1962

The Secured Party and Default Proceedings under the UCC

William E. Hogan

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2556

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The Secured Party and Default Proceedings Under the UCC

The Uniform Commercial Code, already enacted in many states, is currently before the Minnesota legislature. Analyses of the operation of the Code are, therefore, both timely and important, especially to members of the Minnesota bar. In this Article, Professor Hogan examines the concept of default under the Code and analyzes the various means of enforcing secured claims by proceedings within the control of the secured party. Then, after considering certain specialized problems, he deals with enforcement by judicial proceedings. Professor Hogan concludes that although a sound evaluation of the Code's treatment of default proceedings must await further case development, the Code establishes the first integrated system for realization by secured parties, and promotes flexibility and efficiency in the realization procedure.

William E. Hogan*

The secured creditor who at the outset of a transaction purposely plans a definite foreclosure upon the collateral is usually either a knave or a fool. In consumer finance transactions, there is evidence that some unscrupulous lenders do structure their arrangements to trigger default, repossession, and resale at an exorbitant rate. On the other hand, the pawnbroker is really the only legitimate lender who can regularly extend credit to poor risks, taking comfort in his ability to collect his debt from the collateral. Assuring repayment of the indebtedness, and not realization upon the collateral, is the main object of any sensible lender. The honest secured creditor will usually find that realization upon the collateral merely increases his administrative expenses and reduces his over-all profit. Actually, default proceed-

* Professor of Law, Cornell Law School.
2. An attempt by the secured party to recover a share of his overhead costs for the realization will probably be met by a rule of damages limiting recovery to the cost and expenses directly attributable to repossession and resale. Shepherd Tractor & Equip. Co. v. Page, 158 F.2d 655 (5th Cir. 1947); Cherner v. Lawson, 162 A.2d 492 (D.C. Munic. Ct. App. 1960).
ings are at best a means of salvage, aimed at reducing some losses, not at eliminating all of them. Even where the collateral is quite liquid in form, the debtor will probably be lost as a customer. Since such proceedings may actuate other creditors, the secured party may find himself in a dispute with a trustee in bankruptcy or with governmental units claiming priority over his claim. The law of priorities is so complex and intricate that the creditor may well lose no matter how careful he has been in complying with the formal requisites of chattel security law.

The lawyer for the secured party must, however, concern himself with the prospect that trouble may overtake this particular transaction. In preparing standard forms, in drafting the tailor-made contract, and in advising as to procedures upon default, counsel can minimize the woe attendant upon the realization process. It is here that the value of any security is put to the hard practical test. No matter how beautifully synthesized the scholar

---

3. The "loss-of-a-customer" argument is probably more telling in the business transaction than in the consumer loan. This fact may partially account for the large number of nonbusiness bankruptcies (131,402) as compared to the much smaller number of proceedings aimed at business debtors (15,241) during the last report year. 1961 DIR. AD. OFFICE U.S. CTS. ANN. REP. 211.

may consider the Code's rules on priorities, after-acquired property, dominion over the collateral, or notice filing, the Code fails as a practical matter unless it effectively promotes an efficient, fair, and prompt means for the payment of the debt by resort to the collateral. It is in this light that this paper attempts to analyze Part 5 of Article 9 and the related sections of the Code that treat the problems arising when there is a "default under a security agreement."

The Code sets out to accomplish two goals. First, to assure the highest possible realization price, a considerable discretion is conferred upon the secured party seeking to realize upon his collateral. There is a remarkable absence of stringent requirements for mandatory public sales, detailed public notices, or other specific prohibitions. For the most part, the Code requires only that the secured party must be "commercially reasonable" in making the disposition. Second, the Code aims at increasing the ability of a court to review the conduct of the secured party in the disposition of the collateral. An explicit statutory grant permits the court to interfere prospectively with dispositions that will violate the Code requirements and to require the payment of money damages when the defective dispositions have already occurred.

The Code generally allows modification of its rules by a provision in the security agreement if practicable and possible,


10. § 9–507, comment 1.

11. § 9–507(2).

but a long-standing concern with overreaching by secured creditors is reflected in the Code limitations upon variation by agreement. These limitations are collected in section 9-501. Fundamentally, variations of the rules dealing with accounting for surplus proceeds, the disposition of the collateral, the retention of the collateral, redemption, and the liability for noncompliance may not be varied in advance to the extent that "they give rights to the debtor and impose duties on the secured party." 13 Significantly, the Code does permit the agreement to establish standards for the measurement of the performance of these obligations so long as such standards are "not manifestly unreasonable." 14 This ability to set standards for Code-created obligations will be especially important in working out a practicable program for default under the general Code requirement that dispositions must be "commercially reasonable." 15

This Article will first examine the concept of default and then will study the various means of enforcement by proceedings within the control of the secured party. After the general Code plan has been established, certain specialized problems such as those relating to consumer goods, equipment, goods covered by documents, intangibles, and agreements covering both real and personal property, will be considered. Finally, the Article will deal with enforcement by judicial proceedings.

At the outset it should be made clear that the Code pattern in default proceedings is formulated upon the notion that the remedies will be the same with respect to all kinds of collateral and without regard to whether the secured party is in possession. 16 The departures from this pattern occur only where there is a perceived need for specialized treatment.

13. § 9–501(3).
15. § 9–504(3).
16. Although the Code abandons the terminology of the prior law and concentrates upon the nature of the collateral and function of the security devices, the pledge remains as a security interest created and perfected by possession. §§ 9–203(1)(a), –302(1)(a). Distinctions in the Code as to filing and priority parallel the law of conditional sales and trust receipts when a purchase money security interest is involved, but in the Code the purchase money category is not limited as to sellers or goods. § 9–107. See Hogan, supra note 5. Formalities are simplified, but all agreements for nonpossessory interests must be in writing to be enforceable against the debtor or third parties. §§ 9–110, –203; cf. Minn. Stat. § 511.18 (1961). Most of the important distinctions among classes of collateral, such as inventory, equipment, consumer goods, and accounts, are set forth in § 9–102, comment. For a "painless" introduction to Article 9, see Coogan, The Lazy Lawyer's Guide to Secured Transactions Under the Code, 60 Mich. L. Rev. 685 (1962).
I. DEFAULT

Article 9 of the Code does not often specifically answer the question of what is a "default under a security agreement." Once such a default occurs, the remedial techniques of Part 5 of Article 9 are made operative. For the most part, the security agreement itself must define the standards for determining whether a default occurs. Default may hinge on such things as a failure to make a required payment; the unauthorized removal of the collateral; the filing of a petition in bankruptcy or the making of an assignment for the benefit of creditors; the death of an individual debtor; the dissolution of, or the appointment of a receiver for, a business debtor; the legal seizure of the collateral; the unauthorized sale or transfer of the collateral; or the making of any fraudulent or false statement by the debtor at the time of the credit extension. Obviously, the draftsman of the particular standard form or tailor-made arrangement must carefully review these risks when the secured party can be most effectively protected by seizure and disposition of the collateral.

A. ACCELERATION CLAUSES AND DEFAULT

In some instances, the Code does provide standards for default — "acceleration" or "insecurity" clauses are dealt with in Article 1. It is often wise to include such an acceleration provision in the security agreement to assure that the violation of an ancillary promise will mature the promise to pay the debt. This gives the secured party an assurance of his ability to bring suit to obtain a money judgment for the debt and not merely for damages for violation of the related promise.

Frequently these acceleration clauses turn upon a failure to make an installment payment when due. At that point all installments ripen and must be paid by the debtor. In addition to this kind of acceleration, the security agreement may also include the right to accelerate the entire debt whenever the secured party deems himself to be insecure. Where the right turns upon the secured party's state of mind rather than upon an observable fact, there is a real potential for abuse. The Code basically requires that the

---

18. § 1–208. Such acceleration clauses are also less of a problem on the question of the formal requisites for negotiability. See § 3–109; Note, 101 U. Pa. L. Rev. 835 (1953).
19. There may still be a right to redeem the goods on the payment of the overdue installment. See text accompanying note 158 infra. There is some indication that the secured party may have a duty to elect to accelerate notwithstanding the wording of the clause. Note, 88 U. Pa. L. Rev. 94, 96 (1939) (real property mortgages).
creditor be honest. Under section 1–208, an accelerating party has the power to act only if he has the good faith belief that the prospect of payment or performance is impaired. The debtor who wishes to object to the acceleration must sustain the burden of establishing lack of good faith, which is defined as "honesty in fact." Consequently, the secured party is fairly safe in operating under such an insecurity clause. At the same time, there is available judicial control of his conduct when there is evidence of dishonesty. In the absence of an acceleration clause, the creditor could proceed to enforce the security for the default in a single payment, but in the ordinary case this would hardly be worth the effort. Usually the safest route calls for the inclusion of such a clause and for its enforcement when the debtor breaches either his promise to pay or any related promise in the security agreement.

B. Prohibition on Transfer by the Debtor and Default

The Code also recognizes the debtor's interest in the collateral and provides that this interest may be reached by creditors or may be voluntarily transferred by the debtor "notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default." The quoted language should in no way impede the secured party's right to proceed to enforce his interest in the collateral after the voluntary or involuntary transfer. The only purpose of this reference to default is to

20. Judicial reaction to such clauses has varied. In some cases, the creditor is said to be the sole judge of the facts and is bound only to act in good faith. E.g., Thorp v. Fleming, 78 Kan. 237, 96 Pac. 470 (1908); Johnson v. Thayer, 53 Ohio App. 25, 4 N.E.2d 172 (1936); Cline v. Libby, 46 Wis. 123, 49 N.W. 832 (1879). Other courts conclude that the creditor must be in good faith and have reason to think himself insecure. E.g., Bullock v. Young, 118 A.2d 917 (D.C. Munic. Ct. App. 1955); Monson v. Pickett, 253 Minn. 550, 93 N.W.2d 537 (1958); Deal v. D. M. Osborne & Co., 42 Minn. 102, 43 N.W. 835 (1889); Kellogg v. Anderson, 40 Minn. 207, 41 N.W. 1045 (1889); cf. Hendrickson v. Grengs, 237 Minn. 196, 54 N.W.2d 105 (1952); Parks v. Phillips, 71 Nev. 313, 289 P.2d 1053 (1955); Woodruff v. Stahl, 126 Wash. 184, 217 Pac. 1013 (1923). Still others conclude that the creditor must act in good faith and upon facts that actually make the debt insecure. Flinn v. Fredrickson, 89 Neb. 563, 131 N.W. 934 (1911); Humphner v. D. M. Osborne & Co., 2 S.D. 310, 50 N.W. 88 (1891). Under § 9–201, regulatory legislation may still affect these clauses. See Hogan, A Survey of State Retail Instalment Sales Legislation, 44 CORNELL L.Q. 38, 55 (1958).

21. § 1–201(19). Under § 2–103(1)(b) of the Sales Article, "good faith" in the case of a merchant requires, in addition to honesty in fact, the observance of reasonable commercial standards of fair dealing in the trade. It is doubtful that this added duty upon merchants, defined in § 2–104, will affect their obligations under Article 1 or Article 9. See § 1–201, comment 19.

22. § 9–311.
assure that even if the transfer is a default, the transferee obtains some rights. In no sense does the language prevent the secured party from proceeding to enforce his interest because such a transfer constitutes a default. The only impediment to enforcement by the secured party after this kind of transfer will come from other Code rules protecting third parties.

II. SELF-HELP: THE RIGHT TO POSSESSION UPON DEFAULT

A. THE SECURED PARTY'S OBLIGATIONS IN REPOSSESSING

Commonly, with chattel security, the secured party seeks to re-capture the collateral from the debtor after default without the aid of judicial process. Litigation only adds to the expenses of the lender seeking to recoup his loss. The Code, as did the prior Uniform Laws dealing with chattel security, makes clear that the secured party has the right to take possession upon default without judicial process as long as no breach of the peace results. Chattel mortgage law, governed for the most part by non-uniform statutes, was not always so clear, mainly because of some confusion with the law of real property foreclosures. Again, like the prior uniform legislation on the subject, the Code makes no attempt to articulate the standards for determining whether the repossession can be accomplished without breach of the peace.

23. § 9-311, comment 2.
24. Oklahoma provides a variation which makes this result clear. The latest version of the Code proposed in California has the same provision. Comment, 8 U.C.L.A.L. Rev. 812, 976 (1961).
25. In some cases, Article 9 permits third parties to prevail over the secured creditor even where the security interest is perfected by filing. See, e.g., §§ 9-307(1) (buyers in ordinary course of business), –310 (liens arising by operation of law), –309 (protection of purchasers of instruments and documents).
26. In consumer transactions, the repossession of motor vehicles is more common than the repossession of household goods. Automobiles are more easily seized and sold and have a sufficiently active resale market to permit recovery of the costs of repossession. 1 U.S. Bd. of Gov's, Consumer Installment Credits, pt. I, at 75 (1957).
27. § 9—503; see Uniform Conditional Sales Act § 16; Uniform Trust Receipts Act § 6. The Code does not permit the secured creditor the right to extinguish the debtor's right to redeem by sending a notice prior to repossession, as do Uniform Conditional Sales Act §§ 17–18; Ill. Rev. Stat. ch. 121½, § 245 (1961); Minn. Stat. § 511.19 (1961). On the other hand, the Code does not impose any duty upon the secured party to delay sale for a specified period. See §§ 9–504–07.
On occasion, debtors have been able to recover substantial amounts when they have been successful in asserting tort liability against the secured party because of the conduct of the repossession. Where the threat of such liability is present, the wise course is to proceed by action to recapture the collateral. What form that action will take must depend upon local law. In Pennsylvania, the Code was amended to specify that the secured party may elect to proceed “by writ of replevin or otherwise.”

A new feature of the Code provisions is the statutory recognition of a provision in a security agreement requiring the debtor to assemble the collateral and make it available at a reasonably convenient place to be designated by the secured party. This feature is not expressly limited to any particular kind of collateral or to any particular type of transaction. However, it would appear from the fact that the section relates to taking possession of the collateral that it only deals with tangible kinds of collateral, such as goods, documents, instruments, and chattel paper. Although


32. § 9–503.
33. See note 16 supra.
Article 9 is silent on the question of the enforcement of this contractual right to require the debtor to assemble the collateral, section 1–106 clearly invites a court to grant specific relief. Money damages in this context are hardly sufficient to put the secured creditor who already has a money claim “in as good a position as if the other party had fully performed.”

B. THE SECURED PARTY’S OBLIGATIONS WHILE IN POSSESSION OF THE COLLATERAL

To the secured party who repossesses, the introductory section of the default rules gives the rights, remedies, and duties, provided in section 9–207. The latter section also sets forth the obligation of a pledgee or the holder of a possessory security interest. A high degree of freedom is given to the secured party during the period he is in possession since only two of the rules in section 9–207 cannot be altered by agreement of the parties. First, the obligation to use reasonable care in the custody and preservation of collateral in the secured party’s possession cannot be disclaimed, but the security agreement may set up standards that are not “manifestly unreasonable.” Despite this general prohibition upon disclaimer of the obligation to use reasonable care, the section clearly authorizes disclaimer in connection with the obligation to preserve rights against prior parties on instruments or chattel paper. Second, the secured party may not rely on a contractual provision authorizing him to use or operate consumer goods. All other kinds of collateral may be used or operated (1) in the manner and to the extent provided in the underlying agreement; (2) for the purpose of preserving the collateral or its value; or (3) pursuant to the order of a court of appropriate jurisdiction. Consumer goods are expressly excepted only from the first mentioned category. The freedom to use or operate the collateral is important in business financings since the secured party who repossesses may thus preserve the going-concern value of the debtor’s enterprise. Obviously, this has particular impact on trust indentures. In fact, the present Code rules in this context are the product of objections to the possible limitations imposed by earlier forms of the Code.

34. § 1–106(1).
35. § 9–501(3) will still prohibit any agreement waiving or varying the protected class of rights of the debtor and the mandatory duties of the secured party. § 9–207, comment 4.
36. § 9–501(3).
37. § 9–207(1).
38. § 9–207(4).
39. Draftsmen of corporate indentures were concerned that the earlier
The wise approach for the counselor calls for a step-by-step analysis of the other specific rules of section 9-207, which will control "unless otherwise agreed."

**Risk of Loss and Increase.** To the extent of any deficiency in effective insurance coverage, the risk of accidental loss or damage to collateral in the possession of the secured party remains on the debtor. Making insurance relevant here is consistent with the risk rules in Article 2, which govern the time at which risk passes to any purchaser at a disposition.\(^{40}\) Any non-monetary increase in the collateral may be held by the secured party as additional security.\(^{41}\) Money, such as interest, must be applied in reduction of the obligation or remitted to the debtor.\(^{42}\) The latter course is hardly appropriate in the default situation.

**Commingling the Collateral.** The secured party must keep the collateral "identifiable," but fungible collateral may be commingled.\(^{43}\) The definition of fungible includes certain securities and goods, but recognizes that the parties may make goods fungible by contract.\(^{44}\) In New York's Article 8, a special modification makes all investment securities fungible.\(^{45}\)

**Repledge.** The debtor's right to redeem must not be impaired version of § 9-501 might exclude a common provision that upon default the trustee could enter the debtor's premises and "collect and receive all rents, tolls, issues, income and proceeds therefrom," or seek a receiver to make such collections. The amendments to §§ 9-501 and 9-207 were made in the 1958 Supplement to the 1957 Text edition of the Code. Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203, 221 n.61 (1959).

40. By § 9-504(1), all of the provisions of Article 2 govern any sale of goods by a secured creditor after default. Sections 2-509 and 2-510 put the risk on the possessor rather than the owner of the goods in situations where there is a likelihood of insurance. Section 2-722 may permit the secured party seller to recover from third parties who negligently injure the goods prior to default, See Harvard Trust Co. v. Racheotes, 337 Mass. 73, 147 N.E.2d 817 (1958), 38 B.U.L. REV. 620 (1958); MASS. ANN. LAWS ch. 231, § 85E (Supp. 1961).

41. § 9-207(2)(c). *But see RESTATEMENT, SECURITY § 3* (1941).

42. § 9-207(2)(c). The pledgee's right to dividends declared on shares registered in the name of the pledgor is limited by § 8-207. See Notc, 45 CORNELL L.Q. 111, 116 (1959).

43. § 9-207(2)(d).

44. § 1-201(17). The notion of fungible goods under the pre-Code law seemed to require that each unit must, by its nature or by mercantile usage, be the equivalent of another. UNIFORM SALES ACT § 76(1). Distinguished commentators on the Sales Act have suggested that the test is basically whether the parties intended to treat the mass as fungible. VOLD, SALES 230 (2d ed. 1959); 1 WILLISTON, SALES § 159 (rev. ed. 1948).

by a repledge of the collateral, but usually the secured party will not consider using the authorization to repledge. In some situations such action may be perfectly proper, as where there is an attempt to avoid the drastic remedy of liquidation through the operation of the business by the secured party. One caution must be raised in connection with this requirement. The redemption section of the Code specifies that any other secured party is also entitled to redeem. Consequently, if repledge is contemplated, the realizing secured party would be well advised to preserve the redemption rights of the debtor and any other secured party.

III. CODE TOOLS FOR REALIZATION

A. RETENTION OF THE COLLATERAL IN SATISFACTION OF THE OBLIGATION

With an important exception relating to certain consumer transactions, the Code permits the secured party after default to propose to retain the collateral in satisfaction of the obligation of the debtor. The policy permitting this non-judicial type of benevolent strict foreclosure is based upon the conclusion that experience has shown that parties are frequently better off without a resale of the collateral. If the debtor or certain other secured parties object to the retention within specified periods, the secured

46. § 9-207(2)(e). If the collateral is a negotiable document or instrument, the repledge may constitute an effective transfer even though wrongful as to the debtor. See Restatement, Security §§ 23, 41 (1941).

47. Creditors' agreements are used when the creditors are in substantial accord and regard the debtor's embarrassment as temporary, due to unfavorable market conditions, a low phase of the business cycle, unfortunate financial policies, or inefficient marketing methods. The creditors will be inclined to work out some friendly method of continuing the business in order to realize their obligations when there is a pronounced difference between the value of a business as a going concern and the forced-sale value of individual assets. Bank creditors especially may be concerned to have the raw materials in the creditor's stock converted into finished products. Merchandise creditors may find in the debtor one of their chief outlets. Hanna & MacLachlan, Cases on Creditors' Rights and Corporate Reorganization 27 (cohsol. 5th ed. 1957).

48. § 9-506.

49. This exception is discussed in text accompanying note 171 infra.

50. § 9-505(2). In a limited sense, this Code rule is similar to the common-law rules governing conditional sales, which permitted the seller to elect to retain "title" to the goods or to sue for the price and pass "title" to the buyer. See Warren, supra note 1, at 290.

51. § 9-505, comment 1. From the debtor's viewpoint, it must be kept in mind that a retention of the collateral permits the secured party to keep the goods and any payments made by the debtor.
party must dispose of the collateral.\textsuperscript{52} Otherwise, the collateral may be retained by the secured party, and the debtor is discharged of all liability for a deficiency.\textsuperscript{53}

Two classes of third parties must be considered in connection with the proposal for retention of the collateral.

The debtor is entitled to a written notice of the proposed retention from the secured party in possession.\textsuperscript{54} Within thirty days of the receipt of that notice, the dissenting debtor must object in writing to the retention. This means that in some cases the secured party may be required to store the collateral for as many as thirty days.\textsuperscript{55} Although the thirty-day period begins to run upon receipt of the notice, the Code does not clearly provide for the termination of the period by written objection. Unfortunately, the Code is silent as to whether the dispatch or the receipt of the written objection by the debtor is the crucial point.\textsuperscript{56} Another potential problem for the secured party may stem from the vacillating debtor who objects in writing to the retention, withdraws the objection, and then objects again, all within the thirty-day period. The Code, indicates from the expression of the rule, that the last objection may be effective despite the possibility of an estoppel.\textsuperscript{57}

\textsuperscript{52} § 9-505(2). Under the Uniform Conditional Sales Act §§ 19-20, the buyer is required to notify the seller of his demand for a resale in cases where a compulsory resale was not required. The Code rule will preclude the loss of the right to a resale by the debtor's ignorance of his right to make a demand. In Minnesota, no compulsory resale is required, but the debtor has thirty days in which to redeem when he has paid fifty per cent or more on the purchase price of a conditionally sold motor vehicle. Minn. Stat. § 511.195 (1961).

\textsuperscript{53} § 9-505(2).

\textsuperscript{54} The statute requires that the secured party must be in possession prior to sending the notice. § 9-505(2). Furthermore, if the secured party knows that the collateral is owned by a person who is not the debtor, the actual owner is entitled to notice of, and to object to, any retention. § 9-112(b).

\textsuperscript{55} It has been suggested by an experienced commentator that this thirty-day period is unrealistic and will result in secured parties ignoring the retention tool in favor of an immediate resale, and that as a consequence, debtors will be called upon to pay deficiencies more frequently. Kripke, Practicing Law Institute, Program on Uniform Commercial Code (1962).

\textsuperscript{56} If the secured party is confronted by a written objection dispatched before the thirty-day period but received after that period, the wise counseling point may be to dispose of the collateral. There is, however, much merit to the argument that the thirty-day period is more than generous, and that the adoption of an interpretation making the dispatch of the written objection the effective point actually extends the thirty-day period. Obviously, if the dispatch is crucial, then the secured party must wait for the thirty days and for the expiration of a period thereafter sufficient to allow for the delivery of the notice of objection mailed on the last day of the thirty-day period.

\textsuperscript{57} “If the debtor . . . objects in writing within thirty days . . . the secured party must dispose of the collateral . . .” § 9-505(2).
The best counseling technique here seems to be to proceed to dispose of the collateral promptly after the first objection. No right to retention and freedom from liability for deficiency would be won by the debtor in that event, and the debtor who first rejected the proffered retention could not properly claim any right to rely on the very proposal he first spurned.

*Other secured parties* who are known to the person proposing retention or who have filed a financing statement in the state are also entitled to notice of the proposed retention. As will be seen in connection with the application of the proceeds upon disposition of the collateral, the Code explicitly recognizes the rights of junior secured parties. In the present context, subordinate secured creditors may have a greater interest than the debtor in assuring that a disposition in the form of a sale of the collateral takes place. The fact that the junior security interest may absorb all of the debtor's "equity" may be the very reason why the debtor does not care whether the disposition takes place.

Of course, in providing a rule that protects the junior secured creditor, the Code is also imposing a burden upon the secured party who is seeking to realize his claim. When he decides to propose to retain the collateral, the secured creditor must search the records for those persons who have duly filed financing statements indexed in the name of the debtor in "this State." To ease this burden somewhat, no such duty is placed on the secured party in consumer goods transactions. Thus, the principal impact of the rule will be in business and farm transactions. If the Code's central filing rules for business deals are adopted, a single search of the central office will be sufficient to meet the requirement. In the farm transaction, the filings will also be concentrated in either a single local office, or in the central office where a state adopts central filing in all cases. Where fixtures are involved, it will also be necessary to search the financing state-

---

58. Under § 9-505(1), it could be argued that the debtor in these circumstances has signed "after default a statement renouncing or modifying his rights under this Part..." Whether this language also controls in subsection (2) seems to be an open question. See note 154 infra.
59. § 9-505(2).
60. § 9-504(1)(c). See text accompanying note 153 infra.
61. § 9-505(2).
62. Ibid. In Oklahoma the exception as to consumer goods was retained in the retention section, but omitted in the disposition section. OKLA. STAT. tit. 12A, §§ 9-504(3), -505(2) (1961).
63. § 9-401, optional para. (c). With or without the bracketed phrase calling for double filing where there is a place of business in only one county, this section still requires central filing. For variation in the filing rules, see Haydeck, *supra* note 8.
64. Under § 9-401, optional paragraph (a) may make farm trans-
ments filed with the real property records. The burden on the creditor is also eased by reason of the fact that only secured parties who are known or who have financing statements filed in "this State" are entitled to notice. No duty to search the records elsewhere is practicable, and the obligation is fulfilled by searching the records in the state where the property is located.

In addition to deciding when written objection to the disposition must be received, the secured party realizing on the collateral must concern himself with fixing the time when he must determine the class of secured creditors entitled to notice. If a secured party has or takes possession of the collateral and decides to offer to retain the collateral in satisfaction of the indebtedness, he must send notices to other known secured parties and to those who have duly filed a financing statement in the appropriate state. When are these classes determined? If the secured party proposing retention learns of another security interest, or another financing statement is filed after he has dispatched the written proposal, must additional notices be sent? The Code gives no explicit answer to this question. In other comparable areas, the Code adopts a sensible rule of practicality and does not require a series of notices. The provision here should be read in the same pragmatic light; the group entitled to notice should be limited to those known or on file at the time the notice-proposing retention is dispatched.

The class of secured parties entitled to notice is narrower than that entitled to object to the retention. If secured parties not en-
titled to notice of the proposed retention learn of the proposal, they are also entitled to insist on disposition of the collateral. 70 No burden is cast upon the secured creditor seeking to satisfy his claim by reason of this rule. In these cases the thirty-day period for objection obviously cannot run from the receipt of notice, and the Code sets the thirty-day period running at the time the secured party obtains possession. 71 Where a non-possessory security interest is present, the time will start when the secured party takes possession under section 9–503, and there is little difficulty with the test. However, when a pledge-type, possessory security interest is involved, the statute literally starts the period at the time the pledgee takes possession and perfects his security interest. 72 This act occurs long before default, and the Code rule consequently literally deprives other secured creditors who are not entitled to notice of any right to object to a proposed retention of the collateral. In this limited category, this result is patently unfair and should be changed.

B. DISPOSITION BY SALE OR OTHERWISE

Where retention of the collateral in satisfaction of the obligation is rejected by either the statute, the secured party, or those entitled to object, the secured creditor must proceed in accordance with the core of Part 5 of the Code, section 9–504. The policy of Article 9 is to provide a simple, efficient, and flexible tool to produce the maximum amount from the disposition of the collateral. 73 To effectuate that decision, the Code draftsmen rejected any requirement of a mandatory public sale on the assumption that private sales through regular commercial channels will normally produce more money. 74 As a necessary partner to that conclusion, the draftsmen also discarded any elaborate public notice requirements of the time and place of the sale. In addition, there is no set waiting period for disposing of the collateral after default. 75

All of these apparent blessings to the secured creditor must be considered in light of the specific requirement of section 9–504

70. § 9–505(2).
71. Ibid.
72. "[I]f any other secured party objects in writing within thirty days after the secured party obtains possession the secured party must dispose of the collateral under Section 9–504." § 9–505(2).
73. See Gilmore, Article 9 of the Uniform Commercial Code—Part V: Default, 7 CONF. ON PER. FIN. L.Q., 4, 9 (1952).
74. § 9–504, comment 1.
75. Nonetheless, the disposition must be commercially reasonable, and if the secured party attempts to make a public sale he may be required to give some kind of public notice. See text following note 101 infra.
that the disposition must be "commercially reasonable" in "every aspect including the method, manner, time, place and terms..." This section attempts to chart a path in the narrow area between two policy positions—one, a desire to impede dishonest dispositions, and the other, a reluctance to strangle honest transactions with red tape.\textsuperscript{6} As will be seen shortly, not all of the legal red tape has disappeared.

1. \textit{Code Requirements in Making the Disposition: Commercial Reasonableness}

(a) Tests of Commercial Reasonableness: "Recognized Market"

In pursuit of its goal of flexibility, the Code substitutes for the more specific and rigid tests of the prior law a requirement that every aspect of a disposition, including the method, manner, time, place, and terms, must be "commercially reasonable."\textsuperscript{7} This general standard is a favorite in the Code, and case law will undoubtedly develop some precise criteria for its application.\textsuperscript{8} In the meantime, the secured party must work out a practicable set of standards for himself in light of the various Code rules and the prior case law. For Article 9, the comments state that it is of great importance to make clear what types of disposition are to be considered "commercially reasonable," particularly in light of the serious consequences attached to a violation of that standard.\textsuperscript{9} Section 9–507(2) is the Code's attempt to set forth tests for making the kind of prediction envisioned by that comment.

In cases covered by the last sentence of section 9–507(2), this goal of a clear standard is met. Any disposition, by sale or otherwise, is conclusively deemed to be commercially reasonable where approved in any judicial proceeding, by any bona fide creditors' committee, or by a representative of creditors. Troublesome ques-

76. Gilmore, \textit{supra} note 73, at 7.
77. § 9–504(3).
78. For example, the Code expressly makes "commercial reasonableness" a standard of conduct in defining the merchant's duty of good faith (§ 2–103); in limiting one party's right to specify the particulars of performance (§ 2–311); in limiting the seller's resale (§ 2–706); in authorizing a buyer to recover incidental damages (§ 2–715); in the enforcement of a warehouseman's or carrier's lien (§§ 7–210, –308); and in the duty of good faith of a bailee who delivers according to the terms of a document (§ 7–404). In an earlier version of Article 3, the holder in due course definition also contained the same standard. After much debate, particularly in New York, the provision was dropped. Braucher, \textit{Legislative History of the Uniform Commercial Code}, 58 COLUM. L. REV. 798, 812 (1958). Nonetheless, the problem continued to plague the Code sponsors. Penney, \textit{supra} note 45, at 998.
79. § 9–507(1), comment.
tions here will probably be rare. Of course, any collusively obtained approvals could still be attacked as violations of the secured party's general obligation of good faith, and there may be some argument over the definition of "bona fide creditors’ committee" and "representative of creditors." Otherwise the provision can be safely relied upon by a realizing secured creditor.

The second sentence of section 9-507(2) is not so free from difficult questions in determining the kinds of disposition that are to be considered commercially reasonable. Three categories of sales are isolated here: (1) those in a recognized market; (2) those at a price current in such a market; and (3) those in conformity with commercial practices among dealers. All are deemed sales made in a commercially reasonable manner. Since the "manner" seems to be a distinct aspect of a disposition, this special provision may be only partially effective. Sales within these classes may still be attacked as violating the standard of commercial reasonableness as to other aspects of the sale, including method, time, and place. This conclusion finds support in the language of section 9-507(2) itself. Certainly the draftsmen expressed their policy plainly by making all sales approved in judicial proceedings or by appropriate representatives of creditors commercially reasonable as a matter of law. On the other hand, sales in a

80. § 1–203. Good faith is defined in § 1–201(19) as "honesty in fact." This test apparently is wholly subjective since comment 19 to § 1–201 indicates that the commercial reasonableness tests of §§ 2–103 and 7–404 add to the duty of good faith.

81. The question of a "bona fide" committee suggests the possibility that something different from the common Code term of "good faith" as defined in § 1–201(19) is required.

82. In § 9–507, comment 1, there is a reference to the definition of "representative" in § 1–201(35) in connection with the approval of a disposition by a representative of creditors. The Article 1 definition is not so helpful as § 9–301(3), which spells out the meaning of "lien creditor" as including a trustee in bankruptcy or an assignee for the benefit of creditors. See also § 1–201(12) for the statutory definition of "creditor."

83. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

§ 9–507(2).

84. § 9–504(3). A failure to appreciate this point led to an addition to the second sentence of § 9–507(2) in Massachusetts and New Hampshire, requiring the secured party to act for the "purposes of avoiding or reducing loss and of effective realization." MASS. GEN. LAWS ANN. ch. 106, § 9–307(2) (Supp. 1958); N.H. REV. STAT. ANN. § 382A: 9–507 (2) (1961).

85. The provision dealing with representatives of creditors states flatly
recognized market, or at a price current in that market, and sales in conformity with dealers' practices were made commercially reasonable only as to manner.\textsuperscript{86} It seems only sensible to conclude that in the Code plan a different result in the two classes of disposition is intended.

Some further ambiguity stems from the statement of the classes of sales made commercially reasonable as to manner. The first group consists of sales "in the usual manner in any recognized market."\textsuperscript{87} Next, if the manner of the sale differs from the usual, but the price is the price current in the recognized market, the sale falls into the second group.\textsuperscript{88} In both these categories we confront the problem of analyzing and defining the term "recognized market." The scale of possible meanings for this term is obviously broad, and the use of the word "recognized" immediately provokes questions. Who must recognize the market? What features must be recognized? Since three fairly liberal privileges are granted to the secured party who sells in a "recognized market,"\textsuperscript{89} it is submitted that the courts may read the term narrowly.

Some tests for the meaning of the term may be found from the different statutory partners of "recognized market" found in various Code sections giving the secured party these privileges. (1) When collateral is perishable or threatens to decline speedily in value, notice is excused under section 9-504(3). (2) When collateral is of a type that is subject to widely distributed standard price quotations, the secured party may buy at a private disposition under section 9-504(3). (3) When a sale is in conformity with reasonable commercial practices among dealers in the type of property sold, it is commercially reasonable as to manner under section 9-507(2). One can thus make the inference that any one of these three features is not sufficient alone to constitute a recognized market.\textsuperscript{90} Otherwise, their addition to recog-

\textsuperscript{86} Compare § 2-706, dealing with the seller's right to resell upon breach by the buyer, which requires that where the resale is made in good faith and in every aspect is commercially reasonable, the seller may recover a deficiency. The relationship of § 2-706 to § 9-507(2) is not stated in the Code, but the things made commercially reasonable as to manner in Article 9 will probably be sufficient under Article 2. The same question may occur in §§ 7-210 and 7-308 dealing with carrier's and warehouseman's liens.

\textsuperscript{87} § 9-507(2).

\textsuperscript{88} Ibid.

\textsuperscript{89} Notice of a disposition is excused (§ 9-504(3)); the secured party may buy at a private disposition (§ 9-504(3)); and a resale is considered to be made in a commercially reasonable manner (§ 9-507(2)).

\textsuperscript{90} The statement in the text that "recognized market" should be in-
nized market in the statute would be a meaningless redundancy. There is clearly no need for alternative categories if "recognized market" itself includes the alternatives. One must constantly keep in mind that a disposition is not defective when it is not made on a recognized market—only those privileges that the Code attaches to such a disposition are eliminated.

When the collateral is sold in a market where buy and sell prices of actual sales of comparable property are quoted and available to the trade,\(^9\) it seems proper to classify that market as "recognized." Most investment securities and many commodities would fall into this category.\(^9\) More difficulty comes when we deal with other kinds of collateral, and the final answer must depend upon the customs of a particular trade. The minimum standard for a recognized market seems to be that those trading in this kind of collateral would know and accept the price and terms generated by a series of purchases of comparable property. The fact that the particular market, such as an automobile wholesale auction, is accepted as a place for disposition of repossessed cars is probably not enough. However, such auctions are recognized by dealers as a means of disposing of their own inventory of used cars and thus may constitute a recognized market for disposing of automobiles repossessed from a dealer's inventory. For cars repossessed because of a default by a retail buyer, dealer auctions probably should not qualify as recognized markets. Since the class of buyers at such auctions is usually limited to dealers and the wholesale realization price would not fairly relate to a retail debt, there is not the assurance of fairness necessary to conclude as a

\(^9\)§ 2-724 provides that "whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence." Although not directly relevant to Article 9, this section may help to qualify the kinds of markets described as "recognized markets" under Article 9.

\(^9\) One of the tests in the definition of "security" under the investment securities provision of the Code is that the instrument must be of "a type commonly dealt in upon securities exchanges or markets . . . ." § 8-102(1) (a)(ii). This may also help to establish such exchanges as "recognized markets." Note that an "instrument" under Article 9 includes a security under Article 8. § 9-105(1)(g).
matter of law that the sale is made in a commercially reasonable manner. A financing agency that has a right of recourse against the dealer who sold the collateral might be required to call upon that dealer to make a retail sale of the collateral. Of course, this does not mean that in a given set of circumstances the use of such auctions is not commercially reasonable, as where a retail resale is not feasible. Once again, denying that this kind of sale is made in a recognized market only precludes the conclusion that the sale is made in such a way that other Code safeguards need not be applied. Where dealers in the collateral use association price lists in the sale of the collateral, these lists should be relevant in factually ascertaining the reasonableness of the sale, but it is doubtful that they should control to the extent that a sale made at a listed price is a sale at the price current in a recognized market at the time of the sale and thus in a commercially reasonable manner. Two Pennsylvania lower court opinions now suggest this result under the Code.

The first sentence of section 9-507(2) demonstrates that the Code does not purport to provide a sure guide for testing whether a sale is “commercially reasonable.” Only a negative rule is stated. The fact that a better price could have been obtained by a sale at a different time or method is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The Code here seems to aim at settling a bothersome question present in various security and execution sales. Little more will be achieved, since the fact that a better price could be obtained by a different method or at a different time, when added to other appropriate evidence, will support a determination that the sale was not commercially reasonable.

93. See note 89 supra.
94. In Alliance Discount Corp. v. Shaw, 195 Pa. Super. 601, 171 A.2d 548 (1961), the court said that there is no recognized market for used cars and that “redbook” prices were merely for the dealers’ convenience, and therefore, notice was not excused under § 9-504(3). On the other hand, in Family Fin. Corp. v. Scott, 24 Pa. D. & C.2d 587 (C.P. 1961), the court used the “redbook” price to show a wide discrepancy between the sale price and one recognized value in the trade. In non-Code cases, the National Tractor and Farm Implement Bluebook, disclosing average prices of used equipment in poor as well as good condition, has been held admissible, but not determinative of the fair cash market value. Dearborn Motors Credit Corp. v. Hinton, 221 Miss. 643, 74 So. 2d 739 (1954). The National Automobile Dealers Association Book has been made admissible without much discussion in O’Brien v. General Motors Acceptance Corp., 362 P.2d 455 (Wyo. 1961).
95. In Family Fin. Corp. v. Scott, 24 Pa. D. & C.2d 587 (C.P. 1961), a resale price of less than fifty per cent of the “redbook” quotation was held to be sufficient basis to open a deficiency judgment obtained by confession.
The comments to section 9-507 indicate that none of the specific methods set forth in subsection two are to be regarded as either required or exclusive, provided that any disposition is commercially reasonable. The statute itself only states this conclusion in connection with sales approved in judicial proceedings, by a bona fide creditors' committee, or by a representative of creditors. Nonetheless, the conclusion in the comment seems warranted. First, the other methods of disposition are not explicitly made mandatory. Second, a contrary result would reject the policy that flexible methods of disposition will promote more proceeds for all concerned.96

What is commercially reasonable in a given disposition proceeding will normally be a question of fact. If the statute spelled out further and more specific tests, the Code would freeze practice at the current level. By keeping the concept open at its boundaries, the Code sensibly permits change in existing methods and helps to safeguard the debtor from the practically unlimited ingenuity of those few secured parties who would consciously evade particularized standards. On the other hand, by providing some fairly clear standards in certain situations, it permits the secured party a defense to unfair "strike suits" by a consciously-avaricious debtor.97

(b) Form of the Disposition: Public or Private, Sale or Lease

The Code quite clearly specifies that the disposition of the collateral may be by public or private sale, by lease, or by some other means. Whichever of these forms is employed, the general requirement of commercial reasonableness still controls.98 If the security agreement itself originally took the form of a lease of equipment, it might be commercially reasonable to select that same method when seeking to realize upon the collateral.99 On the other hand, the lease of a consumer's automobile might not be commercially reasonable. Although there is an argument to the contrary, it seems possible that even the question of public or private disposition must be examined in terms of commercial reasonable-

96. Note 73 supra.
98. § 9-504(3).
99. A lease may be a security interest within the definition of § 1-201 (37) and becomes subject to all of the requirements and protections of Article 9.
The language of the first sentence of subsection three of section 9–504 states that the proceedings may be public or private, but then it is indicated in the second sentence that every aspect of the proceedings must be commercially reasonable, including method, manner, time, and place. This structuring of the statute permits two arguments. It can be said that the problem of public versus private proceedings is settled in the first sentence, and only other aspects of the disposition are dealt with thereafter when the commercially reasonable test is imposed. On the other hand, there is more force to the argument that the Code explicitly requires that the method or manner of the disposition must be commercially reasonable, and the question of private or public proceedings is plainly a question of method and manner.100

Whether the sale is public may also involve a question of time and place. Since the Code fails to define public sale, we are forced to the prior law to ascertain the standards for such a disposition. There is some indication that “public” is a literal requirement and that everyone must be allowed to be present and to make an offer.101 Consequently, the time of the sale must be set after a due notice to assure such attendance.102 Perhaps such notice

100. The original Code draftsmen seem to agree that the Code abolished any requirement of a public sale, but this conclusion under the statute as now written is not so clear to this writer. Similarly, the suggestion has been made that a public sale is always a permissible alternative under the Code. See Gilmore, supra note 73, at 7, 10 (point 6). Yet it seems that the test of “commercially reasonable” could well be applied to require a private sale in some circumstances.

101. An annotation on the broad question of what constitutes a “public sale” within various statutes or in pledge and mortgage agreements concludes that in general the term means “a sale in which the public, upon proper notice, is invited to participate and give full opportunity to bid upon a competitive basis for the property placed on sale, which is sold to the highest bidder.” Annot., 4 A.L.R.2d 575 (1949). See also Hagan v. Continental Nat'l Bank, 182 Mo. 319, 342, 81 S.W. 171, 177 (1904) (place of sale cannot be restricted to particular merchant exchange membership); General Phoenix Corp. v. Cabot, 300 N.Y. 87, 89 N.E.2d 238 (1949) (place where such sales are usually held is adequate). In Bulldog Concrete Forms Sales Corp. v. Taylor, 195 F.2d 417 (7th Cir. 1952), the court concluded that notice and accessibility to the sale, rather than the place, was crucial and upheld as a public sale a transaction conducted in a lawyer's office but open to all who came after notice.

102. Union & Mercantile Trust Co. v. Harnwell, 158 Ark. 295, 250 S.W. 321 (1923), involved an agreement that pledgee could sell a note “at public or private sale, at any place in the City of Little Rock, without notice.” The court concluded that if pledgee elects to make a public sale, notice to the public is still necessary. In Louisville Trust Co. v. Drewry, 266 Ky. 279, 98 S.W.2d 900 (1936), the court held that the public must be afforded notice of the sale and an opportunity to bid in “public sale” under a pledge agreement. See also In the Matter of Kiamie, 309 N.Y. 325, 130 N.E.2d 745 (1955), where a notice describing only the number of shares in an otherwise unidentified and unlisted corporation was held insufficient to satisfy the pledgee's duty of good faith.
must be published in a newspaper or at some public place.\textsuperscript{103} Furthermore, the term "public sale" may carry with it the notion of an auction where the price is successively raised through a series of offers; thus, sealed bids may not suffice.\textsuperscript{104} In light of the fact that the Code does not explicitly require a public sale, the absence of a definition of the term may not be serious; however, as was noted earlier, it is possible that the commercial reasonableness standard will require such a sale in some cases.\textsuperscript{105} The secured party in good faith may erroneously believe that he is holding a "public sale" when he is, in fact, holding a private sale. If the secured creditor fails to send a proper notice or purchases at the sale himself, he may incur a substantial liability.\textsuperscript{106} The articulation of a statutory test of public sale either in the Code itself or in the accompanying revision of the statutes of any enacting state seems to be worthwhile to avoid this kind of unnecessary snare.\textsuperscript{107}

\textsuperscript{103} Finley v. Insurance Fin. Corp., 106 Pa. Super. 314, 163 Atl. 325 (1932) (public sale by pledgee requires some public notice by handbills, newspaper advertisements, or otherwise). Notice directed only to those whom the pledgee deemed likely to be interested was not sufficient in Hellman v. Pogue, 22 Ohio C.C. Dec. 559, \textit{aff'd mem.}, 85 Ohio St. 463, 98 N.E. 1131 (1911).

\textsuperscript{104} The concept of "public sale" may be equated with "public auction" so that there may be a requirement that the prospective purchasers must know of other bids and be permitted to raise their bids. Offredi v. Huhla, 135 Conn. 20, 60 A.2d 779 (1948) (statute authorizing probate court to order a "public sale" of decedent's realty precludes sealed bid sale). \textit{But cf.} Goodman v. Fisher, 205 Misc. 896, 131 N.Y.S.2d 184 (Sup. Ct. 1954) ("public sale" permits sealed bids or auction of land by welfare commissioner). There is some evidence that sale and auction were equated by the draftsmen of the Code. In discussing § 9-504(3) in an earlier version, Professor Gilmore stated, "Private sale is never mandatory, however; the traditional public sale by \textit{auction} is always a permissible alternative." Gilmore, \textit{supra} note 73, at 10 (point 6). (Emphasis added.) The Restatement of Security states that a public sale by a pledgee is

one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold. The goods must be offered and sold for cash to the highest responsible bidder. Statutes generally regulate public sales as to place, notice and conduct. It is usual to provide that if the sale is not conducted by one of the parties or by a public official such as a sheriff, it must be in charge of a licensed auctioneer. A sale of securities or commodities on a stock or commodities exchange is now generally regarded as a public sale.

RESTATEMENT, \textit{Security} § 48(a), comment c (1941).

\textsuperscript{105} See text accompanying note 100 \textit{supra}.

\textsuperscript{106} § 9-507(1).

\textsuperscript{107} The difficulty is also present to a somewhat lesser degree in other articles of the Code, where different consequences are attached to a public and to a private resale by sellers or the holders of certain possessory liens. Under § 2-706, dealing only with goods, a public sale cannot involve future goods except where there is a recognized market for futures; it
(c) Sale in Units or Parcels

Subject to the over-all requirement that every aspect of disposition must be commercially reasonable, the secured party is permitted to dispose of the collateral by one or more contracts, as a unit, or in parcels. Where disposition of the collateral as a unit would obviously bring a better price, commercial reasonableness probably dictates a sale as a unit. For example, a pledgee of shares of corporate stock that represent control of the corporation probably would be required to obtain the premium for public sale, and the goods must be within view of those attending the sale or made available for reasonable inspection by prospective bidders. In dealing with the enforcement of a warehouseman's lien, § 7-210(2) states rules for delivering notice, for the location of the sale, and for public notices, by newspaper or posting, where the goods were stored by someone who is not a merchant acting in the course of his business. No specific rules are set forth for the merchant bailor. Finally, § 7-308 sets out the means of enforcing a carrier's lien, but does not establish any special criteria for public sales. The relationship of these provisions to Article 9 is clear as a functional matter, but it is doubtful that a court would follow these few standards for "public sales" in applying Article 9 rules that apply to all kinds of personal property. Compare §§ 2-102, -105, 7-102(1)(f), 9-102.

Probably the security agreement can establish standards for a "public sale" as to time, place, notice, and manner of bidding if such standards are not "manifestly unreasonable." §§ 1-102, 9-501. It is quite possible that, in the absence of such a contract provision, the courts might look to the security statutes repealed by the Code as guides for "public sales," e.g., Uniform Conditional Sales Act § 19, or to the law governing sales on execution after a judgment. No cases could be located that defined the difference between public and private sale under Uniform Trust Receipts Act § 6.

A recent bill in the California Senate contained the following amendment to § 9-504(3) on the question of public sale:

Notice of the time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Any public sale shall be held in the county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any part thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this State. If the collateral is located outside this State or has been removed from this State, a public sale may be held in the locality in which the collateral is located. Any public sale may be postponed from time to time by public announcement at the time and place first noticed for the sale or by public announcement at the time and place to which the sale may have been postponed . . . . Any sale of which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale.


108. § 9-504(3).
associated with control. But, on the other hand, the courts should be slow in adopting any general requirements that the secured party should sell in parcels in order to obtain the greater profit that might be associated with a retail sale as distinguished from a wholesale disposition. A sensible lender may well realize that breaking the collateral down into small segments and making individual sales will only serve to increase the expense of the disposition to the breaking point.

Article 9 itself makes clear that a transfer for security purposes is not a bulk transfer under Article 6, which sets up the Code standards for warning creditors of an impending bulk transfer outside of the ordinary course of business. Nothing is said in Article 9, however, about disposition after a default. This apparent gap in the law is filled by section 6–103, which particularly exempts from the bulk transfer provisions “transfers in settlement or realization of a lien or other security interest.” Consequently, the secured party need not concern himself with complying with the details of Article 6 when he disposes of collateral on a bulk basis after default.

2. Application of the Proceeds of the Disposition

In the first subsection of section 9–504, the Code states the order of distribution of the proceeds resulting from the disposition as follows: (1) realization expenses; (2) payment of the indebtedness secured by the interest under which the disposition was made; and (3) payment of certain subordinate interests where such junior claimants (a) make an adequate demand for their shares and (b) when requested, seasonably provide reasonable proof of their interest in the collateral. The second subsection of section 9–504 requires the secured party to account to the debtor for any surplus and, unless otherwise agreed, the debtor is liable for any deficiency.

(a) Realization Expenses

First to be satisfied from the proceeds are the reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and, to the extent provided in the security agreement and not prohibited by law, the reasonable attorneys’ fees and legal expenses incurred by the secured party. The expenses of retaking, holding, and selling the collateral are commonly found in security

109. § 9–111.
110. For the special rule governing sales of certain intangibles, see text accompanying notes 194–204 infra.
The drafters of the Code indicate that running up these expenses by delaying a resale might be a violation of the standard of commercial reasonableness. It is probable that expenses of leasing or other types of disposition authorized in subsection one are covered by the use of the omnibus language "and the like" in paragraph (a) of the same section.

In furtherance of the policy of encouraging private disposition through regular commercial channels, the Code also authorizes the secured party to prepare or process the collateral prior to disposition and to recover the reasonable expenses of preparing the collateral for sale. Of course, subsection one of section 9-505 makes the authorization contingent upon the commercial reasonableness of the processing or preparation. Finishing work in process in a factory to realize a higher market value from completed goods than from a salvage operation or the servicing and conditioning of a repossessed automobile by a dealer is most probably commercially reasonable.

The Code follows those cases that permit recovery of reasonable attorneys' fees and legal expenses by the secured party where the security agreement so provides. It is noteworthy that the language of the statute rather candidly indicates by its use of the plural "attorneys' fees" that in some situations, as where trials

111. Uniform Conditional Sales Act § 21; Uniform Trust Receipts Act § 6(3).
112. § 9-504, comment 6.
114. In § 9-504(1), the Code permits "any commercially reasonable preparation or processing," while in subsection (1)(a) processing expenses are not explicitly mentioned. It is difficult to believe that a different treatment was intended in connection with what is authorized and with what expenses may be recovered.
and appeals are necessary or where a number of jurisdictions are involved, more than one attorney may be needed. The term "legal expenses" is not defined, but at a minimum it would appear to permit recovery of something more than the limited amount usually associated with costs.

(b) Satisfaction of the Indebtedness Secured

Ordinarily this amount will not be difficult to ascertain where there is a default in payment either of a single payment loan or of an installment under a contract with an acceleration provision. When the Code's more liberal rules dealing with description of the debt and collateral, future advances, and after-acquired property are fully utilized, troublesome questions may arise as to precisely what is the indebtedness secured by the particular security interest. This is another reason for making the description of the collateral and of the debt as specific as practicable despite the Code recognition of more general terms in the agreement.

(c) Satisfaction of Subordinate Security Interests

Since any subordinate security interest is discharged by the disposition, the Code here provides a means by which junior secured creditors may participate in the proceeds of the liquidation. The right of participation is conditioned by two requirements im-

116. Nothing is required in the public records regarding the amount of the debt under § 9-402. Further, the formalities for the security agreement itself do not include any requirement that the debt be mentioned. §§ 9-203-04. It may not be wise to take advantage of these liberties in all cases. See Coogan, The Lazy Lawyer's Guide to Secured Transactions Under the Code, 60 Mich. L. Rev. 685, 701 (1962).

117. § 9-110 validates any description "whether or not it is specific if it reasonably identifies what is described."

118. § 9-204(5) states that "obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

119. § 9-204 generally makes security agreements covering future goods effective without any additional intervening act by the secured party. Coupled with the first-to-file priority rule of § 9-312 and the abolition of the "dominion rule" in § 9-205, this section generally effectuates after-acquired property clauses. See Coogan, Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien," 72 Harv. L. Rev. 838 (1959). For the limitation on such clauses protecting purchase money security interests, see Hogan, Financing the Acquisition of New Goods Under the Uniform Commercial Code, 3 B.C. Ind. & Com. L. Rev. 115 (1958).

120. § 9-504(4). Unfortunately, no mention is made of the distribution of the proceeds to other lien creditors in § 9-504(1)(c) even though these liens are also discharged. Marsh & Robinson, Some Observations on Article 9 of the Uniform Commercial Code, 63 Dick. L. Rev. 45, 55 (1958).
posed upon the junior secured creditor. First, the subordinate creditor must place in the hands of the holder of the security interest under which the disposition is made a written notification of a demand for his share. The mere dispatch of the notice is not enough because the language of the statute clearly requires receipt by the senior secured creditor. Another factor affecting the timing of this notice is that it must be received "before distribution of the proceeds is completed." The New York revision of the Code adds language limiting the realizing secured party's responsibility to the junior creditors to the proceeds undistributed when the notification is received. At first blush the New York modification may seem to be a minor one; but it makes clear that a secured party, A, who had realized $10,000 upon the collateral, satisfied $9,000 worth of expenses and debt, and turned over $900 to junior creditor C, would not be in peril if he received a written notice from junior creditor B demanding $800 and claiming priority over C. Although it seems unlikely that a court would allow B to recover from A in this situation, the Code literally creates a doubt, and the variation seems to be a sensible resolution of that doubt. The second condition placed upon the junior secured party seeking to share in the proceeds gives the realizing secured creditor the right to require reasonable proof of the junior interest. The junior holder must comply with such a demand seasonably. It will probably be sufficient for the junior party to furnish a copy of his security agreement covering the collateral.

As indicated by the earlier discussion of notice of a proposed retention, the foreclosing secured party must notify other secured creditors who are known to him or who have filed an appropriate financing statement in the state where the realization occurs. Since notice of disposition may be excused and since there may be other secured parties with a perfected security interest who have not filed in the particular state, some or all junior creditors

121. § 9-504(1)(c).
122. Ibid.
124. New York amended § 9-504(1)(c) further by adding a provision whereby the realizing secured party is entitled to "a sufficient indemnity bond" from the junior secured party.
125. § 9-504(1)(c).
126. "Seasonably" is defined in § 1-204.
127. § 9-504(3). See text following note 149 infra.
128. § 9-504(3). See text accompanying note 140 infra.
129. Apart from the pledge, several other nonpossessory security interests are perfected without filing—some purchase-money security interests in consumer goods and farm equipment under § 9-302(1)(c)–(d); interests in "proceeds" under § 9-306 and negotiable documents under
may be unaware of the proceedings. Apparently, the Code considers that in comparison to the heavy burden that would be placed upon foreclosing secured parties if all were entitled to notice in all cases, the burden on junior creditors who will not be entitled to notice is not great. This conclusion is probably sound because disposition proceedings will seldom generate any excess in any event.

3. Purchasers at Disposition

(a) Protection Afforded

To implement further the two basic Code policies of encouraging dispositions at the highest practicable price and protecting innocent purchasers, section 9–504(4) safeguards the purchaser in the realization proceedings. All of the debtor's rights are conferred upon the purchaser for value, and all subordinate security interests or liens are discharged. Of course, the security interest under which the disposition is made is also discharged.

In addition to the requirement that the purchaser must pay value, the Code requires that he must have a certain state of mind. One who buys at a private sale is protected if he acts in good faith, which requires that he be honest in all respects. It was apparently intended to require less of the public-sale purchaser, who must have no knowledge of any defects in the sale and who must not act in collusion with the secured party, other bidders, or the person conducting the sale. The draftsmen's comments indicate that the purchaser at the public sale is protected as long as he is not acting in bad faith and that he is put under no duty to inquire into the circumstances of the sale. One can infer that the purchaser at the private sale must act affirmatively in order to obtain the same protection. The distinction between acting in good faith and the absence of bad faith has long troubled the law. It has been abandoned elsewhere in the Code as impracticable. Nothing in section 9–504(4) is offered to rebut that judgment, and the distinction here may also prove troublesome.


130. § 1–201(19).

131. § 9–504(4). The secured party's liability for warranty of title is also made less troublesome by this section. See §§ 2–312, 9–504(1).

132. § 9–504, comment 4.

(b) The Secured Party as a Purchaser

If the secured party fears that a public sale is not bringing a sufficiently high price for the collateral, he is often prepared to bid for the property himself. In such cases the Code authorizes the secured party to purchase. This is not the only case where the secured party may be the buyer; again there is a "recognized market exception." When the collateral is of a type customarily sold in such a market, the secured party may be a purchaser. Apparently, the Code takes the position that a sale in a recognized market will itself reveal that the secured party is not obtaining a windfall. Fairness is assured by the operation of the market. The same reason seems to be behind the permission to purchase granted to the secured party where the collateral is of a type that is the subject of widely-distributed standard price quotations.

An interesting question is presented by the interrelationship between these provisions authorizing the secured party to purchase and subsection four of section 9-504, which protects certain purchasers for value. Will the secured party be able to claim the protections afforded if he is a purchaser for value? Since one of the major aims of the protections rule seems to be the safeguarding of an innocent third party when the secured party fails to comply with the applicable law, it would appear that the secured party should not be able to cloak himself in the mantle provided for strangers. Even when the secured party buys at a public sale and when he is honest in fact, if he has failed to comply with the requirements of the Code, he probably should not be insulated from the debtor's claims.

4. Notice of the Disposition

The reader who delights in the prose of the notice portion of the newspaper classified advertisements or the bulletin board of the courthouse will be disappointed to learn that the Code demands no public notice of a proposed disposition. Few others


134. § 9–504(3).
135. See the discussion of the concept "recognized market" in text accompanying notes 89–94 supra.
136. § 9–504(3).
137. § 9–506 may also permit redemption by the debtor in such cases. See text accompanying note 169 infra.
138. For the concept of a "public sale," see text accompanying notes 101–07 supra. The commercially reasonable standard (see text accompanying note 77 supra) or installment sales legislation may demand such a notice. Installment sales legislation is usually consumer-oriented and may occasionally call for certain formalities on default. See Hogan, A Survey
will be distressed. Little improvement in the size of the group interested in buying the property results from such notices. In the majority of cases under the Code, individual notices must be dispatched to the debtor and, except in cases involving consumer goods, to other secured parties.\textsuperscript{139}

(a) When Notice is Excused

In some cases the secured party is excused from the obligation to send any notice of the disposition. When the goods are perishable or threaten to decline speedily in value, notice is not demanded.\textsuperscript{140} However, even in these situations it may be practicable and desirable to notify the debtor and appropriate junior secured parties of the time of the rushed sale. This approach will eliminate one possible argument in attacking the sale. In addition to permitting crash sales to avoid further loss, the Code also excuses notice where the collateral is of a type customarily sold on a "recognized market."\textsuperscript{141} Where notice of the sale is not given, one can expect that the secured party will claim that the goods fall within the recognized market exception. Until the meaning of that term is more completely elaborated by case law,\textsuperscript{142} the wise counseling point here is to send the notices and avoid the risk of liability for violating the Code requirements.\textsuperscript{143}

In one situation, where the secured party is from the outset in possession of the collateral as pledgee, the Code rules excusing notice may appear to work an unfair hardship upon the debtor. Since the debtor in default is not warned of the impending sale of his collateral by reason of repossession nor by any notice of the disposition, he is effectively deprived of exercising his right of redemption at any time prior to the sale.\textsuperscript{144} In a sense, this rule does little more than is accomplished by most collateral note forms under pre-Code law. Notice of any disposition is usually waived in such cases.\textsuperscript{145} However, it is possible that collateral

\textit{of State Retail Instalment Sales Legislation}, 44 CORNELL L.Q. 38, 59–65 (1958). A note to § 9–503 calls for the repeal of these default rules even though the Code generally purports to permit the regulatory legislation to control §§ 9–201, –203.\textsuperscript{139}

\textsuperscript{139} Oklahoma does not provide the exception for consumer goods. OKLA. STAT. ANN. tit. 12A, § 9–504 (Supp. 1961).\textsuperscript{140}

\textsuperscript{140} § 9–504(3).\textsuperscript{141}

\textsuperscript{141} \textit{Ibid.}\textsuperscript{142}

\textsuperscript{142} See discussion of "recognized market" accompanying notes 89–94 supra.\textsuperscript{143}

\textsuperscript{143} § 9–507(1).\textsuperscript{144}

\textsuperscript{144} § 9–506. Unfortunately, the difference between the possessory and nonpossessor security interest has been deliberately ignored. § 9–501, comment 2.\textsuperscript{145}

\textsuperscript{145} See Note, 66 YALE L.J. 257, 258 (1956). Compare Seasongood,
of a type sold in a recognized market may be disposed of without notice to the debtor at the market price, but at a time when the market is rising. Will the secured party be able in this situation to avoid a claim that the failure of the pledgee to notify the debtor was a breach of the obligation to make every aspect of the disposition commercially reasonable? The debtor who had no chance to redeem because no notice was given can claim that as a result of the disposition he lost the benefit of the rising market. This is a hard case. On one side the statutory language excusing notice is explicit and may be said to control the more general reference to commercial reasonableness. Nonetheless, it is clear from repeated reference in the comments that every aspect of the disposition is to be tested by commercial reasonableness. For the counselor, it once again seems best to avoid the risk by sending notices and, where possible, eliminating the issue from litigation.

(b) Time and Method of Making the Notice

The text of the Code merely specifies that there must be reasonable notice of the time and place of any public sale and reasonable notice of the time after which any private sale or other intended disposition is to be made. This leaves open a question as to the minimum waiting period required between the notice and the public sale or the time after which another disposition will take place. Both the term "reasonable notification" and the general demand for commercial reasonableness as to the time of the disposition require some period of time between the dispatch of the notice and the sale. The Uniform Conditional Sales Act required ten days' notice of the sale, and this may well continue to be a rough rule of thumb in the absence of special circumstances, such as a declining market, that require a shorter notice.

To avoid the problem, it is probably wise to specify some notice period in the security agreement at the time of the credit extension. Under section 9-501(3), the parties may determine standards by which the nonvariable rights of the debtor and duties of the secured party may be measured. Such standards in the agreement may not be manifestly unreasonable. Consequently, one should avoid specifying excessively short periods between the notice and the sale. When the period specified in the pre-Code

---

Drastic Pledge Agreements, 29 Harv. L. Rev. 277, 281 (1916); Vincens, A Perilous Path for Pledgees, Bus. Law, April 1956, p. 22.
147. § 9–504(3).
uniform acts is used in the security agreement, the secured party may immunize himself from a claim that the period is manifestly unreasonable. Within the same limitations, the security agreement may also set the standards for the place at which and the means by which such notices are to be delivered to the debtor.\footnote{149}

(c) Group Entitled to Notice of the Disposition

As in the case of notice of a proposed retention of the collateral in satisfaction of the obligation, the secured party who is required to send notice of the disposition must notify the debtor and, except in the case of consumer goods, certain other secured parties.\footnote{150} The secured parties entitled to notice are defined here, as in the retention situation, as those known to the realizing creditor and those who have duly filed a financing statement indexed in the name of the debtor in the state.\footnote{151} The question of the time when the group is ascertained is left open here in the same fashion as in the case of a retention of the collateral in satisfaction of the indebtedness. The answer here should be the same, and the class to be notified should be fixed when the notices are first dispatched.\footnote{152}

IV. REDEMPTION

Since the basic purpose of any kind of security device is to assure payment of the debt, the Code does not limit to any set period the debtor's power to pay the debt and ransom the collateral. Furthermore, the Code recognizes the interest of junior secured creditors in the collateral by conferring upon them the right to redeem.\footnote{153} Four ways are open under the Code to termi-

\footnote{149. Probably the junior secured parties entitled to notice would also be bound by such standards on the basis of the fact that they take their interest subject to the terms of the senior security agreement. Note, however, that under the first-to-file rule of § 9-312(5), the senior secured party may obtain priority by filing much in advance of any agreement. §§ 9-203, -303, -402. In an appropriate case the junior party may be able to argue that the agreement creating the prior security interest and establishing the standards was not even in existence at the time the junior party took his interest. Nonetheless, practicality would seem to require that the junior party be bound by the standards imposed by a senior creditor's security agreement under § 9-501(3).}

\footnote{150. See text accompanying note 49 supra. If the secured party knows that a third person is the owner of the collateral, notice must be sent to that owner. § 9-112.}

\footnote{151. §§ 9-504(3), -505(2).}

\footnote{152. See text accompanying note 68 supra.}

\footnote{153. § 9-506. Section 9-112 specifically permits a third party who is known to the secured party as the owner of the collateral the same right as the debtor to redeem. Despite a possible contrary inference from the statutory language, it is hard to believe that an owner would not have the right to redeem even when he is not known to the secured party.}
nate the right to redeem: (1) disposition of the collateral; (2) making of a contract of disposition; (3) satisfaction of the secured obligation by retention of the collateral under section 9-505(2); (4) making of a written agreement with the debtor or other secured party after default.\(^1\)

In some cases, the debtor will profit because his right to redeem will be continued beyond the statutory periods set by pre-Code law.\(^2\) Nonetheless, in other situations the debtor may find that the collateral has been sold promptly after repossession or default. In these latter cases, the Code may somewhat reduce the power of redemption. Apparently, the only safeguard extended to the debtor in these circumstances is that the sale must be commercially reasonable, and in some cases speedy disposition may violate that standard. For example, a sale made without testing the market at all may effectively cut off the debtor's right to redeem, but make the secured party liable under section 9-507 (1). Indirectly, where notice of the time of disposition is required, the debtor will be able to redeem at any time prior to the actual sale. In these cases, therefore, ascertaining the meaning of "commercial reasonableness" and of "reasonable notification" may well involve consideration of the debtor's right to redeem.

A word for word reading of section 9-506 might permit the secured party to make a contract for the disposition of the collateral any time after default. Such a contract might possibly be entered into even before repossession of the collateral. Thus, the debtor would find his equity destroyed by the secured party's action taken prior to repossession. Although this is a possible reading of the statute, one is ill-advised if he attempts to follow such a course of conduct. This is the kind of case where the commercially reasonable standard might take its biggest bite. It cannot be emphasized too often that secured lenders as a class may find the commercially reasonable test as interpreted by the courts a stringent one if individual secured parties take short cuts in the realization process. Part 5 of Article 9 gives secured creditors

\(^1\) Doubtless the debtor may renounce his right after default, both where a compulsory resale is required under § 9-505(1) and where redemption is permitted under § 9-506. Whether after default he may renounce lesser rights conferred upon him by the Code is more obscure. Only in § 9-505(1) is the broad question touched upon, and it states the duty of compulsory disposition where the debtor "has not signed after default a statement renouncing or modifying his rights under this Part." The implication here authorizes other modifications as to the details of the sale and so forth. Compare Uniform Conditional Sales Act § 26.

\(^2\) Compare Uniform Conditional Sales Act §§ 17, 18, where the right to redeem is limited to ten days after retaking and may be cut off entirely by a notice before repossession.
considerable flexibility, but it has built into its provisions a tool whereby judge-made developments may restrain the secured party.

The kind of caution expressed in relation to contracts of disposition made prior to default is also relevant elsewhere. As indicated in the discussion of the Code requirements for making a disposition, there is specific recognition of dispositions by sale, lease, or otherwise. If the secured party utilizes a lease or some form of bailment and retains the interest of lessor or bailor himself, he may take comfort in the thought that under section 9-506 the debtor's right to redeem has been terminated by the disposition. Despite the language of the statute, it is a practical certainty that courts accustomed to years of watchful concern for the debtor's equity will protect the debtor who pays the obligation and seeks to recover whatever interest the secured party has retained after the disposition.

Similarly, one wonders if many courts will not permit the debtor who has defaulted in the payment of a single installment to redeem by the payment of that installment. The comments state a policy that the debtor should be required to pay all of the obligation as a condition to redemption. Thus in the presence of an adequately drafted acceleration clause, the debtor would seem to be required to pay the full amount of the debt in order to redeem. The statutory language is not so specific, however, and may provoke litigation over the question of whether the defaulted payment or the whole debt must be paid.

V. CONSEQUENCES OF VIOLATION OF THE CODE STANDARDS

In an attempt to permit the secured party to proceed with realization in confidence, section 9-507(2) sets out some particu-
larized tests of commercial reasonableness. For the same purpose, the debtor and other secured parties are given the right to test before its consummation any disposition that they consider to be in violation of the Code requirements. Of course, the Code requires that the person attacking the disposition must "establish" the secured party's failure to follow the Code rules. If the courts follow this statutory invitation, the ability to interfere with prospective dispositions may work to the secured party's advantage. At least in the business loan where the protected group sits back with full knowledge of a disposition and fails to make use of this right to test the case in advance, the secured party can argue that the burden of establishing any loss caused by non-compliance should be stringent.

Only in the case of consumer goods does the Code require a minimum liability for failure to comply with the Code standards. The consumer-debtor may recover "in any event an amount 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." In consumer transactions, the amount of the debt is often small and losses are hard to prove, and therefore, the Code creates this minimum recovery. One can surmise that, because of the difficulty of proof, this minimum may usually be the maximum, and the secured party can safely predict the extent of his liability here. In the business transaction, including farm financings, the complaining party must clearly show both the violation of the Code requirement and the extent of the resulting loss.

The statutory language does not attach loss of the security to a violation of the Code standards, and this is made explicit in section 9-207(3), dealing with the secured party's liability for violation of his duty while in possession of the collateral as a pledgee or upon repossession after a default. The relationship of the debtor's right to redeem and a violation of the Code's requirements is less certain. For example, the redemption section provides that the debtor or any other secured party may redeem at any time before "the obligation has been discharged under Section due under the contract at the time of retaking and interest." See Davis, The Law of Secured Transactions and Article 9 of the Uniform Commercial Code, 6 S.D.L. REV. 173, 209 (1961); cf. MINN. STAT. ANN. § 511.19(3) (1961).

161. See text accompanying note 79 supra.
163. Gilmore, supra note 73, at 11; see § 9–112.
164. § 9–507(1).
165. Gilmore, supra note 73, at 11.
166. See text accompanying note 34 supra.
9–505(2).” The cited section relates to retention of the collateral by the secured party in satisfaction of the obligation and sets forth certain requirements for notice and for a waiting period. No definite statement appears in the Code in connection with the effect of a defectively attempted retention upon the right to redeem. However, one can argue that in such cases the debtor's obligation is not discharged and, consequently, that his right to redeem remains unimpaired. Certainly the debtor will be able to redeem when the secured party proposes retention in a transaction where a sale of the collateral is compulsory.

A more difficult case arises when the secured party disposes of the collateral and the Code requirements are violated. The disposition portion of the redemption rule merely requires action to redeem before "the secured party has disposed of collateral or entered into a contract for its disposition under Section 9–504." No other mention is made of the standards established for a disposition in section 9–504. Consequently, it is possible to argue that even a defective disposition cuts off the right to redeem. In support of this position one can also assert that section 9–507(1), establishing the liability of the secured parties, is the exclusive remedy for violation of the requirements of the section.

Of course, when the purchaser at the disposition qualifies for the protections specified in section 9–504(4), the purchaser will clearly be safeguarded against the debtor's claim of redemption. However, the fact that protection is extended only to a certain class of purchasers is some argument that a defective disposition does not cut off the debtor's redemption right in some cases. If the secured party himself purchases and violates the Code requirements, redemption will probably remain available.

VI. SPECIAL RULES DEPENDENT UPON THE NATURE OR USE OF THE COLLATERAL

Although the default provisions might first appear to be drafted upon the assumption that all security interests are the same, distinctions are made in the treatment of various kinds of collateral.

167. See text accompanying note 50 supra.
168. An interesting question arising from the argument stated in the text relates to the effect of failure to notify a junior secured party under §§ 9–504(3) or 9–505(2). Will this defect in the secured party's conduct of the default proceedings enable the debtor to redeem?
169. § 9–505(1). See text accompanying note 171 infra.
170. This conclusion suffers from the fact that § 1–106 should grant a specific remedy to a debtor who is prevented from redeeming by the secured party. Thus it can be argued that § 9–507(1) is not the exclusive remedy for violation of the standards of Part 5 of Article 9.
A. Consumer Goods

The first such category consists of consumer goods, and the most significant special rule calls for a compulsory disposition of consumer goods in specified cases.\(^{171}\) The general Code rule does not set a mandatory period for disposition, but, when the debtor has paid sixty per cent of the debt,\(^ {172}\) the secured party must dispose of consumer goods within ninety days after he takes possession. The section is patterned upon the Uniform Conditional Sales Act, where the seller must resell within thirty days of a retaking if the buyer has paid fifty per cent of the price.\(^ {173}\) Under the Code the right of redemption is preserved until the disposition.\(^ {174}\) The secured party's obligation to make a compulsory disposition cannot be disclaimed in the security agreement.\(^ {175}\) On the other hand, the Code recognizes a renunciation or modification of the right to such a disposition after default.\(^ {176}\) Frequently, such a waiver may be in the debtor's interest, and he may thus avoid the possibility of a liability for a deficiency. In the same connection, after default the debtor may also contract away his right to redeem.\(^ {177}\)

The general Code treatment of the obligations of a secured party requires that a notice of any disposition or of a proposed retention must be sent to other secured creditors who have filed or who are known to the secured party,\(^ {178}\) but such notice is excused in consumer transactions.\(^ {179}\) There is support for this approach on three bases. First, each consumer transaction involves a relatively small amount and must be treated in a standardized fashion by financing agencies. Second, the realization of excess proceeds in these cases is probably relatively rare in any event. Third, the duty to notify other secured parties who have filed appropriately would be relatively ineffectual as to consumer goods since the most significant group of such interests is perfected without filing by reason of the special purchase-money rule.\(^ {180}\)

In consumer goods transactions, the secured party's liability
for violation of the Code requirements is expressed alternatively. The usual recovery of any loss caused by the violation is permitted; further, in consumer transactions there is a minimum recovery of 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. This is another rule which cannot be varied by agreement. Moreover, for violation of the compulsory disposition requirement, the creditor financing consumer goods may be liable alternatively for conversion.

B. Equipment

In an attempt to reduce the expenses of realization, the Code permits a secured party to render equipment unusable in lieu of removal and to dispose of such collateral on the debtor's premises. Heavy equipment is particularly suitable for this technique, which eliminates the costs of removal and storage of such equipment, thereby reducing the possibility of a deficiency and enhancing the realization of the full amount of the debt. However, the draftsmen did not here intend to confer an unlimited power upon the secured party. All of the secured party's actions in connection with a disposition must be "commercially reasonable." If the debtor has a business need for the space occupied by the collateral or if the premises of the debtor are not adequate to permit his continued operation, the secured party may be required to remove the collateral. There is also the obvious practical problem arising from the fact that the debtor who continues in possession after default may wrongfully dispose of the collateral.

Further difficulty stems from the possible objection by the debtor to the entry upon his premises of the secured party either

---

181. § 9-507(1).
182. § 9-501(3)(e).
183. § 9-505(1).
184. § 9-503.
185. § 9-505, comment.
186. The comment to § 9-503 states that § 9-504(3) requires that every action by the secured party in connection with a disposition must be taken in a commercially reasonable manner. One might otherwise argue, however, that repossession is separate from disposition and thus outside of the Code rules requiring disposition to be "commercially reasonable." Compare § 9-503 with § 9-504.
187. Under § 9-306(2), the secured party's interest in the collateral continues even after such a sale except where the Article "otherwise provides." Section 9-307(1), protecting buyers in ordinary course of business against even perfected security interests, and § 9-307(2), protecting certain buyers against unfiled but perfected security interests obviously limit the general rule. Noncompliance with the Statute of Frauds provision also makes the interest ineffective against third parties. § 9-203(1).
at the time the collateral is to be rendered unusable or at the time of the sale. Although the statute does not require the use of legal process in these circumstances, it appears to be appropriate to resort to legal action, particularly where a breach of the peace is threatened. But what kind of action is available? Of course, the secured party could still resort to an enforcement of his right to possession, but this approach begs the question of enforcing the special rule as to equipment. Is the secured party given some sort of real property right to enter on the premises? Is that right irrevocable? To what extent is the right effective against holders of interest in the real property? What is the effect of a contract provision waiving any trespass associated with the secured party's entry? All of these questions must be answered under non-Code law, although section 1-106(2) states that any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

C. Goods Covered by Documents

The default provisions rather laconically state that if the collateral consists of documents, the secured party may proceed either as to the documents or as to the goods covered thereby. This special default rule is a natural outgrowth of the notion that perfection of a security interest in documents automatically perfects a security interest in the goods covered thereby. There is more to the problem, however. The secured party cannot conclude that the special default rule entitles him to seize the goods covered by the document in the hands of the carrier or the warehouse. Too much other law is brought into play to permit such an inference.

The rights of a holder to whom a negotiable document of title has been duly negotiated are not limited by anything in Article 9. Consequently, the creditor secured by a negotiable document must proceed against the document to eliminate the possibility of an intervening holder. Furthermore, the person in possession of the goods will be particularly concerned with his obligation to cancel a negotiable document. The secured party

---

188. § 9-501(1). "Documents" in Article 9 are "documents of title" as defined in § 1-201(15) (See § 9-105(e)) and will be controlled by Article 7, which replaces the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act.

189. See § 9-304(2).

190. § 9-309.

191. § 9-304(1) permits filing to perfect a security interest in negotiable documents, but by reason of § 9-309, the filing has no effect upon a "holder to whom a negotiable document of title has been duly negotiated." See § 7-501.

192. The bailee must conspicuously note any partial deliveries. § 7-403 (3).
will not improve his position as to negotiable documents by attempting to foreclose on the goods by judgment and levy of execution since section 7-602 then requires the surrender of the document or an injunction against negotiation. In other situations involving documents, the bailee may deliver to the foreclosing secured party so long as this delivery is "rightful" as against the claimant. As against the debtor and any junior party, the delivery would probably be permitted.

D. A THIRD-PARTY'S UNDERTAKING: INTANGIBLES

When someone else's promise or obligation is the collateral, the secured party is given the right to collect from the third party. Section 9-502 authorizes the secured party to notify an account debtor or the obligor on an instrument to make payment to him and to take control of proceeds under section 9-306. The secured party is entitled to act under this section whenever the agreement permits him to do so and upon default.

The use of the term "account debtor" may cause some initial difficulty. The definition section makes clear that the term includes obligors under many kinds of collateral in addition to accounts. The persons who are obligated upon chattel paper, a contract right, or a general intangible are also included. Thus, when the term "account debtor" is added to the term "obligor on an instrument," it is clear that all forms of collateral bottomed upon the undertaking of a third person are included.

193. § 7-403(1) (a), (f).
194. It is customary for commentators to speak of a requirement of default or nonperformance of the duty to which the assignment is related. 4 CORBIN, CONTRACTS § 881 (1951). If a sale of accounts is involved, there is no need to require default. Acceleration clauses are not as significant here because of the self-liquidating nature of the series of loans contemplated. See Dunham, Inventory and Accounts Receivable Financing, 62 HARV. L. REV. 588, 595 (1949).
195. An account as defined in the Code is the right to payment that has been earned, and a contract right is a right to payment that has not been earned. § 9-106. Neither of these terms include "chattel paper" (writings that evidence both a monetary obligation and a security interest in, or a lease of, specific goods). § 9-105(1) (b). On this kind of collateral generally, see Kripke, Chattel Paper as a Negotiable Specialty Under the Uniform Commercial Code, 59 YALE L.J. 1209 (1950). "General intangibles" represent all other kinds of personal property not covered in the definitions of goods, accounts, contract rights, chattel paper, documents, and instruments. § 9-106.
196. An "instrument" in Code lexicon includes all negotiable instruments under Article 3, all investment securities under Article 8, and any other writing evidencing a right to the payment of money that in the ordinary course of business is transferred by delivery. Chattel paper, security agreements, and leases are excluded from the definition in § 9-105(1) (g).
197. Under § 9-306(1), a secured party obtains a security interest
The relatively liquid nature of this kind of collateral and the fact that collection may be attempted without disruption of the business activities of the debtor are cited as the reasons for permitting the secured party to proceed to collect directly from the various obligors.\textsuperscript{198} Furthermore, the third party's promise will normally be an undertaking to pay money, and problems of valuation of the collateral will be minimized.\textsuperscript{198} In some cases, however, the debtor may be particularly affected by the secured party's handling of the collections from the obligor. If the security agreement permits a recovery of any deficiency from the debtor, and the secured party compromises the claim with the account debtor or the obligor of instrument, the debtor may be adversely affected.\textsuperscript{200} Similarly, if the secured party is able to charge back any uncollectible accounts to the debtor, the debtor has a real interest in the techniques of collection used by the secured party. In these situations the secured party must act in "a commercially reasonable manner."\textsuperscript{201} On the other hand, where the transaction involves no right of recourse against the debtor and no right to charge back uncollectible accounts, the debtor and other third parties have no legal interest affected by the secured party's conduct. The same sort of notion pervades the special rule as to the debtor's liability for a deficiency. Where the secured transaction is a sale of accounts, contract rights, or chattel paper, the debtor is not made liable unless the security agreement provides for a deficiency.\textsuperscript{202} In this kind of arrangement, the financing agency in "proceeds" when collateral is "sold, exchanged, collected or otherwise disposed of." Thus, even where the collateral covered by the security agreement is originally tangible personal property, such as inventory, the realization may ultimately be on accounts arising as proceeds.

198. § 9–502, comment 1.
199. Some difficulty may arise in determining the relationship of § 9–502, which permits the secured party to notify the account debtor "to make payment" to him, and § 9–106, which seems to permit the courts to include promises in addition to the payment of money within the term "general intangibles." See § 9–106, comment. It seems that the collection rights of § 9–502 should be limited to situations where the collateral is a promise to pay money.
201. § 9–502(2). Comment 3 to § 9–502 describes subsection two as requiring the action "with due regard to the interest of the assignor and of his other creditors." Section 9–507(2) will be useful in setting some standards of "commercially reasonable" manner. See Andersen v. Anderson, 46 Wash. 2d 903, 280 P.2d 252 (1955) (assignee may settle for less than face amount if he uses "utmost good faith").
202. Sales of "general intangibles" (§ 9–106) are not included within this class since sales of such collateral are not covered by Article 9. § 9–102. A Statute of Frauds in § 1–206 will cover the outright transfer of general intangibles.
assumes the credit risk as to the third parties and calculates its charges on that basis.\textsuperscript{203} In other cases, the transaction merely secures a debt and the debtor remains liable for the deficiency as a matter of law under the statute.\textsuperscript{204} Section 9–504(2) emphasizes this rule and provides the logical corollary that when the debtor is liable for a deficiency, the secured party also has a duty to account to the debtor for any surplus proceeds.

E. AGREEMENTS COVERING BOTH REAL AND PERSONAL PROPERTY

Under subsection four of section 9–501, if the security agreement covers both real and personal property, the secured party may proceed as to both in accordance with his rights and remedies in respect of the real property; the Code default rules are then made inapplicable. Alternatively, the secured party may proceed under the Code as to the personal property. The first alternative procedure primarily seeks simplicity and speed in transactions such as corporate indentures, where the collateral consists of both real and personal property.\textsuperscript{205} Moreover, if this method is used, all questions of procedure will be referred to the non-Code law of real property.\textsuperscript{206} Apparently, the procedure may involve a judicial foreclosure or a foreclosure under a power of sale in the security agreement.\textsuperscript{207} In either event, safeguards extended to the debtor and other secured parties in the Code are not applicable, and these parties will be required to look to the realty law for protection. Of course, the opposite is also true; the secured party may be more restricted in his action to the extent that he

\textsuperscript{203} A succinct description of the sale type of arrangement is contained in Greenberg, \textit{Inventory and Accounts Receivable Financing}, 1956 U. ILL. L.F. 601, 616. The Code avoids the difficult fact question of whether a given assignment is for security by including both sales and security transfers within the scope of Article 9, making the filing and priority rules apply in either case. § 9–102. Upon default, however, the distinction must be made, and parol evidence may be used to show that an absolute assignment was given for security purposes. Allen v. Home Nat'l Bank, 120 Conn. 306, 180 At. 498 (1935); Lucius Beebe & Sons v. Wason, 274 Mass. 254, 174 N.E. 500 (1931).

\textsuperscript{204} § 9–502. In Miami Station Inc. v. Coplan Pipe & Supply Co., 128 So. 2d 170 (Fla. App. 1961), the secured creditor made an unsuccessful attempt to retain $98,000 when the debt was $31,000.

\textsuperscript{205} § 9–501, comment 5.

\textsuperscript{206} The duty to conduct the disposition in light of the standard of "commercial reasonableness" may be avoided by resort to realty procedure where more formal requirements as to notice and the conduct of the sale may be established.

\textsuperscript{207} § 9–501(4) does not limit itself to judicial foreclosure; rather the secured party may proceed "in accordance with his rights and remedies in respect of the real property."
will be unable to use the more flexible and less formal methods of disposition permitted under the Code.\textsuperscript{208} On the other hand, if the secured party chooses to do so, he may use the Code default system "as to the personal property."\textsuperscript{209} In many cases this will be feasible and perhaps desirable; dispositions of inventory and accounts may well bring better returns under the Code plan.

Where consumer goods and equipment are included within an agreement covering both real and personal property, a fixture problem may arise. First, is it necessary to decide whether the fixture is real or personal property? If the secured party wishes to proceed under the Code, section 9-313 seems to authorize the use of the default rules of Part 5.\textsuperscript{210} On the other hand, if the secured party wishes to utilize the real estate techniques to foreclose on the fixture, there is an argument that fixtures do not fall into either the real or personal property classifications. Commonly, we may think that use of the real and personal property terminology creates a perfect dichotomy, but the fact that the Code purports to leave to the prior law the question of what is a fixture may create a third category.\textsuperscript{211} If the real property foreclosure proceedings reach fixtures apart from the Code, the practical basis suggested for the special rule of section 9-501(4) would seem to require authorization for a realty foreclosure as to real estate, personal property, and fixtures. Neither speed nor simplicity results from requiring a separate disposition for fixtures.\textsuperscript{212}

VII. JUDICIAL PROCEEDINGS

A. Judicial Sales and Foreclosure Actions

When the debtor is in default, the secured party has the option under the Code either to sue for the debt or to foreclose on the

\textsuperscript{208} § 9–501, comment 5, indicates that the Code is indifferent on the question of the realty remedies permitting separate proceedings for personalty.

\textsuperscript{209} § 9–501(4).

\textsuperscript{210} This conclusion is only an inference from § 9–313(5), which permits a secured party to remove his collateral from the realty, subject to the provisions of Part 5.

\textsuperscript{211} With the exception of bricks and mortar-type material, which the Code excludes from its fixture rule, § 9–313(1) purports to leave the determination of whether property becomes a fixture to state law. However, § 9–313(5) rejects any "material injury" test for establishing the right to remove, and this may change the law of fixtures in several jurisdictions. See Coogan, Security Interests in Fixtures Under the Uniform Commercial Code, 75 Harv. L. Rev. 1319, 1343–49 (1962).

\textsuperscript{212} The suggestion has been made that the draftsmen may have deliberately omitted fixtures because an "ordinary real estate mortgagee who had made no separate fixture filing should not be able to take advantage of its removal rights." Coogan, supra note 211, at 1350 n.46.
collateral in a judicial proceeding. If a judgment is obtained on the basic claim, then the secured party may enforce that judgment against the collateral by a levy of execution. Because of the costs involved, the secured party will usually seek to realize on his claim without the aid of the courts, but there are advantages to judicial proceedings. One is that the secured party need not be concerned with the application of a doctrine of election of remedies. The Code explicitly makes the lien obtained through levy of execution relate back to the date of perfection of the security interest. The levy is recognized as one means of enforcing the security interest and not as a separate and inconsistent method of collecting the underlying debt.

B. AVOIDING POWERS IN BANKRUPTCY

Because of the Code rule on election, even though the debtor becomes bankrupt within four months of the levy of execution,

213. § 9-501(1). A secured party, such as a pawnbroker, apparently may agree in advance to rely only on the collateral. 2 New York Law Revision Commission, Study of the Uniform Commercial Code, N.Y. Leg. Doc. No. 65, at 2028 (1955).

214. § 9-501(5).

215. Election can operate at two levels. In the development of the conditional sale, the courts permitted the seller to seize the goods or to sue for the price. Repossession results in loss of any right to a deficiency or redemption because it is classified as a rescission; the suit for the price confirms the title in the buyer. This exclusiveness of each remedy was developed without much rational basis. See Warren, Statutory Damages and the Conditional Sale, 20 Ohio St. L.J. 289, 291 (1959). See the rule in operation in Yellow Mfg. Acceptance Corp. v. Handler, 249 Minn. 539, 83 N.W.2d 103 (1957). Apart from this kind of exclusiveness of remedy, the doctrine of election of remedies operates to bar a shift from one remedy to another, inconsistent remedy on the basis of estoppel or waiver. Cf. First Nat'l Bank v. Flynn, 190 Minn. 102, 250 N.W. 806 (1933). The Code rejects both notions. §§ 9-202, -501.

216. This is another drawback to the unperfected security interest, which is generally of little value. It is worthless in bankruptcy. See § 9-301. "Perfection" is a basic Code concept. Normally a security interest is perfected by filing or by taking possession of the collateral, but there are exceptions whereby certain transactions are perfected without filing. See § 9-302. It is important to realize that perfection cannot occur until the security has "attached," that is, until there is a pledge or an agreement, value is given, and the debtor has rights in the collateral. §§ 9-204, -303. Furthermore, § 9-203 requires evidence of the agreement either by a transfer of possession or by a writing.

217. Under an earlier, less clear version of § 9-501, proceeding by levy was held to be a binding election of one remedy inconsistent with realization under a filed security agreement; this decision was reversed when no inconsistency was found between the two remedies. In re Adrian Research & Chem. Co., 169 F. Supp. 357 (E.D. Pa. 1958); rev'd. 269 F.2d 734 (3d Cir. 1959). See Note, 1 B.C. Ind. & Com. L. Rev. 236 (1959); Note, 1959 Duke L.J. 640; 32 Temp. L.Q. 348 (1959); 107 U. Pa. L. Rev. 1230 (1959).
the trustee in bankruptcy should not be able to use his power to avoid liens obtained by legal proceedings within four months of bankruptcy. 218 Further, the trustee should not be able to assert that the lien is a transfer for antecedent debt within the preference provision of the Bankruptcy Act. 219

One warning should be noted here. The Code is silent on the question of the relation back of liens obtained by attachment or other proceedings prior to the suit for the judgment. If the debtor becomes a bankrupt within four months after an attachment by the secured party, may the trustee in bankruptcy claim that his avoiding powers upset the attachment and that the attachment constituted an election of inconsistent remedies? That well-worn maxim of statutory interpretation, expressio unius, exclusio alterius, gives force to such an argument, particularly where state law recognized a doctrine of election prior to the Code. In addition, the approach is strengthened by the fact that the preliminary and provisional quality of an attachment lien makes it necessarily less potent than the judgment lien, which is the consequence of judicial action and usually comes only after a hearing on the merits. On the other hand, after judgment any lien arising from execution is usually given priority from the date of attachment. 220 One can thus argue that the liens created by judicial process prior to judgment are merely the initial steps to a judicial sale pursuant to execution, which the Code equates to a foreclosure. 221 This argument, rejecting technical distinctions among various kinds of liens created by judicial process, seems sensible. 222 It also has the virtue of eliminating one further difficulty in the bankruptcy context.

C. BANKRUPTCY JURISDICTION OVER FORECLOSURE

Even if the secured party has a security interest that is not

218. Bankruptcy Act § 67a, 66 Stat. 427 (1952), 11 U.S.C. § 107(a) (1958). Here the original contractual lien is perfected and is more than four months old at bankruptcy even though the levy is within four months.


221. § 9-501(5).

222. This nontechnical approach is buttressed by § 9–501, permitting repossession by "action," which could include attachment and other forms of mesne or provisional process.
defeasible by the debtor's trustee in bankruptcy, the secured party may not commence judicial foreclosure proceedings after the petition in bankruptcy has been filed without the consent of the bankruptcy court.\(^{223}\) If the secured party has attached the collateral but has not yet obtained a judgment, has he initiated foreclosure proceedings prior to bankruptcy so as to preclude bankruptcy administration of his collateral? A stringently literal reading of section 9–501, limiting foreclosure proceedings only to situations where a judgment lien was obtained, should be rejected. Such an approach will result only in an increase in the tension between the state and federal system and in confusion in predicting the rights of the parties.\(^{224}\)

D. JUDICIAL FORECLOSURE AND ARTICLE 9

Another advantage stemming from proceedings to a judicial sale pursuant to a judgment on the debt stems from the fact that the Code makes such a sale a foreclosure, and the secured party is free to "purchase at the sale and thereafter hold the collateral free of any other requirements of this Article."\(^{225}\) As the comment to section 9–501 suggests, the quoted language probably means that a judicial sale is entirely governed by law outside the Code.\(^{226}\) Consequently, this kind of proceeding frees the secured party from all of the terms of Article 9, including the obligations to send notices to the debtor and certain other secured parties under section 9–504(3); to assure that every aspect of the disposition, including the method, manner, time, place and terms, are commercially reasonable under section 9–504(3); to apply the surplus proceeds to any junior secured party's claim under section 9–504(1); to conduct any compulsory resale of consumer goods within ninety days under section 9–505(1); and to propose to retain the collateral in satisfaction of the obligation secured under section 9–505(2). Further, the secured party purchasing at a judicial sale is apparently also free of any Code requirement protecting the debtor's equity of redemption under section 9–506 or imposing liability upon the secured party for failure to comply with part 5 under section 9–507.

Although the statute is literally silent on the question of this kind of freedom of action in the judicial sale to a third party purchaser, there is even less reason to hold a stranger to the secured

\(^{223}\) Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931); Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658 (2d Cir. 1940).


\(^{225}\) § 9–501(5).

\(^{226}\) § 9–501(5), comment 6.
transaction to the listed requirements of Article 9.\footnote{227} Here the explanatory comment to section 9–501(5) indicates that the language apparently limiting the liberating provision to cases where the secured party purchases is aimed at emphasizing the freedom given to the secured party to purchase at a judicial sale.

Unfortunately, ambiguity as to the group protected is not the only difficulty presented by section 9–501(5). In indicating that the requirements of Article 9 do not bind the secured party where there is a judicial sale, this section implies that any benefits of Article 9 may be retained by the purchaser at the sale. One such benefit may be found in section 9–504(4), which could be used to rebut any argument based upon the traditional notions of\textit{ caveat emptor} related to judicial sales.\footnote{228} Contrary to this approach is the language of section 9–504(4), which protects a purchaser for value "when collateral is disposed of by a secured party." This language can and should be read to exclude judicial sales from the subsection since any other reading unfairly impairs the claims of a junior secured party. Under the nonjudicial disposition requirements of section 9–504, certain junior secured parties are entitled to notice and may claim any surplus after payment of the debt and expenses of resale.\footnote{229} Consequently, there is little harm in the further provision that a purchaser for value at such a private disposition takes free of the rights of the debtor and of the rights of any subordinate security interests. No such requirement attends the execution-type foreclosure, and consequently, the purchasers for value at such sales should receive only what the state procedural law confers upon them.\footnote{230} They should not be permitted to come ahead of the earlier junior lien creditors where no provision is made for protecting the interest of those creditors. Otherwise, the sale to satisfy a relatively small senior debt may deprive the junior creditors of their security.

\footnote{227} § 9–504(4) protects such purchasers in Code-regulated dispositions. See text accompanying notes 130 & 131 \textit{supra}.

\footnote{228} Not much protection is given to such purchasers, since usually the courts apply the\textit{ caveat emptor} philosophy to purchasers at execution sales. 20 M\textsc{inn.} L. \textsc{rev.} 557 (1936). \textit{Compare Uniform Sales Act} § 13 \textit{with} § 2–312. Some relaxation of this view affords the purchaser protection and permits recovery of the price from the judgment creditor, the judgment debtor, or both, upon the basis of unjust enrichment. Annot., 68 A.L.R. 659 (1930); 6 \textsc{Cornell L.Q.} 205 (1921). If the purchaser can show that he is protected against the defect in title by recording acts, he may prevail. Note, 24 M\textsc{inn.} L. \textsc{rev.} 805 (1940).

\footnote{229} See text accompanying note 120 \textit{supra}.

\footnote{230} See note 228 \textit{supra}. 
CONCLUSION

An evaluation of the Code default provisions must await more case development.231 Probably the greatest impact of these provisions will occur in two areas.

First, the Code provides the first truly integrated system for realization by secured parties. For example, no longer will the choice of the form of conditional sale or chattel mortgage have serious consequences upon the rights of the parties on default. More than any other part of Article 9, the default rules are really stated on an integrated basis. In most jurisdictions, this will also mean that the Code will supply for the first time detailed standards for transactions now covered by such devices as the factor’s lien and assignments of accounts receivable. Only on a few occasions does the Code create a special rule for particular kinds of collateral.

The second area where the Code will have a substantial effect rests more in what the statute does not state than upon what it does state. The attempt to provide flexible, effective, and efficient realization procedures hopefully will result in fewer deficiencies and more realistic resale prices.232 Lawyers should not stand in fear of the Code’s standard of “commercial reasonableness”; statutes are not able to decide cases—that is the job of the courts. The law has thrived for centuries with a standard of reasonableness, intelligently applied by the judiciary. It seems likely that we will be able to endure the extension of that standard to default proceedings.

232. One able commentator suggests:
The theory of the law has been that the way to protect a defaulting debtor is to have a public sale of his automobile or other collateral. Everybody knows in practice that public sales are usually perfunctory, and nobody bids but the creditor. Not only that, but there never would have been a sale if the debtor had any equity to protect; if he had had any equity, he would have sold the goods himself to salvage his equity, rather than go into default, or he would have found substitute financing.