# ARTICLE 9—NOTICE PROVISIONS UPON DEFAULT

## INTRODUCTION

Article 9 of the Uniform Commercial Code unified the law of secured transactions. It treats various financing devices, such as the chattel mortgage, the conditional sale, and the pledge as merely different methods of creating security interests. Part 5 of article 9 sets out the rights and remedies of the parties when a secured transaction breaks down. Specifically, sections 9-504 and 9-505 impose notice requirements upon the secured party[1] before he may seek remedies for the debtor's[2] default. These requirements were fashioned for simplicity and flexibility,[3] embodying the most practical of commercial needs—salvaging as much of the benefits of the original transaction for the secured party as possible, yet protecting the equity of the debtor in the collateral.[4] Despite the laudable efforts of the drafters, no other sections of the Code, save those dealing with warranties in the sale of goods, have given rise to so much litigation. In view of the approval of revisions in the *1972 Official Text*[5] and a recent Supreme Court decision, *Fuentes v. Shevin,*[6] it is appropriate to review the response of courts to the problems encountered in the notice provisions of article 9.

## DEFAULT AND REMEDIES IN GENERAL

Upon default the remedies of part 5 of article 9 become applicable. The Code, however, does not define default;[7] its meaning is left to the

1. UCC § 9-105(1)(i):

"Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold . . . .

2. UCC § 9-105(1)(d):

"Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper . . . .

3. Hogan, *The Secured Party and Default Proceedings Under the UCC,* 47 MINN. L. REV. 205, 220 (1962) [hereinafter cited as HOGAN].

4. UCC § 9-105(1)(c):

"Collateral" means the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold.

5. AMERICAN LAW INSTITUTE, 1972 OFFICIAL TEXT AND COMMENTS OF ARTICLE 9, SECURED TRANSACTIONS, at viii (1972) [hereinafter cited as 1972 OFFICIAL TEXT]. The 1972 Text was approved by the ALI and the National Conference of Commissioners on Uniform State Laws. 1972 OFFICIAL TEXT at viii.

6. Fuentes v. Shevin, 92 S. Ct. 1983 (1972).

7. Borochoff Properties v. Howard Lumber Co., 115 Ga. App. 691, 696, 155 S.E.2d 651, 654 (1967).

determination of the parties in the security agreement.[8] Typically, parties will provide that default occurs when a payment is missed, when the collateral is transferred or removed without authorization, when a petition in bankruptcy is filed or when the debtor dies.

Once default has occurred, the secured party can choose from three basic remedies: section 9-504(3) allows the secured party to dispose of the collateral by public or private sale or by any other disposition which is commercially reasonable;[9] section 9-505(2) permits the secured party to propose a retention of the collateral in satisfaction of the debt;[10] and section 9-501(1) allows the secured party to "reduce his claim to judgment or otherwise enforce the security interest by any available judicial procedure."[11] His choice, however, is not a binding election since the Code states that the rights and remedies upon default are cumulative.[12]

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8. UCC § 9-105(1)(h): "'Security agreement' means an agreement which creates or provides for a security interest."

9. UCC § 9-504(3) (emphasis added):

> Disposition of the collateral may be by *public* or *private* proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any *public sale* or reasonable notification of the time after which any *private sale* or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any *public sale* and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

10. UCC § 9-505(2) (emphasis added): "In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to *retain* the collateral in satisfaction of the obligation."

11. UCC § 9-501(1):

> When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in the security agreement. He may reduce his claim to judgment, foreclosure or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in 9-207. The rights and remedies referred to in this subsection are cumulative.

12. UCC § 9-501(1). Professor Gilmore has labelled the Code's multiplicity of remedies as the "anything goes approach" to default. The breadth of the remedies,

## THE IMPACT OF *Fuentes v. Shevin*

When the secured party does not reduce his claim to judgment by judicial process but rather disposes of the collateral by sale or proposes to retain it in satisfaction of the debt, he is exercising a self-help remedy. The recent Supreme Court opinion in *Fuentes* casts doubt upon the constitutionality of the Code's self-help remedies. In *Fuentes*, a four-to-three decision, the majority held the Pennsylvania[13] and Florida[14] prejudgment replevin statutes unconstitutional.[15] When the debtors in *Fuentes* defaulted, the secured parties sought to regain possession of the collateral through prejudgment writs of replevin which authorized state officers to seize the property listed on the writs. The Court noted that the repossession of the collateral by the secured parties, under the authority of the state, was a deprivation of a possessory interest within the protection of the fourteenth amendment.[16]

The significance of *Fuentes* for the Code's self-help remedies lies in the Court's recognition that the debtors' possession of household goods, on which several payments were still due, was a property interest to which the rationale of *Sniadach v. Family Finance Corp.*[17] and *Goldberg v. Kelly*[18] extended. *Sniadach* and *Goldberg* require that before

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the minimal red tape surrounding their execution, and the flexibility which characterizes all the default provisions were specifically intended by the draftsmen to allow the secured party, acting in good faith and utilizing his commercial expertise, to realize the highest possible price from the collateral. *See* 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965) [hereinafter cited as GILMORE].

Professor Shuchman suggests that upon default there are usually two sales: one where the dealer sells to another dealer at a wholesale price and then the other where the purchasing dealer sells the automobile at retail price. He notes that the first sale in the wholesale market is usually thirty to fifty percent below the going wholesale price while the second sale in the retail market is usually able to bring full value. He writes, "In nearly half the cases examined, the difference between the actual first resale in the wholesale market and an equally first resale in the retail market would have meant the difference between a deficiency judgment and full satisfaction of the debt." Shuchman, *Profit on Default: Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 31-32 (1969).

13. PA. STAT. ANN. tit. 12, § 1821 (1967).

14. FLA. STAT. ANN. § 78.01-.13 (1964).

15. Fuentes v. Shevin, 92 S. Ct. 1983, 2002 (1972).

16. *Id.*

17. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). The case held that even a temporary deprivation of wages through prejudgment garnishment worked a deprivation of property within the protection of the due process clause of the fourteenth amendment.

18. Goldberg v. Kelly, 397 U.S. 254 (1970). Following *Sniadach*, the Court held that welfare benefits could not be cut off without a hearing.

there can be any taking of property under color of state law, there must be notice and an opportunity to be heard.

The self-help remedies of the Code, however, provide that the secured party can repossess the collateral pursuant to section 9-503 and dispose of it by sale or otherwise under section 9-504(3) notwithstanding that the debtor may not have received notice or has not had the opportunity to be heard by an impartial tribunal. Under the *Fuentes* rationale, the self-help remedies would be constitutionally void if the Court were to find that the secured party was acting under the color of state law.[19]

In *Adams v. Egley*,[20] a California district court has recently held that the California legislature's enactment of sections 9-503 and 9-504 constituted sufficient state action to hold these sections invalid under the due process clause of the fourteenth amendment.[21] The *Egley* court reasoned that the enactment of these sections persuaded or induced secured parties to include the self-help remedies in their security agreements.[22] The court rather forcefully rejected the argument that the self-help remedies did not involve state action because they were self-executing contract provisions between private citizens.[23]

The dissenting Justices in *Fuentes* considered the majority decision to be an "ideological tinkering with state law" which would have little impact.[24] They chided the majority for failing to consider properly

19. In *Fuentes,* it was clear that the secured party had invoked the authority of the state. The writs were orders to state officers to take possession of the listed property. Whether today's Court would be willing to extend the state action theory followed in the racial discrimination cases, *e.g.* Reitman v. Mulkey, 387 U.S. 369 (1967), to situations involving secured transactions is an open question. In *Reitman,* the Court found that a clause of the California Constitution was enacted as a repealer of California's anti-discriminatory housing legislation and that it actually functioned as state encouragement to private discrimination. Thus, state action for purposes of the fourteenth amendment was found in the state's enactment of the clause.

20. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972).

21. *Id.* at 617. The *Adams* court relied on *Reitman. See* note 19 *supra.*

22. The *Adams* court at 617 states,

> The specific reference to the Uniform Commercial Code in the Adams contract and to "immediate repossession . . . according to law" in the Posadas contract are ample indication that in drawing up the agreements defendant creditors were "persuaded or induced to include" repossession by the fact that such repossession was permitted by statute.

According to the *Adams* court, such inducement or persuasion is sufficient "state action" for purposes of the fourteenth amendment.

23. *Id.* at 620. *Cf.* McCormack v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

24. Fuentes v. Shevin, 92 S. Ct. 1983, 2006 (1972).

the interest of the secured party in protecting the collateral and for neglecting to give proper weight to recent studies of the Permanent Editorial Board of the Uniform Commercial Code, which suggested only minor changes to the Code's self-help provisions.[25]

At this juncture, it is presumptuous to conclude that *Fuentes* necessarily implies that the Code's self-help remedies are unconstitutional. Several points cast doubt upon any extension of the case. The *Fuentes* majority was narrow and Justices Powell and Rehnquist, known for their attitude of judicial restraint, did not participate. Moreover, the majority opinion's analysis of the special nature and interests involved in secured transactions is inadequate; it fails to recognize that the right to look to the collateral upon default was the very basis upon which the secured party entered into the transaction.[26] Furthermore, the *Fuentes* case clearly involved state action, yet it is still open to question, notwithstanding *Egley*, whether the Code's self-help remedies necessarily involve state action within the meaning of the fourteenth amendment. Finally, it is difficult to predict the reaction of the court when forced to determine the constitutionality of a uniform law adopted in forty-nine states. There most certainly is a strong presumption of constitutionality.[27]

This note focuses primarily on the notice provisions the secured party must comply with before he can either dispose of the collateral by sale or retain it. It presupposes that the secured party has gained possession of the collateral upon default by having either had a possessory security interest,[28] by the debtor having voluntarily given up possession[29]

25. *Id.*

26. The Court was oblivious to the fact that the secured party often has a greater equity in the collateral than the debtor, and to the fact that part of the basis of the bargain was that the secured party could look to the collateral when default occurred. The secured parties in *Fuentes* were not going after collateral property to which they had no claim, such as wages or welfare benefits, but were seeking to repossess property which they had as much or more of a right to than the debtor. *See* the discussion of "collateral property" compared to "wages" and "welfare benefits" in Epps v. Cortese, 326 F. Supp. 127, 133 (E.D. Pa. 1971), which was vacated in *Fuentes.*

27. Most states have prejudgment replevin statutes similar to the ones declared unconstitutional in *Fuentes;* but when the Court faces a statute which is nearly identical in forty-nine states and the result of over twenty years of effort, the Justices undoubtedly will apply a stronger presumption of constitutionality.

28. UCC § 9-203 recognizes the common law pledge as creating a valid security interest. Thus the secured party may be in possession of the collateral when default occurs.

29. A vast number of repossessions result from the debtor merely turning the col-

or by the secured party having exercised his right to repossession under section 9-503.

PARTIES TO WHOM NOTICE IS NECESSARY

According to section 9-504(3), whether the secured party chooses to retain the collateral or to dispose of it, he must notify three classes of parties: (1) the debtor; (2) "any person who has duly filed a financing statement indexed in the name of the debtor in this state"; and (3) any party who is known by the secured party to have a security interest in the collateral.[30] For consumer transactions, the rules are modified to require notice only to the debtor.[31]

Under existing law, the debtor is not permitted to waive his right to notice of a sale.[32] The *1972 Official Text,* however, proposes to alter present law and would add to section 9-504(3) a clause permitting the debtor to waive notice of sale once default has occurred.[33] This change may prove unfortunate. It makes the uninformed and unsuspecting debtor vulnerable to an overreaching creditor;[34] it provides for waiver, but does not state whether the waiver has to be written or supported by consideration;[35] and it poses difficult constitutional ques-

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lateral over to the secured party. Letter from Richard Beard, Retail Credit Attorney for the May Department Stores Company, to *Washington University Law Quarterly,* September 2, 1972, on file in Washington University Law Library.

30. UCC § 9-504(3).

31. Generally the holder of a security interest in consumer goods will have a purchase money security interest. Since such an interest has priority in any distribution of the proceeds, there will seldom be excess proceeds. If there is little possibility of excess proceeds, other secured parties would not be motivated to participate in the sale to ensure that the collateral brings its fair value. *See generally* 2 GILMORE § 292.

32. Existing § 9-501(3) provides the following (emphasis added):

> To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below *may not be waived* or varied except as provided with respect to compulsory disposition of collateral (subsection (1) of Section 9-505) and with respect to redemption of collateral (Section 9-506) but . . . .

33. *See* note 47 *infra,* where the change in section 9-504(3) to permit waiver of notice after default is italicized.

34. In *Fuentes,* the majority noted that security agreements are often contracts of adhesion. 92 S. Ct. at 2001-02. After default, when the debtor may feel threatened and be unusually cooperative with the secured party because of this fear, it seems unwise on the part of the revisors to place the debtor in a position where he can be the unsuspecting victim of a waiver clause.

35. *See* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972) (waivers of constitutional rights must be knowingly made, voluntarily entered into, and involve con-

tions insofar as it may operate to deprive the debtor of a property interest without notice.[36]

The purpose of notifying those persons specified in 9-504(3) is "to give the debtor, his representatives, and competing secured parties the information they need in order to decide whether to redeem the collateral or to bid at the sale."[37] It is thought that the greater the number of parties aware of any sale or retention, the more likely the collateral "will not be sacrificed at less than its true value."[38] Since the Code provides that subordinate secured parties will participate in any excess of proceeds over those necessary to satisfy the secured party holding the sale,[39] it is felt that subordinate secured parties will be motivated to ensure a fair value, especially in view of the fact that a sale or retention discharges subordinate security interests.[40]

Secured parties should be cautious when considering the scope of the term "debtor". Section 9-105(1) defines "debtor" as the "person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral. . . . Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral. . . ." Section 9-112 specifically sets out the rights of the owner of the collateral to notice. The comment to this section indicates that the duties of the secured party to notify "the owner of the collateral are conditioned on the secured party's knowledge of the true state of the facts."[41] The secured party has no duty to discover who may be the actual owner of the collateral.[42]

"Debtor" has been construed to include parties not ordinarily considered debtors. For instance, in *Third National Bank & Trust Co. v.*

sideration). The Code's definition of waiver in section 1-107 would not be applicable since section 1-107 is concerned with the waiver of a right arising out of a breach of contract, not a right provided by statute.

36. *Cf.* Fuentes v. Shevin, 92 S. Ct. 1983, 1995 (1972).

37. 2 GILMORE § 544.6, at 1241 (1965).

38. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

39. UCC § 9-504(1).

40. UCC § 9-504(4):

> When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto.

41. UCC § 9-112, Comment.

42. *Id.*

*Stagnaro*,[43] the endorser of a note was held to be a debtor within the meaning of the Code and therefore entitled to notice. When the maker of the note defaulted by missing payments, the secured party sold the collateral which secured the note and attempted to collect from the endorser the deficiency resulting from the sale. The *Stagnaro* court refused to hold the endorser liable for the deficiency because of the secured party's failure to notify the endorser of the sale.[44] The trustee in bankruptcy will also come within the definition of "debtor" and must be notified if the sale of the collateral takes place after the initiation of bankruptcy proceedings.[45] In *Norton v. National Bank of Commerce*,[46] a car dealer who sold with recourse a conditional sale contract to a bank, was held to be a debtor for purposes of notice. When purchaser of the car defaulted, the bank, without notifying the dealer, sold the car. The court held the bank's sale improper because the bank failed to notify the car dealer. Any party, therefore, who may become liable for any portion of the debt or obligation should be notified.

The *1972 Official Text* proposes to eliminate the secured party's obligation under existing law to notify any secured party who has filed and any party whom the secured party knows to have a security interest in the goods. In those states that adopt the *1972 Official Text*, "the secured party will only have to notify the debtor and any other secured party from whom the secured party has received . . . notice of a claim of an interest in the collateral."[47] The revisors reason that the burden

43. 25 Mass. App. Dec. 58, 4 UCC REP. SERV. 675 (1962).

44. *Id.* at 66, 4 UCC REP. SERV. at 677. "We are of the opinion that the defendant, as endorser, was a debtor at and before time of the sale as the maker had heretofore dishonored the note." *Accord*, T. & W. Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (1969) (secured party proceeding against collateral securing a corporate note upon default violated notice provisions by not notifying accommodation endorser who came within definition of debtor). *But see* A. J. Armstrong, Inc. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (1967).

45. *In re* Frye, Bankruptcy No. 69-1880-D (S.D. Ohio 1970), 9 UCC REP. SERV. 913 (trustee in bankruptcy is entitled to notification of sale of repossessed collateral); *In re* Senters, Bankruptcy No. 70-246-D (S.D. Ohio 1970), 9 UCC REP. SERV. 923 (secured party who has taken repossession before bankruptcy and given notice of sale to bankrupt does not violate notice provisions if date of sale antedates the appointment of the trustee).

46. 240 Ark. 143, 398 S.W.2d 538 (1966).

47. 1972 OFFICIAL TEXT, § 9-504(3), at 252:

> . . . [R]easonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the

of searching the records is "greater than the circumstances called for because as a practical matter there would seldom be a junior secured party who really had an interest needing protection in the case of a foreclosure sale."[48] The revisors have placed the burden of requesting notice upon the subordinate secured party. Upon filing, he will recognize the inferior nature of his interest; since he is a second encumbrancer, he should carry the burden of sending the superior secured party a written request for notice of any disposal of the collateral. If he neglects to submit a written request, the harm is not great, since any excess from the sale goes to the debtor.[49] If the sale is by a subordinate secured party, the property passes subject to the senior security interest.[50]

### WHEN NOTICE IS EXCUSED

The Code's requirement of reasonable notification is excused in three situations:[51] when the collateral is perishable;[52] when it threatens to decline speedily in value;[53] or when it is of a type customarily sold on a recognized market.[54] With perishable collateral and collateral quickly declining in value, the Code excuses notice to avoid any further loss resulting from delay. When the collateral is disposed of on a recognized market, the market's regularity and stability protect the debtor's equity in the collateral against prejudice from want of notice.

For many categories of collateral, there is no recognized market. In holding that there was no such market for used cars,[55] the *Norton*

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> debtor, *if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.*

Changes italicized. *See* current UCC § 9-504(3), quoted in note 9 *supra*.

48. *Id.* at 253-54.

49. UCC § 9-504(2).

50. The Code does not discuss the possibility of a sale under a subordinate security interest, but Professor Gilmore has written that "Senior liens are not discharged; the retaining secured party, like a purchaser under § 9-504, would continue to hold this erstwhile collateral as 'his own' subject to the senior liens," 2 GILMORE, § 1225.

51. Although the Code does not require notice in these three situations, the secured party, to avoid difficulties at trial, should dispatch regular notice.

52. UCC § 9-504(3).

53. *Id.*

54. *Id.*

55. Norton v. National Bank of Commerce, 240 Ark. 143, 146, 398 S.W.2d 538,

court described a recognized market as "a stock market or a commodity market, where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale and where the prices paid in actual sales of comparable property are currently available by quotation."[56]

## REASONABLE NOTIFICATION

Compliance with the Code's mandate of "reasonable notification" will depend on whether the secured party has decided to hold a public sale, a private sale, or proposes to retain the collateral in satisfaction of the debt.

### *Private Sale or Other Disposition*

Section 9-504(3) demands that "reasonable notification of the time after which any private sale or other intended disposition is to be made shall be *sent* by the secured party . . . ." The word "sent" has led some courts into mistakenly thinking that notice must be written.[57] Section 1-201(3), however, says that the requirement of "send" in connection with any notice is satisfied if the party "has notice within the time at which it would have arrived if properly sent . . . ." Section 1-201(28) states that "A person 'receives' a notice or notification when it comes to his attention. . . ." Oral notice, thus, is sufficient, but a secured party would be well-advised to give written notice in order to avoid evidentiary problems in litigation.[58]

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540 (1966) ("What one 1957 Oldsmobile sells for does not fix the amount a different one may be expected to bring."); Alliance Discount Corp. v. Shaw, 195 Pa. Super. 601, 604, 171 A.2d 548, 550 (1961):

> The so-called "red-book" purporting to fix prices of various makes and models of automobiles in accordance with their year of manufacture is adopted for the convenience and benefit of dealers and is not based on market prices which are arrived at in the open, based on asking prices of sellers and bids of prospective buyers.

*But see* Third Nat'l Bank & Trust Co. v. Stagnaro, 25 Mass. App. Dec. 58, 4 UCC REP. SERV. 675 (1962) (considered International Tractor and Trailmobile tandem box as property sold on recognized market).

56. 240 Ark. at 146, 398 S.W.2d at 540 (1966).

57. *See, e.g.*, Foundation Discounts, Inc. v. Serna, 81 N.M. 474, 476, 468 P.2d 875, 877 (1970): "Defendant may have had verbal notice that there would be a sale of the collateral. However, this does not satisfy the requirements of the Code."

58. Crest Inv. Trust, Inc. v. Alatzas, 10 UCC REP. SERV. 482 (Md. Ct. App. 1972).

Reasonable notification only necessitates that the secured party take such steps as "may be reasonably required to inform the other in the ordinary course whether or not such other actually comes to know of it."[59] Though the Code does not require that the other party actually receive notice (except in retention cases),[60] there are situations where reasonable notification requires the secured party to do more than dispatch notice. In *Mallicoat v. Volunteer Finance & Loan Corporation*,[61] the secured party sent notice by registered mail to the debtor. Before the actual sale, the letter was returned to the secured party unclaimed. The court held that the secured party, who was aware that the debtor had not received actual notice, failed to comply with the Code and was acting in conscious disregard of the debtor's right to notice. Since the *Mallicoat* decision dealt with a secured party who knew the debtor and who was in a position to phone him easily, courts in situations where the secured party can not contact the debtor easily might find that the dispatch of a registered letter is sufficient, even though it is returned unclaimed before the sale. It is also clear that a secured party who sends a registered letter to a previous address of the debtor from which he knows the letter will not be forwarded,[62] or who fails to provide adequate postage on the letter,[63] does not give reasonable notification.[64]

Though the question of what type of mailing is reasonable is a factual issue,[65] courts have approved the sending of registered,[66] certified,[67]

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59. UCC § 1-201(26).

60. *See* notes 86-88 *infra* and accompanying text.

61. 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

62. *See* Atlas Constr. Co. v. Dravo-Doyle Co., 114 Pitt. Legal J. 34, 3 UCC REP. SERV. 124 (Pa. C. P. 1965).

63. W. E. Edmondson v. Air Serv. Co., 123 Ga. App. 263, 180 S.E.2d 589 (1971).

64. In cases where the party to be notified is missing, notice dispatched to the person's last known address would suffice. However, the secured party cannot under the Code's requirement of reasonableness send notice to the last known address if he knows the party can not be reached there and he has made no other effort to reach him.

65. Leasing Associates, Inc. v. Slaughter & Sons, Inc. 450 F.2d 174 (8th Cir. 1971); *cf.* Hawkins v. General Motors Acceptance Corp., 250 Md. 146, 242 A.2d 120 (1968).

66. Atlas Const. Co. v. Dravo-Doyle Co., 114 Pitt. Legal J. 34, 3 UCC REP. SERV. 124 (Pa. C. P. 1965); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

67. Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964); Motor Contract Co. of Atlanta v. Sawyer, 123 Ga. App. 207, 180 S.E.2d 282 (1971); Steelman v. Associates Discount Corp., 121 Ga. App. 649, 175 S.E.2d 62 (1970).

and regular letters.[68] Courts recommend registered mail, but it is doubtful whether the registered letter is as effective as regular mail for consumer transactions. If the addressee of a registered letter is not at home to take delivery, the postman will return it to the post office where it will remain for about ten days and then, if not picked up, be returned to the sender as unclaimed. A regular mailing would be left at the debtor's address and would not require the addressee to make a trip to the post office. From a registered mailing, the secured party will learn when a letter is unclaimed, but such knowledge is of little value to the debtor, for by the time the secured party has this information the sale will usually have taken place. Courts, interested in suggesting what is reasonable notification, should recommend that the secured party send two letters: one by registered mail and the other by regular.

Determining whether a particular sale is public or private will affect the content of the notice. Article 9 does not define either, but section 9-504(1) states that, "Any sale of goods is subject to the Articles on Sales." Thus, for a sale of goods, and by analogy for sales of other items, the definitions in the comment to section 2-706 are informative: "By 'public' is meant a sale by auction. A 'private' sale may be effected by solicitation or negotiation."

Notice of a private sale must specify "the time after which"[69] the sale will be made. Notices in which the secured parties have merely informed the parties to whom notice is necessary that there would be a private sale, without stating the time after which they would hold the sale, have been considered inadequate.[70] Professor Gilmore believes that, "[A]t a minimum, a commercially reasonable notice of a private sale also should describe the collateral and state the amount of the obligation for which it is being sold."[71]

After the secured party dispatches notice, he must delay holding the sale until the other parties have had sufficient opportunity to protect their interests. The length of the waiting period is a factual ques-

68. Leasing Associates, Inc. v. Slaughter & Sons, Inc., 450 F.2d 174 (8th Cir. 1971).

69. UCC § 9-504(3).

70. Morris Plan Co. of Bettendorf v. Johnson, 271 N.E.2d 404 (Ill. App. 1971). The debtor knew of sale, but the court held that the Code requires more than a general advertisement or a reasonable expectation on part of the debtor if the notice requirements for a private sale are to be met.

71. 2 GILMORE § 44.6, at 1241.

tion.[72] Waiting periods of seven,[73] eight,[74] and ten[75] days have been approved. Accordingly, it is probably safe to assume that ten days is sufficient time for the notified parties to take steps to protect their interests.[76] If the secured party knew the debtor was out of town for ten days, good faith would, of course, require a longer delay.

To be confident of complying with the Code's dictate of reasonable notification of a private sale, the secured party should send a written notice by either registered mail or regular mail, preferably both, at least ten days prior to the sale. The notice should describe the collateral, state the date after which the sale will be held, list the amount of the obligation for which the sale is being held and give the address where the secured party can be reached.

*Public Sale*

There are two distinct types of notice required for public sales: the notice which must be sent to the parties listed in section 9-504(3) and the advertisement notice necessary to make a public sale commercially reasonable. The advertisement notice, although not expressly mandated by the Code, is implied from the common law concept of a public sale as one to which "notice or invitation to the public is an essential element."[77] Newspaper publication of a sale may be sufficient advertisement notice to inform the public, but it certainly would not be adequate notice to the debtor and other parties, as required by section 9-504(3).

When the secured party is notifying the debtor and other secured parties, the notice must state the "time and place of any public sale." Additional requirements, such as the necessity of a "writing", description of the collateral, etc. are the same as were discussed in relation to notice of a private sale.[78] The more difficult notice problem in regard to a public sale centers on the advertisement notice; namely, what type

72. Babe v. Williams Ford Co., 239 Ark. 1054, 396 S.W.2d 302 (1965).

73. *Id.*

74. Atlas Const. Co. v. Dravo-Doyle Co., 114 Pitt. Legal J. 34, UCC REP. SERV. 124 (Pa. C. P. 1965).

75. Motor Contract Co. of Atlanta v. Sawyer, 123 Ga. App. 207, 180 S.E.2d 282 (1971).

76. UNIFORM CONDITIONAL SALES ACT § 19 (required ten-day notice); UNIFORM TRUST RECEIPT ACT § 6 (required five-day notice).

77. Annot., 4 A.L.R.2d 575 (1949).

78. *See* notes 57-69 *supra* and accompanying text.

of advertisement notice is sufficient to satisfy the Code's requirement that "every aspect"[79] of a public sale be commercially reasonable.

As noted earlier, article 9 does not define public sale. Section 9-504 (4), which discusses the rights of purchasers at a public sale, suggests by its use of the phrase "other bidders" that a public sale is an auction sale. When the collateral is goods, the comment to section 2-706, which discusses public sales, provides little assistance for determining what constitutes a commercially reasonable advertisement notice. Section 2-706(4)(c) does, however, add the specific requirement that "notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders" if the goods are not to be within view of those attending the sale.

Cases decided under section 9-504(3) have taken for granted that a public sale is an auction sale, but only three cases have considered what is a commercially reasonable advertisement notice.[80] Two cases approved of advertisements in newspapers.[81] A third case, while suggesting that advertisement notice might consist of the secured party telephoning several persons he thought would be interested in the sale, also implied that posting a notice in a conspicuous place might be adequate.[82] Comment 9 to section 2-706 suggests that advertisement notice is necessary only when the public sale is not held at "a place or market which prospective bidders may reasonably be expected to attend."

A California amendment[83] to section 9-504(3) specifies that the ad-

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79. UCC § 9-504(3).

80. Goodin v. Farmers Tractor & Equip. Co., 249 Ark. 30, 458 S.W.2d 419 (1970); Foundation Discounts, Inc. v. Serna, 81 N.M. 474, 468 P.2d 875 (1970); Massey-Ferguson Fin. Corp. v. Hamlin, 9 UCC REP. SERV. 142 (Tenn. Ct. App. 1971).

81. Goodin v. Farmers Tractor & Equip. Co., 249 Ark. 30, 458 S.W.2d 419 (1970) (public sale where six separate newspaper ads failed to produce any bidders, held to be reasonable notification); Massey-Ferguson Fin. Corp. v. Hamlin, 9 UCC REP. SERV. 142 (Tenn. Ct. App. 1971) (court states minimum requirements for commercially reasonable newspaper notice).

82. Cities Serv. Oil Co. v. Ferris, 9 UCC REP. SERV. 555 (N.M. Ct. App. 1971).

83. CAL. COMM. CODE § 9-504(3) (West 1964):

> 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

vertisement notice of a public sale must be by newspaper publication, but the Permanent Editorial Board of the Code has criticized the amendment as "unsound public policy" and destructive of the Code's "desirable flexibility."[84]

Presently, no easy formula can be devised to test whether an advertisement notice satisfies the requirements of section 9-505(3). Courts will scrutinize each factual situation to determine whether the secured party took adequate steps to make the sale sufficiently public so that a commercially reasonable price could be expected.[85]

*Retention of the Collateral in Satisfaction of the Debt*

Section 9-505(2) allows the secured party in possession, except in certain consumer transactions,[86] to propose a retention of the collateral. The secured party must send notice of his proposal to retain to the same parties to whom notice of sale is necessary under section 9-504 (3).[87] For retention, the Code demands *written* notice and *actual receipt* of notice. A requirement of actual receipt is implicit within the clause which allows the secured party to retain only if the debtor or other party does not object to the retention "in writing thirty days from the *receipt* of notification." Thus, the debtor must actually receive

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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.

84. REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD OF THE UCC, at 294 (1964).

85. *Compare* the Code's requirements *with Uniform Conditional Sales Act* § 19 which required that the secured party holding a public sale "give notice of sale by at least three notices *posted* in different places within the filing district in which the goods are to be sold, at least five days before the sale. If at the time of retaking, $500 or more has been paid on the purchase price, the seller shall also give notice of the sale at least five days before the sale by *publication* in a newspaper published or having a general circulation within the filing district where the goods are to be sold." (Emphasis added.)

86. When the debtor has paid sixty percent of the price of any consumer goods, the secured party must hold a sale under section 9-504(3). If such a sale is not held within ninety days from taking possession, then the secured party is liable in conversion and damages. UCC § 9-505(1).

87. *See* notes 31-50 *supra* and accompanying text.

notice before the thirty day period can begin to run. Actual receipt is made mandatory in this situation since the secured party who retains the collateral is also allowed to keep any payments which the debtor has made.

Section 9-505(2) specifies only that the notice of a proposal to retain state that it is such a proposal. But the notice, if it is to be useful and commercially reasonable, should also describe the collateral and state the amount of the unpaid obligation so that the notified parties will have sufficient information to decide whether to object to the retention.[88] It is submitted that fairness to the debtor might also require the secured party to inform him of the amount of the payments already made and that they will be forfeited.

CONSEQUENCES OF NONCOMPLIANCE WITH THE NOTICE PROVISIONS

When a secured party has failed to properly observe the notification requirements, three issues arise: the effect of noncompliance on the debtor's and other parties' right to redeem; the amount and nature of damages recoverable from the secured party; and whether the secured party has a right to a deficiency judgment.

Before sale or other disposition under section 9-504(3) or before discharge of the obligation by rentention under section 9-505(2), the debtor or any other secured party may redeem.[89] When the collateral reaches the hands of a purchaser for value without knowledge of defect in the disposition,[90] the right to redemption is lost regardless of whether the secured party has complied with the notice requirements. Presumably in other situations the right to redeem would continue. For instance, a secured party who purchased at his own public sale would not cut off the right to redemption,[91] nor would a secured party who proposed to retain the collateral in satisfaction of the debt defeat the right to redemption if he failed to observe the notice requirements.[92]

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88. 2 GILMORE § 44.3.

89. UCC § 9-506:

> . . . the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral . . .

90. UCC § 9-504(4).

91. 2 GILMORE § 44.9.2.

92. But in the sole case discussing the right to redemption when the secured party chose to retain the collateral and had not complied with notice provisions, the court

Initially, the burden is on the debtor or other party to establish that the secured party has not given proper notice. Section 9-507(1) then provides that the debtor, any person entitled to notice, or any person whose security interest was made known to the secured party prior to disposition has "a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part." The measure of loss usually applied is the difference between the actual selling price of the collateral and the amount which could reasonably have been obtained through a sale conducted according to law.[93] Once it is established that the secured party violated the Code's provisions, the value of the collateral is presumed to be the amount of the debt with the burden upon the secured party to rebut this presumption.[94]

The Code does not provide for punitive damages except when consumer goods are involved. In consumer cases section 9-507(1) provides for a minimum recovery; when the actual damages are less than the minimum statutory damage recovery, the excess would function as a penalty.[95]

The doctrine of strict foreclosure was the rule at common law; the secured party who sold the collateral was limited to the proceeds of the sale,[96] and he could not sue the debtor for any remaining deficiency.

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gave the debtor only the option of allowing the secured party to keep the collateral in satisfaction of the debt or of ordering the secured party to sell the collateral pursuant to section 9-504(3). Brownstein v. Fiberonics Indus., Inc., 110 N.J. Super. 43, 264 A.2d 262 (1970).

93. Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alas. 1969) (difference between selling price and market price); Barker v. Horn, 245 Ark. 315, 432 S.W.2d 21 (1962); Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (1971) (difference between selling price and fair and reasonable value); T & W Ice Cream, Inc., v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (1969) (difference between what the collateral was sold for and what it would have been sold for had the debtor been given notice).

94. Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alas. 1969); Norton v. National Bank of Commerce, 240 Ark. 131, 398 S.W.2d 538 (1966).

95. UCC § 9-507(1):

> If the collateral is consumer goods, the debtor has a right to 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.

96. Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (1971); C.I.T. Corp. v. Haynes, 161 Me. 359, 212 S.2d 436 (1965); Shuchman, *Profit on Default: Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 54 (1969). Professor Shuchman takes the position that dealers

The Uniform Conditional Sales Act[97] changed this rule. The secured party was allowed to sue for a deficiency judgment, but the deficiency judgment was allowed only if the secured party had strictly complied with the statutory notice requirements when selling the collateral.

Section 9-504(2) states that "unless otherwise agreed, the debtor is liable for any deficiency."[98] The Code, however, is silent on whether compliance with the notice provisions is a condition precedent to a deficiency action.[99] The cases are in conflict, with a slight majority denying the secured party a deficiency action for his failure to observe the notice provisions.[100] Under this rule, the secured party who has held an improperly executed sale will be liable in damages to the debtor for any loss caused by the sale and will also be denied his right to a deficiency decree. In jurisdictions which permit the deficiency action, the secured party usually can offset his deficiency judgment against any damages including the minimum statutory damage recovery provided in consumer cases by section 9-505(1).[101]

## CONCLUSION

The amount of litigation involving the notice provisions of article 9 indicate that their apparent simplicity and minimal red tape are a trap

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should be limited to the collateral (strict foreclosure) with no right to a deficiency judgment. He contends that "were automobile repossessors to use the efficient business practices in resale that they do in dealings with one another, there would be no need for anything except the security of the automobile itself."

97. *See* 2 GILMORE § 44.9.4, at 1262 (discusses provisions of the *Uniform Conditional Sales Act*).

98. UCC § 9-504(2):

> If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency.

99. Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963).

100. *Id.*; Braswell v. American Nat'l Bank, 117 Ga. App. 699, 161 S.E.2d 420 (1968); Morris Plan Co. v. Johnson, 271 N.E.2d 404 (Ill. App. Ct. 1971); C.I.T. Corp. v. Haynes, 161 Me. 359, 212 A.2d 436 (1965); One Twenty Credit Union v. Darcy, 40 Mass. App. Dec. 64, 5 UCC REP. SERV. 792 (1968); Cities Serv. Oil Co. v. Ferris, 9 UCC REP. SERV. 555 (N.M. Ct. App. 1971); Foundation Discounts, Inc. v. Serna, 81 N.M. 474, 451 P.2d 995 (1971); Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (N.Y. County Civil Ct. 1971). *Contra*, Leasing Associates, Inc. v. Slaughter & Sons, Inc., 450 F.2d 174 (8th Cir. 1971); Weaver v. O'Meara Motor Co. 452 P.2d 87 (Alas. 1969); Norton v. National Bank of Commerce, 240 Ark. 131, 398 S.W.2d 538 (1966); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (1969).

101. Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (1971); Crosby v. Basin Motor Co., 9 UCC REP. SERV. 555 (N.M. Ct. App. 1971).

for the unwary and a continual source of difficulty; but the *1972 Official Text*, except for reducing the number of parties to whom notice is necessary upon default and a provision for waiver of notice of sale after default, has left part 5 of article 9 intact. It is unfortunate for the cause of uniformity that the revisors did not take a position, at least by way of comment, on some of the recurring problems which require clarification, such as the purpose and operation of the concept of "recognized market" as an exception to notice; the requirements for a commercially reasonable advertisement notice of public sale; and the effect of noncompliance with the notice provisions on the secured party's right to a deficiency action.

These problems will not be moot even if the *Fuentes* decision were eventually to result in a ruling that the Code's self-help remedies were unconstitutional for failure to provide the debtor with an opportunity to be heard before repossession and sale. Security agreements may, as the *Fuentes* dissent noted, include constitutionally valid waiver provisions in which debtors knowingly, willingly, and for consideration waive their right to notice and a hearing. Other situations, such as when the secured party has a possessory security interest or when the debtor has voluntarily returned the collateral, would not come within the *Fuentes* mandate. Thus, the basic problem—how best to adjust the equities when default occurs—remains vital.[102]

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102. If the *Fuentes* mandate of notice and a hearing were applied to the remedies provided in article 9, it would not eliminate them, but merely postpone their operation. The result of the debtor's hearing will in most cases be that the secured party has a right to dispose of the collateral pursuant to one of the Code's remedies.