to the recovery of a deficiency." Id. at 1264. In summary: "The conclusion is inescapable that the prior interpretation continues to be applicable under the U.C.C., and that the failure of this plaintiff to follow the quite modest notice requirements of 9-504(3) defeats absolutely the claim here asserted." Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 1092, 323 N.Y.S.2d 13, 16 (1972).

34. CAL. COMM. CODE § 9507, Comment 3 (West 1964) mentions the California Unruh Act and the California Motor Vehicles Conditional Sales Act.

35. Note that the UNIFORM COMMERCIAL CODE § 9-507(1) allows the debtor in the case of consumer goods to recover from the misbehaving creditor as affirmative relief the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.
cept to be delineated with clarity. The natural inference that the right depends upon compliance is forcefully underlined by the joining of the two provisions in one section.\(^3\)

Therefore, according to *Atlas Thrift* and *Leasco*,\(^3\) a secured party must obey the letter of the law in section 9-504(3) before he can obtain a right to a deficiency judgment under the provisions of section 9-504(2).

Moreover, the Code specifically provides that the noncompulsory requirements of section 9-504 cannot be waived.\(^3\) The Comments add that denying effect to a waiver or variation of the specific rights of a debtor is a long standing and deeply rooted attitude.\(^3\) Thus, courts would deny effect to a bilateral agreement, made at the time of the security agreement, which would waive the protective provisions of section 9-504; therefore, courts should also disregard any unilateral actions—a commercially unreasonable sale or a sale without notice—of the secured creditor after repossession which have the same result as a waiver of those provisions.\(^4\) Indeed, a unilateral action by the secured cred-

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37. *See also Morris Plan Co. v. Johnson*, 271 N.E.2d 404 (Ill. App. 1971), which held that when the secured creditor had repossessed and then resold to a second purchaser without notice to the original debtor, the second purchaser had defaulted, and the creditor had repossessed and had sold to a third purchaser, the original debtor was not liable for a deficiency upon foreclosure by the creditor of the original note, and the original debtor's legal interest in the collateral (as well as his equity of redemption) was entirely extinguished.

38. **Uniform Commercial Code** § 9-501(3)(b), which states:

To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied. . . .

(b) Subdivision (3) of section 9-504 which deals with the disposition of collateral.

*Morris Plan Co. v. Johnson*, 271 N.E.2d 404, 407 (Ill. App. 1971). Only the compulsory provisions of section 9-504 may be waived, i.e., the provisions concerning the disposition of perishable goods, of goods sold in a recognized market and of goods which decline speedily in value. **Uniform Commercial Code** § 9-501(3). Section 9-501(3) does allow the parties by agreement to set reasonable standards by which the fulfillment of the rights and duties can be measured. Obviously, an agreement to dispense with notice is a waiver and not a standard.


40. Some courts, however, take the waiver provision to mean that there cannot be a preemptive waiver in the security agreement, but that a debtor's actions at the time he voluntarily turns over the collateral to the secured party—for example, a statement that
itor after the goods have been repossessed is even more offensive than a waiver by the debtor. To grant the creditor a deficiency when he has ignored a nonwaivable requirement of the Code, especially when the nonwaivable provisions are in the same section which allows the deficiency, would contradict the rationale for having the requirements nonwaivable.41

Many of the courts which hold that compliance with section 9-504(3) is a condition precedent to recovery by the secured creditor of a deficiency rely on the fact that the failure to notify denies the debtor his statutory right to redeem.42 Normally, a contract which forecloses the right of redemption is void as against public policy.43 As said in Skeels v. Universal C.I.T. Credit Corp.,44

It seems to this Court, however, 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 an evil he does not intend to bid at any sale—can be effective as estoppel and waiver. See, e.g., Nelson v. Monarch Inv. Plan, Inc., 452 S.W.2d 375 (Ky. 1970); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972). This view, however, seems to be easily criticizable in light of the specific and unilateral language in section 9-501(b) that there can be no waiver of subsection (3) of section 9-504 (dealing with the disposition of the collateral) and in light of the fact that when a debtor voluntarily turns over malfunctioning collateral to the seller he is often likely to be so irritated that he could inadvertantly say something which could be construed by the creditor to be a waiver. In this case, therefore, he should later be protected by the Code's requirements.

41. Admittedly this waiver argument does not necessarily lead to the conclusion that the deficiency should be denied the creditor. However, it seems more likely in a waiver situation that courts will apply the strictest penalty.

42. UNIFORM COMMERCIAL CODE § 9-506 which states: “At any time before the secured party has disposed of collateral or entered into a contract for its disposition . . . or before the obligation has been discharged . . . [by retention] the debtor . . . may . . . redeem the collateral by tendering fulfillment of all obligations secured by the collateral. . . .” Redemption, however, is often criticized. See, e.g., II GILMORE, supra note 9, at 1216; Note, Secured Transactions—New Jersey Upholds the Right of a Secured Party to Collect a Deficiency Judgment Under UCC 9-504(2) Although Notice Provisions of 9-504 Were Not Served, 76 DICK L. REV. 394, 400 (1972). Gilmore notes that the original purpose of redemption was to keep ownership of land in the mortgagor and his family but that today there is no concern in keeping stability in land tenure. Yet, redemption lingers and permeates areas other than real property, including the area of secured collateral. Also “we recognize that the defaulting debtor never does in fact cure the default and redeem his property, so that the preservation of his right to do so merely adds complication and expense to the secured party's attempt to devote the collateral to payment of the debt. . . . But the burden of three centuries of history is not easily sloughed off.” GILMORE, supra note 9 at 1216. The law review note indicates that section 9-507(1) is adequate to protect the debtor's right to redemption and that the additional penalty of denying the deficiency is not necessary. The real problem, the author concludes, is not providing redemption but obtaining fair value for the collateral upon resale; therefore, courts should emphasize sale procedures.

44. 222 F. Supp. 696, vacated on other grounds, 335 F.2d 846 (3d Cir. 1963).
which the Commercial Code sought to correct. The owner should have an opportunity to bid at the sale. It was the secret disposition of collateral by chattel mortgage owners and others which was an evil which the Code sought to correct. . . . A security holder who disposes of collateral without notice denies to the debtor his right of redemption which is provided him in Section 9-506. In my view, it must be held that a security holder who sells without notice may not look to the debtor for any loss. 45

Therefore, according to Skeels, failure to notify denies the debtor the right to redeem the collateral before the sale and to bid at the sale. 46 As a close adjunct, failure to notify prevents the debtor from attending the sale merely to bid up the price, from finding his own buyer or from having his friends and acquaintances be present at the sale to bid; all of these actions would ensure that the collateral will not be sold at less than its true value. Giving notice seems especially important in allowing the debtor to find his own buyer. In such a case the debtor could have the buyer attend the sale, or the debtor could redeem and sell the collateral directly to the buyer. For example, in Atlas Thrift, the defendant, who was in the delicatessen business, conceivably could have redeemed the equipment himself or notified his acquaintances in the profession that such equipment was for sale.

In denying a deficiency it is also possible that some courts could use the mortgage principle that when a mortgagee takes possession and sells to a third person without following the method of sale prescribed by law, the sale amounts to a conversion of the property by the mortgagee with the result that the mortgage lien is extinguished and with it the mortgage debt. Thus any deficiency is denied. 47 Such disposition is an unlawful assumption of dominion contrary to the debtor's rights and inconsistent with the mortgage lien. Such illegal act, therefore, de-

45. 222 F. Supp. at 702. Note that Skeels recognized that notice may be waived. Id. Also holding that failure to notify the buyer from exercising his right to redemption and that, consequently, a deficiency should be denied in Braswell v. American Nat'l Bank, 117 Ga. App. 699, 161 S.E.2d 420 (1968).

46. Even cases according the deficiency recognize that notice for redemption purposes is important in protecting the debtor. See Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

47. Methany v. Davis, 107 Cal. App. 137, 290 P. 91 (1930); Rocky Mountain Export Co. v. Colquitt, 179 Cal. App. 2d 204, 3 Cal. Rptr. 512 (1960). Since Atlas Thrift cites Methany and Colquitt as prior California law controlling the decision, it seems, therefore, that the conversion theory underlies the conclusion in Atlas Thrift although the holding in Atlas Thrift was specifically based on statutory construction.
prives the mortgagee of his security and his right to maintain an action on the note evidencing the mortgage.\textsuperscript{48}

A finding by the court of accord and satisfaction will also lead to a denial of the deficiency. In \textit{Moody v. Nides Finance Co.},\textsuperscript{49} the debtor sent her sister-in-law to the creditor to pay the late monthly payment. The creditor refused the payment and asked for the keys to the car. The sister-in-law turned over the keys; after having driven the car the creditor announced that he had his money's worth in the car and that he was going to keep it. Thereafter the car was sold at a private sale without notice to the debtor, in violation of the contract provision that upon de-

\textsuperscript{48} No case has been found in which conversion specifically was deemed to bar recovery for a deficiency. The buyer in \textit{Weaver v. O'Meara Motor Co.}, 452 P.2d 87 (Ala. 1969) counterclaimed for conversion and damages under section 9-507(1) for an improper sale when the secured creditor sued for a deficiency. After granting the deficiency the court refused to follow the debtor's contention that, because the creditor failed to furnish him with notice of the sale, the creditor was liable in damages under section 9-507 for conversion of the trucks. The court held that there was no conversion since the creditor had the right to repossess the trucks under the terms of the retail installment contract and pursuant to the Code. An interesting fact was that the defendant debtor did not even attempt to argue that because of the alleged conversion the secured creditor should be denied his \textit{entire} deficiency.

\textit{UNIFORM COMMERCIAL CODE} § 9-503 states that the "secured party has on default the right to take possession of the collateral" and can so act without judicial process if no breach of the peace occurs. Query, however, whether \textit{Fuentes v. Shevin}, 407 U.S. 67 (1972) may cause more frequent use of the conversion theory by the debtor not only in suits for damages under section 9-507(1) but also as a bar to deficiency judgments entirely. In \textit{Fuentes} the Supreme Court ruled that prejudgment replevin statutes worked a deprivation of property without procedural due process of law insofar as they denied debtors the right to an opportunity to be heard before chattels were repossessed by state agents. The holding will certainly have some effect on the question at hand. If it is wrong to use a sheriff to repossess without a hearing, perhaps it is just as wrong for the creditor to repossess and resell without a hearing or in any case without strict compliance with notice and resale requirements. In the narrow area where creditors use state agents to repossess, \textit{Fuentes} may render the notice question moot. At the hearing the creditor could easily notify the debtor of the sale, but the creditor would have to do so specifically as to time, place, and the other particulars. Still, however, there would be the problem of conducting a commercially reasonable sale. Also, the fact that the Supreme Court is entering the area of debtor's rights under the Code may lead the lower courts to take a hard line against creditors and to construe strictly and literally such statutes as the Uniform Commercial Code. Since courts denying deficiencies base their holding on strict statutory construction and since such a holding benefits the debtor, it may be used more often in the future. However, the court in \textit{Fuentes} said that theirs was a narrow holding; in addition, the decision was a four to three decision. Perhaps it is just as likely that debtors will be protected only in situations similar to that in \textit{Fuentes}.

Note also that the \textit{UNIFORM COMMERCIAL CODE} § 9-505(1) provides that "if the debtor has paid sixty percent of the cash price in the case of a purchase money security interest in consumer goods or sixty percent of the loan in the case of another security interest in consumer goods", the secured party must resell pursuant to section 9-504 within ninety days. If he does not the debtor may recover for conversion under section 9-507(1).

\textsuperscript{49} 115 Ga. App. 589, 156 S.E.2d 310 (1967).
fault the creditor could repossess and resell only if notice was
given. In a suit by the creditor demanding a deficiency the court
held that creditor's taking the keys and the car and giving no
notice of the sale denoted accord and satisfaction even though the
defendant had not so pleaded:

If the company had intended to hold the debtor for any defi-
ciency in connection with the selling of the car the prior
written notice called for in the contract should have been
given. This would have afforded the debtor opportunity to
pay off the obligation, or to arrange to interest somebody in
buying the car so that it might sell to her best advantage.\textsuperscript{50}

Thus it seems that when faced with adequate facts—the creditor
by his actions indicates to the debtor that he intends to retain the
collateral—courts may hold that there has been accord and satis-
faction.\textsuperscript{51}

Finally, in denying a deficiency judgment to the misbehaving
creditor, certain courts have additionally concluded that section
9-507, which provides an \textit{affirmative} cause of action to recover
damages sustained by the debtor as a result of the creditor's
neglecting to abide by Part 5 of Article 9, has nothing at all to do
with \textit{defenses} to a deficiency action. This is best enunciated in
\textit{Leasco} as cited by \textit{Atlas Thrift}:

The plaintiff's contention that a secured creditor's right to a
deficiency judgment under the described circumstances is
limited only by the remedies set forth in 9-507 seems to me
a tenuous one indeed, apart from the fact that no such effect
was ever accorded the corresponding section in the Uniform
Conditional Sales Act. . . .

\textsuperscript{50} \textit{Id.} at 590, 156 S.E.2d at 310. The court, while noting that the provisions of the
contract were very similar to the Code, declined to rely upon the Code to decide the case.
"We are content to rest the matter on accord and satisfaction which these facts would
authorize a jury to find though it appears that we could likely have reached the same result
by applying UCC provisions." \textit{Id.} at 591, 156 S.E.2d at 312.

\textsuperscript{51} Something like accord and satisfaction is contained in the Code. See \textit{Uniform
Commercial Code} § 9-505(2), which states that "a secured party in possession may, after
default, propose to retain the collateral in satisfaction of the entire obligation." See note
75 \textit{infra} and accompanying text.

While the Georgia court in \textit{Moody} seemingly used accord and satisfaction to deny a
deficiency merely as a fiction to avoid the Code and later Georgia courts have held under
the Code that reasonable notice is a condition precedent to recovery of a deficiency,
still be a helpful technique to deny a deficiency. See note 75 \textit{infra} and accompanying text.
. . . [S]ignificant is the special nature of the language used: "the debtor or any person entitled to notification . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part." If this were intended to authorize a defense to an action for a deficiency judgment, it is hard to envisage language less apt to that purpose. The words used plainly contemplate an affirmative action to recover for a loss that has already been sustained—not a defense to an action for a deficiency. The distinction between an affirmative action and a defense is a familiar one, phrases that articulate the different concepts are familiar in the law, and it is unlikely that the experienced authors of the Uniform Commercial Code intended by the above language to provide a limited defense to an action for a deficiency judgment based on a sale that had violated the simple and flexible statutory procedure. 52

As a corollary, according to Leasco and Atlas Thrift and many other cases denying a deficiency due to creditor misbehavior, 53 a debtor not only may use the creditor's misbehavior as a defense to a deficiency action but also may sue for damages under section 9-507. As the remedies under section 9-507 and section 9-504 are mutually inclusive, recovery under section 9-507 will not preclude denial of the deficiency under section 9-504. If the creditor wishes to obtain protection through the Code, receive his statutory right of a deficiency, and avoid a suit for damages, he must strictly comply with the literal requirements of the Code as to repossession, notice, resale and the debtor's right of redemption. Because the literal requirements are relatively few, simple and easy to perform, some jurisdictions are not adverse, upon finding misbehavior, to deny creditors deficiencies and to accord debtors damages.

JURISDICTIONS GENERALLY GRANTING A DEFICIENCY

Certain other jurisdictions, however, allow a deficiency where the secured creditor fails to notify the debtor of the resale or fails to conduct a commercially reasonable sale. In such cases the debtor must utilize section 9-507(1) exclusively to sue affirm-


atively to recoup damages caused by the creditor’s errors. These cases are premised on the idea that the spirit of commercial reasonableness inherent in the Code requires that a secured party should not be arbitrarily deprived of his deficiency when he has contravened the Code: \(^{54}\) neglect by the creditor to comply with the Code may not affect the amount received at the resale and consequently the deficiency owed. In many cases, had there been compliance the amount received at the resale would have been the same. Thus, it would seem unfair to deny the creditor his deficiency. \(^{55}\) Moreover, where the debtor has suffered damage or prejudice by the secured creditor’s failure to give notice or to conduct a commercially reasonable sale, the money’s worth of the harm may have no relationship to the amount of the deficiency. It may be more or less than the deficiency. Therefore, the better procedure, according to these cases, is to let the creditor recover his deficiency and to allow the debtor to sue under section 9-507(1) for compensation.

However, these cases do not mean that the creditor will always recover a deficiency. Where the sale is conducted pursuant to the literal requirements of the Code, the amount received at the sale will be considered to be the true value of the collateral, and any deficiency will be awarded automatically. However, if the creditor has failed either to give notice or to conduct a commercially reasonable sale, he should have the burden of proof to show that he did not prejudice the debtor’s rights and that the sale resulted in a fair and reasonable price for the collateral, \(^{56}\)

\(^{54}\) Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (1971). Conti has been discussed in Note, Secured Transaction—New Jersey Upholds the Right of a Secured Party to Collect a Deficiency Judgment Under UCC 9-504(2) Although Notice Provisions of 9-504 Were Not Observed, 76 DICK. L. REV. 394 (1972). The Conti court notes that its decision differs from the cases interpreted in New Jersey under the Uniform Conditional Sales Act [Frantz Equip. Co. v. Anderson, 317 N.J. 420, 181 A.2d 499 (1962) and Berger Auto Co. v. Mattarochio, 58 N.J. Super. 161, 155 A.2d 787 (1959)] simply because the Code is more flexible and does not require the ten days notice demanded by the Uniform Conditional Sales Act. This is a weak argument in view of the Code’s silence on the question and the conclusion by certain courts and writers that the Code intended the Uniform Conditional Sales Act case law to continue to be controlling. See notes 32 and 33 supra and accompanying text. The Conti court would presumably agree with the Atlas Thrift decision since section 9504 of the California Commercial Code is similar to the Conditional Sales Act in that it requires five days notice be given the debtor before resale by the creditor.

\(^{55}\) Weaver v. O’Meara Motor Co., 452 P.2d 87, 89 (Alas. 1969): “Under the evidence adduced, we believe that the trial judge could conclude that reasonable men could not find that appellant (debtor) suffered any damages by virtue of the appellee’s (creditor’s) failure to give the notice of resale required. . . .”

\(^{56}\) Carter v. Ryburn Ford Sales, Inc., 248 Ark. 236, 451 S.W.2d 199 (1970); Conti
because the proof incident to notice and resale are peculiarly within the creditor's knowledge.\textsuperscript{57} If the secured creditor cannot prove that the sale reflected the fair and reasonable value of the collateral, most courts\textsuperscript{58} will presume that the value of the collateral sold without notice and without a commercially reasonable resale is equal to the amount of the debt.\textsuperscript{59} Often though, the secured creditor will be able to rebut this presumption and prove a reasonable value that will accord him a deficiency. For example, reasonable value may be held to be the amount stated in the security agreement. In other cases experts will be called on to testify as to the true value; book value is often used. Once the creditor has established the reasonable value of the collateral, the deficiency judgment will represent the amount by which the debt exceeds that reasonable value. This deficiency will, more than likely, be less than the difference between the debt and the actual resale price.\textsuperscript{60} Any other damages caused by the creditor's misbehavior will have to be collected by the debtor under section 9-507(1).\textsuperscript{61}

Thus, according to the courts allowing a deficiency even though the creditor has not complied with the Code, a sale of the collateral without notice and absent a commercially reasonable sale results in a prima facie rebuttable presumption that the security was sold for less than its true value and that the true value is sufficient to satisfy the debt. The burden is then on the

\textsuperscript{57} Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966). In effect the creditor has two burdens of proof. At the outset the creditor must prove that he has complied with the Code. Having failed that burden he must prove that his actions in contravention of the Code did not harm the debtor.


\textsuperscript{60} Universal C.I.T. Credit Co. v. Rone, 348 Ark. 605, 453 S.W.2d 37 (1970). For an example of a computation of a deficiency using this method see note 18 supra.


Courts that deny deficiencies because of a creditor's misbehavior theoretically could award affirmative relief under section 9-507(1) to the debtor; however, they seldom do. Thus, the only penalty to the creditor is often the loss of the deficiency.
creditor to overcome these presumptions by showing the real value of the collateral on the date it was sold or the price which would have been paid by a purchaser had the sale been commercially reasonable. The actual sale price will be disregarded except in those instances in which the debtor stipulated that the sale price represented the true value.

A good example of the uncertainty concerning whether a creditor will be denied his deficiency for failing to comply with the Code is Norton v. National Bank. There the court requested amicus briefs from two members of the Permanent Editorial Board of the Uniform Commercial Code. Although in both briefs the defendant Norton was not recognized as a debtor and thus was not entitled to notice, the briefs "concede[d] that the bank acted improperly, that it should have given Norton an opportunity to repurchase the contract, and that it is liable to Norton for any damages he suffered as a result of the bank's misconduct." That Norton is not a debtor implies that he should not be liable for any deficiency, since section 9-504(2) states that "the debtor is liable for any deficiency." It is not clear from the opinion whether the Board Members themselves drew this implication; in fact, it seems that the award of damages would contemplate the granting of a deficiency. However, avoiding these problems, the Arkansas court rejected the editorial advice on the defendant's status and also refused to deny the deficiency.

**The Law in Maryland**

It is important in viewing the problem in Maryland to appreciate that both the Retail Installment Sales Act and the Uniform Commercial Code severely criticizes these presumptions as judicial fictions constructed to mitigate and to alleviate harsh and unfair consequences which could more sensibly and fairly be remedied by holding the secured creditor to the letter of the simple and flexible provisions of the Uniform Commercial Code. Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 1093, 323 N.Y.S.2d 13, 17 (1971).


63. 240 Ark. 143, 398 S.W.2d 538 (1966). An auto dealer to whom the debtor executed a promissory note and a conditional sales contract sold the promissory note to the creditor bank. The debtor defaulted, and the bank repossessed and resold the collateral without notice to the debtor or the auto dealer. The bank sued the auto dealer for a deficiency, which the trial court granted.

64. Id. at 146, 398 S.W.2d at 540.

65. The court did find the dealer to be a debtor entitled to notice, stating that if the creditor could not prove the value that should have been obtained at the sale, it would presume that the collateral was worth the amount of the debt.

66. Md. Ann. Code art. 83, §§ 128-153 (1969). Section 141 controls repossess; subsection (c) provides that five days after repossession the holder of the goods must notify
form Commercial Code\(^67\) may be applicable. In case of conflict the requirements of the Retail Installment Sales Act prevail.\(^68\) As no reported cases have arisen under the Retail Installment Sales Act in regard to a creditor's right to obtain a deficiency, the specific meaning of the provisions of the Act is in doubt. Under the Code, however, there have been two cases touching this question. One, *Hawkins v. General Motors Acceptance Corp.*,\(^69\) held that under section 9-504 of the Commercial Code the plaintiff creditor had sent the debtor sufficient notice and that, therefore, a deficiency was proper. The court gave no indication of how it would have ruled had the notice not been adequate.

A more recent case, *Harris v. Bower*,\(^70\) held that a secured

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70. 266 Md. 579, 295 A.2d 870 (1972).
party's failure to attempt to sell a repossessed boat in a commercially reasonable manner violated the terms of section 9-504 and caused a reduction in the secured obligation by the amount of the fair market value of the boat at the time the secured party took possession and title. By so concluding the Court of Appeals seems to have sided with the line of cases holding that a creditor's misbehavior will not deny him a deficiency. However, there is some contrary language in the case, and absent is any reference to the aforementioned presumptions as to value.\textsuperscript{71}

In 1966 Bower sold Harris a boat for $17,000. Harris executed a promissory note for that amount, and to secure payment of the note Bower received a chattel mortgage. Harris subsequently died, and the debt could not be paid from his estate. Bower refused in September of 1969 to accept return of the boat in exchange for the cancellation of the debt, and in October of that year he reduced the note to a $19,762.50 judgment against Harris' estate plus $1,976.25 in attorney's fees. After an unsuccessful attempt to sell the boat through one advertisement in the Washington Star, Bower repossessed on March 30, 1970 and entered title in his name. Testimony at trial indicated that in 1970 the boat had a retail value of $13,900. After Bower's repossession, there was very little effort made to sell the boat; nor were any repairs made.

Eventually, Harris' wife discovered that Bower had retained possession of the boat and filed a bill of complaint for an accounting, damages and other relief.\textsuperscript{72} After the lower court ruled that the value of the boat did not meet the amount of the judgment and that it was not reasonable to expect Bower to retain the boat in complete satisfaction of the obligation, it ordered that the boat be sold at a judicial sale with the proceeds to be applied according to section 9-504(1). If the proceeds did not meet the amount of the judgment, Bower could then obtain a deficiency under section 9-504(2).\textsuperscript{73}

Harris' wife appealed on two basic issues. The first contention was that the creditor accepted the boat in satisfaction of the obligation pursuant to section 9-505(2). Recognizing that section 9-505(2) requires the secured party to send to the debtor notice

\textsuperscript{71} See note 59 supra and accompanying text.
\textsuperscript{72} While not specifically stated as such, this action could be considered an action under \textit{Uniform Commercial Code} § 9-507(1) which states: "If it is established 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."
\textsuperscript{73} 266 Md. at 581, 295 A.2d at 873.
of intended retention, the debtor's attorney argued that because notice is required only to protect the secured party from a later claim by the debtor that the collateral should have been sold, the debtor is not precluded from proving that the collateral has in fact been retained. Such retention would discharge the debtor from any further liability.\textsuperscript{74} Noting that Bower had kept the boat for seventeen months (two boating seasons), had legal title in his name, and made no effort to dispose of the collateral for more than nine months, the debtor concluded that, since actions speak louder than words, the creditor should be considered to have taken the boat in accord and satisfaction of the obligation.\textsuperscript{75}

The court, however, could not accept the accord and satisfaction position and denied this relief by saying that it could not be in Bower's interest to retain the vessel and that in fact Bower had previously refused to do so: "While we think Bower has come perilously close to painting himself in a corner in this regard we are unwilling in these circumstances to hold that what he has done extinguished the entire debt."\textsuperscript{76} Thus, it seems that the court would not be adverse to this type of an argument had the facts been more favorable.\textsuperscript{77}

The debtor's alternative argument, while unnecessarily complex, narrows down to asking the court to credit the previous judgment with the amount of $13,900, the appraised value of the boat at the time Bower repossessed it. The debtor argued that because the Chancellor in the accounting action below ordered a judicial sale of the collateral, he must have found that the creditor was not acting pursuant to Article 9. The Chancellor must have found either that the creditor had not used reasonable care pursuant to section 9-207 in the custody and preservation of the boat while he possessed it or that the creditor did not make commercially reasonable efforts to dispose of the boat pursuant to

\begin{footnotes}
\item[74] Brief for Appellant at 5-6, Harris v. Bower, 266 Md. 579, 295 A.2d 870 (1972) citing Northern Financial Corp. v. Chatwood Coffee, Inc., 4 UCC Rep. Serv. 674 (N.Y. Supp. 1967). The argument, in other words, is that the creditor cannot keep the collateral and claim the unpaid balance. The collateral must be liquidated at a sale before the balance can be claimed. Id. citing Cox Motor Car. v. Castle, 402 S.W.2d 421 (Ky. 1966). The problem here is that Bower sued on the note before he repossessed.
\item[76] 266 Md. at 582, 295 A.2d at 874.
\item[77] For example, had there been no previous judgment against the debtor, had the creditor not previously refused retention in satisfaction of the obligation or had the boat been sold without notice as the car had been sold in Moody, the court may have found accord and satisfaction.
\end{footnotes}
section 9-504(3). Expert testimony showed the value of the boat on the day of repossession to be $13,900. Seventeen months later when the boat was ordered to be sold, the boat was virtually worthless. Thus, according to the debtor, the damage caused by the creditor’s commercially unreasonable action was $13,900, which should be credited against the previous judgment.

More receptive to this argument, the court noted that the debtor was on much firmer ground in contending that, with respect to the possession of the boat, Bower did not act in a commercially reasonable manner. In making its decision, however, the court seemed to dwell on the creditor’s failure to dispose of the boat rather than on his conduct during the time he possessed it. On this point the court cited only one case, Dynalectron Corp. v. Jack Richards Aircraft Co., for the purpose of showing what a creditor is to do after repossession to be deemed to have proceeded in a commercially reasonable manner in selling the repossessed collateral. Dynalectron stated that the creditor should advertise in trade journals, display the collateral, make repairs on the collateral to make it look attractive for resale, contact others who operate similar collateral and negotiate with a broker. In Harris, the court noted that Bower did not advertise in yachting journals nor place the boat with a broker.

Harris then quoted Dynalectron to the effect that “[a]s the Court finds that the sale... was not accomplished in a commercially reasonable manner, the plaintiff is not entitled to a deficiency judgment against the defendant.” Charging Bower with allowing the boat to depreciate ruinously over two boating seasons, the court concluded that such action was not only commercially unreasonable but also utterly lacking in common sense. But rather than follow Dynalectron’s no deficiency the court concluded that, because the uncontroverted evidence showed the fair market value to be $13,900 when Bower took title and possession and because the value at the time of the trial was a great deal less, the shrinkage in value would be attributed to Bower’s conduct and, therefore, on remand, Harris’ estate should be credited

78. See Michigan Nat’l Bank v. Marston, 29 Mich. App. 99, 185 N.W.2d 47 (1971) (once a creditor is in possession of the collateral he must act in a commercially reasonable manner toward the sale, lease, proposed retention or other disposition).
79. To reach its decision the court recognized Code sections 1-102(1), 1-203, 9-504(3), 9-507(2) and the official comments to section 9-504 as being applicable.
81. That the boat in Harris was not sold does not distinguish Dynalectron, since the main issue is the conduct of the creditor in attempting to dispose of the collateral.
with the value of the boat at the time of the repossession against the previous judgment.

Thus, the Maryland Court of Appeals may in the future side with the jurisdictions granting a deficiency, accord a misbehaving creditor a deficiency and leave the debtor to recover for damages to compensate for the creditor's commercially unreasonable actions. At least that is the factual result in *Harris*. The Harris estate owed a debt reduced to judgment from which had been subtracted a credit to produce a deficiency. However, the result reached in *Harris* may be limited by the peculiar facts and procedure of the case. As noticed in the cases previously mentioned, the normal factual situation is that the seller repossesses, resells without notice or in a commercially unreasonable manner, and sues for a deficiency at which time the debtor invokes the defense that the seller has not complied with the Code. In *Harris* there was no resale, and there existed a final judgment on the note evidencing the purchase price of the boat, a judgment which was obtained before repossession. The existence of this judgment forced the debtor to sue for accounting and damages rather than defend in an action for a deficiency on the ground that the creditor's misbehavior on resale should preclude the entire deficiency. That the court used *Dynalectron* and mentioned *Dynalectron*'s disallowance of a deficiency judgment as dicta indicates that possibly the Maryland court may, with facts closer to those in *Dynalectron*, deny a misbehaving creditor any deficiency, as one line of cases has done. This conclusion is particularly compelling in light of the fact that, unlike several of the cases previously considered, the debtor in *Harris* did not try to argue that the creditor's commercially unreasonable actions should preclude the entire deficiency.83 Nor did the debtor argue that the reasonable value of the boat at a timely resale would have been $13,900.84 The debtor probably believed that he had to take the affirmative damage relief route because he could not directly attack the prior judgment on the note, because evidence existed as to the actual value of the collateral at the time of repossession and because no actual resale occurred. Had there been no previous judgment perhaps the debtor would have argued that the entire deficiency should have been denied. Had there been no evidence of the actual value of the collateral perhaps the debtor would have

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84. Obviously whether the debtor argued damage relief or reasonable sale value the result would have been the same — a credit of $13,900.
argued that the value should be presumed to be the value of the debt. Had there been a sale at a reasonable price the debtor might have argued that the reasonable value of the collateral should have been used to assess the deficiency. Since there was a previous judgment and since there was no actual resale it would be easier to justify damages under the language of the Code, which talks of deficiencies only after there has been a resale. Consequently, the court could only directly address the issues as presented by the appellant. That the court in dicta mentioned language seemingly contrary to its conclusion indicates that the Maryland courts may deny a deficiency in an appropriate fact situation.

CONCLUSION

According to the jurisdictions which provide for a deficiency by allowing the creditor to prove the reasonable value of the collateral, theoretically the debtor is not being hurt by the creditor’s initial misconduct since the reasonable value represents the price which would have been obtained in the market had there been notice and a commercially reasonable resale. Practically, however, there is a question whether the failure of the creditor to act reasonably at the time of the sale can ever be compensated for by post hoc determinations of value. Market conditions and people’s predilections—both the debtor’s and the prospective purchaser’s—are elusive and variable. What might and should have happened on a certain day had the creditor acted in compliance with the Code cannot really be adequately measured and determined after that day passes.

While the Code, in setting forth the specific procedures which a creditor must perform, did not conclude that failure to perform would preclude a deficiency, neither did the Code authorize courts to apply a reasonable value in assessing the deficiency. As the former conclusion derives from a more literal read-

85. Some cases . . . base the debtor’s discharge from further liability on the rationale that the secured party, in his failure to comply with the provisions of the Uniform Commercial Code, raised a presumption that the obligation and the collateral were of equal value. . . . Where the courts base their decision on this presumption, the record below invariably reveals that the secured party has failed to present evidence of the actual value of the collateral and the debtor is thereby relieved from further liability.

Brief for Appellant at 6, Harris v. Bower, 266 Md. 579, 295 A.2d 870 (1972).

86. Nor is the secured creditor being punished. He is liable only for a suit under section 9-507 in which the debtor must prove his actual damages.
ing of the law and as it gives authority to the Code’s specific mandates to the creditor and as the latter conclusion would invoke many presumptions and inadequate measurement techniques, the former seems the wiser interpretation. Further, since the obligations on the creditor are rather simple, few and easy to perform, the creditor should be penalized by a denial of a deficiency when his actions frustrate the operation of actual market conditions, thwart the debtor in redeeming or exercising his rights at the sale and prevent the prospective purchaser from attending a commercially reasonable sale.